

Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top ranked lawyers

Public Procurement & Government Contracts

Mexico

Creel Abogados and Mejía, Guizar y Kargl, S.C.

chambersandpartners.com

2019

MEXICO

LAW AND PRACTICE:

p.3

Contributed by Creel Abogados and Mejía, Guizar y Kargl, S.C.

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Creel Abogados and Mejía, Guizar y Kargl, S.C.

CONTENTS

1. General	p.4
1.1 Basic Statutes Governing Public Procurement	p.4
1.2 Regulations Governing Cost Reimbursement and Pricing Issues	p.6
1.3 Public Sector Procurement Procedures	p.6
1.4 Common Types of Procurement Procedures	p.6
1.5 Eligibility to Bid for Public Sector Opportunities	p.6
1.6 Compliance and Ethics Rules	p.7
1.7 Disappointed Bidders	p.7
1.8 Handling Disputes	p.7
2. Contract Award Process	p.7
2.1 Tender Procedures for Soliciting Offers	p.7
2.2 Negotiating Tenders	p.7
3. Post-Award	p.8
3.1 General Process and Terms and Conditions for Payment to the Contractor	p.8
3.2 Purchasing Goods or Services from a Foreign Contractor	p.8
3.3 Rules That Apply to a Foreign Subcontractor's Accounting and Pricing	p.9
4. Review Procedures	p.9
4.1 Resolving Disagreements Between the Government and a Contractor	p.9
4.2 Agencies, Courts and/or Organisations Permitted to Resolve Disputes	p.9

Creel Abogados in collaboration with Mejía, Guizar y Kargl, S.C. The joint collaboration of both firms has made us to participate in various public procurement procedures in the three orders of government advising both individuals and authorities of the three levels of government. Likewise, its partners 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 firm has intervened in the main and most important international public tenders called by the Mexican Institute of Social Security as well as the Institute of Security and Social Services of State Workers under new modalities provided by the current legislation such as subrogations, multi-year tenders, subsequent discount offers and "framework" contracts. Among these are the recent

contracting of serums and injectable solutions, peritoneal dialysis and subrogated hemodialysis. In the matter of acquisitions of various goods, the firm has participated in the main Tenders for the celebration of new contract schemes known as "PPS" or public-private partnership contracts for the provision of long-term services. In terms of energy, this office was hired to provide advice on constitutional matters and public procurement of strategic areas (or "oil industry") 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, participating in the preparation of the same.

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 Basic Statutes Governing Public Procurement Overview

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 even more complex public procurement regulation in Mexico.

This 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, each 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.

Consequently, 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 (Penex)

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.

In addition, there are several Autonomous Constitutional Bodies – such as Bank of Mexico, National Electoral Institute, National Commission of Human Rights, National Institute of Statistics and Geography, Federal Institute of Telecommunications, Federal Commission of Economic Competition (COFECE), National Institute of Transparency, National Institute for Access to Public Information and the Protection of Personal Data, and General District Attorney – which are subject to rules that may differ from those applicable to other public bodies for which the general regime is applicable.

Other specific regimes apply to:

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

General Regime

In general, prior to any contracting procedure, the purchaser requires a market study in order to determine the optimum price that will be accepted by 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;
- An analysis of the competitive market.

This investigation seeks to eliminate the possibility that the contract is granted to a cost in excess of the market price, and allows the identification of two different 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.

On the other hand, the law allows bidders to request to the dependence or entity the payment of not-recoverable expenses only in the following scenarios:

- Cancellation of the public bidding;
- The contract being unsigned in due time because of the authority;
- Early termination of the contract upon request of the authority;
- Suspension of the services upon request of the authority.

Mexican Legislation Applicable to Public Procurement

The legal basis for public procurement in Mexico is Article 134 of Federal Constitution which provide the principles pursuant to which public procurement will be governed.

Despite the complex scenario on public procurement attending to different sectors, the most common public procurement can be divided according to the type of authority in two sectors, the federal level and the sub-federal level.

The federal level comprises federal government agencies and parastatal companies, its principal laws being: Law on Procurement, Leases and Services by Public Sector and its regulation; Law on Public Work and related Services and its regulation.

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 attending to the organisation, as listed below. Despite each one of them involving its specific procedures, in general several similarities can be found regarding requirements and stages.

Pemex: Law of Mexican Oil; Regulation of the Law of Mexican Oil; General Contracting Dispositions for Mexican Oil and its Productive Subsidiary Companies

CFE: Law of the Federal Commission of Electricity.

