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# Public Procurement & Government Contracts

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Creel Abogados

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## Law and Practice

Contributed by Creel Abogados

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**Creel Abogados** and Mejía, Guizar y Kargl, SC collaborate in public procurement procedures in the three orders of government. The partners of both firms have been exhibitors and trainers in various forums regarding the 2009 reforms to the Acquisitions, Leases and Public Sector Services Law. In terms of hiring supplies for health, the firms have intervened in the main international public tenders called by the Mexican Institute of Social Security and the Institute of Security and Social Services of State Workers. Regarding

the acquisition of goods, the firms have participated in the main PPP tenders. In terms of energy, the office has provided advice on constitutional matters and public procurement of strategic areas in relation to the preparation of the new reforms envisaged by the Law of *Petróleos Mexicanos* and its Regulation, the Regulatory Law of the Constitutional Article 27 in the Oil Branch, as well as in the administrative dispositions of *Petróleos Mexicanos*.

## Authors



**José Ruíz López** is a partner at Creel Abogados and head of the antitrust practice, with key practice areas of competition law, corporate and M&A. Mr Ruiz has represented various companies in pre-merger filings with the Federal

Economic Competition Commission (FECC), investigations initiated by the FECC with respect to relative (abuse of dominance) and absolute (cartels) monopolistic practices, and in advisory matters. He has represented national and multinational groups in transactions relating to acquisitions and sales of companies, including joint ventures. Mr Ruiz also represents mining groups, including subsidiaries of foreign public companies, in connection with their activities in Mexico, including regulatory matters, compliance aspects, acquisitions of exploration and exploitation projects, as well as in due diligence processes.

**Fernando Mejía Méndez** is a partner and the head of procurement and administrative law at Mejía, Guizar y Kargl. In the field of procurement, he has participated in federal state projects, advising companies on projects related to entities such as the Secretariat of Communications and Transport, the Secretariat of Finance and Public Credit, and the Ministry of Health. He advises not only private companies, but also public entities as conveners to tendering procedures and has served as Professor of civil law at the Anahuac University Cancun campus and Professor adjunct of “the solution of international conflicts”, taught at the Universidad Iberoamericana.

## 1. General

### 1.1 Legislation Regulating Procurement of Government Contracts

First, it is important to note that in recent years, due to various constitutional reforms, there has been a great fragmentation of the representative institutions of public power.

This fragmentation has aimed at establishing greater autonomy for these institutions and preventing them from being contingent on the swings resulting from the changes that were previously experienced with government transitions, especially every six years when there is a new administration. Such fragmentation and the constant search for autonomy has permeated the public procurement regimes, creating as many regimes as institutions and making public procurement regulation in Mexico even more complex.

The situation is exacerbated by the fact that, in conjunction with the federal regime that prevails in Mexico, there are as many local contracting regimes as there are states in the country, with regulating procurement procedures at a local

level sometimes revealing important discrepancies in areas and stages of procurement. However, there are also great similarities and sometimes even total correlation in the rules that regulate such procedures.

At the federal level there is a regime that can be called general, which is applicable to the agencies and entities of the Federal Public Administration, and there are also various special regimes, such as those applicable to State productive enterprises – eg, *Petróleos Mexicanos* (Pemex) and the Federal Electricity Commission (CFE) – as well as those applicable to autonomous constitutional bodies.

For instance, derived from the Energy Reform of 2013, which opened up Mexico’s energy sector to private investment, Pemex and CFE have become State enterprises, with greater autonomy for their administration, organisation, management and budget, as well as a new corporate structure.

The above implies a reform of the procurement procedures and rules for such companies, including special laws and

regulations in these fields, making them independent from the general regime applicable to other government bodies.

The legal basis for public procurement in Mexico is found in Article 134 of the Federal Constitution, which provides the principles pursuant to which public procurement will be governed. According to this provision, public procurement shall be managed with efficiency, effectiveness and best use of resources, transparency and honesty to achieve the objectives for which it is intended.

Mexico is a federation, therefore the regulation of public procurement is subject to different levels: federal and sub-federal.

The federal level comprises federal government agencies and parastatal companies. Its principal laws are the Law of Acquisitions, Leases and Services of the Public Sector, and its regulations; and the Law of Public Works and Related Services, and its regulations.

