



UNODC

United Nations Office on Drugs and Crime

Transparency, Objectivity and Competition in Public Procurement: Legal Assessment of Mexico's compliance with article 9 of the United Nations Convention against Corruption (UNCAC) in the Federal Government, the Federal District and the State of Puebla

Within the framework of the “Public-Private Partnership for Probity in Public Procurement” project

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¹ Since April 1, 2013 this Secretary has been renamed as the Secretary of Finance and Administration; however, as this document was developed during 2012, the name Secretary of Administration will be used.

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CONTENTS

ACKNOWLEDGEMENTS	06
ACRONYMS AND ABBREVIATIONS	10
EXECUTIVE SUMMARY	14
INTRODUCTION	18
METHODOLOGY	21
CHAPTER ONE. - OVERVIEW OF MEXICO	24
CHAPTER TWO. - OVERVIEW OF PUBLIC PROCUREMENT	30
2.1 ECONOMIC RELEVANCE OF PUBLIC PROCUREMENT IN MEXICO	37
2.1.1 PUBLIC PROCUREMENT IN THE FEDERAL GOVERNMENT	37
2.1.2 PUBLIC PROCUREMENT IN THE FEDERAL DISTRICT AND IN THE STATE OF PUEBLA	40
CHAPTER THREE. - LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT	42
3.1 ORGANIZATION OF THE MEXICAN STATE	42
3.2 INTERNATIONAL LEGAL FRAMEWORK	43
3.2.1 UNITED NATIONS CONVENTION AGAINST CORRUPTION	43
3.2.1.A KEY PRINCIPLES OF ARTICLE 9 OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION	46
3.2.2 UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT	49
3.3 THE PROCUREMENT SYSTEM IN MEXICO UNDER THE CONSTITUTION OF THE UNITED MEXICAN STATES	51
3.3.1 PUBLIC TENDERS	53
3.3.2 EXCEPTIONS TO TENDER	56
3.3.3 RESTRICTED INVITATION	56

3.3.4 DIRECT AWARD	57
CHAPTER FOUR. - PREVENTING CORRUPTION IN PUBLIC PROCUREMENT IN MEXICO ACCORDING TO UNCAC	58
4.1 TRANSPARENCY: PUBLIC DISSEMINATION OF INFORMATION	61
4.1.1 RIGHT TO PUBLIC INFORMATION	61
4.1.1.A DISSEMINATION TOOLS IN PUBLIC PROCUREMENT	62
4.1.1.B LAW OF TRANSPARENCY AND ACCESS TO PUBLIC INFORMATION	68
4.2 CONDITIONS FOR PARTICIPATING, SELECTION CRITERIA AND AWARD PUBLICATION	71
4.3 OBJECTIVE DECISION-MAKING	78
4.4 CONTROL OF PUBLIC BIDS: VERIFICATION MECHANISMS AND LEGAL REMEDIES	83
4.4.1 PUBLIC PROCUREMENT VERIFICATION PROCESSES	83
4.4.1.A SOCIAL PARTICIPATION IN PUBLIC PROCUREMENT	88
4.4.2 DISPUTE RESOLUTION: LEGAL RESOURCES	93
4.5 REGULATIONS OF THE PERSONNEL IN CHARGE OF PUBLIC CONTRACTS	99
MAIN FINDINGS AND AREAS OF OPPORTUNITY	110
BIBLIOGRAPHICAL REFERENCES	114

ACRONYMS AND ABBREVIATIONS

AEE	Executive Economic Analysis - Entrepreneurial Coordinating Council
ANAFARMEX	National Association of Mexican Pharmacies
APF	Public Administration of the Federation
BPIC	Bribe Payer's Index
CANAINTEX	National Chamber of the Textile Industry
CANAIVE	National Chamber of the Clothing Industry
CANIFARMA	National Chamber of the Pharmaceutical Industry
CCDF	Civil Code of the Federal District
CCF	Federal Civil Code
CEESP	Economic Studies Center of the Private Sector, Civil Association
CFE	Federal Electricity Commission
CGDF	Comptroller General of the Federal District
CIDAC	Centre for Development Research
CMIC	Mexican Chamber of the Construction Industry
COLMEX	College of Mexico
CONCAMIN	Confederation of Industrial Chambers of the Mexican United States
CPDF	Penal Code of the Federal District
CPEUM	Political Constitution of the United Mexican States
CPF	Federal Penal Code

CPI	Corruption Perception Index
DOF	Official Journal of the Federation
FTA	Free Trade Agreement
GCR	Global Competitiveness Report
GDP	Gross Domestic Product
GODF	Official Gazette of the Federal District
ICT	Information and Communication Technologies
IFAI	Federal Institute of Access to Public Information and Data Protection
IMCO	Mexican Institute for Competitiveness
IMF	International Monetary Fund
INEGI	National Institute of Statistics and Geography
INFODF	Information and Protection of Personal Data of the Federal District
KPMG	KPMG, Audit, Tax and Advice Services in Mexico
LAASSP	Law of Acquisitions, Leases and Services of the Public Sector
LADF	Law of Acquisitions of the Federal District
LCEC	Law of Business Chambers and their Confederations
LFACP	Federal Anticorruption in Public Procurement Law
LFRASP	Federal Law of Public Servants' Administrative Responsibilities
LFRSP	Federal Law of Public Servants' Responsibilities
LOAPF	Federal Public Administration Organic Law
LOPDF	Law on Public Works of the Federal District
LOPSRM	Law on Public Works and Related Services
LPCDF	Law of Citizen Participation of the Federal District

LRSPEP	Law of Public Servants' Responsibilities of the State of Puebla
LTAIPG	Law of Transparency and Access to Public Government Information
NAFTA	North Atlantic Free Trade Agreement
NGO	Non-Governmental Organization
NOM	Official Mexican Norms
OECD	Organization for Economic Co-operation and Development
PES	Performance Evaluation System
PND	National Development Plan 2007-2012
PWB	Public Work Blogs
SAP	Secretary of Administration of Puebla
SE	Ministry of Economy
SEDECAP	Secretary of Development, Evaluation and Control of Public Administration
SHCP	Ministry of the Treasury
SFP	Ministry of Public Administration
SISREQ	Requisitions System
SSA	Ministry of Health
TI	Transparency International
TM	Transparency Mexico
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNODC	United Nations Office on Drugs and Crime
WB	World Bank
WEF	World Economic Forum

EXECUTIVE SUMMARY

Public procurement or government procurement is the means by which governments procure to provide goods and services required in the country. At the global level, public procurement accounts for about 15% of the world's Gross Domestic Product (GDP). In Mexico, it amounts to approximately 30 to 40% of public sector spending or 7 to 10% of the GDP (about 800 billion Mexican pesos). With such massive inflows of resources, public procurement is a system that is vulnerable to corruption.

Recognizing the importance of putting effective legal frameworks in place to combat corruption in public procurement, the United Nations Convention against Corruption (UNCAC), which came into force in 2005, contains Article 9 on public procurement and the management of public finances. It calls for States Parties to put legal frameworks in place to ensure transparency, objectivity and competition in public procurement processes.

To assist countries in the implementation of effective legal frameworks on public procurement, the United Nations Office on Drugs and Crime (UNODC) is currently working on a project entitled, "Public-Private Partnership for Probity in Public Procurement", which comprises global activities and two sub-projects implemented in Mexico and India.

The purpose of the project is to promote States' implementation of Article 9 while encouraging private sector actors' efforts to comply with the 10th Principle of the UN Global Compact, which states that "Businesses should work against corruption in any form, including bribery and extortion." To facilitate this, the UNODC Liaison and Partnership Office in Mexico formed a working group which brought together public procurement practitioners from the government (Federal Government, Federal District and the State of Puebla) and the private sector to promote dialogue and to enhance public-private partnership in addressing the common challenge of corruption in public procurement.

This report is the first product of the efforts of UNODC and this working group. It is a legal diagnosis of the legislation of the Federal Government of Mexico, as well as two selected States - the Federal District and the State of Puebla. To analyze

the legal framework, a desk review and an analysis of relevant legislation were conducted. While legal analysis is the first step in assessing the public procurement system, it was widely recognized that there are often discrepancies, challenges and lessons to be learned in how laws, policies and administrative processes are put into effect on a daily basis. For a comprehensive analysis, the desk review was coupled with extensive interviews and focus group discussions with government and private sector actors.

This publication is divided into two sections. The first covers the general economic, corruption, and public procurement situation in Mexico (Chapters One and Two). The second provides an in-depth analysis of the legal system and the particularities of public procurement at the federal and state level for the State of Puebla and the Federal District, as it is in law and in its implementation (Chapters Three and Four). This is done within the framework of Article 9 of UNCAC, with special consideration of the good practices established via the United Nations Commission on International Trade Law's Model Law on Public Procurement, 2011. Lastly, there is a presentation of general findings and areas of opportunity which outlines a roadmap for any pending issues that must be addressed. Based on the identified needs, these findings will be translated into a series of trainings, which will be offered to project participants and their partner organizations, with an aim to enhance knowledge and skills in the identified gaps.

The main findings of the report demonstrate that the public procurement laws at the federal level, as well as in the Federal District and in the State of Puebla comply with Article 9 of UNCAC; nonetheless, the statistics on corruption in Mexico outlined in this report demonstrate that, despite strong legal frameworks, corruption exists in public procurement processes. The way in which the law is implemented on a daily basis, as well as the use of discretionary decision-making in some contexts, can lead to acts of corruption.

Public procurement processes at all levels of government in Mexico have a high degree of legitimacy. Reports indicate that the infraction rates are only 3% to 5% in susceptible award procedures, i.e. public bids or restricted invitations. In the case of the Federal District, most of the acquisition processes are carried out by direct awarding, which implies a wide margin of discretion. While discretion is necessary in ensuring effective processes and decision-making, if unregulated, it can open the door to vulnerabilities to corruption.

It was found that there are concerns regarding the legitimacy of procurement processes, which have resonated from the distrust of citizens towards governmental institutions. Mexico has taken extensive steps to try and rebuild this trust, through various mechanisms such as social participation and citizen witness programs, which allow registered citizens to observe the fairness of certain procurements. Yet, there remains the need for further improvement of these programs and training of social witnesses.

According to those interviewed in the private sector, despite the existence of complaint mechanisms, many bidders prefer not to report infractions in public procurement processes due to the fear of being vetoed from participating in future bids, especially when they are by direct award or restricted invitation. It was also discovered that many in the private sector may not be aware of their rights and obligations to report infractions. One possible area of opportunity is further training and awareness-raising on procurement laws within the private sector, their rights and obligations, as well as their means for redress in cases of grievances.

Members of the public sector highlighted that many of the acts related to corruption in public purchasing do not take place during or after the awarding processes, but before. Some companies engage in practices such as making agreements among suppliers or designating exclusive distributorship to large transnational companies. Some companies participate in bids with the premeditated intention of not complying, but rather take the chance of having to pay a fine or penalty.

One of the most relevant areas of opportunity identified was that of market studies, which are conducted in the pre-tender, planning phase of the procurement cycle. Public officials could benefit from training and skill development in market research, specifically in recognizing the required characteristics of goods and services, drafting specifications, effective modes of decision making, and the proper use of subjectivity. Market studies are also not currently released to the public, which can lead to mistrust in the process and speculation that specifications are either outdated or designed with a specific bidder in mind, thereby limiting competition.

The overall findings of the study and public-private sector dialogue within the framework of the project indicate that both the public and private sectors agree that although some legislative gaps remain, the general processes of public procurement in the analyzed Mexican governments meet international standards. They did note, however, that the government and private sector staff involved in procurement should be adequately trained to ensure that laws are put into practice. UNODC plans to roll out a training program in 2013 to address many of the needs identified in this report.

INTRODUCTION

Corruption is a multi-sectorial problem that affects the economic, social, and political development of Mexico. In order to combat corruption effectively, there must be cooperation among all stakeholders. In the business sector, corrupt practices create market distortions, as they foster monopolies, impose price controls, and curb the free market. According to the Executive Economic Analysis of 2012 (AEE), prepared by the Center for Economic Studies Center of the Private Sector (CEESP), these situations have not been resolved despite the efforts made by the Mexican government.

To address these concerns, the United Nations Office on Drugs and Crime, with its mission to prevent corruption from being a hindrance to economic activity, launched a project focusing on combating corruption in one of the most vulnerable areas – public procurement.

The project “Public-Private Partnership for Probity in Public Procurement”, funded by the Siemens Integrity Initiative, arose from the need for a thorough analysis of the comprehensiveness of laws and procedures governing public procurement in Mexico.

The overall objective of the project is to promote the implementation of Article 9 of the United Nations Convention against Corruption, which is related to public procurement and the management of public finances, with a special focus on the importance of public-private partnership in corruption prevention.

This objective will be achieved by strengthening the capacity of the public sector to prevent, detect, and punish corruption, and by giving the private sector a platform for sharing ideas on common goals, such as on the tenth principle of the United Nations Global Compact, which states that businesses should “*work against all forms of corruption, including extortion and bribery.*”

The distinctive feature of the project is the direct involvement of the private sector in all phases of implementation.

Pursuant to the above, this report aims to provide an overview of the current situation in Mexico, relating to public procurement with a focus on the legal

framework and the practical application of laws, rules and regulations on a day-to-day basis. Consideration is given to preventing, combating and punishing corruption in public procurement in line with Article 9 of UNCAC, and the Model Law of the United Nations Commission on International Trade Law on Public Procurement (UNCITRAL), 2011. The overarching aim is to identify the strengths and weaknesses in current procurement systems in Mexico and to identify areas of opportunity and future action for UNODC.

This analysis examines the Mexican legal framework at both the federal and state levels of government. The review was conducted for the Federal Government, the Federal District and the State of Puebla, under the normative perspective of the international instruments cited above. It also draws on indicators of national and international surveys and case studies that were obtained from both the public and private sectors to document the application of Mexican law.

The diagnosis on the public procurement processes analyzed seeks to accomplish the following objectives: a) identify the legal framework in the Federation, Federal District, and the State of Puebla; b) explain the organization of Mexican states; c) demonstrate the complexity of the Mexican legal system on public procurement; d) diagnose and evaluate public procurement systems in relation to UNCAC and the UNCITRAL Model Law; e) provide an overview of the positions and perceptions of the private sector on public procurement in the Federal Government, Federal District and the State of Puebla; and f) identify areas of opportunity and best public procurement practices in respect to preventing, combating and punishing corruption.

Based on the above, the final section has the purpose of: a) generating conclusions to develop recommendations; and b) establishing a final diagnosis of public procurement based on the studies, analyses, evaluations, and interviews with the public and private sectors on regulatory reform to prevent, combat, and punish corruption.

The chapters presented in this work give a comprehensive evaluation to draw conclusions, identify areas of opportunity and make possible recommendations regarding the prevention, suppression, and punishment of corruption within both the public and private sector in Mexico.

The final purpose of this paper is to establish a diagnosis to help identify where the links in communication between the public and private sector can be improved within the framework of government policies and the implementation of UNCAC.

METHODOLOGY

To establish a general analysis of the prevention, suppression and punishment of corruption in public procurement in Mexico, this diagnostic study used three main approaches:

- a. an evaluation of target issues;
- b. an analysis of the Mexican public procurement systems' -Federal, Federal District and State of Puebla- compliance with UNCAC; and
- c. a review of the practical application of administrative procedures.

This assessment was developed based on direct and indirect investigations, analysis and interviews of all relevant parties such as the government, private sector institutions, agencies, and non-governmental associations. International data for the study was derived from organizations such as the World Bank (WB), World Economic Forum (WEF), Organization for Economic Co-operation and Development (OECD), Transparency International (TI), and Transparency Mexico (TM).

The main sources of public sector data were: the National Development Plan 2007-2011 (PND), the Sixth Report presented by the Federal Government in 2012, the Ministry of Public Administration (SFP), and the National Institute of Statistics and Geography (INEGI).

Data collected from the private sector, non-governmental organizations, and educational institutions came from the Entrepreneurial Coordinating Council through its Economic Studies Center of the Private Sector (CEESP), the Mexican Institute for Competitiveness (IMCO), the Centre for Development Research (CIDAC), KPMG Mexico (KPMG), and the College of Mexico (COLMEX).

Applicable laws in the Federal Government, the Federal District, and the State of Puebla were reviewed for compliance with UNCAC Article 9. Supplemental information on the practical application of legislation, rules and regulations were obtained through personal interviews with various stakeholders involved in public procurement from both the public and private sector.

In the area of public procurement, Federal Government representatives include the Ministry of Public Administration (SFP), the Ministry of Health (SSA), the Ministry of Communications and Transport (SCT), the Federal Electricity Commission (CFE), and LICONSA. The Federal District was represented by the Comptroller General of the Federal District, while the State of Puebla was represented through its Secretariat of Administration.

For the preparation of this diagnosis, the private sector participated through the Confederation of Industrial Chambers of the Mexican United States, and four industrial chambers² which contributed to the assessment of the public procurement system. They are the National Chamber of the Clothing Industry, National Chamber of the Textile Industry, National Chamber of the Pharmaceutical Industry, and Mexican Chamber of the Construction Industry, as well as the National Association of Mexican Pharmacies³. They provided useful cases of success and failure in public procurement, which allowed for the identification of needs and opportunities for improvements in both policy-making and related procurement procedures.

CANAIVE a public interest institution consisting of 9 state offices, 13 national sections, and 16 working committees, promotes the garment industry, nationally and internationally. For its part, CANAINTEX works closely with CANAIVE, representing textile companies in Mexico with the aim of promoting the industry and protecting their interests.

2 According to the Law of Business Chambers and its Confederations (LCEC), confederations and chambers represent, promote, and defend the national and international activities regarding industry, commerce, and services. They are, by virtue of this law, collaborative bodies of the State, which shall be mandatorily consulted to develop economic policies, and contribute to socio-economic growth in the country.

3 The Confederation of Industrial Chambers of the Mexican United States (CONCAMIN) is the industry representative body that brings together 46 national chambers, 14 regional chambers, 3 generic chambers, and 44 associations of the various productive sectors in the country.

Its mission is: «To represent and promote the interests of the various productive sectors in Mexico, and measures to promote development, to achieve greater competitiveness of the industry, and the country.»

Each institution documented the development of mechanisms to prevent, combat, denounce, and punish acts of corruption, as well as methods of collaboration between the private sector and government to achieve these purposes.

Having formulated the three approaches used in this methodology, the aim of the study is to find good practices, identify areas of opportunity that encourage cooperation between the public and private sectors, and establish a set of recommendations to prevent, combat, and punish corruption in the field of public procurement.

ANAFARMEX is a representative body of the majority of pharmacies in the country. It has direct contact to pharmacy managers and owners.

CMIC is a public institution, currently consisting of around 8,000 members. It aims to represent the issues faced by the Mexican construction industry and to defend the interests of employees.

We also had valuable support from Siemens Mesoamerica.

CHAPTER ONE

OVERVIEW OF MEXICO

The Mexican State has sought to achieve an ethical, effective, transparent, and accountable public administration system to combat and punish acts of corruption, arbitrariness, and impunity. It also deems necessary to ensure that all acts by public officials are in accordance with the law and that those which are not are penalized.

The National Development Plan (PND)⁴, which was valid when this document was developed, states that impunity and corruption have been obstacles to the development of Mexico throughout its history. It further points out that citizens distrust government authorities and institutions.

For this reason, the Federal Government recognizes that the country requires a legal framework in line with these national realities, in order to generate public confidence in both the government and the laws that govern it, and to promote transparency that will generate certainty among citizens.

The indicator used by the Federal Government in the PND to confirm their assertions is the Corruption Perception Index (CPI) 2006 of Transparency International (TI), which measures perceptions of the degree of corruption. It documents that Mexico was at the 70th position out of 163 countries. The same year, it was rated 3.3 on a scale of 0 to 10 on issues of government transparency and corruption, where 0 means that a country is perceived as highly corrupt and 10 means it is perceived as very transparent.

⁴ This report was outlined throughout the first six months of 2007 and published within the first year. The PND is a document prepared by the President at the beginning of his duties in order to establish objectives, goals, strategies, and priorities for comprehensive and sustainable development of the country. Given the period in which this Diagnosis was prepared, the PND taken as a primary source of information was the 2007-2012 one, for it was still in use.

In the PND 2013-2018 of the current Administration the fight against corruption is picked up as one of the many objectives of the Federal Government. The PND lists National Goals with precise strategies executed through specific lines of action. All of them are subject to the cross-cutting strategy “Close and Modern Government”, which aims at guaranteeing access to public information and protection of personal data, fostering accountability.

In 2010, the CPI scored Mexico at 3.1, which placed it in the position 98 out of 178 countries evaluated. A year later, the same study revealed that Mexico was still considered as a country with a high level of corruption, as it was positioned at 100 out of 183 countries evaluated and received a rating of 3 on the same scale.

On the other hand, as per the report of the National Index of Corruption and Good Governance produced by Transparency Mexico (TM) in 2010, Mexico reported 10.3 corruption cases per 100 cases of citizens requesting an administrative procedure or service. This means that the number of times a bribe was paid for 100 times a procedure was undertaken has significantly increased, which implies that corruption prevention needs to be strengthened.

However, from the perspective of the private sector, the CEESP⁵ calculated the cost of corruption in Mexico at 1,259,300,000 pesos (over one billion pesos), which equals about 10% of the national GDP.