Bank of Mexico: Internal Regulation of Mexican Bank.

National Commission of Human Rights: Law of Acquisitions, Leases and Services of the Public Sector; Law of Public Works and Services related to them; CNDH's President agreement for the application of the Law of Acquisitions Leases and Services of the Public Sector and the Law of Public Works and Services related to the same ones; Policies, rules and guidelines for acquisitions leases and services for the CNDH.

National Institute of Statistics and Geography: Acquisitions Leases and Services Rules for the National Institute of Statistics and Geography.

Federal Institute of Telecommunications: Procedure as for Acquisitions, Leases and Services of the Federal Institute of Telecommunications.

Federal Commission of Economic Competition: Federal Law of Economic Competition.

National Institute of Transparency: Regulation 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: Regulation for Acquisitions, Leases and Services of the Federal Institute of Access to Information and the Protection of Information.

1.2 Regulations Governing Cost Reimbursement and Pricing Issues

See 1.1 Basic Statutes Governing Cost Reimbursement and Pricing Issues above.

1.3 Public Sector Procurement Procedures

Processes that enable public institutions to acquire goods, services and leasing arrangements or the execution of public works with the private sector.

There is no a unique public procurement regime in Mexico, but actually several regimes, considering State and Federal legislation, and within the latter, such specific procurement regimes, such as the applicable to Petroleos Mexicanos (Pemex) and the Federal Electricity Commission (CFE), but given the limitations of space, this refers basically to the general regime applicable to Federal Public Administration bodies.

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

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

Subject to certain specific rules for such proceedings, it is possible to say that in general, the main procedures are public bid, restrictive bid and direct award.

1.4 Common Types of Procurement Procedures

As a general rule, all government acquisitions and leases of any kind of goods or construction of public works must be carried out by a public bidding process. Nevertheless, by exception, public entities can choose among other types of public procurement such as restricted invitations and direct award.

1.5 Eligibility to Bid for Public Sector Opportunities

All government procurement regulations prohibit governmental bodies or agencies from receiving proposals or awarding contracts from 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 partner or subsidiaries;
- Pretend to participate in a public procurement before they have carried out, by themselves or through subsidiaries companies, specific previous works or activities.

Foreign participants: certain tenders may be limited to only national participants such as when the products to be ac-

quired are manufactured in Mexico and have a national content of at least 50%.

1.6 Compliance and Ethics Rules

There are no unique compliance and ethics rules for public sector contractors. Nevertheless, there are several regulations that govern the activity displayed by the private sector regarding their relationship with government, including in public procurement processes. The most important regulations are:

- General Law for Administrative Responsibilities;
- Code of Conduct for Public Sector;
- Federal Law for Economic Competition;
- Federal Law for Prevention and Identification of Transactions with Funds from Illegal Resources.

1.7 Disappointed Bidders

It is possible for the offerors to challenge specific acts during the public procurement procedure. Such challenges should only be made in connection with:

- The invitation for the tender process and for the clarification meetings;
- Restricted invitations to at least three participants (only such participants may contest the invitation);
- The submission and opening of bid proposals;
- The award;
- The cancellation of the tender process; or
- Facts and omissions from the tendering government agency that hinder the execution of the relevant procurement agreement.

It is also possible to challenge the award through an amparo claim in specific circumstances.

1.8 Handling Disputes

There are several mechanisms that can be executed in order to solve any dispute arising from the execution of public contracts, as listed below.

Rescission procedure: dependencies and entities may at any time administratively terminate contracts when the supplier is in breach of its obligations.

Conciliation procedure: 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 fulfillment of the contracts.

Arbitration procedure: 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.

2. Contract Award Process

2.1 Tender Procedures for Soliciting Offers

The Public Procurement normativity regulates the processes that enable public institutions to acquire goods, services and leasing arrangements or public work with private businesses either through public tenders or through other procurement methods with limited competition, such as direct awards and restricted invitations (to at least three different suppliers); nevertheless, the most common is the first one.

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 credits are published according to the guidelines of the credit institution.

Bidders must submit to evaluation their technical and economic proposal in two separate 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 both 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. It 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 at 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 that must not exceed the maximum amount established in the Federal Budget, or to specific circumstances of the product, market or necessities.

2.2 Negotiating Tenders

See 2.1 **Formal Process for Soliciting Proposals**, above.