The sub-federal level comprises State government and municipal authorities. The sub-federal level is autonomous under its own constitution, therefore has its own regulation – although in most cases it is similar to the federal legislation – and must be analysed on a case-by-case basis.

In addition, according to the complex scenario mentioned before, there are several specific laws that comprise a precise chapter for public procurement pertaining to the organisation, as listed below. Despite each one of them involving specific procedures, in general several similarities can be found regarding requirements and stages.

- *Pemex* – the Law of Mexican Oil, regulations of the Law of Mexican Oil, general contracting dispositions for Mexican oil and its productive subsidiary companies.
- *CFE* – the Law of the Federal Commission of Electricity.
- Bank of Mexico – internal regulations of the Mexican bank.
- *National Commission of Human Rights (CNDH)* – the Law of Acquisitions, Leases and Services of the Public Sector; the Law of Public Works and Related Services; CNDH's Presidential agreement for the application of the Law of Acquisitions, Leases and Services of the Public Sector and the Law of Public Works and Related Services; and policies, rules and guidelines for acquisitions, leases and services for the CNDH.
- *National Institute of Statistics and Geography* – the acquisitions, leases and services rules for the National Institute of Statistics and Geography.
- *Federal Institute of Telecommunications* – the procedure is the same as for the acquisitions, leases and services of the Federal Institute of Telecommunications.
- *Federal Commission of Economic Competition* – the Federal Law of Economic Competition.

- *National Institute of Transparency* – the regulations for acquisitions, leases and services of the Federal Institute of Access to Information and the Protection of Information.
- *Federal Institute of Access to Information and the Protection of Information* – the regulations for acquisitions, leases and services of the Federal Institute of Access to Information and the Protection of Information.

Other specific regimes apply to:

- concessions granted for works and services, regulated by different laws (depending on the work and service);
- PPP, which are regulated by specific law; and
- legislative and judicial powers, which follow their own public procurement rules.

Furthermore, most governmental bodies also have internal guidelines related to public procurement issued by themselves that are relevant to their specific needs.

In addition, the General Law on Administrative Liabilities is indirectly applicable to public procurement as it has implications for the private sector in the case of corrupt practices.

### 1.2 Entities Subject to Procurement Regulation

As a general rule, most of the governmental bodies are obliged to execute public procurement under specific procurement regulations as mentioned above. Given the limitations of space, herein refers to the general regime applicable to Federal Public Administration bodies.

Under federal regulation, the entities could comprise administrative units of the Presidency, Secretaries of State, administrative departments, the Republic's General Prosecutor, the government's decentralised organs, companies with a majority of equity held by the state, federal entities and municipal bodies in which the federal budget is applied.

The productive companies of the State are exempted from these provisions and have their own procedures.

As mentioned above, specific bodies or entities are subject to special provisions of their own that a specific procedure for procurement.

### 1.3 Type of Contracts Subject to Procurement Regulation

Procurement rules are applied to any transaction related to the acquisitions of goods, services or public works and services related to them.

#### Services

The acquisition and lease of movable property, including those intended to be incorporated in real property that are necessary for the execution of public works, are considered as services, as are services related to real estate where their

maintenance does not imply any modification to the property.

Also, reconstruction and maintenance of movable property, insurance, transport, surveillance and cleaning services are considered as services, as are consulting and researching services, and those provided by natural persons. Overall, the execution of services of any nature represent a payment obligation for the government.

### Public Works

Projects intended to build, install, amplify, adequate, remodel, restore, maintain, modify or tear down any government's real estate and all services related to these works are considered as public works.

A minimum value threshold can apply in those public bid- dings with international character that are published under the scope of international trade agreements. The minimum amount will be established in connection with the total amount of the contract and can vary.

### 1.4 Openness of Regulated Contract Award Procedure

Foreign suppliers may participate in contracting procedures called international open tenders, in which any foreign goods or contractor may participate, regardless of its nationality, and those covered by free trade agreements, in which only foreign bidders from countries with which Mexico has a free trade agreement may participate.

In any case, it may be requested for the bidders to state, under oath, that the prices offered in their economic proposal are not quoted in conditions of unfair international trade practices in terms of their price discrimination or subsidies modality.

The bidder must indicate the average price of his or her property placed in the plant that prevails in the domestic market of the exporting country, or of export to a country other than Mexico, in a period of one year prior to the date of presentation of the proposal and in the same currency of the proposal with which it participates in the public tender.