Meanwhile, studies by KPMG Mexico⁶ in 2008 indicated that 44% of Mexican firms made some unofficial payments to public officials to expedite proceedings. They also reported that 5% of the annual income of the companies was used to pay bribes.

According to The Global Competitiveness Report (GCR) 2012-2013 of the World Economic Forum (WEF), these situations have been changing and improving since 2011. Nonetheless, despite these improvements, Mexico still faces persistent structural problems that need to be addressed in order to further increase the competitiveness of the economy.

According to the data presented in the GCR 2012-2013, there remains an insufficient and ineffective legal framework to combat corruption, poor functioning of public institutions, a lack of confidence of the small business community in politicians, and a lack of effective competition. Thus, from the perspective of the GCR 2012-2013, the business sector indicates that out of the 16 most common

5 Análisis Económico Ejecutivo (Executive Economic Analysis), (Mexico City: CEESP, April 2012)

6 KPMG Cárdenas Dosal, Encuesta de Fraude y Corrupción en México (Mexico City: KPMG, 2008)

factors⁷ that prevent companies from doing business in Mexico, corruption is in first place, as the most problematic, while inefficient bureaucracy is the third most common reason.

The following tables and graphs show the comparison of Mexico as to six factors that encourage corruption in government institutions in the country. It also shows Mexico's position relative to other countries in 2012 and 2011. The report grades on a scale of 1-7, where 1 shows that the situation arises all the time and 7 that it has never occurred.

COMPARISON OF CORRUPTION FACTORS IN GOVERNMENT INSTITUTIONS IN MEXICO

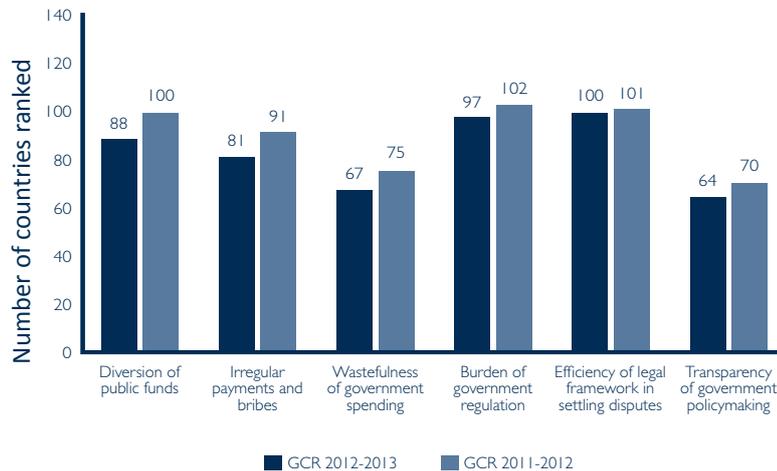
	GCR 2012-2013		GCR 2011-2012	
	Rank out of 144	Value 1 to 7	Rank out of 142	Value 1 to 7
Diversion of public funds	88	2.9	100	2.2
Irregular payments and bribes	81	3.7	91	3.6
Wastefulness of government spending	67	3.3	75	3
Burden of government regulation	97	3	102	2.9
Efficiency of legal framework in settling disputes	100	3.3	101	3.1
Transparency of government policymaking	64	4.4	70	4.2
Overall	92	3.6	103	3.4

Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum.

⁷ The Global Competitiveness Report of the World Economic Forum assesses the perception of entrepreneurs in each country with respect to the factors that hinder business, asking them to rank in order of importance 16 variables: corruption, crime and theft, inefficient government bureaucracy, access to financing, restrictive labor regulations, tax regulations, inadequate infrastructure, low-skilled workforce, tax rates, insufficient innovation capacity, poor work ethic among domestic workers, policy instability, inflation, government instability (coups), regulations the use of foreign currency, and poor public health.

By looking at the respective graph, significant improvements in each of the rankings can be better illustrated:

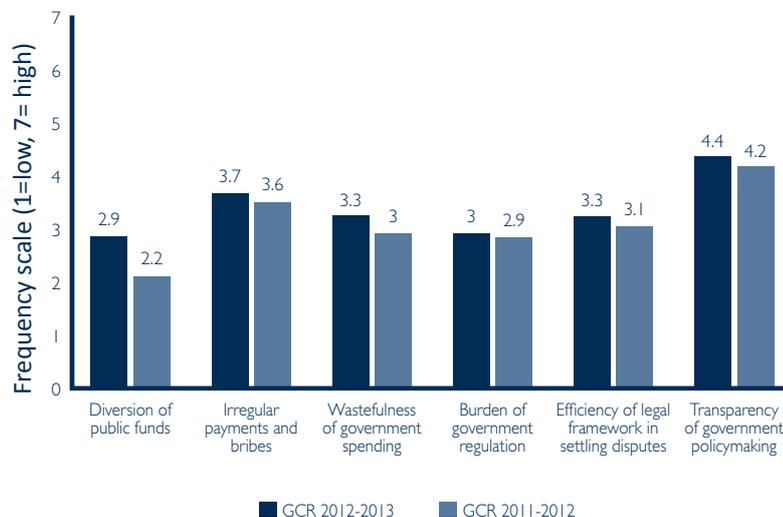
COMPARISON OF GCR RANKING OF MEXICO ON SIX KEY INDICATORS IN 2012-2013 AND 2011-2012



Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum

The graph shown below compares ratings on Mexico between 2012 and 2011, as to the factors that affect public sector institutional corruption. The results point to a positive development, but there is still work to be done.

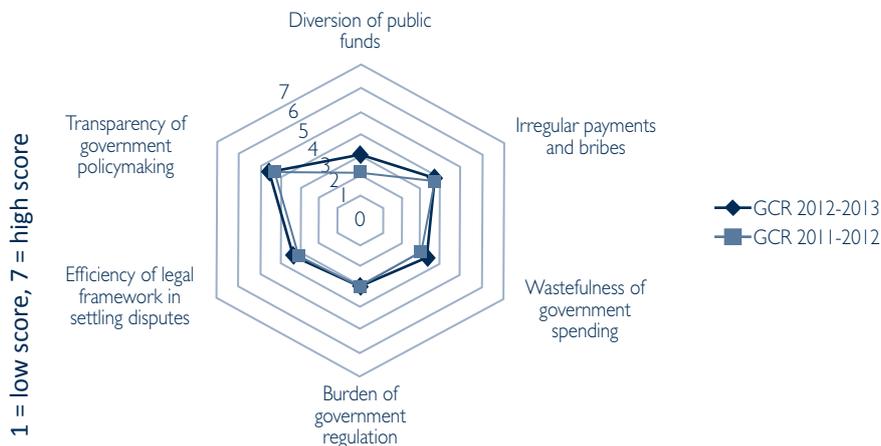
COMPARISON OF GCR FREQUENCY OF CORRUPTION FACTORS IN MEXICO, 2012-2013 AND 2011-2012



Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum

However, the following chart shows how Mexico's ratings on factors affecting institutional corruption are within the three-point range, which indicates a trend toward institutional corruption.

COMPARISON OF MEXICO'S RANKING IN GCR 2011-2012 AND 2012-2013 IN THREE-POINT RANGE FORM



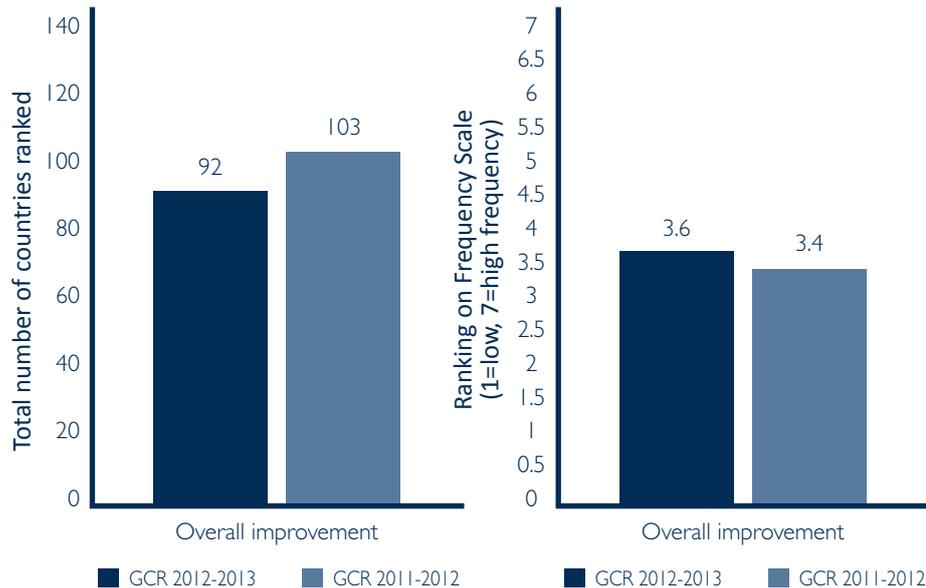
Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum (WEF)

Finally, the following two graphs show the position and the overall assessment that the country has achieved in preventing governmental institutional corruption. The graph on the left shows that in the overall assessment in 2012 of the 17⁸ factors affecting institutions, Mexico has significantly improved compared to 2011, gaining 11 spots to be at position 92 out of 144 countries, whereas in 2011 it held position 103 out of 142 countries.

The overall assessment has also improved, gaining two tenths in relation to the previous year. The rating was 3.6 in 2013, while in 2011 it was 3.4.

8 Among the variables considered in this area, we can find for government institutions: property rights, intellectual property protection, diversion of public resources, confidence in the political class, kickbacks and bribery, judicial independence, favoritism in decisions of authorities, inappropriate spending of public resources, regulatory burden, efficiency of legal framework to resolve disputes, efficient legal framework to deal with the regulation, transparency in public policy, government services for business improvement, costs of terrorism, violence and costs crime, organized crime, and confidence in the police service. For private variables are: ethical conduct, strength in audit and reporting standards, effectiveness of corporate boards, protection of minority shareholders, and strength of investor protection.

OVERALL IMPROVEMENT OF MEXICO'S RANKING IN GCR 2011-2012 AND 2012-2013



Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum

Notwithstanding the aforementioned, the WEF recognizes that Mexico climbed five places from the GCR 2011 in its overall rating of competitiveness. In 2012, the country was ranked at 53 of 144 countries evaluated with a rating of 4.4, where 0 is low and 7 is very corrupt. In 2011, it was at the position 58 of 142 countries and received a rating of 4.3.

Thus, the graphs referenced confirm the general picture of corruption in Mexico.

Mexico has made significant progress in the fight against corruption. Although the trend is positive, the overall assessment reflects that there remains citizens' lack of trust in government institutions and the actions of the authorities, inefficient bureaucracy, unofficial payments, and inefficient legal frameworks.

CHAPTER TWO

OVERVIEW OF PUBLIC PROCUREMENT

The Centre for Development Research (CIDAC) and TM have stressed that studying the rules under which the government buys goods and services is a key step in determining the degree of transparency and competitiveness in procurement processes that impact the daily lives of citizens.

According to the Bribe Payers Index by Country (BPIC) of 2011⁹, carried out by TI on various companies, Mexico ranked at 26 of 28 countries surveyed with a rating of 7.0; with 0 meaning that companies have never participated in acts of bribery and 10 meaning that they always do.

In the survey, many international business leaders indicated a widespread practice of companies paying bribes to public officials in order to win public tenders, avoiding regulatory compliance, streamlining government processes, or influencing policies.

On a scale from 1 to 7 points, where 1 indicates that it is very common for companies to engage in improper payments or bribes to receive a contract or license and 7 indicates that this never happens, the GCR 2012-2013 rates Mexico with 3.7, which locates it at position 81 of the 144 evaluated countries. It improved by only one tenth in comparison to 2011, when it received a rating of 3.6 and was placed 91 out of 142 countries.

However, companies are just as likely to pay bribes to other businesses, says the BPIC, 2011. This finding suggests that corruption is not a problem of the public sector exclusively, but also of the business sector, as there are significant financial and reputation-related risks for the companies concerned.

The same report also examines the probability that 19 target companies may be involved in bribery and exert undue influence on governments. Under this view, businesses and public works construction companies obtained the lowest rating

9 *Bribe Payers Index 2011* (Berlin: Transparency International, 2011)

in the survey, making the sector most likely to engage in these practices. This is a sector where the omission of regulations and failure to comply can have disastrous effects on public safety. The oil and gas sector is also perceived as particularly prone to bribery.

The regulation of public procurement is important as the effective maximization of public resources, as well as the creation of the maximum value and best possible use of the money invested depend upon it. If you create a set of rules to have a competitive and transparent system, the goal of having the highest quality at the lowest price will be reached.

If the rules are not clear and not simultaneously implemented by the public and private sector, discretion may be used. This increases the likelihood that: corruption cases occur in the purchasing process; the good or service purchased is of poor quality or overpriced; and procurement fails to comply with social objectives. On the other hand, if the rules are well-defined and criteria such as competition, efficiency, and integrity prevail, then it is more likely that the procurement processes will result in quality goods and services at the best price.

Mexico, as a federation, has granted each of its entities the right to make government purchases through mechanisms local governments consider appropriate.

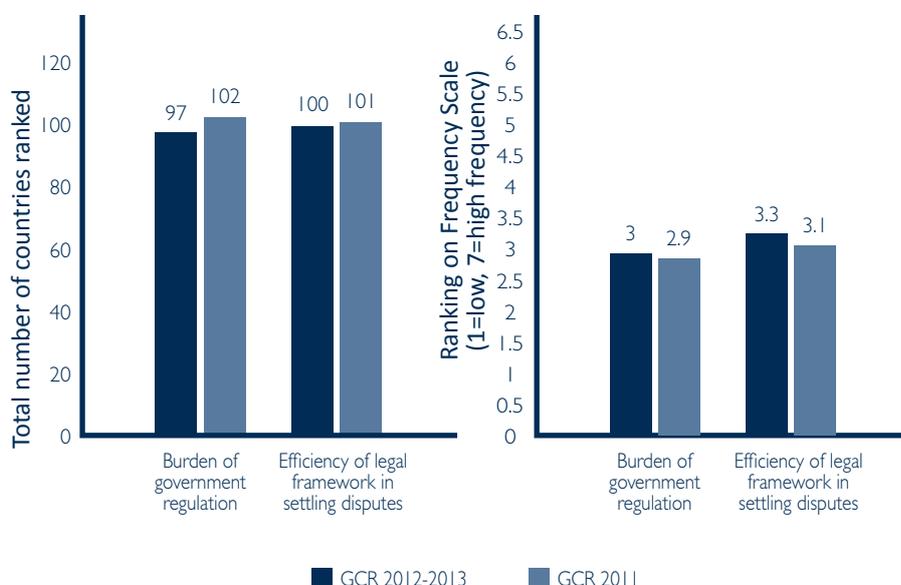
The framework regulating government procurement in each state is complex. It consists of rules in various hierarchies: laws, regulations, operating manuals, and purchase contracts. However, high-level standards outline rigid limits, both for governmental institutions and all individuals with whom contracts are executed.

GCR 2012-2013 data shows that Mexico is in position 97 of 144 countries evaluated with a rating of 3 points out of a possible 7 in relation to the burden of government regulation. It has placed the country at position 100, with a rating of 3.3, in terms of the efficiency of the legal framework to resolve disputes¹⁰.

10 Klaus Schwab, "Global Competitiveness Report" 2012, 2013 (Ginebra: Fórum Económico Mundial), p. 257 URL: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

If we compare this with figures of 2011, there was an improvement in Mexico. Mexico climbed five places in relation to the burden of government regulation and also one place with regards to legal efficiency. This means that in 2011 it stood at positions 102 and 101, respectively. The ratings also showed significant progress, as it shows that Mexico advanced by one and two tenths, respectively. In 2011, it scored 2.9 and 3.1.

COMPARISON IN THE GOVERNMENT REGULATION AND EFFICIENCY OF LEGAL FRAMEWORK OF MEXICO, 2011 AND 2012



Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum

This improvement is in large part due to the efforts of the Federation, mainly made by the Ministry of Public Administration. The Federation aimed to have an efficient and effective government to improve the regulation, management, processes, and results to meet citizens' needs in terms of the provision of public goods and services. From that objective, a number of strategies have been developed by the Federation over the past years which have yielded significant results:

- Increase in efficiency standards and government effectiveness through the systematization and digitization of all administrative procedures, and the use of information technology and communications for public management.

- Digitalization of procedures and services to facilitate compliance and information to citizens- notably, the Citizen Portal (www.gob.mx), websites of various institutions in the APF (currently 198 services and administrative procedures), and the procedures and services registered with the Federal Regulatory Commission, which can now be accessed online. With regards to procurement, the main achievement is the Electronic System CompraNet, which is explained in detail below.
- Elimination and/or merger of procedures: since the Regulatory Reform implemented in 2009, there has been significant removal of procedures and public services. By July 2012, 2,841 procedures had been eliminated, making processes faster and more efficient.
- Reduction of substantive and administrative internal norms: 6,057 substantive rules were eliminated between 2010 and 2012, and 10,426 administrative rules out of 14,579 provisions were eliminated between 2009 and 2012.
- Digitalization: a tool for efficiency and transparency in public works. Given the importance of public works in government procurement, the Federal Government has implemented two major electronic instruments that allow its procedures to be more transparent and efficient:
 1. Public Works Blogs (PWB): a software application that provides access to information on public works projects funded with federal resources, and the means to follow up on them.
 2. Intelligent System of Public Works (ISPW): a tool that allows citizens to access the information of the Ministry of Public Administration about public works, including PWB, the State of Works Contract under observation, the Annual Procurement, Leasing, and Services and Public Works Program and the related Public Works and Services Annual Program, as well as Public Works Contracts Financial Physical Progress Follow-up. In this way, users can know about and follow up on the processes of tender, execution, and payment of federal public works.

- Zero Bases Regulatory Reform. In order to promote an efficient public service, a profound regulatory reform by the Ministry of Public Administration and the Ministry of Economy (SE) was announced in September 2009, representing the largest deregulation process that both Ministries have undergone.
- After a rigorous evaluation of regulatory burdens, the identification of unnecessary internal rules (substantive and administrative) and the assessment of the regulation of high economic impact, the Ministry of Public Administration generated a strategy for administrative simplification that resulted in the abolition of a total of 16,483 internal rules out of an inventory of 35,584 provisions.
- Reducing internal rules in public procurement has been particularly beneficial. The Ministry has made great progress in the simplification and standardization of administrative operations of various government bodies, including those relating to acquisitions, public works, materials, internal audit, and control.
- Project Zero Base Regulation received the “United Nations Public Service Award” in the category “Promoting prevention of and combating corruption in public administration” in June 2011.
- “Performance Budgeting”, “Performance Appraisal System.” and “Management Improvement” in the Federal Public Administration:
 1. Performance Budgeting aims to improve the implementation of programs of the federal budget by assessing indicators and contrasting allocations with the final destination of public resources, so as to ensure efficient use in meeting the objectives of the National Development Plan.
 2. Performance Evaluation System (PES) is a methodology to verify the degree of compliance with the goals and objectives of the Ministry of Public Administration in the performance of its programs; it is an assessment and evaluation of strategic and management indicators.
 3. Special Program Management for Improvement in the Federal Public Administration 2008 - 2012 seeks to reduce the transaction costs

between government and citizens, and to improve access to public and common goods. The Ministry of Public Administration developed the Institutional Development Index, which evaluates APF institutions to measure their progress in implementing the program in terms of indicators, such as the reduction of administrative burdens and simplification (standardization) process.

- National Public Expenditure Reduction, implemented in 2010, strengthens austerity measures, particularly in terms of the reduction of operating and administration expenses and the automation of procedures and services. Between 2010 and 2011, savings of 43, 512.1 million pesos were generated, of which 72.6% corresponded to the reduction in operating expenses.

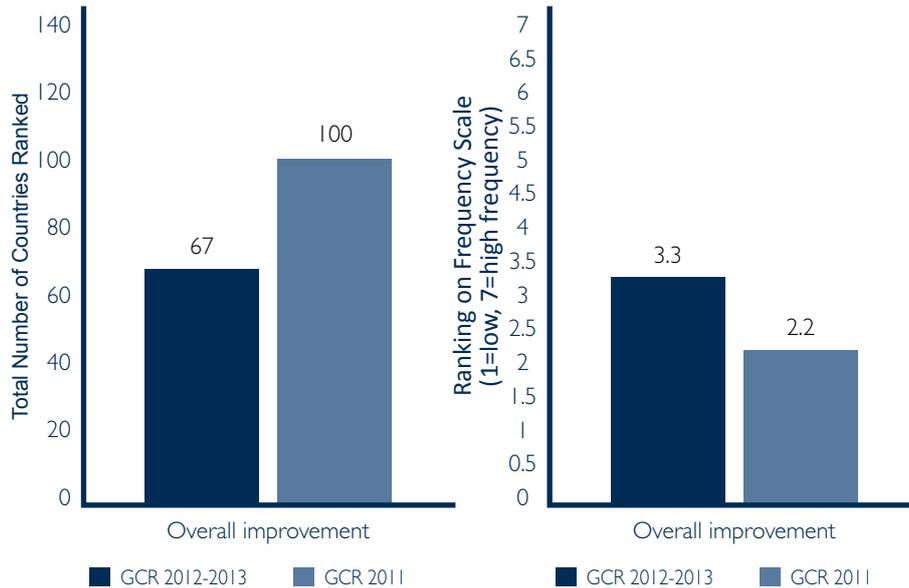
According to data from the Ministry of Public Administration, 410 procurement rules and 182 rules on public works were eliminated altogether. These were synthesized into 11 processes. The purpose was to provide the Federal Government with legislation that would allow the use of public procurement for development and outline clear rules for planning, programming, and budgeting of public procurement.