3. Post-Award

3.1 General Process and Terms and Conditions for Payment to the Contractor

Considering the nature and characteristics of the moveable property or services and the complexity of the contracting – as it could be that the supply or rendering is carried out in a single moment, in a continuous and reiterated way or in stages – the dependencies and entities should specify in the respective contract the following:

- The maximum period in calendar days for the delivery of goods or the provision of services, which will count from the date on which the supplier receives the respective requisition;
- The official source that will be taken to carry out the conversion and the exchange rate, or the date to be considered to do so, in case of payment in foreign currency;
- The insurance that, in its case, must be granted, indicating the goods that would be covered and the coverage of the corresponding policy;
- The deductions that, if applicable, will be applied due to partial or deficient breach which the supplier may incur in the delivery of the good or the provision of the service;
- The breakdown of the amounts to be exercised in each year, in the case of contracts covering more than one fiscal year.

Likewise, in accordance with the agreement by which various guidelines are issued regarding acquisitions, leases and services as well as public works and related services – published in the Official Gazette of the Federation on 9 September 2010 – the following must be clearly specified:

- The address to which the moveable property will be delivered or the service and corresponding schedule for it which will be provided;
- The specific conditions of delivery of the chattel or the provision of the service;
- The public servant empowered to receive the moveable property or services, who will be responsible for its acceptance to satisfaction, its return or rejection and for determining the breaches in the case of services, as well as enforcing the deadlines that are established for such effects in accordance with these guidelines;
- The type of tests or physical verification to which the moveable assets or services will be submitted, to be considered satisfactory, as well as the person responsible for carrying them out and the time required for their realisation, which may not exceed ten calendar days counted from the delivery of the moveable property or the provision of the service at the address indicated for it;
- The procedure for the return or rejection of the moveable property or to determine the breaches in the provision of the services, which will only proceed for causes foreseen in the respective contract;

- The type of currency that will be used for the payment, which in case of being different to the peso is paid at the exchange rate published in the Official Gazette of the Federation in most cases.

Likewise, a maximum period of 30 days is established between the date in which the supplier proves the delivery of the moveable property or the rendering of the service, without prejudice to the possibility of establishing shorter terms in the contracts if this is stipulated.

Suppliers may consult the information related to their payments and monitor them through the Product Chain Programme of Nacional Financiera, SNC; the agencies and entities must deliver the necessary information to said programme at the time of the award of the contract, as well as the request for affiliation to it.

Any payment that is made after the established maximum term will give rise, at the request of the supplier, to the payment of financial expenses from the natural day following its expiration.

In any case, the payment will be made once the corresponding invoices have been delivered; these must comply with the fiscal requirements included in the Federal Fiscal Code, its regulations and, if applicable, the Miscellaneous Fiscal Resolution of the corresponding fiscal year. Most payment transactions are made by bank transfer so that providers must at least provide a bank account in order to process the payments.

Only when expressly requested by the Secretary of Economy may the information be forwarded for an additional review on economic competition. Likewise, the Federal Commission of Economic Competition may initiate investigations on any economic agent, such as bidders and government suppliers based on the Federal Competition Law, for alleged relative monopolistic practices (abuse of dominance) or absolute monopolistic practices (cartels).

3.2 Purchasing Goods or Services from a Foreign Contractor

Foreign suppliers may participate in contracting procedures called as international open tenders, in which any foreign goods or contractor may participate, regardless 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 property placed in the plant which 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.

3.3 Rules That Apply to a Foreign Subcontractor's Accounting and Pricing

See 3.2 Purchasing Goods or Services from a Foreign Contractor, above.

Creel Abogados

Paseo de los Tamarindos No. 400-B, Piso 29
Fraccionamiento Bosques de las Lomas
05120
Mexico City
Mexico

Tel: +52 (55) 11673005
Fax: +52 (55) 11673001
Email: jose.ruiz@creelabogados.com
Web: www.creelabogados.com



Mejía, Guizar y Kargl, S.C.

Tenancingo 18
Col. Countess
Mexico, DF, CP 06140

Tel: +52 (55) 52866578
Fax: +52 (55) 53952607
Email: mgk@mgk.mx
Web: www.mgk.mx



4. Review Procedures

4.1 Resolving Disagreements Between the Government and a Contractor

The following processes exist for resolving disagreements between the government and a contractor in connection with the performance of a government contract.

Rescission procedure: dependencies and entities may at any time administratively terminate contracts when the supplier is in breach of its obligations.

Conciliation procedure: 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 fulfillment of the contracts or request.

Arbitration procedure: 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.

4.2 Agencies, Courts and/or Organisations Permitted to Resolve Disputes

See 4.1 Resolving Disagreements between the Government and a Contractor, above.