### 1.5 Key Obligations

For the participants, the key obligations are determined in the specific tender basis of each procurement procedure.

## 2. Contract Award Process

### 2.1 Prior Advertisement of Regulated Contract Award Procedures

It is established by law that the open call for public tenders must be published in the public electronic information system CompraNet, which is controlled and administrated by

the Federal Public Administration through the Ministry of Public Function.

In the same way, every procedure issued under the general regime must be published in the Federal Official Gazette and must comprise at least the following information:

- the name of the entity that will be act as representative of the consortium;
- the language, character and nature of the proceeding, its identification number assigned in the Electronic Information System and the contracting period;
- the object and scope of the proceeding, and a detailed description of the goods, services or works to be provided by the competitors;
- the terms and conditions, including the requirements that must be met by the participants; and
- the evaluation criteria, standard contract and format to be used during the proceeding.

### 2.2 Preliminary Market Consultations by Awarding Authority

In general, prior to any contracting procedure, the purchaser requires a market study to determine the optimum price that will be accepted through a proposal made by bidders or participants, which, according to the applicable regulation, is defined as: "The prior verification of the effective existence of goods, leases or services of national or international suppliers and the estimated price based in the information provided by the dependence or entity, public or private organisations, manufacturers of goods or lenders of the service, or a combination of the mentioned sources."

The market study aims to provide the pertinent information to carry out the corresponding process for public procurement to ensure the best economic conditions and chiefly determines the market price of the service or supplies that will be acquired. The results of the market study may define the following concepts:

- the existence of the goods, leases or services and the identification of possible international and national suppliers;
- identification of replaceable goods or services;
- alternative processes;
- the prevalent price at the moment of the research; and
- an analysis of the competitive market.

This investigation seeks to eliminate the possibility that the contract is granted at a cost in excess of the market price and allows the identification of two price parameters: (i) unacceptable price and (ii) maximum reference price.

Based on the above, the entity will be able to choose the best cost-benefit option from the proposals received that does not exceed the maximum reference price.

### 2.3 Tender Procedure for Award of Contract

With regard to the procurement procedures, the Federal Constitution establishes the obligation for public entities to contract any purchase of goods, leasing, services, as well as the contracting of public works and services related to public works, through public bids in public events.

According to special laws and in line with Article 134 of the Federal Constitution, there are ways of procurement other than public bids, such as restrictive bids and direct awards, which may be followed in those specific cases provided in each applicable special law.

Public invitations to tender are published (in Spanish) on the official website and/or in domestic newspapers; restricted invitations are not published. Tenders financed entirely or partly by foreign credit are published according to the guidelines of the credit institution.

Bidders must submit for evaluation their technical and economic proposals in two sealed envelopes, which will be opened in a public session where only a quantitative analysis will be made.

Subsequently, the caller will proceed in private for a qualitative analysis of the technical and economic proposals, on the understanding that the envelope containing the price bid is opened only for tenders whose technical characteristics have been found to meet the specified requirements.

Proposals are evaluated according to the selected criteria, which can be (i) through percentages and points or (ii) cost-benefit relation. The criteria applied to the evaluation of tenders are defined in the invitation to tender and the bidding conditions published; entities are not permitted to negotiate the provisions contained in the bidding conditions but they are subject to further clarification through 'explanation meetings' and the specifications agreed therein will be considered part of the bidding conditions.

Contracts are awarded by written notice, which must specify to unsuccessful bidders the reasons to dismiss each one of the proposals and the unfulfilled conditions by each of them. Once the contract is awarded, the obligations arising from it become enforceable and must be signed on the date specified in the bidding conditions, or within the next 15 days.

Exceptions for public tender can be made by restricted invitation or direct award, but only in specific circumstances that can be related to the amount of the operation, which must not exceed the maximum amount established in the federal budget, or to specific circumstances of the product, market or necessities.

As a general rule, competitors need to stick to the terms and conditions published in the open calling so there is no room

for open negotiations regarding the terms and conditions of the bidding. Nevertheless, during the proceedings, clarification meetings can be executed to make clear any doubt related to the terms, so competitors are free to participate in those acts.

In addition, specific public biddings, where analysis can be made just after the quantitative analysis of proposals, contemplate the modality of subsequent offering discounts whereby bidders, after submitting their economic and technical proposals with final prices, can offer subsequent discounts to improve the price offered, but in any case the modality must be justified and ensure competitive standards.