Approving the strategies and criteria for all agencies of the Federal Public Administration, the Ministry of Public Administration reduced the complexity of the procurement processes at the federal level by incorporating new schemes, whose overarching objective was greater efficiency and effectiveness in the procurement process.

In an effort to make procedures more precise, the Law of Acquisitions, Leases, and Services of the Public Sector (LAASSP), and the Law of Public Works and Related Services (LOPSRM) were revised, and new regulations were created.

Meanwhile, on June 11, 2012, the Federal Law on Public Procurement Corruption (LFACP) was published in the Official Journal of the Federation. CIDAC and TM concluded that the law reforms, as of 2009, managed to give greater certainty in the process to all stakeholders. As per the GCR 2012-2013, the diversion of funds was reduced in relation to 2011.

ANTI-CORRUPTION FACTORS



Source: The Global Competitiveness Report 2011-2012 and 2012-2013, World Economic Forum

Upon analyzing the results of the transformation of the public procurement system of the APF, we can highlight:

- It led to savings of 3,670 million pesos by the IMSS, PEMEX, and FEC through subsequent discounted deals.
- The design and operation of three framework contracts (food stamps, work clothes, and airfare) represented a savings of 741 million pesos.
- The completion of 21 consolidated contracts represented savings of almost 339 million pesos.

Between September 2011 and June 2012, the set of strategies to achieve better conditions for state government procurement generated an estimated savings of 4,435 million pesos. In May 2012, the initiative “National Public Procurement System” earned the Ministry of Public Administration the second position for the “United Nations Public Service Award” in the category “Promoting the prevention of and combating to corruption in public administration”.

However, with respect to the states, there are various discrepancies to the achievements of the Federal Act. The local laws are not as strong in planning, programming, and budgeting. Furthermore, excessive regulation leads to inequality and discrimination in the public procurement processes, which do not necessarily contribute to development in the states or to the rational use of public resources.

Notwithstanding, the actions polluting the public procurement processes in the federal and state levels are difficult to document and, therefore, the first step in transforming public procurement processes into a development platform consists on identifying weaknesses and strengths in the governing standards.

In Mexico, it is common for companies to engage in improper payments or bribes to ensure success in being awarded a contract. Companies also pay bribes to other businesses. The regulatory body governing government procurement in each state is complex. There is a burden of government regulation and a deficiency in the legal framework to resolve disputes. Amendments to the federal legislation since 2009 managed to give greater certainty to everyone involved in the process and reduced the diversion of resources in 2011. It is difficult to determine the acts that corrupt public procurement processes at the federal level and in the states, as few records exist on the matter.

2.1

ECONOMIC RELEVANCE OF PUBLIC PROCUREMENT IN MEXICO

2.1.1 Public Procurement in the Federal Government

Government procurement makes up a substantial amount of total financial expenditure in economic and market terms. According to reports from the Ministry of Public Administration, public procurement in Mexico represents between 30-40% of public sector spending, equivalent to 7 to 10% of GDP, respectively¹¹.

11 Ministry of Public Administration, 'Rendición de cuentas y compras de gobierno', Cuadernos sobre Rendición de Cuentas, 5 (Mexico: SFP, 2012)

In 2011, spending on procurement registered in the CompraNet system amounted to \$287,775,082,884 pesos for the Federal Government and \$37,128,697,195 pesos for state governments, which gives a total of \$324,903,780,076 pesos for a total of 67,540 contracts.¹²

The importance of government procurement is evident when considering the following indicators:

Mexico is one of the economies most open to international trade. The free trade agreements signed by the Mexican government that include a chapter on government procurement are:

- North American Free Trade Agreement (NAFTA)
- Free Trade Agreement between the Government of the United Mexican States and the Government of the Republic of Costa Rica
- Free Trade between Mexico and the Republic of Nicaragua
- Free Trade between Mexico and the Republic of Colombia
- Free Trade between Mexico and the State of Israel
- Economic Partnership, Political Coordination and Cooperation between the United Mexican States, on the one part, and the European Community and its Member States on the other (Mexico – EU FTA)
- Free Trade Agreement between the United Mexican States and the European Free Trade Association (EFTA FTA)
- Agreement for the Strengthening of the Economic Partnership between Mexico and Japan.

Additionally, the Mexican State joined the last session of negotiations for the Trans-Pacific Partnership (TPP), which also provides a chapter for government purchases. If commitment to these international agreements is formalized, national legislation should be adapted to incorporate requirements.

According to the CompraNet public procurement system, in 2011, \$324,903 million pesos for government procurement were spent in the following categories which are expressed in percentages and amounts: 27.45% in public works, which is \$89,203 million; 2.23% in services related to public works, which is \$7,262 million;

12 CompraNet. Custom Query: https://compranetim.funcionpublica.gob.mx/Compranet/ContratosConsultaPersonalizada.faces;jsessionid=-DA824CE_71A4C16A3B76F3C3606E3D4A9_26 (2011), January 2013.

51.07% on acquisitions, representing \$165,938 million; 0.48% leases, representing \$1,585 million; 18.38% in services, representing \$59,738 million pesos, and 0.36% by others, representing \$1,175 million pesos¹³.

According to the Federation, the agencies with the largest government procurement expenditures are the following agencies and entities: SSA, Ministry of Communications and Transport, and Ministry of Education, Petroleos Mexicanos, Federal Electricity Commission, the Mexican Social Security Institute, Institute for Social Security and Services for State Workers, National Water Commission, and LICONSA.

The following table shows the number of contracts and the corresponding expenditures by said entities in 2011.

COMPRANET STATISTICS ON NUMBER AND AMOUNT OF CONTRACTS TO MAJOR ENTITIES (2011)

Unit / Entity No.	No. of Contracts	Total Amount in Mexican Pesos
Mexican Social Security Institute	5559	119,236,945,744
Ministry of Communications and Transport	2731	40,335,079,417
Federal Electricity Commission	17114	24,199,101,698
Institute for Social Security and Services for State Workers	2006	15,667,878,342
National Water Commission	1504	9,740,278,389
Mexican Petroleum	1305	4,098,517,713
Liconsa S.A. de C.V.	331	1,672,219,218
Ministry of Education	455	3,520,088,564
Ministry of Health	772	1,535,324,164
Total	31777	220,005,433,249
% of Total Federal Budget	54.16%	67.70%

Source: Based on data from Module Information and Market Intelligence for Public Contracts of CompraNet.

13 CompraNet. Custom Query: <https://compranetim.funcionpublica.gob.mx/Compranet/ContratosConsultaPersonalizada.faces;jsessionid=DA824CE71A4C16A3B76F3C3606E3D4A9> (2011), January 2013.

2.1.2 Public Procurement in the Federal District and in the State of Puebla

Based on reports from the National Institute of Statistics and Geography (INEGI), the Mexican Institute for Competitiveness (IMCO)¹⁴ indicates that states in Mexico spend more than 60 million pesos of their annual tax revenues on the purchase of goods and services.

This corresponds to 4% expenditure on roads and 30% of the annual budget for the Popular Security¹⁵. Citizens are interested in the way state governments exercise their purchases, because they are the ones who generate public resources and ultimately benefit or suffer from the officials' purchasing decisions.

According to the Comptroller General of the Federal District, the Government of the Federal District reported the following public purchases between 2010 and 2011: in 2010, consolidated purchases reached a spending cap of \$4,838,860,622 pesos; in 2011, it reached \$5,902,062,759. There was an increase of 21.97%, or \$1,063,202,137 pesos more than in the previous year.

Throughout 2010 and 2011, there was increased use of restricted invitation and direct award, except for consolidated purchases, where public bidding was used more frequently in both years. This means that despite most procurement processes being awarded directly or by invitation, most of the budget is spent on bidding processes.

As discussed below, the restricted invitation award is not conducive to a scenario that favors reducing corruption, as it does not fully provide for free competition and equal participation in the public procurement processes.

In the case of the State of Puebla, it is difficult to present figures, as we do not have the necessary statistics that would allow for a study that reflects procurement amounts.

14 Competencia en las compras públicas: evaluación de la calidad de la normatividad estatal en México (Mexico: IMCO, 2011).

15 Popular Security is part of the System of Social Protection in Health, which aims to provide health care coverage through public, voluntary insurance for those who do not have jobs or are self-employed, and, therefore are not entitled to any social security institution, such as IMSS or ISSSTE (people affiliated to Popular Security have access to medical, pharmaceutical, and hospital services to meet their needs as to health).

Given the amount of public funds spent in government procurement and its impact on the economic development of the country, the legality of these processes is a determining factor for the achievement of government objectives to ensure the best conditions for the state in relation to price, financing, economic growth, quality, opportunity, job creation, energy efficiency, optimization, sustainable resource use, and environmental protection.

In this logic of strict legality, prevention of corruption and collusion in public procurement processes are critical, according to the OECD.

Bidding processes must be transparent and in line with rules of public procurement. Awards made under exceptions should only be allowed under truly exceptional circumstances. It should, however, be noted that such exceptions are necessary and that their use does not necessarily imply corruption. Often their implementation is due to urgency, a lack of planning or the need to avoid under spending. These situations must be regulated to restrict the degree of discretion that may be executed.

CHAPTER THREE

LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT

3.1 ORGANIZATION OF THE MEXICAN STATE

Mexico is “a representative, democratic, secular, federal Republic, comprised of free and sovereign states in all matters relating to their internal affairs, but united in a federation established according to the principles of this fundamental law.”¹⁶ It is composed of thirty-one states and a Federal District.¹⁷ The latter is the seat of the branches of government and capital of the country. All, without exception, must observe the Political Constitution of the United Mexican States (CPEUM), and all international treaties that are in accordance with it.

The Mexican State has three levels of government: federal, state, and municipal.

The federal power observes the Constitution, any international treaties, the federal laws and regulations, and, finally, the remaining provisions governing the Federation.

At the state level, the constitution shall be generally observed, along with the state constitutions and treaties, then local laws, regulations, and eventually other provisions. The states are governed by federal law, provided federal resources are exercised.

Due to the lack of a constitution, the Federal District is governed by a Statute of Government, which acts as a local constitution; however, the Federal District, unlike the states, complies with federal laws and regulations when the Constitution has not stipulated otherwise.

The legal regulation of public procurement is not reserved to the Federation by constitutional mandate; so it will concurrently be carried out by the Federation and the states, as well as the Federal District¹⁸.

16 Political Constitution of the United Mexican States, Article 40°

17 Ibid., Articles 43° and 44°

18 Ibid., Article 124°

There is no explicit prohibition in the Constitution to prevent a local government from regulating procurement; as such, Mexico has a wide-range of policies. Not only do federal norms regulate public procurement, but also 32 local regulations, including those of the Federal District, set the rules on acquisitions, leases, public sector services and public works.

Notwithstanding the above, it should be noted again that if the state, including the Federal District and the municipalities, manages federal procurement resources, it must observe federal regulations. In such a situation, it may be inferred that such regulations, in some cases, apply to other levels of government, but the reverse will not occur.

In Mexico, there is not just one single rule of law to regulate public procurement but 31 state provisions, the provision of the Federal District and Federal legislation itself. All of them provide for the rules on procurement, leases, services, public works, purchases or requests by the public sector.

3.2 INTERNATIONAL LEGAL FRAMEWORK

3.2.1 United Nations Convention against Corruption

UNODC has highlighted that corruption is a phenomenon with highly negative consequences in almost all spheres of human endeavor.

According to UNODC, corruption erodes the confidence of people in political actors and institutions, generating discredit and apathy. Politically, corruption undermines the basis of democratic systems.

Economically, corruption causes distortion in markets, discourages investments, and increases the risks and costs of production in general. At the same time, corruption seriously impacts state resources by significantly reducing funds for legitimate economic activity. All this leads to serious social consequences, such as a diversion of resources that should be allocated to those in need, altered patterns of public spending and investment, and general economic slowdown which hurts sectors with fewer resources.

The United Nations Convention against Corruption¹⁹ is the first and only universally agreed upon international instrument addressing corruption globally. It sets forth a number of obligations that States Parties should meet in order to address corruption in a comprehensive manner.

The Convention is a practical tool, and the provisions are intended to provide guidance to States Parties in the design and implementation of public policies. At the same time, it seeks to ensure transnational cooperation and sustainable development amongst States.

The main areas of application of UNCAC are prevention, criminalization, law enforcement, international cooperation, asset recovery, and implementation and monitoring mechanisms.

Prevention. Many of these measures are for both public and private sectors. They provide the basis for the development of corruption prevention policies, such as the establishment of specific bodies responsible for preventing corruption and promoting transparency in the political and economic spheres. It imposes an obligation on States to ensure that public services are subject to controls, and provides that public officials should be governed under codes of conduct, while making their patrimonial status more transparent.²⁰

Based on the principle that prevention of corruption requires the commitment of society in general, the Convention provides that citizens should demand proper conduct by public officials. Consequently, it urges countries to promote the participation of non-governmental organizations and community-based organizations, including civil society players, in order to create public awareness about the problem and methods of countering it.

Criminalization and law enforcement. States are required to establish UNCAC mandatory forms of corruption and to establish criminal sanctions to that purpose. The Convention in this respect exceeds other international instruments as it calls

19 Adopted by the General Assembly of the United Nations in New York on October 31, 2003. It was published in Mexico on May 27, 2004 through the Official Gazette of the Federation and entered into force on 14 December 2005. To date, there are currently over 165 State Parties to the Convention. A State Party is a country which has signed and/or ratified the Convention. In 2012, Mexico began the process of evaluating the implementation of UNCAC.

20 A public servant is obliged by law to make annual declarations of assets by advanced electronic signature (FIEL).

for the criminalization of bribery, both passive and active forms, embezzlement, trading in influence, concealment, money laundering, and obstruction of justice. It also encourages States to criminally punish unlawful conduct committed in the private sector, through the criminalization of bribery and embezzlement in the private sector.

International Cooperation. Corruption extends its reach beyond national borders to other countries. From this perspective, the States Parties of the Convention agree to cooperate in the investigation and prosecution of persons accused of corruption, in that they are required to provide mutual legal assistance, collect, and share evidence, and cooperate in extradition matters. The States Parties of the Convention also undertake to implement measures for the tracing, freezing, seizure, and confiscation of proceeds of crime.

Asset Recovery. The recovery of assets and property obtained as a result of corruption is an important component of the Convention. It provides avenues for cooperation and assistance to that purpose.

Implementation and monitoring mechanisms. It provides for the establishment of the Conference of States Parties on the United Nations Convention against Corruption, which aims to promote and review the implementation of the provisions of the Convention.

By signing and ratifying the UN Convention against Corruption, Mexico is supporting these efforts. The state adopted this international instrument in Merida in December 2003, which entered into force on December 14, 2005. Thus, the Convention is part of the Mexican legal system, occupying a hierarchical-regulatory level interlinked with various levels of government in the national context.

The United Nations Convention against Corruption develops and establishes a number of mechanisms and obligations that address corruption from a holistic and multidisciplinary viewpoint. It addresses prevention and the punishment of corruption in the public as well as the private sector. It represents the first global instrument to set out a shared responsibility between the public and private sectors to combat corruption. To date (December 2012), it has been signed and ratified by 165 countries. It is a practical tool and its provisions are intended to provide guidance in the design and implementation of public policies. The main areas of application of the Convention are prevention, criminalization, law enforcement, international cooperation, and asset recovery.

3.2.1.A Key principles of Article 9 of the United Nations Convention against Corruption

Government procurement is a public process that refers to the way in which an individual contracts with the State.²¹ Public procurement encompasses the private contracts entered into with the State aimed at satisfying public and state interests. Examples of public procurement include contracts relating to acquisitions, leasing services, public works, and services related thereto. These types of contracts must be consistent with the Constitution, and international treaties ratified by the Mexican State.

Internationally, Article 9 of UNCAC provides for minimum standards to be followed by each State to prevent corruption in public procurement. The Convention provides that procurement systems should be based on the principles of transparency, competition, and objective criteria in decision-making that are effective in preventing corruption.

Transparency means the clear, effective and honest management of state resources.

21 Alfonso Nava, *Derecho Administrativo Mexicano*. (Mexico City: Fondo de Cultura Económica, 2007)

Competition refers to public administration opening the possibility of participation to any bidder who wants to participate, in order to select the offer with the best conditions, price, delivery times, quality of materials, and services, generating jobs and opportunities.

Objective criteria for decision-making means establishing a margin of equality among bidders intending to execute any award, lease, services or public works contract with the State. In order to enable the authority to select the best contractor, it needs to establish the same requirements and conditions to avoid favoritism, and to provide interested parties with equal access to information related to the procedures.

Access to information shall be provided to the extent that it is public, accessible, and publicized through distribution mechanisms of the State, using the best technologies that enable it to achieve the highest possible degree of informative advertising.

Efficiency, defined as the ability to achieve certain effects, is a conventional principle, as it obliges Member States not only to adopt the best mechanisms in their procurement processes to prevent corruption, but to actually avoid it altogether.

Other principles and rules related to public procurement processes in the Convention which are to be observed by States Parties are: a) advertising and publishing information in a prompt and timely manner, b) prior formulation of conditions for participation, c) verification, d) effective mechanisms allowing contestants to express concerns of inconformity in procedures, e) recruitment of suitable officers, and f) sanctions or measures to avoid and prevent corruption.

To further elaborate on the above points:

- a. Disclosure of information means that those interested in participating in the procurement process or those who want to know how the process develops may do so without any withholding of information in any of its stages. A lack of publicity or disclosure can lead to suspicions of corruption.
- b. The prior formulation of conditions of participation goes hand in hand with the principle of developing objective criteria for decision-making. It implies that they are developed early enough so that those involved in a recruitment

process know, through the principles of openness and disclosure, the requirements and conditions necessary to achieve the award of a public procurement.

- c. The principle of verification or evaluation makes explicit that all procurement is subject to review. Each country will have an authority (appointed by itself) in charge of making inspection, monitoring, evaluation, and audit at every stage of the public process involving public and private sectors. This does not prevent that verification can be made by civil society or by any agency or authority external to the participants of public procurement. Beyond acting as a mere observer, social participation ensures that public procurement processes are developed in accordance with the rules, since it avoids administrative secrecy and discretion that may exist. In addition, it can expose good or bad practices that arise in public procurement through reports submitted.
- d. When the Convention stipulates that each country shall have effective mechanisms for contestants to express inconformity regarding the public procurement procedures, it also provides that those involved will have the assurance that they will be informed of the legality in public procurement procedures, in order to safeguard equal conditions for competitors and to ensure that procurement is conducted under the principles and rules set.
- e. Concerning the recruitment of appropriate officials, countries should adopt necessary regulations to ensure well-trained public procurement management and staff. In this regard, states will be responsible for selecting their staff according to specialized technical profiles and for providing them with regular training. Should public servants not conduct themselves honestly, they will merit sanctions as set out by the legal system of each country.
- f. Each State shall determine the penalties applicable to both public servants and individuals who are involved in corruption in public procurement processes. These may include economic sanctions or the application of legal measures such as imprisonment. The intention is to ensure that the procurement processes are conducted legally and honestly.

Finally, trustworthiness is a fundamental principle that must prevail at all stages of procurement. This relates to the fact that players in a recruitment process –

especially public servants– shall not take advantage of their position in order to obtain a benefit or compensation from third parties with the intention of gaining preference over other participants in a tender. Contractors should also refrain from offering any monetary payment or informal gift that calls into question the exercise and performance of the public servant, but which also can threaten the moral integrity of the procurement process.

UNCAC Technical Guide and Legislative Guide are tools designed to help States to implement and operate UNCAC. They present examples of legislative interpretation and mechanisms which can be used by States to comply with the principles of Article 9. They provide guidance on transparency requirements in UNCAC.

In Mexico, tenders may be opened publicly and/or in the presence of all participants, thereby not restricting the participation of any provider (except those who have been vetoed for good cause). This ensures that: all participants know of the selection criteria prohibiting negotiation between the procuring entity and suppliers; all relevant information is free, accurate, and accessible; and the use of exceptions is curtailed.

3.2.2 UNCITRAL Model Law on Public Procurement

The United Nations Commission for International Trade Law's Model Law on Public Procurement (2011) has several minimum requirements which are in line with the basic principles of Article 9 of UNCAC. These are: a) to achieve economy and efficiency, b) to promote broad participation of suppliers and contractors, which will derive in international participation as a general rule, c) to maximize competition, d) to ensure fair and equitable treatment, e) to ensure the integrity, fairness, and public confidence in the process and f) to promote transparency.

The UNCITRAL Model Law covers the basic principles and procedures for the procurement system, with the intention of being adapted to local circumstances and supported by other relevant and appropriate regulations and institutions.

The UNCITRAL Model Law outlines the following essential requirements and procedures:

- a. Applicable laws, procurement regulations and other relevant information are to be made publicly available (Article 5);
- b. Prior publication of announcements should be made for each procurement procedure (with relevant details) (Articles 33-35) and ex post facto notice of the award of procurement contracts (Article 23) are required;
- c. Items to be procured should be described in accordance with Article 10 (that is, objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis);
- d. Qualification procedures and permissible criteria to determine, which suppliers or contractors will be able to participate, and the specific criteria that will determine whether or not suppliers or contractors are qualified in a particular procurement procedure should be advised to all potential suppliers or contractors (Articles 9 and 18);
- e. Open tendering should be the recommended procurement method and for the objective justification for the use of any other procurement method (Article 28);
- f. Other procurement methods should be available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialized items or services) and conditions for use of these procurement methods (Articles 29-31);
- g. The conduct of each procurement procedure (Chapters III-VII) should be standardized;
- h. Communications with suppliers or contractors should not impede access to the procurement (Article 7);
- i. A mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement should be required in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (Article 22); and

- j. Challenge and appeal procedures should be required if rules or procedures are breached (Chapter VIII).

The Model Law on Public Procurement of the United Nations Commission for International Trade Law has six main goals, which are in line with the broad objectives of Article 9 of the United Nations Convention against Corruption. The Model Law promotes objectivity, fairness and transparency to ensure proper budget execution and to avoid wastage and diversion of public funds.

3.3

THE PROCUREMENT SYSTEM IN MEXICO UNDER THE CONSTITUTION OF THE UNITED MEXICAN STATES

The basis of the procurement systems in Mexico are provided for in Article 134 of the Constitution. According to this instrument, financial resources available to the Federal Government, the States, and the Federal District will be managed with efficiency, effectiveness, austerity, transparency, and honesty to fulfill the purposes for which they are intended. These requirements should result in proper budget planning, which will be assessed by the relevant technical bodies of the Federation, the States, and the Federal District.

The Mexican constitutional regulation complies with the principles on public procurement set forth by UNCAC (transparency, competition, objective criteria for decision making, effectiveness, advertising, previous formulation of conditions for participation, evaluation or verification procedures, mechanisms of disagreement, etc.), as will be seen throughout the legislative review. It even adds other principles that are not included in the Convention: efficiency, economy, good budget planning and impartiality.

Efficiency allows for proper spending of the budget of the Federation in the procurement of goods, leases, public works, and services that meet quality and quantity standards. Public procurement does not only have to meet economic practicalities, but must also ensure the best product conditions.

Austerity is seen as more than just budget savings. It goes hand in hand with the principles of efficiency and effectiveness in achieving the best results with the least possible expense, but it also means that the goods or services meet the necessary technical specification requirements of the State.

This principle applies not only in the award of procurement, leasing, public sector services, public works, and related services, but it must also apply in the project development stages. The principle of austerity means to save money and time, through streamlined procurement processes.

Proper budget planning has to do with how the State will spend its resources. The State should only spend within its allocated budget. Furthermore, the State needs to know where and how funds are spent in order to avoid generating unnecessary costs, a lack of goods or services in public administration, or purchases that endanger the principles established under UNCAC and the Constitution.

The principle of fairness in public procurement goes hand in hand with the principles of austerity and budgeting. By setting a threshold in formulating uniform conditions of participation (including selection and award criteria), the State may choose the highest bidder for goods and services among the contractors. It will select who offers the best possible price, quality, and delivery times, without having any preference for any participant.

In this regard, public procurement has been classified into the following categories by legislation: a) acquisitions, leases, and public sector services, and b) public works and services related thereto.

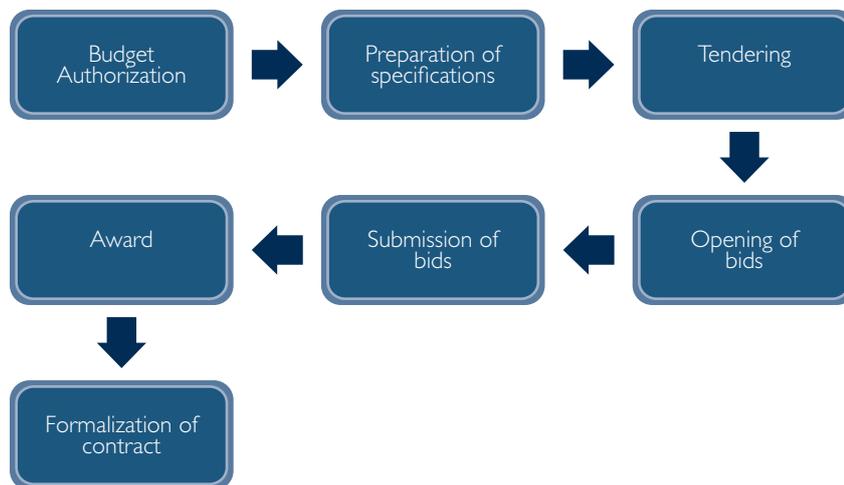
In following with the Constitution, government procurement will be awarded, as a rule, by public tender. Also, in the three levels of government additional processes to tender by exception are permitted for very specific circumstances detailed in the laws of each level of government. These exceptional tender cases allow for deviation from the requirements for the invitation to tender of at least three people. In exceptional cases, restricted invitation and direct award may be used.

In other words, when the bid is not ideal to ensure the price, quality, financing, timing, and other relevant circumstances, the State will establish the specifications, procedures, rules, requirements, and other elements to prove the austerity, efficiency, effectiveness, impartiality, and honesty in such cases.

3.3.1 Public tenders

Competitive bidding itself is neither a contract nor an act, but a series of acts²². It is the administrative procedure that has to do with the formation of the legal relationship that will be developed between the State and those who wish to offer the most favorable conditions in the purchase and lease of goods, services, and public works. The public administration will select the best person or entity to execute a contract that meets the government's interest.²³

The federal characteristics of the Mexican State and each autonomous level of government can be divided into seven common stages in the tender process: a) budget authorization, b) preparing the criteria, c) publication of the call, d) tendering, e) opening of bids, f) award, and g) contract.



Source: Based on Bejar, 2007. For both Federation and the State of Puebla and the Federal District steps have different names and there can be more steps contemplated.

22 Luis José Béjar, *Curso de Derecho Administrativo* (Mexico City: Oxford University Press, 2007)

23 Lucero Espinosa in Béjar, 2007.

Budget authorization means that each level of government should have the approval of the appropriate budget line issued by the body or bodies responsible prior to initiation of a procurement process for every purchase. This step is critical as this is when the government should identify the needs of the public administration in terms of goods, services, and public works for the period the budget is in effect.

In the **preparation of the call stage**, all necessary documents containing the legal, technical, economic, delivery, and payment details, as well as the place, date and time where bids must be submitted should be published. This sets off the bidding process. The criteria or specifications contain the conditions of participation – a document linking the public administration and those who wish to participate in the tender.

After preparing the above document, the **publication of the call stage** begins. Here, the qualifications for participation, which contain government specifications and requirements, are announced. This opens the possibility of participation to all individuals and entities that meet the requirements set forth. A traditional means of publication in the Federal Government is the Official Journal of the Federation (DOF), apart from CompraNet- the electronic procurement tool. The states, for their part, publish in their local official journals or gazettes. Since these are local newspapers, some states have chosen to publish in the DOF, in order to announce the call throughout the Mexican territory. This does not preclude any order of government from publishing the bidding rules in a private journal of national or local circulation.

In a world where digital media has a wider reach than traditional media, the public administration at both federal and local levels has been adapting their legal systems to ensure the publication of calls are made not only in print media, but also in electronic forms. Digital media information can be published in the newspapers mentioned above, as many of them have adapted to new technologies and are already available on the Web. It can also be made available on specific electronic platforms acquired by the federal or local public administration in order to integrate public procurement processes into a single website available both domestically and internationally.

In Phase Four of the procurement process, the **submission of bids**, those seeking to engage with the government secretly exhibit the price offered to the public administration for the property, public works or service it requires and state

that they meet the conditions of the call. The offer is maintained for a specified period or until a judgment award is made, and will cease to be secret once it moves to the next phase.

The **bid opening** is directly and solely related to bidders, since the proposals of those who have chosen to participate are open in a public event to meet the price and quantitatively verify whether they meet the requirements of the call. This open bid allows bidders to acknowledge, among other things, the proposals submitted and the monitoring process, to verify the legality, equality and impartiality of the process. Apart from the participants and the presence of agency officials, there may or may not be social participation and even a verifying body providing legal certainty to the tender process.

The **award phase** will determine which proposal is more advisable for the public administration. It is a unilateral act in which a particular proposal will be accepted, as long as it has met the requirements mentioned in the notice and within the price limit set. The other participants may withdraw their tenders, documents, and guarantees, and break free from any obligation²⁴. After notification of the judgment on the award, the awardee takes on rights and obligations with the public administration, which set forth the bidding rules and contract execution. In case the above does not happen, the awardee may request to be compensated for damages caused by the negative response of the convening body. It could even request the establishment of a guarantee if there is a breach of contract.

Signing of the **contract** in the last phase outlines the rights and obligations. The bidder shall execute the relevant contract within the term noted in the publication of the requirements or in terms of the law.

In spite of the differences between the federal and state levels of government, at least seven common stages in the administrative bidding procedure can be identified. They are: 1) budget authorization 2) preparation of the specifications 3) tendering 4) submission of bids 5) opening of bids 6) award and 7) formalization of the contract.

3.3.2 Exceptions to tender

In the previous section, it was mentioned that the general rule for awarding public contracts is through bidding. However, the award may also be carried out through two emergency procedures: a) invitation to three to five people also known as restricted tender, or b) direct award.

For this to occur, the conditions requested by the law must be met. Decisions whether a bid is valid or not cannot be left to the authority's discretion. The principles of economy, efficiency, effectiveness, fairness, and honesty shall be safeguarded at all times in order to ensure the best conditions of purchase for the state.

3.3.3 Restricted invitation

The invitation procedure is not used to replace the tender, but rather when it is apparent that there are few participants to draw up a public contract. In situations where there is a patent, artwork, copyrights, exclusive rights or in cases where there is a risk of upsetting the country's economy, social order, or due to force majeure, this exception to the bid award may be used.

This type of acquisition is commonly used to purchase a particular good, service, or in the development of a public work, for which the government already has a list of reliable suppliers with whom it may enter into a bidding process.

The main difference from a tender is the mass publication of the call. While tendering involves public dissemination of the specifications, in the restricted invitation, invitations to participate are made to certain suppliers.

In the Federal District, invitations are made to at least three suppliers so that the same amount of bids is received. However, in some states the invitation will be made based on the minimum number established by the legislation. The Federal District is restricted to invitation of at least three people, while the State of Puebla also includes invitation to at least five people.

Invitees must disclose their proposals in order to ensure fair competition between them. The contractor will evaluate them and choose who has ensured the best conditions in terms of price and quality.

As can be seen, although the award process is closed, participants are still competing, and throughout the whole process will have to safeguard the principles of transparency, legality, advertising information, etc. The remaining stages of the bidding will have to be fully met based on the terms listed. The drawbacks of this type of award are that it may limit the participation of other potential competitors at

some point and lead to discretion on the part of government to favor a few; thus, this type of awards may encourage corrupt acts. It should, therefore, be used in specific cases and situations only.

3.3.4 Direct Award

In this case, there is no public announcement or invitation for participation to certain providers or bids. The state contracts directly with a chosen person, possibly from a list of suppliers, making it highly discretionary. It determines the conditions and persons who can fulfill the conditions based on experience, quality, and price. In no case is the best price guaranteed, but it offers a streamlined process. It also carries acute drawbacks due to the subjectivity of the buyer.

Direct award is used when there is urgency to conclude a contract, where national security is at risk: in a state of emergency, in cases of force majeure, in cases of unusual acquisition or a single supplier, among others.

Direct award does not ensure the principles of competitiveness, equality, and competition in public procurement. This type of award could infringe on the principles of transparency, openness, and disclosure.

The general method for awarding public contracts is through bidding; however, the award can be made through two additional procedures—restricted invitation and direct award—which should only be used under the conditions and situations outlined in relevant rules.

Award by restricted invitation is a closed procedure chosen by the State, which can limit the participation of other potential competitors. Direct award occurs when the State contracts directly with a particular supplier, in order to expedite and ensure the effectiveness of the purchase. Direct award is a highly discretionary method. It should only be used where there is urgency to conclude a contract, where national security is at risk, in a state of emergency, in cases of force majeure, in cases of unusual acquisition or when there is a single supplier.

CHAPTER FOUR

PREVENTING CORRUPTION IN PUBLIC PROCUREMENT IN MEXICO ACCORDING TO UNCAC

UNCAC establishes a legal framework that lays the foundation to prevent and combat corruption in all its forms. Article 9 of UNCAC prescribes specific provisions on public procurement. It calls upon States to take the necessary steps to establish appropriate systems of procurement, based on transparency, competition, and objective criteria in decision-making that are effective in preventing corruption.

UNCITRAL created a model law that serves as a guiding framework for states to build their public procurement legislation based on the general principles of the Convention.

For the purpose of the legal assessment to be made in this document, the content of Article 9 of UNCAC has been broken down into five main criteria, whose application allows the achievement of the principles that should underpin procurement systems: transparency, competition, and objective criteria in decision-making.

As explicitly written in the Convention, Article 9 states that:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:
 - a. The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
 - b. The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
 - c. The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
 - d. An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
 - e. Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

-United Nations Convention against Corruption

4.1

TRANSPARENCY: PUBLIC DISSEMINATION OF INFORMATION

The first rule of Article 9 of UNCAC refers to public disclosure of information relating to public procurement: contracts, tenders, and award. It must be relevant, and timely, so that potential bidders will have sufficient time to prepare, and submit their tenders. This idea is also highlighted in the UNCITRAL Model Law, which specifies that regulations and relevant information should be publicly available.

With respect to Mexico, the Constitution complies with Article 9 of the Convention and is in harmony with the UNCITRAL Model Law. Article 134 of the Constitution, which relates to public procurement procedures, includes both the principle of transparency and the disclosure of information.

To ensure access to this information, the Constitution in Article 6 prescribes the right to public information as a fundamental human right.

Article 134 of the Constitution states:

The economic resources at the disposal of the Federation, the States, the municipalities, and the Federal District and administrative organs of political boundaries shall be administered with efficiency, effectiveness, economy, transparency, and honesty to meet the objectives for which they are intended.

The results of the exercise of such remedies shall be evaluated by the technical instances established, respectively, by the Federation, the States and the Federal District, with the purpose of promoting the economic resources allocated in the budgets in the foregoing paragraph.

[...] The propaganda in any form of media, disseminated by the governments, autonomous bodies, agencies and entities of public administration and any other entity of the three levels of government, must be of institutional nature and have an informational, educational or guiding purpose. In no case shall this propaganda include names, images, voices or symbols implying the promotion of any public officer [...].

4.1.1 Right to Public Information

It is the right of every citizen to request and be provided with information about government activities. This allows for transparency and public participation. In Mexico, the right to information is a human right enshrined in Article 6 of the Constitution. To fulfill its obligation, the State must meet the principles set out below:

1. Maximum disclosure, which refers to any information that is in the charge of governmental institutions, entities and dependencies. It must be public, except for those exceptional cases expressly arranged by law.
2. Privacy policy.
3. Free access to information.
4. Mechanisms for access to information and expedited review procedures.
5. Publication of information in electronic media.
6. Publication of information related to the delivery of public resources.
7. Sanctions to public officers for non-compliance.

The right to information is enshrined as a human right in the Constitution of the United Mexican States. By virtue of this fact, the Federation, the States, and the Federal District are compelled to take any steps necessary to guarantee this right.

4.1.1.A Dissemination tools in Public Procurement

The right to information is particularly relevant, because its exercise ensures the legality and transparency of procurement procedures for goods and services. To safeguard this right, established mechanisms exist for access to information that are especially useful, such as various communication instruments available to the population at large.

At the various levels of the Mexican government, both traditional and electronic media co-exist, through which civil society can check information regarding the activities of the various government entities and agencies.

➤ **Traditional media**

Official Journal of the Federation (DOF). This is a mouthpiece of the Federal Government which publishes laws, regulations, agreements, circulars, orders, notices, bidding documents, and other acts issued by the three levels of government. Regarding public procurement, the DOF publishes a summary of the calls for tenders for procurement, leases, public works, and public sector services. The Federal Government, the Federal District, and the State of Puebla resort to this means of public dissemination, which is available both in print and electronic form and can be purchased by the general public.

Official gazettes. Official gazettes are broadcast media that the Federal District and some states in Mexico (but not the Federal Government) use to publish laws, regulations, circulars, notices, biddings, and other government regulations.

The GODF can be found in printed form or at the website of the Federal District government by any citizen. The official newspaper of Puebla is only available in print form.

Major national and state daily newspapers. Major newspapers of general circulation constitute the national and state media. They are used in states that do not have an official gazette publication to report any purchase calls.

The State of Puebla, in addition to making use of the DOF, has an official

newspaper which publishes calls for tenders for procurement, leasing, construction, and services of the public sector. However, it also uses the most widely circulated local media, El Sol de Puebla, La Jornada de Oriente, El Heraldo, and Puebla sin Fronteras.

The main forms of traditional media for announcing government tenders are the Official Journal of the Federation, newspapers and official gazettes, and major national/state newspapers.

➤ **Electronic Government: CompraNet and websites of agencies and Public entities.**

The great advantages of Information and Communication Technologies (ICT), especially the Internet, have given rise to e-government in Mexico.

<p>Advantages of the use of the use of ICT in public administration</p>	<ul style="list-style-type: none"> ▲ Adds transparency and efficiency to procedures ▲ Better accessibility of information for citizens ▲ Less bureaucracy ▲ Reduces costs ▲ Encourages citizen participation ▲ Prevents corruption in governmental action by avoiding contact between public officers and citizens ▲ Makes services more efficient ▲ Reduces discretionary decision-making
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In this context, Article 6 of the Mexican Constitution establishes that the government is obliged to publish the complete and updated information on their indicators for management and appointment of public resources through electronic means.

This is mainly implemented through an electronic portal for the procurement of services. The portal aims to improve the efficiency and effectiveness of internal processes and to provide information to the public.

In conclusion, e-government aims to facilitate the operation of the state apparatus and the distribution of procurement information, thus establishing a mechanism to combat corruption and increase transparency in procurement activities of public administration. The main electronic media forms in Mexico are:

Infomex. To safeguard the transparency of its activities, the Federal Government created a digital instrument called Infomex for information query.

It is an inquiry electronic portal where individuals can ask questions to government agencies, contributing to the transparency of public agencies and government entities. In public procurement, the portal can be used to obtain information not only on governmental institutions, but also on bidders. This digital government mechanism allows the consultation of activities under federal jurisdiction, and also has specific sections to consult the states, and the Federal District.

Compranet. The Federal Laws on Procurement state that public procurement information is to be disseminated on the Compranet portal.

According to these laws, electronic government information on purchases, leases, services, public works, and services is to be available for free.

The electronic system is under the charge of the Ministry of Public Administration, through the Policy Unit Procurement and aims to bring transparency to these administrative procedures and monitor their development.

According to the Sixth Report of the government, released in 2012, Compranet “[...] was consolidated as a transactional scheme for electronic contracts, organizing and classifying the historical information of procedures for monitoring and evaluation, as well as for agile quotes online”²⁵.

Compranet automates the purchasing and procurement of goods, services, leases, and public works of the Federal Government, and contributes to bringing transparency to the process. The portal allows for the monitoring of procurement processes from start to finish, creating a kind of virtual file that specifies all the information regarding the procedure in question.

25 Presidency of Mexico. Sexto Informe de Gobierno (Mexico: Federal Government, 2012), p. 696.

On CompraNet's website, diverse information may be found in several sections:

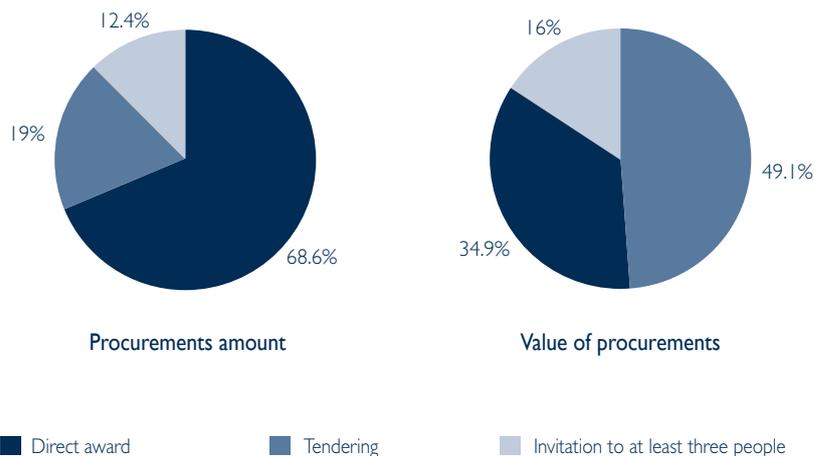
- The Public Procurement Regulatory Unit has all relevant legislation.
- Annual Programs has the Annual Procurement Programs submitted by agencies of the Federal Government.
- The Social Witness Register listed registered individuals and companies which have an obligation to actively and permanently participate in procurement processes, as established by law.
- The Directory of Purchasing Units lists all relevant areas of the agencies or entities registered and licensed for public procurement.
- The Single Register of Suppliers and Contractors (RUPC)²⁶ contains all suppliers' information: name or company name, country, legal ownership, business address of the company and dependence with whom procurement is finalized. The register is updated constantly to safeguard transparency. By September 2012, CompraNet had recorded approximately 1,043 suppliers.
- Sanctioned Suppliers and Contractors. This module contains the data on the bidders, suppliers, and contractors who are prevented from submitting proposals or contracts with the federal public service.
- Electronic Non-conformities, which houses the instances of disagreement by bidders with the legality of public procurement decisions and processes.
- Contracts contain data on contracts executed for procurement processes, including case number, name of the purchasing unit, type of procedure, type of contract, amount of the contract and other details.
- The Market Intelligence Information Module for Procurement contains timely and systematic access for the general public to information related to planning, execution, and the results of procurement decisions made by the Ministry of Public Administration and the state and municipal governments, when made through CompraNet.