### 2.4 Choice/Conditions of Tender Procedure

As mentioned, the general rule for awarding public contracts is through public bidding. However, the award may also be carried out through exceptional procedures: (i) invitation to three, also known as restricted tender, or (ii) direct award. For this to occur, the conditions requested by the law must be met.

If there are apparently insufficient participants, copyrights, patent, art works or exclusive rights are involved, or there is a possibility of upsetting social order or economy, or previously unsuccessful proceedings, a specific brand required among others can be used to justify the decision.

Regarding the above, public entities shall select among those available proceedings the one that may ensure the best contracting conditions for the State with respect to price, quality, opportunities and other related criteria.

### 2.5 Timing for Publication of Documents

Public entities have the obligation to make available to the public through the digital system their annual acquisition programme at the beginning of each year, no later than January 31st.

According to this programme, the caller will publish the open call with all the necessary requirements, formats and documents that participants must meet and stick to the terms and conditions set therein.

### 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

In public biddings, once the open call has been published, the act by which participants must submit their technical and economic proposals shall take place on a specific date no longer than 15 to 20 days after the publication.

### 2.7 Eligibility for Participation in Procurement Process

All government procurement regulations prohibit governmental bodies or agencies from receiving proposals from, or awarding contracts to, participants that:

- have a family, business or labour relationship with the government agency, or where a government officer that participates in the bidding process could otherwise benefit from the relevant contract;
- have a conflict of interest with the contracting governmental agency or other participants in the same tender process;
- have been condemned by a final and non-appealable judgment in the previous three years in connection with government procurement contracts;
- have had a governmental agency rescinded contract;
- are insolvent or subject to an insolvency proceeding;
- have been administratively disqualified;
- are contractors who delayed in the execution of another contract with the same authority;
- present propositions in the same item of a good or service in a procurement procedure that may be linked between a partner or subsidiaries; or
- pretend to participate in a public procurement before they have carried out, by themselves or through subsidiary companies, specific previous works or activities.

Certain tenders may be limited to national participants, such as when the products to be acquired are manufactured in Mexico and have a national content of at least 50%.

### **2.8 Restriction of Participation in Procurement Process**

As mentioned, according to special laws and in line with Article 134 of the Federal Constitution, there are ways of procurement other than public bids, such as restrictive bids to at least three persons and direct award.

The selection of these proceedings must be justified according to the specific circumstances and relied on principles such as economy, efficiency, impartiality, transparency and honesty to ensure the best purchase conditions for the government.

In any case, the possible participants must have immediate response capacity as well as enough economic, technical and any other resources needed. In addition, the economic or professional activities shall be directly related to the main object of the contract.

### **2.9 Evaluation Criteria**

Proposals are evaluated according to the selected criteria, which can be (i) through points and percentages or (ii) cost-benefit relation.

In exceptional cases, it is also possible to use a binary system, which is based on the lowest price when it is impossible for the entity to use any of the above-mentioned criteria.

## **3. General Transparency Obligations**

### **3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology**

The criteria applied to the evaluation must be defined in the invitation to tender and the bidding conditions published.

Contracts are awarded by written notice and in the decision it must be specified for each one of the unsuccessful bidders the reasons to dismiss each one of their proposals and the unfulfilled conditions by each of them.

### **3.2 Obligation to Notify Interested Parties Who Have Not Been Selected**

As a general rule, all participants that meet the criteria attending to the character of the public bidding are capable of submitting their proposals in the proceedings and the government entity cannot refuse to receive any of them under any circumstance.

### **3.3 Obligation to Notify Bidders of Contract Award Decision**

The act by means of which the final judgment is given to the participants shall be signed and a copy must be handed to each of them. In addition, the caller must make publicly available the same in its office within a period of no less than five working days.

In addition, the judgment must be uploaded and published on CompraNet.

### **3.4 Requirement For ‘Standstill Period’**

Once the contract is awarded, the obligations arising from it become enforceable and must be signed at the date specified in the bidding conditions, or within the next 15 days.

## **4. Review Procedures**

### **4.1 Responsibility for Review of Awarding Authority’s Decisions**

Non-conformity complaints against the contract award decision can be submitted by participants that consider that the judgment is not aligned with the provisions of the law or the terms and conditions of the bidding.