26 The list of suppliers and contractors belonging to RUPC can be downloaded from the following link: <http://upcp.fucionpublica.gob.mx / RUPC / 26> Page 696

Bidders who wish to formalize their participation in public procurement through CompraNet must have a prior record that allows them to do so. Thus, anyone who wants to lease, provide a service, sell assets or public works to the government, may do so easily through the portal, as the language is based on the law.

Based on figures obtained from the Sixth Government Report²⁷, from January to June 2012, the system recorded 30,836 procurement procedures for a total value of 71,042 million pesos. According to the figure, 68.6% of the contracts were awarded through direct award, 19% through public tenders and 12.4% by invitation to at least three people. With respect to the amount of the contracts, 49.1% is held by public tender, 34.9% through direct award, and 16% through the procedure of invitation to at least three. According to the latest CompraNet²⁸ contracts report, until November 6, 2012 there have been recorded a total of 135,693 contracts through the system.

REGISTRY OF COMPRANET (JANUARY – JUNE 2012)



Source: Sexto Informe de Gobierno (Mexico: Federal Government 2012)

27 Presidency of Mexico. Sixth Government Report Area 5, Effective Democracy and Responsible Foreign Policy. Objective 5.4, Efficiency and Government Efficiency (Mexico: Federal Government 2012), p.718

28 In the section of Contracts on the CompraNet page relevant data on contracts resulting from procurement procedures is reported in the system by the Purchasers of Units Agencies and Entities of the Federal Government and the State Governments. The most current report contracts has a cut-off date of November 6, 2012, and is available for download at the following link: google.com/site/cnetuc/contrataciones

From January to June 2012, according to documents in the report above, 1,049 operators from 3,230 purchasing units were trained in the use of CompraNet. 18,771 national and international suppliers' contractors participating in procurement procedures were registered into the system. "It should be noted that since June 2010 (coming into force of the new system), a total of 7,988 operators of 3,230 purchasing units have been trained, and 67,420 national and international providers and contractors participating in procurement procedures have been registered".²⁹

Finally, it can be said that CompraNet is an essential tool to ensure transparency in procurement of the Federal Public Administration. This generates an environment of equality, legal certainty, and confidence in government procurement processes.

Websites of agencies and public entities are an alternative means by which institutions or agencies may disclose information relating to their contracts. For the case of public procurement, both agencies and entities are required to publish on their websites their annual purchases, leases, public works, and services.

All dependencies, decentralized bodies, offices, and agencies of the Federal District have posted on the website information on public procurement, such as the results of direct award procedures, restricted invitation, and legal tender of any nature, including the relevant records and contracts executed for that purpose, as well as the register of suppliers in procurement matters and a register of contractors in public works matters.

In the case of the Federal District, the Comptroller General has its own individual webpage within the Government Citizen Portal. People can access a variety of informative topics regarding the acquisition by the entity, including "Planning, Programming, and Budgeting", "Committees & Acquisitions, Leasing, and Service", "Administrative Award Procedure", "Contracts", "Recourse of Disagreement", "Register of Providers", and "Catalogue of prices of goods and services of common use".³⁰ Also, the Surveillance and Control section has a specific area for suppliers and contractors where the following is available: administrative procedures of impediment, contractors with delays or deficiencies in public works, suppliers and contractors banned from participating in public tenders or sanctioned by the Federation and the recourses of disagreement as filed.³¹

29 Presidency of Mexico, *op. cit.*, pp. 718

30 General Comptroller of the Government of the Federal District. 'Adquisiciones', <http://www.contraloria.df.gob.mx/wb/cg/adquisiciones>

31 *Ibid.*, 'Proveedores y Contratistas', http://www.contraloria.df.gob.mx/wb/cg/proveedores_y_contratistas

The Government of the State of Puebla also has a website where relevant information on public procurement is published. Although the Department of Procurement and the Department of Public Works Awards do not have their own page, the State of Puebla has a Transparency Portal³² through which all kinds of public information queries may be made by filling in an application form to gain access to information. Also, the agency has a fiscal transparency portal³³ which includes, among other things, the Budget Program Framework, the operating costs of the state, the Register of Contractors, and the Register of Providers. On the Department of Administration's website, under "Acquisitions"³⁴, the various current calls are published.

With the development of information and communication technologies, e-government aims to facilitate the distribution of information on services and contracts granted. This can assist in combating corruption, as it increases transparency in the activities and acquisitions of the government.

4.1.1.B Law of Transparency and Access to Public Information

In addition to the provisions of the laws on public procurement and the dissemination of information through traditional and electronic media, other legal systems at the federal and local levels exist to strengthen the right to access to information, such as transparency and access to public information laws and institutions.

At the federal level, the regulation of the right to information is established in the Law of Transparency and Access to Public Government Information (LATIPG). This law guarantees access to information held by the Federal Government, establishes procedures for requesting the same, and includes defense mechanisms for cases where the information is not released.

32 Government of the State of Puebla. 'Transparencia. Información Socialmente Útil', <http://transparencia.puebla.gob.mx/>

33 Ibid., 'Transparencia Fiscal', <http://www.transparenciafiscal.puebla.gob.mx/>

34 Ibid., 'Dirección de Adquisiciones de Bienes y Servicios', <http://cga.sfapuebla.gob.mx/>

The Federal Institute of Access to Information and Data Protection (IFAI) is the organization responsible for promoting and disseminating information on the exercising of this right, as well as resolving disputes arising from the refusal of requests for access to information for the Federal Public Administration.

The Federal District has the Institute for Access to Information and Protection of Personal Data of the Federal District (INFODF). It is based upon the Law of Transparency and Access to Public Information of the Federal District and the Data Protection. It is an institute specifically responsible for informing the public on how public governmental information is made transparent, processing requests, and reporting failures by the governing bodies of the Federal District.

For its part, the State of Puebla has the Commission for Access to Public Information, an independent body to monitor the enforcement of the Law on Transparency and Access to Public Information of the State of Puebla. Its primary function is to safeguard the right to information.

It is noteworthy that the Puebla state government signed a collaboration agreement with the Federal Government from which CompraNet may be accessed. The full name of the agreement is “Coordination Agreement entered into by the Ministry of Public Administration and the State of Puebla”, which aims to carry out a special program called “Strengthening Coordination of the State System of Monitoring and Evaluation of Public Management and Collaboration on Transparency to Combat Corruption”. This was published in the Official Journal of the Federation on August 6, 2007.³⁵ The agreement addresses a number of subjects, Chapter IV “Of Collaborative Actions on Transparency and Combating Corruption” being particularly relevant. Section I, “Modernization of State and Municipal Public Administration”, provides that:

The Ministry of Public Administration shall collaborate through the E-government Unit and Information Technologies Policy with the state government, in the following:

- I. Sharing knowledge and experience in e-government, in order that they can be applied, where appropriate, by the various levels of government.

35 Ministry of the Interior. ‘Acuerdo de Coordinación que celebran la Secretaría de la Función Pública y el Estado de Puebla’, *Diario Oficial de la Federación* [online], 6 August (Mexico: Federal Government, 2007).

- II. Establishing mechanisms to organize, manage, and operate electronic government services.
- III. Promoting the implementation and application of certification of electronic identification media.
- IV. Promoting the development of electronic systems that give individuals the option to file documents and applications through electronic media.
- V. Performing actions for cooperation and coordination to promote the use and development of information technologies in order to improve administrative efficiency and government services.
- VI. Establishing mechanisms for coordination in the implementation of e-government institutional policy, and fulfilling them through counseling, training, monitoring, and technological cooperation.³⁶

Similarly, Section III “On Procurement Procedures”, specifies that:

To strengthen the state and municipalities in the decentralization of duties, the State Government through the Ministry of Development, Evaluation, and Control of Public Administration undertakes to consolidate, with support from the Ministry of Public Administration, the operation of an electronic government procurement system to ensure transparent public resource allocation, to hear bids for goods, services, and public works, the results of tenders (awards), the origin and destination of public resources, works and actions being undertaken with federal resources, and to simplify the payment of specifications and other paperwork related to participation in the statewide public tenders.³⁷

Despite this, tenders and biddings by invitation are still made on-site (except in the case of invitation to at least three people, which is done electronically). Therefore, the section III of procurement procedures also states that the federal entity in question has developed a Requisition System (Sisreq), which gradually operates as a portal similar to the federal one. Sisreq is a tool that allows the government agencies of the State of Puebla to capture, edit, and print their requisitions to facilitate procedures and processing, which allows the entity to plan public purchasing.

36 Ibid.

37 Ibid.

Thus, in general it can be said that the Mexican laws at the federal and state levels formally comply with Article 9 of UNCAC in relation to the public dissemination of information concerning public procurement procedures and contracts.

However, since 2007 the Federal Government policy recognizes that progress on transparency and access to public information has been inadequate.³⁸ Additional regulations are still required, as are mechanisms for verifying compliance and creating transparency in the three levels of government. Access to public information can be more effectively promoted among the public, since very few exercise this fundamental right.

CompraNet can be accessed from anywhere via the Internet, encouraging competitive tendering. It notifies all those companies registered in the portal whose products or services are relevant to the bidding.

4.2

CONDITIONS FOR PARTICIPATION, SELECTION CRITERIA AND AWARD AND PUBLICATION

The second provision of Article 9 of UNCAC is on the formulation of the conditions for participation, including selection and award, tendering rules and publication.

Article 134 of Constitution prescribes that the acquisitions, leasing, and sales of all kinds of goods, the provision of services of any nature, and the execution of works contracts must be awarded or implemented through public calls to ensure the best conditions in terms of price, quality, financing, timing, and other relevant circumstances. These conditions shall be binding on the three levels of government and shall develop the qualifications, procedures, rules, requirements, and other elements required to justify, in advance, economy, efficiency, effectiveness, fairness, and honesty.

In this regard, the Constitution meets the provisions of Article 9 of UNCAC and is in line with the objectives referred to in the UNCITRAL Model Law to ensure broad participation of suppliers and contractors to maximize competition and ensure fair and equitable treatment.

38 Presidency of Mexico. Plan Nacional de Desarrollo 2007-2012 (Mexico: Federal Government, 2007), pp. 671 - 709.

As for the Federation, the public procurement laws prescribe and detail rules which the public procurement tendering and award procedures shall be subject to in relation to the Constitution.

These include participation requirements and the qualifications of proceedings, which are to be established in the call for public tenders. The convener shall make available to bidders the text of the call electronically through CompraNet.

Among the bidding rules set forth by both ordinances, the following characteristics are of importance:

- The call may not establish requirements that aim to restrict the process of free competition and concurrence, nor contain impossible requirements.
- Agencies may modify aspects set forth in the notice no later than the seventh calendar day prior to the submission and opening of bids.
- Policy instruments establish the obligation to perform at least one bid clarification meeting with the bidders.

Federal law regulates the procedures for submission of tender, the criteria for evaluation and award of contract; the contents which must be included in the respective award, conciliation mechanisms, the contents of the contract, the conventional penalties applicable for breach of contractual obligations, and assumptions of withdrawal and early termination.

The evaluation of bids shall be done using three systems: a) percentage points, b) cost-benefit, and, c) binary. The system used will depend upon market studies performed to determine the bidder's average prices.

The assessment by points or percentage mechanism is used for highly specialized or technological goods and services. Headings and subheadings are subject to technical and quality assessment, in order to establish a minimum rating or percentage, with which tenders may be selected to compete on price for award for the best result obtained in the combined evaluation. Thus, the product or service offered by the bidder will provide a sum of points or percentages.

The cost-benefit assessment is a formula for determining the degree of benefit based on requirements that are evaluated by price, in order to establish a balance

between the benefit and the cost involved. This methodology should be indicated in the assessment notice. The formula must be measurable and verifiable on concepts such as maintenance, operation, consumables, and performance. The award is made to the proposal with the widest cost-effective range.

The binary system refers to the evaluation of compliance with certain technical requirements. This rating is used for basic goods or services with simple features and standards for evaluation. Once compliance is determined, the award is given to the lowest priced bidder. Thus, if the participant meets the requirements and offers the lowest price, he/she may execute a contract with the state.

Once the winner is determined, the information will be disseminated through CompraNet. This brings transparency to the procurement process and provides a resource for complaints, should bidders feel that the procurement procedure or award did not comply with the rules.

Notably, legislation provides exceptions to competitive bidding procedures, which allows the use of invitation to at least three people or direct award. Both modalities prescribe the persons eligible for participation, the reasons for objection, and the reasons for limiting bidding in public tenders.

Laws also outline the circumstances in which tenders can be national or international, as when in relation to a treaty or when open to all bidders.

With respect to the Federal District, the procurement process is very similar to that used at the federal level. Regulation is provided in the Law of Acquisitions of the Federal District (LADF) and the Law of Public Works of Federal District (LOPDF). The preparation of specifications is very similar to that of the Federation: it should not be limiting, specifications must be necessary to avoid duplication and must be linked with the purpose of procurement. Just like in the Federation, there are also clarification meetings.

One difference is that the assessment systems for products and services differ with respect to the Federation. They consist of the lowest price, fixed price, and reverse auction. In the Federal District, all assessments give priority to the price, not to quality. Thus, whoever offers the lowest price in the market survey carried out by the Federal District government, can be awarded the contract, otherwise the procurement process will be declared void.

The fixed price prevents the government from buying at very different prices to those previously established in price lists held by the capital city government.

Another method used is the reverse auction. If three or more bidders have offered the best price, a subsequent auction will be made so as to further reduce the prices of their products or services. A remarkable difference is that in the Federal District exceptional forms of procurement (restricted invitation and direct awards) are favored over standard tenders. It should be noted, though, that this difference is not written down in the law, but is done in practice. The Federal District also considers within its legal framework the possibility for tenders to be held nationally or internationally.

In the Puebla state government, however, bidding is indeed privileged. According to data from the Ministry of Administration of Puebla's Direction of Public Works, Acquisitions and Awards, it tenders 85% of items. Exceptions are rare because efforts are made to avoid direct award. Their assessment system does not provide for points or percentages or subsequent auction or reverse auction. The electronic system being developed for contracts is called Sisreq, but a collaboration agreement with the Federal Government encourages the use of CompraNet. Even questions asked in the pre-bid meeting may be sent by electronic means.

The main difference between Puebla and other governments is that in others, procurement is done through the offices responsible for purchases in each of the departments of public administration. In Puebla, this function is concentrated within the Deputy Ministry of Public Works Procurement and Awards, through the Department of Procurement, and the Department of Public Works Awards. There is only one office that is responsible for making procurement for all public administration in the State.

Therefore, it can be concluded that the Federal Government, the Federal District, and the State of Puebla have electronic, traditional or mixed public procurement systems. There are similarities in their processes, such as the seven stages of the procurement process. What stands out from this analysis is that the Federal District prefers to award contracts using exceptions to the bid and that its goal is to meet the procurement price.

In this sense, it can be concluded that the Mexican legal framework formally complies with both UNCAC and the UNCITRAL Model Law. However, the GCR

2012-2013 indicated that diversion of public funds to benefit certain companies, kickbacks and bribes, and a low efficiency of the legal framework still prevail.

The obtained results in the cases and statistics outlined above, as well as the interviews conducted with the private sector allow us to conclude that there is still a high level of discretion in the way the government awards contracts to the business sector. The private sector also notes that funds are awarded to certain companies at state's discretion because criteria for the funding contains obsolete guidelines that have been prepared with the intention of benefiting a specific supplier of goods or services. They also note that the specifications are made on short notice and with a lack of planning, which encourages sales to certain companies.

Private sector members interviewed also perceive that the specifications are made with technical requirements that are sometimes difficult to meet.

The private sector also stated that in specific cases, governments rely upon obsolete Official Mexican Norms³⁹ (NOM) that few companies can meet, resulting in unclear specifications. They also specified that the purchasing and assessment units of most sectors are unaware of the use of NOM and the Federal Law on Metrology and Standardization, and therefore the NOM are not properly applied during the database development and evaluation of technical proposals.

The private sector points out that there is a wide range of NOM that are not necessarily subject to the current rules of international metrology.

As the application of rules is not subject to constant review or comparison against international standards, a high degree of discretion is present in the public procurement process. It should be noted that as part of the results of the interviews, the private sector believes public officers in purchasing and assessment areas in most sectors not only ignore the use of NOM, but do not conduct procurement processes based on general market conditions.

39 According to the web page of the Ministry of Economy, the Official Mexican Norms establish characteristics or specifications to be met by products, processes, and services to reduce risks in their users. Their application is mandatory, as issued by the various Federal Government agencies. The different kinds of NOM cater to health risks, damage to the environment, and consumer deception. NOM are prepared by committees formed by consumers, merchants, manufacturers, academia, and government officials, and are subject to public consultation in the Official Journal so that anyone interested can make comments.

Corruption in public procurement is not the norm. It is possibly caused by both private and public actors ignoring the public procurement procedures. Although Mexico has introduced professional career services to ensure public servants have the necessary skills for their job, there has to be more capable human resources within public procurement processes in order to avoid trial and error.

The same happens in the private sector: by ignoring the rules on procurement, they learn by trial and error. Moreover, the private sector does not challenge the application of procedures and standards. This may be reflected in the statistics provided by the Federal Government in its Sixth Report⁴⁰. Of the 1,462 disagreements in the recruitment process that the MPA received between September 2011 and June 2012, 1,367 were resolved: 449 (32.8%) were not examined thoroughly as they had to be discarded, and 567 (41.5%) were discarded as the reasons for dissatisfaction were unfounded. Only in 351 cases (25.7%) were disagreements with part or all of the procurement process rendered void as a result of actions contrary to norms. Of 100% of all conciliations resolved by the Secretariat above, only 25.7% underwent legal analysis. The remaining 74.3% were not raised properly; therefore, no legal basis was found whereupon the private sector could support claims of non-conformity.

Although there are public servants with a high degree of professionalization, experienced human resources are lost due to the frequent turnover in public administration staff, particularly resulting from changes in government following elections. Public servants often have expert knowledge of legal, administrative, or accounting spheres, but lack expertise in public procurement procedures. They, therefore, need to resort to persons knowledgeable on the subject for advice, but this creates an additional cost that is not always calculated into the budget. This scenario is further complicated by the fact that Mexico does not offer any specialized academic programs on public procurement⁴¹. Within this context, the Federal Government, the Federal District, and the State of Puebla, in collaboration with various schools (public and private), have recently developed and implemented training programs for civil servants to help mitigate the lack of skills and knowledge in public procurement.

40 Presidency of Mexico. Sexto Informe de Gobierno (Mexico: Federal Government, 2012), p. 726.

41 In this sense a major step has been taken, since the Ministry of Public Administration and the School of Business EGADE of Tecnológico de Monterrey have coordinated efforts to establish the program in Advanced Studies in Management in Public Procurement per Competences, which began in fall 2012. In 2013, EGADE Business School launched the Master's Degree in Public Procurement certified by UNOPS.

At the federal level, and in accordance with the Accountability Notebook of the Ministry of Public Administration⁴², most of the training for procurement officers has focused on improvements and adaptations of the electronic government procurement system, although the Ministry has put major efforts into providing training on various topics relating to public procurement. The public sector recognizes that it is essential that officials at both federal and state levels be educated to purchase strategically⁴³.

While the private sector is a technical expert in the materials it produces and sells, it must also be in legal matters, in order to know the market for public sector projects and to challenge irregularities in the process. Training should consider the use of market research as a basis for purchasing decisions and consider using information technology for collusion detection. It is also important that staff receive legal advice on disagreements, processes for reporting disagreements and the means for challenging purchasing decisions.

Based on discussions held with both the public and private sectors, it has been found that the public sector does adhere to the rules when formulating conditions of participation, selection, award, and publication criteria. Nonetheless, diversion of public funds to the benefit of certain companies, irregular payments and bribes, and limited efficiency in the legal framework still exist. This is partially due to the limited technical education of civil servants and a lack of legal knowledge on public procurement procedures within companies. In some cases, procurement announcements refer to norms and standards no longer in use or contain non-applicable or inconsistent technical specifications.

42 Ministry of Public Administration, 'Rendición de cuentas y compras de gobierno.' *Cuadernos sobre Rendición de Cuentas*, 5 (Mexico: MPA, 2012), p. 52.

43 Ibid., p. 75.

4.3 OBJECTIVE DECISION-MAKING

The third criteria of Article 9 of UNCAC requires that objective and predetermined criteria for decision-making be applied in public procurement to facilitate the verification of the correct application of rules or procedures. The UNCITRAL Model Law requires an objective description of the desired items without having specific reference to brand names, so as to allow independent bids for further comparison on a common objective basis.

The Constitution's Article 134 complies with international standards by providing that the laws will establish the foundation, procedures, rules, and requirements to ensure fairness.

In this way, in all three levels of government, public procurement procedures are subject to criteria and rules set out in advance of the relevant calls. These criteria, which must meet legal requirements, allow for the verification of their implementation and assessment by authorities and individuals. They: 1) must establish a participation framework that guarantees the same requirements and conditions of competition to all bidders, to avoid unduly favoring of any of them, and 2) may not establish requirements that are impossible to achieve.

To ensure that these legal requirements are satisfied, the government should develop a projection of anticipated costs before any procurement is conducted. This is so that they know the intended use of funds, in order to avoid a shortage of goods and services in their respective entities and agencies.

Once the public administration (Federal, State, and Municipal) knows what financial resources are available and what goods and services are needed, the public administration desiring procurement shall conduct market research to allow projecting of the cost, considering, among other things: the type of products and services that are available in the market, the characteristics and quality criteria that are required, how fast the product or service can be delivered, which and how many domestic suppliers exist, what product or service uses the best technologies in their development, and which promote sustainability, energy efficiency, and responsible use of water.

At the federal level and in the two states studied, the public procurement

agencies and entities are required to conduct market research prior to launching the procurement procedures, so that the organizers have elements and criteria allowing a decision-making which is based on objective, verifiable specifications.

In this logic of objectivity and certainty, the laws prevent the possibility of negotiating the terms of the call and the invitation to at least three people, except in the State of Puebla. Similarly, it states that the proposals submitted by the bidders shall not be removed or rendered ineffective. The legal framework empowers the administrative bodies to review programs, reports, budgets, application of conditions, and results related with public procurement. In particular, the LAASSP provides for the creation of Committees for Acquisitions, Leasing, and Services, as well as Joint Consultative Committees on Supply, while the Law on Public Works of the Federal District sets up the creation of Public Works Committees. The Federal District has the Comptroller General, the Comptroller Citizen, and the Ministry of Finance, in addition to internal and external audits. The State of Puebla establishes these through the Ministry of Development, Evaluation, and Control of the Public Administration, the Department of Finance and Administration, and the Municipal Committees.

From the above, it can be concluded that the assessed laws of the Federal Government, the Federal District, and those of the State of Puebla meet their own respective objectives and predetermined criteria for decision-making, as they define that procurement processes must be subject to the allocated budget. The guidelines established in the calls, as well as the existing regulatory provisions, prevent misuse of public resources and safeguard the legality of the process.

The State of Puebla has a system that centralizes public procurement and, as a result, planning is affected by a number of problems: dependencies not delivering their requisitions on time, deadlines for requisitions which are too tight, slow authorizations for purchases, and centralization of procurement in urgent cases. As permission must be obtained from the Puebla authority, unnecessary complications can result.

The private sector, meanwhile, says that the rules are not yet entirely clear. It reports that there is still a preference for certain suppliers and brands, since market research is not verifiable, and researchers and their methods are unknown. Moreover, market research sets prices that do not match those that may be offered by business organizations or refers to products that use obsolete or very advanced technologies, which leads to the belief that there is preference to a specific supplier.

When the purchasing power of governments is high, the prices of products or services may be lower. Thus, the Federal Government has a purchasing pattern different to the one of local governments. While the federal level buys large quantities, local governments purchase relatively small quantities. In this sense, the prices found in market research should be considered as reference prices, not as fixed prices. According to the interviewed members of the private sector, there are framework agreements for some goods and services, which set frameworks, standards, or homogeneous prices for certain products and services, which render the free market unfeasible. These pre-determined prices have not been updated according to commercial reality.

The situation described above does not allow firms that have adopted new technologies or made improvements to their products and services to lower their prices. Since their production costs may be higher, the market surveys omit their data and thus undermine the best deal.

According to the private sector, buyers generate demand based on market studies that do not always match the reality in terms of specifications, timeframes, and processes. Buyers are not always aware of the exact processes used by companies to develop their products.

According to the Accountability and Government Procurement Notebook 5⁴⁴ of the Federal Government, one of the most common causes of a lack of competition is collusion among bidders. This implies that potential suppliers generate an agreement prior to publication of the public procurement notice to increase or distribute the proceeds of a contract.

One form of collusion reported during interviews with both sectors is the fake or sheltered bid, which is designed to appear genuine in the competition. Bidders agree that at least one of them will bid higher than the designated awardee, with a bid too high in price to be accepted or one containing special terms that are clearly unacceptable to the buyer. The second act identified has to do with the suppression of bids. In this scheme, bidders agree that one or more suppliers will abstain or withdraw a previously submitted bid so that the bid is granted to the designated awardee.

44 Ministry of Public Administration, 'Rendición de cuentas y compras de gobierno.' Cuadernos sobre Rendición de Cuentas, 5 (Mexico: MPA, 2012), pp. 22-23

There is also bid turnover. Companies agree amongst themselves who will make the lowest bid to be awarded the contract. In the following procurement procedure, a different company is guaranteed to be the best bidder to get the contract. Finally, competitors can decide to share the market or certain geographic areas, and how many customers each will have. This is called market allocation. Based on the agreement, bidders may not bid in the areas assigned to a particular tenderer.

In addition, the public sector states that due to a lack of studies and assessments, it cannot prevent acts of collusion or verify whether the awarded company has the actual capacity to meet the technical demands or the government purchasing conditions. Moreover, in interviews and meetings held with the public sector, the latter said that suppliers sometimes act in bad faith, since they change the quality of the product while implementing the contract. Governments noted that there can be incidences of poor planning in the public sector, but stated that this is due to lack of resources or budget overspending due to the high costs of service providers.

Since 2007⁴⁵, the Federal Government has implemented a new budget program with the intention of reducing poor planning. This is called Performance Budgeting, in which the actions of planning, programming, monitoring, and evaluation of budget decisions are based on measured indicators to improve public spending. In the Federal District, Performance Budgeting has been in place since 2010.

In the area of market research, the public sector states that the opacity found in studies is justified because the laws do not allow disclosure of the results of these studies due to concerns that bidders will adjust their prices accordingly. However, the deficiency is that market studies fail to provide the actual data, as information is obtained from the suppliers themselves, who tend to increase their quotations in order to participate in acts of collusion.

In some cases, this is due to the lack of specific expertise on the products and services government intends to purchase, especially if it is a new or very specific requirement.

The same risk exists when firms or consultants are outsourced to prepare the specifications, thus generating additional costs in the bidding process. When the public sector prefers certain brands, it does so by exception and just to comply with specific needs, but not to limit participation. Furthermore, sometimes the goods owned by administrative areas have a considerable seniority, which makes them keep contracting services that are obsolete in the market.

45 Presidency of Mexico. Sexto Informe de Gobierno (Mexico: Federal Government, 2012).

The public sector may at times get advice from chamber organizations in preparing bid specifications. While this is not done with the intention of privileging any supplier, there is a risk that the Chamber will release information which may generate partiality toward a certain supplier.

As part of the observations from the private sector, it is preferred to promote innovation and technological development as part of the criteria in government purchases. While this could impact the pricing and delivery time, in the long run, it would allow a better quality and better use of the goods and services acquired, as well as promote competitiveness in these processes.

It may be concluded that the law analyzed in this section complies with the principles of the international standards; however, its execution is not ideal in practice due to the failures that still exist in the preparation of expense budgets and in the poor quality and transparency that exists in the preparation of market research studies.

In applying objective and predetermined criteria for decision-making, the legal framework at the federal level, as well as in Federal District and the State of Puebla, formally comply with Article 9 of UNCAC by establishing budgetary and procedural planning. Governments carry out market research at the onset of public procurement procedures. Mexican laws prevent the possibility of negotiating the conditions established in the bid and in the invitation. However, poor planning persists in public procurement practices which continues to affect planning, budgeting, cost, funding, payment, quality and opportunity.

4.4**CONTROL OF PUBLIC BIDS: VERIFICATION MECHANISMS AND LEGAL REMEDIES**

The fourth component of Article 9 of UNCAC considers the implementation and utilization of efficient mechanisms of internal examination and appeal systems in order to guarantee legal resources and solutions in case the established rules or procedures are not respected.

To this effect, Article 134 of the Constitution mentions the verification of public procurement processes. It states that the results of using public resources will be assessed by the laws of the Federation, States and the Federal District.

Article 14 of the Constitution outlines the fundamental right of persons to a hearing or an effective judicial decision, where all persons have the right to defense before any act is performed against them. UNCITRAL Model Law integrates this rule by stating that there must be infraction and appeal procedures, if rules and procedures are violated.

In this context, the Constitution legally follows the provision of both, Article 9 of the Convention and also the UNCITRAL Model Law by regulating the verification and solution of disputes that arise in public procurement.

Verification methods in the Mexican legal system are not only related to organizations, institutions or instruments that the government itself adopts, but they can also be performed through external agents or social participation mechanisms.

4.4.1 Public procurement verification processes

In public procurement, there is a control mechanism that helps monitor that processes have been carried out in accordance with the Law of Acquisitions, Leases and Services of the Public Sector (LAASSP) and the Law on Public Works and Related Services (LOPSRM), as well as state laws.

Verification is a mechanism which analyzes whether the public procurement process complies with the law that regulates such issues. Verification is carried out and the results are presented in a report. Verification is a key part of the legality of the public procurement system. By tracking the processes, it becomes clear whether the procuring entity abided by the laws or if it violated them.

At the federal level, the Ministry of the Treasury (SHCP), the Ministry of Economy and the Ministry of Public Administration are in charge of verification. Each of these organizations has been granted power to conduct verification in their respective competencies.

The powers of the Ministry of Public Administration established by the LAASSP and LOPSRM include:

- Verifying, at any time, that public works and services related to them are carried out as stated in this act or in other applicable provisions.
- Performing visits and inspections on the organizations and entities that carry out public works and services related to them, as well as conducting visits with public officials and contractors to request data and reports related to the acts in question.
- Verifying quality of work through laboratories, educational institutions, and research institutions, or with the people that they determine, under the terms stated in the Federal Act on Metrology and Standardization.

To this effect, the Sixth Government Report from September 2012⁴⁶ shows that the Federal Government has strengthened the systems for fighting corruption by using resources for public works. Between January and June 2012, there was progress in the following fields:

- Program of Reactivation of Problematic Works. Identified 5,492 problematic works accounting for 159,695 million pesos in savings.
- Program of Permanent Inspections. Preventive accompaniment where 273 contracts of public work (with a value of 80,578 million pesos) were supervised, with the purpose of concluding them in the allotted time, with consideration of cost and quality.
- Program of Inspections and Direct Audits. Direct inspection visits were made to 150 contracts of public works accounting for 3,906 million pesos. Likewise, direct audits were carried out on 71 contracts of public work accounting for 18,098 million pesos.

- Program of Quality Verifications of Public Works. Verifications were made on 90 contracts of public works accounting for 3,384 million pesos.
- Program of Audits to Concluded Contracts. Audits were carried out on 97 contracts of public works for an amount of 2,102 million pesos.
- Program of Public Works Progress Tracking. Tracking was done on the physical and financial progress of 8,327 public works contracts which account for 689,311 million pesos.

The Ministry of Public Administration has also implemented the Simulated User program, which aims to detect public officials who have committed corrupt acts while performing their duties. This program is carried out when a report is submitted to the Ministry's internal control organization or to the citizen's attention area. It tries to foster the culture of reporting, as well as to strictly apply the law on public officials. The operation is carried out by certain public officials of the General Management of Citizen Attention who pretend to be citizens to carry out investigations to verify whether there are or are not any illegal conducts, so that when infractions or crimes are committed, they can take these public officials to the competent authorities.

According to the Sixth Government Report⁴⁷, the Ministry coordinated 97 Simulated User operations in 35 FPA institutions in 21 states of the Republic during the past administration (until June 2012). From the 97 administrative proceedings that were initiated, 81 previous investigations were launched and 7 private individuals were discovered and penalized.

The powers of the Ministry of Economy, established by LAASSP, are to verify that goods comply with the requirements related to national content or to the origin or market rules and, in the case that they do not comply with such requirements, they inform the Ministry of Public Administration.

The Federal Public Administration Organic Law (LOAPF) gives power to register the prices of merchandise, real-estate leasing and service contracting for the public sector; make decisions on related contracts or orders; authorize purchases by the public sector for goods of foreign origin, and along with the Ministry of Treasury, authorize the basis of requesting international bids.

47 Ibid, p.89.

The powers of the Ministry of Treasury stated by LOAPF are to: establish and review prices and fees of goods and services of the Ministry of Public Administration, and fix them if necessary, so that they agree with the Ministry of Economy and involve the corresponding entities. Together with the Ministry of Public Administration, it further coordinates the evaluation of results of the application of federal public resources.

In the Federal District, those in charge of verifying that issues of acquisitions in public procurement are carried out, as established by law are: the Ministry of Public Finance of the Federal District, the Comptroller General of the Federal District (CGDF) and the Public Administration of the Federal District. They are able to:

- Carry out visits and inspections considered pertinent to decentralized agencies, delegations and entities, as well as the facilities of suppliers involved in the acquisitions, leasing and provision of services.
- Request public officials and suppliers to provide all data, documentation and reports related to the acts in question.
- Verify the quality of specifications of real estate.

The Comptroller General is the agency in charge of verifying whether the procedure is carried out in accordance with legal provisions for contracting public works.

Also related to acquisition issues, the Comptroller General has the power to intervene in any act that goes against the provisions of Law of Acquisitions of the Federal District (LADF) and its regulation, and it may suspend, temporarily or permanently, the procedure for public bid or restricted invitation, keeping it frozen in this stage until a resolution is issued. The resolution may result in confirmation of the validity of the act, nullification or suspension of the procedure indefinitely.

The Comptroller General, the Ministry of Finance, and the Chief Administrative Officer, among others, may hire technical consultants to carry out market research for: improving the system of acquisition, leasing and service rendering; verifying the prices of supplies; performing quality tests; lowering environmental impact; and conducting other activities related to the objectives of this law.

The Public Works Act of the Federal District gives power to the Comptroller to intervene in procedures. The Comptroller monitors that agencies, decentralized agencies, delegations and public administration entities carry out the hiring process according to the law. Should it be otherwise, the Comptroller will nullify the bid procedure or it may order its reissuance.

The Ministry of Finance and the Secretariat of Works and Services may do market research, improvement of the contracting system of Public Works, price verification or quality testing.

In the State of Puebla, verification of acquisitions, leasing, and services is performed according to the provisions relevant to the Ministry of Comptroller, which has the power to:

- Carry out visits and inspections considered as pertinent to the awarded parties.
- Request public officials in charge of awarding parties, bidders and suppliers provide all data and information related to the acts in question.
- Verify the quality of specifications of real estate through laboratories, educational institutions, research companies or determined persons.

In spite of the regulation existing on verification, one of the problems detected both by the public sector and the private sector is the lack of verification regarding the awarded goods and services.

Sometimes, within the procedure of public bidding, suppliers show their best product in order to comply with the requirements described in the specifications; however, when the contract is awarded, the quality of the product or service does not match with that presented in the beginning stages; this is an example of supplier acting in bad faith. Sometimes, these situations are detected, but in other situations, it is impossible to identify them, as the public sector does not have access to verification laboratories.

Regarding the State Government of Puebla, there is a post-delivery verification process where the quality and quantity of services is reviewed. Suppliers are notified of this procedure in advance.

In the Federation, the Federal District and the State of Puebla, the laws that regulate public purchasing give the competent authorities the power to carry out verification. However, in practice, verification is a complex process. In many cases, the technical, operational and financial capacity of suppliers to comply with the contract is not verified prior to award, as the company is only required to submit a Letter under Oath. Furthermore, the public sector has limited technical and financial resources available to properly verify goods and services or to charge laboratories with the task. Little verification by the public sector allows companies to intentionally deliver a final product different from the one presented during the selection process. More emphasis and resources should be put into the verification stage of the public procurement process to foster probity in public purchasing.

4.4.1.A Social participation in public procurement

Social participation is an important component of good public administration because it provides participation and oversight to the process.

In public procurement, it serves as a preventive mechanism for corruption.

At the federal level in Mexico, social participation in processes of public contracts is outlined in two acts: the LAASSP and the LOPSRM.

Legislation on this matter creates a platform for citizen intervention, since it allows civil society, entrepreneurial associations, non-governmental organizations or educational institutions to participate.

Transparency in contracting processes and the acts related to them are strengthened by regulation of such participation. Social participation in public procurement is represented by an observer or social witness.

An observer is any individual that, personally or in representing chambers, entrepreneurial associations, non-governmental organizations or educational institutions, may witness or observe the different public acts of contracting procedures, without intervening.

Social witnesses may belong to non-governmental organizations or corporations registered in the Single Registration of Social Witnesses. In order to get such registration, a request must be made to the Unit of Standards of Public Procurement of the Ministry of Public Administration, and it must comply with some essential requirements. The candidate should:

- Be a Mexican citizen exerting his/her rights or a foreigner whose immigration condition allows him/her to perform such a function.
- If part of a non-governmental organization, said NGO must be accredited according to the legal provisions applicable and have non-profitable aims.
- Not have been sentenced to imprisonment.
- Not have been an active public official in Mexico or abroad. Likewise, not having been a federal public official or an official in a state less than one year before the date when the request to be accredited is submitted.
- Not have been penalized as a public official, no matter if it is at the federal, state, municipal level or by a competent authority abroad.
- Submit a curriculum vita that accredits academic degrees, corresponding specialty, work experience and, if applicable, teaching experience, as well as academic or professional references that he/she has received.
- Attend the training courses taught by the Ministry of Public Administration on the laws or treaties that regulate such public contract.
- Submit a written document, under oath that he/she will refrain from participating in contracts in which there may be a conflict of interest, i.e. when the bidders or public officials involved have the same academic, business or family linkages.

On December 16, 2004 an announcement was made in the Official Journal on the “Agreement establishing the guidelines that regulate the participation of social witnesses in contracts made by agencies and entities of the Federal Public Administration”. Such agreement, in its Twelfth Article, states that:

Social witnesses may participate with the right to speak at any moment while the contract is being carried out by agencies and entities as per their request or at the request of the social witnesses themselves. In those cases, agencies and entities may not prevent them from participating. In any cases, agencies and entities will provide all facilities and documentation requested by Social Witnesses, except for those considered as reserved or confidential as per the terms of the Federal Act on Transparency and Access to Governmental Public Information.⁴⁸

However, such participation is only mandatory under some conditions. When it comes to acquisitions, leasing, and services, as stated in LAASSP in Article 26, social witnesses shall participate in public bids whose amount surpasses the equivalent of five million days of minimum wage in the Federal District and in those cases determined by the Ministry of Public Administration considering the scope of the contract. When it comes to public works, as provided in LOPSRM in Article 27 bis, social witnesses will participate in public bids whose amount surpasses the equivalent of ten million days of minimum wage in the Federal District and in those cases determined by the Ministry depending on the scope of the contract.

In the acquisition, leasing and services purchased through public bids, the participation of social witnesses is required in cases in which the amount surpasses the equivalent of five million days of general minimum wage, currently valid in the Federal District. In the case of public works and services, social witnesses will participate when the amount surpasses ten million days of minimum wage. Both processes shall be subject to this, as determined by the Ministry. In these cases, the Ministry will consider the impact that the contract has in substantive programs of the agency or entity.

Unlike observers, who have limited participation in public procurement, social witnesses have powers established in the laws that allow them to:

- Propose improvements to agencies, entities and the Ministry of Public Administration in order to strengthen transparency, impartiality and legal provisions on issues of public works and services.

48 Ministry of Public Administration. 'Acuerdo por el que se establecen los lineamientos que regulan la participación de los testigos sociales en las contrataciones que realicen las dependencias y entidades de la Administración Pública Federal', *Diario Oficial de la Federación* [online], 16 December (Mexico: Federal Government, 2004)

- Keep track of the establishment of actions that were recommended as a result of their participation in contracts.
- Give testimony at the end of their participation.

If something irregular were detected in the procurement procedure, the social witness would send their testimony to the complaint unit of the Internal Control Organization of the agency or entity or to the Surveillance Commission of the Lower Chamber of the Congress.

The Sixth Government Report⁴⁹ reported that until June 2012, 39 social witnesses were registered, of which five are corporations and 34 are individuals. Furthermore, it was documented that between January and June 2012, the following results were obtained:

- 46 social witnesses were designated, which is on par with the number of procurement procedures for an approximate amount of 90,119 million pesos.
- Of the 46 designations, 16 corresponded to public work procedures, with an estimated value of 31,879 million pesos, and 39 to acquisition procedures, leasing of real-estate and service contracting, with an estimated value of 58,240 million pesos.

In the case of the Federal District, citizen participation is done through a Citizen Comptroller, which differs from the role of observer and social witness. The process is performed in accordance with the laws and regulations of acquisitions and public works. The Citizen Comptroller is part of the Network of Citizen Comptrollers regulated by the Citizen Participation Act of Mexico City. The program is defined as an instrument of participation by which any citizen, honorably, voluntarily and individually, may assume the task of surveying, supervising and guaranteeing transparency, efficacy and efficiency of public expenditure in the Federal District.