The Ministry of Public Function through the internal controller of the contracting entity will be responsible for deciding the legality of the decision. That verdict can be appealed at the Federal Court of Administrative Justice through a nullity claim. Furthermore, the judgment of the Federal Court can be challenged at Federal Collegiate Tribunals, with any such decision being final.

## 4.2 Remedies Available for Breach of Procurement Legislation

In the event of disagreements between the government and a contractor in connection with the performance of the contract, the parties can opt for the following proceedings:

- rescission – dependencies and entities may at any time administratively terminate contracts when the supplier is in breach of its obligations;
- conciliation – at any time, the suppliers or the agencies and entities may submit a request for conciliation to the Ministry of Public Function, due to disagreements arising from the fulfilment of the contracts or request; and
- arbitration – an arbitration commitment may be agreed with respect to disputes that arise between the parties due to interpretation of the clauses of the contracts or issues arising from their execution.

## 4.3 Interim Measures

The participants of a public bidding are entitled to submit a non-conformance claim towards the internal comptroller body regarding any problem related to:

- terms and conditions of the public bidding;
- clarification meetings;
- the act whereby the participants submit their proposals;
- the invitation to at least to three persons; and
- the final decision.

In the first four cases, after filing the claim, the procurement will be suspended until the proceeding is finished. Regarding the final decision, the claim does not suspend automatically the execution of the contract but the claimant relying on specific and critical circumstances can request a suspension, which can be granted or not.

## 4.4 Challenging Awarding Authority's Decisions

Any participant that submitted a proposal has the standing to challenge the awarding authority's decision.

## 4.5 Time Limits for Challenging Decision

For a non-conformity claim, the general rule is six days after the execution of the act and ten days if the bidding is international under the scope of free trade agreements. Likewise,

30 working days for a nullity claim and 15 working days for an amparo claim.

## 4.6 Length of Proceedings

In general, legal proceedings in Mexico are not so fast. For non-conformity, they could take up to six months and for judicial proceedings, one year or more.

## 4.7 Annual Number of Procurement Claims

There are no specific statistics in this respect, but it is very common for bidders to challenge the procedure.

## 4.8 Costs Involved in Challenging Decision

There are no judicial costs involved in this kind of litigation.

The costs are those expenses incurred if an expert opinion is involved, as well as legal fees.

## 5. Miscellaneous

### 5.1 Modification of Contracts Post-award

Governmental entities (under the scope of their budget and their own responsibility) can agree to increase the amount of the contract or the goods or services related to the contract, provided that the total amount of the increase does not exceed 20% of the amount originally agreed in the contract.

Likewise, when the contractors justify extraordinary circumstances that prevent them from fulfilling the contract with the quantities already agreed, the entity can modify the contract by cancelling part of the original quantities provided that it does not exceed 10% of it.

In any case, all entities shall refrain from executing any modification related to price, advance payments, progress payments, terms and conditions or any change that implies better conditions to a supplier than the ones originally agreed.

### 5.2 Direct Contract Awards

Direct award is one of the exceptional proceedings that the law allows but specific circumstances must be fulfilled in order that an authority can opt for this proceeding.

### 5.3 Legislative Amendments Under Consideration

A new proposal to ensure better control of public expenditure is being discussed in the legislative Congress.

In order to achieve this aim, the political group Morena has proposed to confer on the Ministry of Finance and Public Credit the ability to plan, determine and manage public policy related to public procurement governed by the federal Law of Acquisitions, Leases and Services of the Public Sector, and the federal Law of Public Works and Related Services; to interpret the laws, guidelines, handbooks and any other legal instrument related to the subject; and to promote their

### Creel Abogados

Paseo de los Tamarindos 400 B, Piso 29,  
Bosques de las Lomas,  
C.P. 05120 Ciudad de México.

Tel: +52 55 1167 3000  
Fax: +52 55 1167 3001  
Email: Jose.Ruiz@creelabogados.com  
Web: www.creelabogados.com





homologation. These functions currently are managed by the Ministry of Public Function.

In addition, the proposal would empower the Ministry of Finance and Public Credit to intervene and manage all functions related to the consolidation of public procurement among entities and manage the Integral Information System of Governmental Programmes Roll.

With this proposal, the government aims to concentrate and have a major control over public procurement.