The Citizen Comptroller participates in processes with the right to vote and speak in the Committees and Subcommittees of Public Works and Acquisitions. The aim is to ensure that public contracts are carried out rationally, optimally, efficiently and transparently, and that they comply with the provision of the law.

49 Presidency of Mexico. Sexto Informe de Gobierno (Mexico: Federal Government, 2012), p. 725.

Citizen comptrollers have the following powers (in line with applicable standards):

- To analyze and vote on the issues, subject to consideration by the Committee or Subcommittee, and express their comments during sessions.
- To propose alternatives for solving and attending to the issues presented in accordance with the legislation applicable to the matter.
- To participate in public bidding and restricted invitation procedures.

Until 2005, there were social witnesses in the State of Puebla, but the Acquisitions, Leasing, and Services of the State and Municipality Public Sector Act does not consider them as appropriate observers; however, bidders who were not selected may stay as observers during the rest of the process.

In conclusion, in the Federation, the activities of both observers and social witnesses constitute an element of corruption prevention, because they observe whether the public procurement process that is being carried out is corruption-free, meaning that it is objective and impartial. In the Federal District and in the State of Puebla, although they do not establish the roles of social witness and observer, there is evidence of social participation, although in different forms. In the Federal District, the law of public procurement opens a space for the role of citizen comptroller. In the State of Puebla, on the other hand, little participation is noticed, since it is restricted to bidders not favored in the awarding process.

In the Federation, the activities of both observers and social witnesses are a form of corruption prevention. In the Federal District, the law on public procurement only opens a brief space for citizen comptrollers in public works. In the State of Puebla, on the other hand, little participation is noticeable, since it is restricted to bidders not favored in the awarding process. It is worth mentioning that only the Federation includes social participation as part of the public procurement legal framework, while in the other cases, it is based on other orders.

4.4.2 Dispute resolution: Legal resources

One of the fundamental rights recognized by the Constitution is that every act of authority must abide by the law. In cases where laws and regulations have not been adhered to, there is a means of defense.

At the federal level, the laws related to public procurement consider that in instances of non-conformity or non-compliance with the rules or procedures of public contracts, there are mechanisms for redress such as arbitration, judicial defense and other alternative mechanisms in the contract stage.

Nonconformity, as a non-judicial administrative procedure, is the best developed means of defense in the law. When people participating in public bids consider that the process was irregular or not in accordance with the laws and procedures, the contract may be nullified and replaced. People affected may express personal disagreement at no cost to the Ministry of Public Administration through the CompraNet electronic system or at specified bid offices.

According to the law applicable to the federal public procurement processes, disagreement may be raised in the following stages of the process:

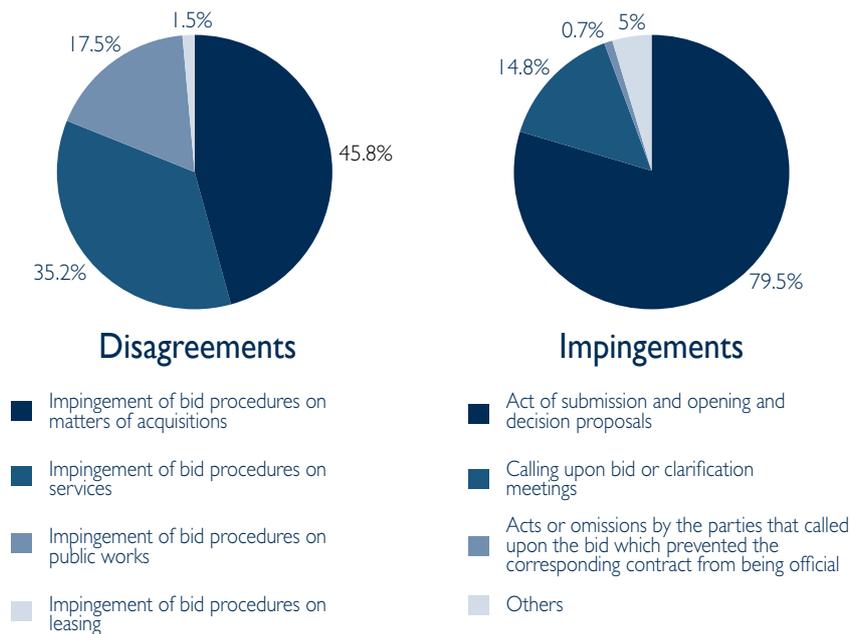
- Call upon the bid or invitation to at least three people
- Clarification meetings
- Act of submission and opening of proposals
- Decision
- Cancellation of bid or invitation to at least three people
- Acts and omissions in making the contract official

An initial disagreement document is prepared, within a term of six working days. It is required that the promoter collects the documents that accredit his/her position, as well as the evidence accrediting his/her intention. The final resolution of the authority may state that the complaint is unfounded or decide on the total nullity of the contract procedure.

In this context, according to the Sixth Government Report⁵⁰ from September 2012, the Ministry of Public Administration promoted a framework of transparency, certainty, and legality of the use of federal resources in the procurement processes by attending to or resolving disagreements put forward by bidders. Between September 2011 and June 2012, the Ministry received 1,462 disagreements, from which 670 impinged bid procedures on matters of acquisitions (45.8%), 515 on services (35.2%), 256 on public works (17.5%) and 21 on leasing (1.5%).

From the total number of disagreements submitted, there were 1,163 infractions regarding the act of submission and opening of proposals and the decision (79.5%); 217 when calling upon the bid or at the clarification meetings (14.8%); 10 on the acts or omissions by the parties calling upon the bid who prevented the corresponding contract from being official (0.7%) and 72 were reported as others (5%).

BREAKDOWN OF PERCENTAGE AND TYPES OF CHALLENGES IN BID PROCEDURES IN MEXICO (2011-2012)



Source: Sexto Informe de Gobierno (Mexico: Federal Government, 2012).

Having integrated the disagreements, 1,367 files were resolved between September 2011 and June 2012. The average resolution time of disagreement files was of 66.2 working days. The legal quality of the resolved disagreements is proven by the fact that 91.2% of the means for infraction confirmed the resolution issued by the Ministry.

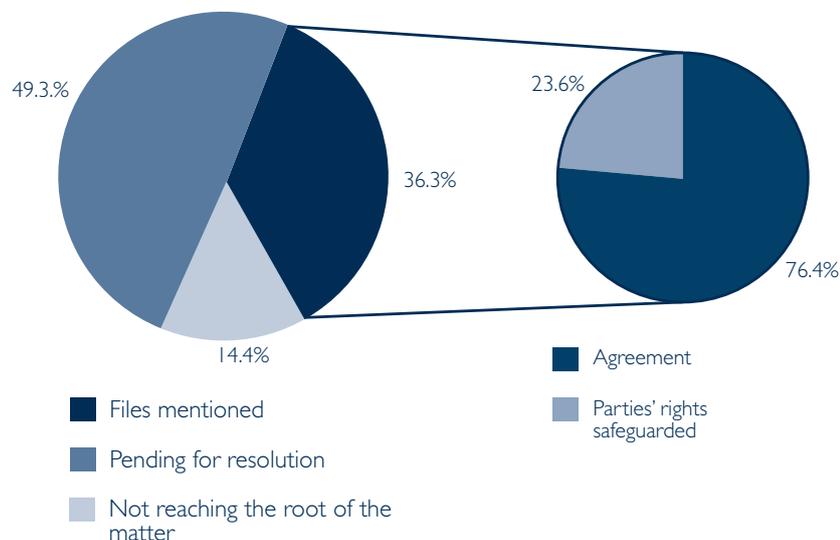
50 Ibid, p. 726.

Conciliation is a legal means of defense. It is a procedure that the Ministry of Public Administration promotes on behalf of the suppliers or contractors participating in public procurement processes, when there are divergences in contract compliance. The objective of conciliation is that contract parties come to an agreement. The Ministry of Public Administration calls the parties to a hearing that may conclude in an agreement, the dismissal of the request for conciliation or the determination from any of the parties not to have a conciliation. In this case, the contracted party's rights are safeguarded, as they may still seek to resolve their disagreements through other means.

In the same chapter of the Sixth Government Report, it was documented that the Ministry of Public Administration promoted conciliation to expedite the resolution of disputes that came about due to misinterpretation or non-compliance of contracts for acquisitions, leasing, services or public works. This prevented delays in the execution of contractual commitments that could negatively affect the rendering of public services⁵¹.

This same report stated that between September 2011 and June 2012, there were 501 conciliation proceedings, from which 139 cases reached an agreement (27.7%), while 72 did not delve deep into the matter due to remissions, impediment, incompetence, and dismissals (14.4%). In 43 cases, the parties' rights were safeguarded (8.6%), and 247 cases remained pending for resolution (49.3%). From the 182 files mentioned, 76.4% of cases came to an agreement.

BREAKDOWN OF FINAL DECISIONS IN CONCILIATION PROCEEDINGS, MEXICO (2011-2012)



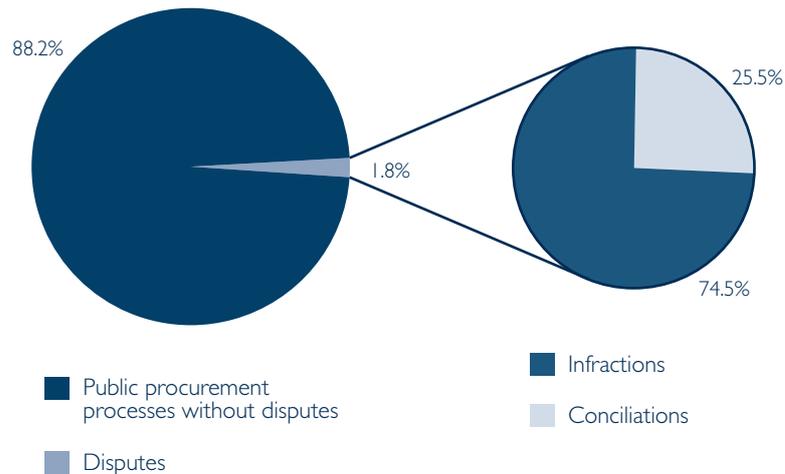
Source: Sexto Informe de Gobierno (Mexico: Federal Government, 2012).

The other two means for resolving disputes in public procurement processes are arbitration and judiciary competency.

Arbitration is a mechanism for resolving disputes arising from questions on the interpretation or execution of contract clauses. Here, an arbitrator concludes a decision. Dispute resolution is decided upon in federal courts when agreements have not been reached through arbitration or by non-conformity.

Upon analyzing the data corresponding to the year 2011 obtained from the last report of the Federal Government, it may be concluded that from 108,679 public procurement processes, 1,462 were impinged and 501 were ended through conciliation. This translates into 1,963 disputes, which account for 1.81%.

OVERVIEW OF CHALLENGES TO CONTRACTS IN MEXICO (2011)



Source: Sexto Informe de Gobierno (Mexico: Federal Government, 2012).

This percentage could show that 98.19% of bid procedures were done according to the law or without having any irregular practice. However, based on discussions with the private sector, it was revealed that the high percentage is due to suppliers not reporting out to fear of being vetoed or due to high legal costs and the necessary time investment. They also stated that they refrain from challenging procedures due to a lack of trust in the institutions.

On the other hand, the public sector states that the bids are public and any supplier may participate in them, as long as they qualify according to corresponding

standards. The government has detected irresponsible practices, such as incorrect use of conciliation mechanisms. This may be due to a lack of understanding of the law or it may be done with the sole intent of delaying proceedings.

The various governments have taken action to address these issues:

- To reduce the cost and time required, the public sector (Federation, Federal District and the State of Puebla) has shortened its resolution times to between 60 and 90 days.
- The public sector indicated that suppliers have benefited from alternative means of conflict solution, since they are less expensive than going through the courts.

In the Federal District legislation also considers the means of defense in cases when there are acts that violate legal provisions of the public procurement process. The competent authority to be notified is the Comptroller General of the Federal District, which should act within five working days.

In the Public Works Act of the Federal District, three means of defense are stated: act clarification, conciliation and disagreement. A clarification document is offered when a bidder or contractor considers that he or she is affected due to the manner in which the law is being applied. The conciliation procedure may be promoted when there are discrepancies resulting from the interpretation in the application of the requirements of the bid, contract clauses or any document regulating the contract payment conditions.

Disagreement is the means of defense of any interested party that feels affected by any act or resolution issued in the public bid procedures or invitation for at least three people by any agency, decentralized agency, delegation or entity of the Federal Public Administration.

In the case of the State of Puebla, the Acquisitions, Leasing and Services Act of the State and Municipalities states disagreement as a means of defense for whoever violates the provision of the legal order; the conciliation procedure is considered in cases where there is a default on terms and conditions of the contract.

Disagreements are submitted in writing or remotely via electronic communication to the Secretary of Development, Evaluation and Control of Public Administration (SEDECAP) or before the Municipality Comptroller, who will resolve and state their resolutions, which are:

- Nullity of the irregular act or acts and the establishment, when it proceeds, of the directives necessary for it to be replaced.
- Total nullity of the procedure.
- Dismissed or unfounded basis for the disagreement or a statement of validity for the impinged act.

Conciliation procedures are means of defense that bidders or suppliers may promote at SEDECAP or the Municipality Comptroller offices if there is a default in terms and conditions in the agreements held with agencies or entities of the public administration.

The Public Works and Services Act for the State of Puebla only considers disagreement as a means of defense against acts carried out within the procedures for awarding, contracting or during contract execution. The disagreement procedure in the State of Puebla is similar to the one carried out at the Federation. It starts with a document being presented at the Comptroller office, which is then officially submitted. Once the evidence has been discussed and a conclusion has been reached, the decision is issued. There are no recourse or appeal proceedings available.

From the aforementioned, it may be concluded that in the Federation, the Federal District and the State of Puebla, there are means of defense if public procurement processes have not been carried out as provided for in the law, or when there are disputes regarding the contracts held between agencies or entities and the contractors or suppliers.

In the Federation, the Federal District and the State of Puebla, there are means for disagreement if public procurement procedures have not been carried out according to the provisions in the laws or when there are disputes related to the agreements held between agencies or entities and the contractors or suppliers, (except in case of direct awarding, since there is no legal resources that allows for review of this procedure). Public procurement processes reviewed have a high degree of formal legitimacy, since there are infractions in less than 2% of contracts. However, there is little use of the infraction mechanism due to citizens' distrust toward governmental institutions, fear of retaliation, the high costs involved in contracting lawyer services and/ or the lack of knowledge by companies of the standards for dispute resolution.

4.5

REGULATIONS OF THE PERSONNEL IN CHARGE OF PUBLIC CONTRACTS

The last part of Article 9 of UNCAC on public procurement calls for the adoption of measures to regulate personnel in charge of public contracts, as well measures to ensure screening and training for public procurement personnel.

Articles 108, 109 and 113 of the Constitution address administrative liability and obligations of public officials, in order to safeguard lawfulness, honesty, loyalty, impartiality and efficiency in the performance of duties, jobs, positions and commissions. These laws also contain the penalties applicable in relation to certain acts or omissions. Such penalties will consist of suspension, dismissal, and disabling, as well as economic penalties.

At the federal level, there are prohibitions, such as exclusions in participating in public contracts, as well as penalties for bidders or contracting parties who infringe on provisions established in the law.

The people from whom agencies or entities may not receive proposals are:

- Those in which the public official intervening at any stage of the contract procedure has a personal, family or business interest.
- Those who have a job, position or commission in the public service, or the associated corporations without the previous and specific authorization of the Ministry of Public Administration.
- Those suppliers to whom, due to causes not attributable to themselves, the agency or entity that calls upon the bid may have administratively terminated more than one contract within a term of two years.
- Those who are dismissed due to a resolution made by the Ministry of Public Administration.
- Suppliers who are delayed in the delivery of goods or services due to causes attributable to themselves.
- Those who have been subject to mercantile bid or any similar action.
- Those having proposals on the same item of goods or services in a contract procedure and which are linked to each other by some partner or common associate.
- Those who intend to participate in a contract procedure that they have previously done or are doing or through companies that are part of the same entrepreneurial group.
- Those that, by themselves or through companies that are part of the same entrepreneurial group, intend to be contracted for decision making, expert work and valuations, when they will be used for solving discrepancies derived from the contracts that these individuals or companies are part of.
- Those who hold agreements on matters regulated by this law, not being entitled to make use of intellectual property rights.
- Those who have used privileged information, unduly provided by public officials or their relatives by blood or civil relation, and by affinity up to fourth grade.
- Those who hire advisory, consulting and support services from any type of person on matters of governmental contracts.
- Those bidders that, without justification and due to causes attributable to them, have not made official a contract awarded previously by the agency or entity.

The Ministry of Public Administration has the power to hear about infractions in public contracts and to impose penalties. It initiates the penalizing process when it is informed about an act or fact allegedly constituting an infraction, performed by bidders, contractors or public officials. Thereafter, the Ministry performs an investigation to find a resolution. If the accusations against the bidder or contractor prove to be true, the offender is requested to pay a fine equivalent of up to one thousand times the general current minimum wage in the Federal District. Furthermore, it may be penalized by disabling it from participating directly or through another person in contract procedures or contract holding.

Penalties on federal public officials are not stated in the laws of public contracts, but they are outlined in the *Federal Act on Administrative Liabilities of Public Officials* and to the *Federal Act on Anti-corruption in Public Procurement*⁵². They are applied to those involved in acts affecting lawfulness, honesty, and impartiality of public procurement processes. Penalties will be established according to the seriousness of the illegal conduct that was committed and they consist of:

- A private or public warning.
- Suspension of employment, position or commission for a period not shorter than three days or longer than one year.
- Job dismissal.
- Economic penalty.
- Temporary suspension from performing jobs, positions or commissions in the public service.

According to the chapter 'Effective democracy and foreign policy: governmental efficacy and efficiency' of the Sixth Government Report⁵³, the acts most often penalized are those related to not making the awarding of a contract official, acting willfully or intentionally wrong, or the submission of false information.

Between September 2011 and June 2012, the Ministry of Public Administration issued 510 resolutions, from which 234 were subjected to penalties (45.9%). The total amount of fines imposed accounted for 80.5 million pesos. By the month

52 Ley Federal de Responsabilidades Administrativas de los Servidores Públicos. Diario Oficial de la Federación, 11 June (Mexico: Federal Government, 2012)

53 Presidency of Mexico. Sexto Informe de Gobierno (Mexico: Federal Government, 2012), pp. 695-705

of November 2011, according to the 'Notebook 5: Accountability and government purchases,⁵⁴ there was a total of 922 companies dismissed and fined, while only 158 contractors were penalized with fines. This information is from the Directory of Suppliers and Contractors on the CompraNet platform.

The aforementioned directory prevents purchasing units from accepting proposals coming from companies having been dismissed or fined, so it is a filter to prevent them from selling to the government. However, purchasing units may continue acquiring goods from a dismissed company as long as it is justified.

The federal executive branch submitted a legislative project on a Federal Act on Anti-corruption in Public Procurement and a project of Amendments to the Federal Act on Administrative Liabilities of Public Officials to the Congress in March, 2011. This was to ensure that Mexico had a law to fight corruption in matters of public procurement and to protect the people who report corruption acts. Both projects were approved by the Congress and published in June, 2012.

This was done as part of the recommendations indicated by the Working Group on Bribery of OECD.

On June 1, 2012 there was a release in the Official Journal of the Federation (DOF) of the Federal Act on Anti-corruption in Public Procurement, which specified that it applies to individuals, corporations and foreign corporations that commit corruption acts against the Mexican government in federal public procurement procedures, as well as Mexican companies who carry out unduly international commercial transactions. Likewise, it also applies in cases of infractions in procedures to obtain federal permits or concessions.

The conducts penalized under the Federal Act on Anti-corruption in Public Procurement are bribery, extortion, collusion, simulation, trading in influence and the submission of false information. Its provisions seek to discourage potential offenders by imposing: a) penalties of up to 124 million pesos –two million times the current minimum wage in the Federal District, b) penalties up to 35% of the contract amount subject to irregularity, and c) the banning of participation in public contracts at federal level for up to 10 years.

There are also clear procedures on matters of investigation and penalties, as well as incentives to reporting through penalty reduction.

It is worth mentioning that penalties imposed, both on the bidder or contractor and on the public officials, will be independent from the criminal and civil penalties that may result from committing conducts contrary to the law. This law applies to states and municipalities if federal funds are used.

Despite this great legislative achievement in terms of sanctioning corruption in public procurement, the effectiveness and efficiency of the law cannot be assessed due to its recent release. Likewise, members of the private sector noted that there is a need to develop a communication strategy to share the contents of this law with concerned stakeholders.

The Constitution states that crimes committed by any public official shall be prosecuted and penalized under the terms of the criminal law. If the Ministry becomes aware of a crime committed in the public procurement process, it reports it to the *Public Prosecutor's Office*. Among the crimes outlined in the *Federal Criminal Code*, which may result in the trial of a Public Official, the following are mentioned:

- Forging of documents in general (both public and private) is punishable with imprisonment, depending on the type of document in question.
- Undue exercise of public service, which implies acts of removal, destruction, illegal non-utilization of information or documentation carried out by the public official, to which the official has provided false facts or circumstances. For this crime, there is a penalty from two to seven years in prison, a fine from thirty to three hundred times the current minimum wage in the Federal District, dismissal and banning to perform another public job, position or commission for two to seven years.
- Bribery, which takes place when the public official receives, offers or requests money or other gifts from any person, or when he/she accepts a promise to do or stop doing something fair or unfair in relation to his/her duties. Penalties are established depending on the quantity or the value of gifts or promises. When the value exceeds an equivalent to five hundred times the current minimum wage in the Federal District or it is not measurable, the penalty will

be of three months to two years in prison, from thirty to three hundred days of fine, dismissal and disabling from three months to two years to perform other public job, position or commission. When it surpasses this equivalent, the penalty will be from two to fourteen years in prison, from three hundred to one thousand days of fine, dismissal and disabling from two to fourteen years to perform other public jobs, positions or commissions.

In addition to the above law pertaining to the conduct of public officials, the three levels of government reviewed in Mexico also have provisions and penalties for private sector actors.

For example, prohibitions and penalties to bidders, contractors or suppliers in the Federal District are found in the laws on acquisitions and public works of each territory. They also establish assumptions that prevent bidders from submitting proposals or holding contracts with agencies, decentralized agencies, delegations and entities. This prohibition is given in some cases due to a statement provided by the Comptroller General of the Federal District and in some others, it is applied directly by the contracting areas for conducts or omissions attributable to contractors or suppliers that are included in standard assumptions.

Some of the people to whom a statement of impediment will be issued are:

- Those that due to causes attributable to them, did not comply with their contractual obligations derived from a previous contract and that, consequently, the respective agencies, decentralized agencies, delegations or entities have been affected in their patrimony.
- Those that provided information that is false.
- Those which have held contracts contravening the provision of this law or those that without justification or due to causes attributable to them do not make the awarded contract official.
- Those that are declared in bankruptcy, which are subject to a bankruptcy process, or in its case, which are subject to a bid of creditors.
- Those that by themselves or through companies that are part of the same entrepreneurial group, prepare decisions, expert's opinions and valuations required to solve disputes among those people and the agencies, decentralized agencies, delegations and entities.

- Those that have warranties, which cannot become effective due to causes not attributable to Public Administration of the Federal District.
- When the party calling upon the bid, during or after the bid procedure, restricted invitation or the holding of the contract or within the validity term of the contracts, finds out that any supplier agreed with another or others to increase the prices of goods or services.

Public officials that infringe the provision of the laws will be penalized according to the *Federal Law of Public Servants' Responsibilities* (LFRSP), and they will be safe from the criminal or civil penalties that may be derived from the process of administrative penalty. LFRSP establishes the following penalties for public officials:

- Private or public notice
- Private or public warning
- Suspension
- Job dismissal
- Economic penalty
- Temporary disabling of performing jobs, positions or commissions in the public service

In the case of the State of Puebla, prohibitions and penalties for bidders, contractors or suppliers are provided in the *Act on Acquisitions, Leasing and Services of the State and Municipality Public sector*, as well as in the *Act on Public Works and Related Services of the State of Puebla*. They state penalties for bidders or suppliers who infringe their precepts.

The penalizing authority shall be the Ministry of the Comptroller, or the Municipality Comptroller. The penalty shall consist of a fine equivalent to the amount of ten up to three hundred times the current general daily wage in the capital of the State of Puebla. Furthermore, it may suspend or cancel the registration of bidder or supplier in the respective listing and disable it temporarily from participating in awarding processes or from holding contracts. Some of the assumptions by which disabling takes place are the following:

- When bidders, without justification and due to causes attributable to them do not make the awarded contract official.
- When suppliers do not comply with their contractual obligations due to causes attributable to them, and consequently, causing damages or serious harms to the agency or entity in question, as well as those who deliver goods with specifications different from those agreed.
- When bidders or suppliers provide false information or act intentionally or with bad faith in some contract procedure, in holding contracts or during its validity term.

Public officials are also penalized if they commit acts against the provision of the laws, but penalties are imposed according to the provision of the *Act on Liabilities of Public Officials of the State*, which establishes the following penalties:

- Private or public warning
- Suspension for up to six months
- Dismissal from the job, position or commission
- Economic penalty
- Temporary disabling for up to eleven years, to perform jobs, positions or commissions in the public service.

The previous penalties are independent from those of civil or criminal order, which may derive from committing the same acts.

In conclusion, at the Federation, at the Federal District and in the State of Puebla, certain prohibitions are established so that some individuals cannot participate in the public procurement processes. The three laws consider penalties in case public officials or bidders do not comply with the provision of the laws.

The Federation, the Federal District and the State of Puebla consider penalties if public officials or suppliers do not comply with the provisions of the laws on matters regarding public procurement. Criminal, civil and administrative penalties are possible. Each kind of penalty can be applied independently for offences such as bribery, extortion, collusion, trading in influence or the submission of false information. The Federal Government recently created the Federal Act on Anti-corruption in Public Procurement, which offers different mechanisms for fighting corruption, such as the establishment of infractions (Second Chapter), regulation of investigation procedures (Third Chapter), administrative penalties (Fifth Chapter) and prevention media (Seventh Chapter). However, due to the recency of this law, the effectiveness of its application cannot yet be measured.

LEGAL AND ADMINISTRATIVE REGULATIONS THAT OBSERVE THE STANDARDS OF THE 9TH ARTICLE OF UNCAC

Government Level	Standard	Transparency: Public Division of Information		
		Traditional Media Distribution	Electronic media	Laws/Instances of Access to Information
Federation	Political Constitution of the United Mexican States, Law of Acquisitions, Leases and Services of the Public Sector (LAASSP), Law on Public Works and Related Services (LOPSRM), Federal Law of Public Servants' Administrative Responsibilities (LFRASP) and Federal Anticorruption in Public Procurement Law (LFACP).	Official Journal of the Federation (DOF), newspapers of national distribution.	CompraNet. Electronic system of governmental public information on acquisitions, leasing, services, public works and services related to them, where you can freely inquire about public procurement procedures.	Art. 6 of the Constitution / Art.134 of the Constitution / Law of Transparency and Access to Public Government Information (LTAIPG) / Federal Institute of Access to Public Information and Data Protection (IFAI) / Infomex.
Federal District	Law of Acquisitions of the Federal District (LADF), Law on Public Works of the Federal District (LOPDF), Federal Law on Public Servants' Responsibilities (LFRSP).	Official Journal of the Federation (DOF), Official Gazette of the Federal District (GODF).	CompraNet (Coordination Agreement with the Ministry of Public Administration, May 13, 2009), when it comes to federal funds. Mexico City Government Citizens' Portal /General Comptroller and in electronic media determined by the Public Administration of the Federal District.*	Act on Transparency and Access to Public Information of the Federal District / Act on Data Protection / Institute of Access to Public Information and Protection of Personal Data of the Federal District (INFODF).
State of Puebla	Law of Acquisitions Leases and Services of the Public Sector (LAASSP), Law on Public Works and Related Services for the State of Puebla (LOPSRM), Law of Public Servants' Responsibilities of the State of Puebla (LPSRP).	Official Journal of the Federation (DOF), newspapers of national distribution and of the State of Puebla.	CompraNet (Coordination Agreement with the Ministry of Public Administration, August 06, 2007), when it comes to federal funds. Requisition System (Sisreq) in development, Portal of Transparency of the State of Puebla/Fiscal Transparency.	Act on Transparency and Access to Public Information of State of Puebla / Commission for Access to Public Information.

Previous formulation of the conditions for participation	Application of objective criteria in decision-making	Effective Internal Review Mechanisms			Regulation of personnel in charge of Public Contracts
		Verification	Social participation	Dispute solution	
<p>The Constitution states that for public procurement, public bids will be established in order to ensure the best conditions available regarding price, quality, funding, opportunity, and other pertinent circumstances. LAASSP and LOPSRM prescribe and give details on fundamental rules to which the bidding and awarding process must be subject in public contracts, in relation to the Constitution. The law states the assumptions of exception to the public bid procedure.</p>	<p>According to the Constitution, public procurement is subject to criteria and rules established previously in the corresponding specifications. It is forbidden to negotiate such conditions. As per LAASSP and LOPSRM, it is mandatory to carry out market research. Economic and quality evaluation of proposals by means of three systems:</p> <p>a) points or percentages, b) cost benefit and c) binary</p>	<p>In charge of the Ministry of the Treasury, the Ministry of Economy and the Ministry of Public Administration. Verification programs: Program of Reactivation of Works with Problems / Program of Permanent Inspections / Program of Audits / Program of Quality Verification of Public Works / Program of Audit to Concluded Works / Program for Tracking progress of Public Works.</p>	<p>Role of "Social Witness", who will participate actively in public procurement processes, follows and monitors compliance, gives testimonies, and proposes improvements for them. Social participation is regulated as part of the regime of public contracts.</p>	<p>Participants in a public procurement process may promote a disagreement personally and with no cost to the Ministry of Public Administration, through CompraNet or at the offices indicated in the specifications. Other dispute solution mechanisms are conciliation, arbitration and judiciary competence.</p>	<p>Penalties for public officials are established in LFRASP and in LFACR. They may be private or public warning, suspension of the job for a period longer than three days and shorter than one year, dismissal, economic penalty and/ or temporary disabling of public service. There are also the cases of conflict of interests which limit the participation of those who may have undue advantages or being close to those in charge of public procurement. Those in charge of public contracts, such as public officials, are regulated by LFRASP.</p>
<p>The Constitution states that for public procurement, public bids will be established in order to ensure the best conditions available regarding price, quality, funding, opportunity and other pertinent circumstances. LADF and LOPWFD prescribe and give details on fundamental rules to which the bidding and awarding process must be subject in public contracts. In practice, privilege is given to exceptions to the bid: direct awarding and restricted invitation.</p>	<p>According to the Constitution, public procurement is subject to criteria and rules established previously in the corresponding specifications. LADF and LOPWFD prohibit negotiating such conditions. It is mandatory to do market research. Economic and quality evaluation of proposals is done through three systems:</p> <p>a) The lowest price, b) fixed price and c) reverse auction.</p>	<p>In charge of the Ministry of Public Finance of the Federal District, Comptroller General of the Federal District and the Public Administration of the Federal District. LOPWFD allows the Comptroller General to intervene in the procedures, so as to survey that agencies, decentralized agencies and entities of public administration carry out the contract according to the law.</p>	<p>Role of the "Citizen Comptroller", only in contracting public works. Social participation is not part of the public contract regime, but it follows the Law of Citizen Participation of the Federal District (LPCDF).</p>	<p>Participants in a process of public contract may promote a disagreement before the CGFD in a term of 5 working days from the irregularity detected. In case of public works in particular, there are also procedures for the clarification of acts and conciliation.</p>	<p>Penalties for public officials are established in LFRSP. They may be: private or public notice, private or public warning, suspension, dismissal, economic penalty and/ or temporary disabling of public service. It also states the cases of conflict of interest which limit the participation of those who may have undue advantages or being close to officials in charge of public procurement. Those in charge of public contracts, such as public officials, are regulated by LFRSP.</p>
<p>The Constitution states that for public procurement, public bids will be established in order to ensure the best conditions available regarding price, quality, funding, opportunity and other pertinent circumstances. LAASSP and LOPSRM prescribe the rules of the procedure for bidding and awarding. All contracts are concentrated at the Under-Ministry of Acquisitions and Awarding of public works, not offices of public purchasing from each agency.</p>	<p>According to the Constitution, public procurement is subject to criteria and rules established previously in the corresponding specifications. In LAASSP and LOPSRM, it is allowed to negotiate conditions. It is mandatory to carry out market research. The evaluation system does not state the points and percentages, or further auction or reverse auction.</p>	<p>The Secretary of Evaluation and Control of Public Administration, the Secretary of Administration of Puebla and the Municipality Committees are in charge of the Secretary of Development. It has a post-delivery verification, with previous notice to the supplier, who checks quality and quantity of goods and services which are delivered or executed.</p>	<p>Bidders who are not selected may remain as observers during the rest of the process. Social participation is not part of the public contract regime, but it uses other regulations.</p>	<p>Participants in a public procurement process may promote a disagreement in writing, or electronically before SEDECAP or before Municipality Comptroller. It also considers conciliation in case of default of the awarded contracts.</p>	<p>Penalties for public officials are established in LPSRP. They may be: private or public warning, suspension for up to six months, dismissal, economic penalty, disabling from the public service for 12 years. . It also states the cases of conflict of interest which limit the participation of those who may have undue advantages or being close to officials in charge of public procurement. Those in charge of public contracts, such as public officials, are regulated by LPSRP.</p>

MAIN FINDINGS AND AREAS OF OPPORTUNITY

The laws at the federal level, as well as those of the Federal District and of the State of Puebla, comply with Article 9 of UNCAC on public procurement.

Legislative instruments outline requirements for the promotion of public information, transparency and social participation, as well as the permissible degree of discretion in decision-making. Nonetheless, figures on corruption show that despite compliance with the legal requirements of UNCAC, there are still gaps that translate into possible scenarios for corrupt practices. These gaps must be identified and addressed, both through review and legislative reinforcement, including a series of training sessions to strengthen knowledge on topics identified by UNODC.

Public procurement processes at the government levels have a high degree of formal legitimacy. There are infractions in only 3% to 5% of the susceptible award procedures, namely public bids or restricted invitations. Particularly in the case of the Federal District, most of the acquisition processes are carried out by direct awarding, and this implies a wide margin of discretion which could lead to instances of corruption.

The legitimacy of processes is largely a product of the distrust of citizens in governmental institutions. Although some factors contribute to building legitimacy, such as social participation through citizen comptrollers in the Federal District, and the role of the social witnesses at federal level, distrust among suppliers remains.

According to those interviewed in the private sector, many bidders prefer not to report infractions due to the fear of being vetoed from participating in future bids, especially when they are made by direct award or restricted invitation.

Some noted that complaint proceedings are expensive and lengthy, considering that there may be multiple instances reviewing the cases. Others argue that this fear derives from a lack of knowledge about the procedures, as there are tools, such as conciliation and arbitration, which are quicker and less costly resolutions.

In addition, there is no certainty that a procurement process will be reversed as a contract may be finalized before the complaint investigations are concluded. It must be noted though that in some cases, the complaint mechanism can be effective and the suspension of contracts is done prior to their commencement.

Furthermore, the private sector can launch complaints based on unethical reasons; however, this is not done regularly in practice. This could be due to their lack of awareness of their rights and obligations. In other cases, false complaints are submitted to make the public sector waste time and resources by having to investigate unjustified disagreements. Among the public officials interviewed, there was consensus about the need for some form of penalty for those who intentionally lodge complaints which they know are inadmissible.

Despite efforts to collect information on corruption in practice, there are few documents available on corruption in public procurement at the federal level and in the states.

Public sector officials participating in the preparation of this document highlighted that many of the acts related to corruption in public purchasing take place before the award processes. Some companies engage in practices such as making agreements among suppliers or designating exclusive distributorship to large transnational companies. It has even been found that some companies participate in bids with the premeditated intention of non-compliance, and rather take the chance of having to pay a fine or penalty.

Occasionally, although the awarding procedure is transparent and complies with the standard procedures, there are still gaps due to the wide application of discretionary decisions that can give rise to opportunities for corrupt acts.

In the case of the public sector, it is recognized that details of a tender are sometimes tailored to a specific company or product.

In most cases, corruption occurs through collaboration between public officials and suppliers.

Poor planning of public purchasing is also common, which influences: a) planning and budgeting, b) costs, c) funding, d) payment, e) quality, and f) opportunity. The lack of planning is often due to uncertainty in budgetary issues faced by public agencies. Due to time pressures, procedures may not be carried out with the necessary caution and planning.

Suppliers know that many governmental agencies have a relatively stable, periodic and planned demand for consumer goods, which can lead suppliers to agree to raise or fix their prices together.

There is an overall lack of technical expertise of public officials in understanding the characteristics of goods and services, definition of terms, modes of decision-making and subjectivity. It is recognized that it is impossible for public officials to have specific knowledge of all the goods and services they contract, especially when it comes to new requirements. In order to overcome this deficiency, public officials hire consultants from chambers or external consultants, but this increases the cost and risk of leaking information or favoring certain suppliers. Thus, members of the public sector acknowledged the need to have a group of experts specialized in the matters and needs of each agency within their own organizational structure.

Tenders favoring a certain party, good or service or particular brands may constitute a justifiable exception to the public bid if said tender is the only option to meet the specific needs of the agency. This mainly occurs in the formulation stage of the bidding.

In some isolated cases, it was found that requests for public contracts and verification procedures made reference to outdated standards or technical specifications, or they used obsolete test methods. In some cases, this may be due to the fact that goods have long been in use, and agencies continue to contract services that are outdated in the market.

It was also detected that in some cases, some suppliers did not have the technical, operational, and financial ability to comply with the contract terms. In other instances, ghost companies as well as collusion between suppliers were reported. These situations may be generated: a) by deficiency in the assessment of a bid, b) due to a lack of truthfulness in the information provided by bidders, or c) because there is no previous assessment in the direct awarding case. In some cases, it is possible to contract somebody that does not really have the financial and operational capability, as long as they have the necessary funding and joint partnership with other companies.

There is also a lack of clarity concerning market studies, as there is no clear methodology for their implementation. A lack of transparency appears to be inevitable as the law does not allow for the results of the study to be released. There are, however, challenges posed by the fact that no market research is carried out at all or findings are inaccurate (suppliers tend to increase their quotes, sometimes with the authority's consent).

It is necessary to have a standardized methodology to perform market research in order to reduce its discretionary nature. Very few public agencies have specialized market research knowledge, so the responsibility lies with the requesting agency, which often does not have the human resources and technical knowledge necessary to carry out an integrated research.

Verification instruments used by the authority are often inefficient as they are not applied regularly, which generates the risk of not being able to properly verify contract quality.

There is a need to strengthen the technical and human resource capacity of public procurers to assess the quality of the good or service offered and to verify that such quality is maintained until the end of the contract.

Administrative agreements are made which fill legal gaps or seek to rectify the administrative procedures of public procurement. This may lead to an improvement of legal principles, but could also fuel discretion. In order to avoid the latter, an Integrity Pact could be created to foster probity in public procurement.

Both the public and private sectors agree that although some legislative gaps remain, the general processes of public procurement meet international standards. The next step is to ensure that laws are put into practice and that government and private sector staff involved in procurement is adequately trained.

BIBLIOGRAPHICAL REFERENCES

- Béjar, L. J. (2007). *Curso de Derecho Administrativo*. Mexico City: Oxford University Press.
- Código Civil Federal. (1928, 26 May). Amended on 9 April 2012. *Diario Oficial de la Federación*. Mexico: Federal Government.
- Código Civil para el Distrito Federal. (1928, 26 May). Amended on 23 July 2012. *Gaceta Oficial del Distrito Federal*. Mexico: Federal Government.
- Código Civil para el Estado Libre y Soberano de Puebla. (1985, 30 April). Amended on 14 September 2012. *Periódico Oficial del Gobierno Constitucional del estado de Puebla*. Mexico: Federal Government.
- Código de Defensa Social del Estado Libre y Soberano de Puebla. (1986, 23 December). Amended on 11 October 2011. *Periódico Oficial del Gobierno Constitucional del estado de Puebla*. Mexico: Federal Government.
- Código de Procedimientos en Materia de Defensa Social para el Estado Libre y Soberano de Puebla. (1986, 23 December). Amended on 4 January 2011. *Periódico Oficial del Gobierno Constitucional del estado de Puebla*. Mexico: Federal Government.
- Código de Procedimientos Penales para el Distrito Federal. (1931, 29 August). Amended on 26 July 2011. *Gaceta Oficial del Distrito Federal*. Mexico: Federal Government.
- Código Federal de Procedimientos Penales. (1934, 30 August). Amended on 14 June 2012. *Diario Oficial de la Federación*. Mexico: Federal Government.
- Código Penal Federal. (1931, 14 August). Amended on 14 June 2012. *Diario Oficial de la Federación*. Mexico: Federal Government.
- Código Penal para el Distrito Federal (2002, 16 July). Amended on 3 August 2012. *Gaceta Oficial del Distrito Federal*. Mexico: Federal Government.
- Correa, I. (2002). *Manual de licitaciones públicas*. Santiago: Latin American and Caribbean Institute for Economic and Social Planning (ILPES).
- Dussauge, M. I. (2010). "Combate a la corrupción y rendición de cuentas: avances, limitaciones, pendientes y retrocesos". In: L. Méndez (ed.), *Los grandes problemas de México* (Vol. 13, pp. 207-252). Mexico: Colegio de México (Políticas Públicas).
- Fernández, J. (2004). "Teoría y praxis de la licitación" [e-journal]. In: J. Fernández. & J. A. Herrera (ed.), *Teoría y praxis de la contratación*

- administrativa: el caso del estado de Guerrero (pp. 3-89). Mexico: Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM, <http://biblio.juridicas.unam.mx/libros/libro.htm?l=1465>
- Flores, S. (2008). "La Convención de las Naciones Unidas contra la Corrupción (Convención de Mérida) a cinco años de su adopción." *Revista de Administración Pública*, Vol. 53 (September-December), pp. 133-142.
- Comptroller General of the Government of the Federal District (2013). "Capacitación en Línea: Adquisiciones." Available at: <http://www.contraloria.df.gob.mx/wb/cg/adquisiciones>
- Guerrero, M. A. (2010). "El Instituto Federal de Acceso a la Información Pública: el acceso a la información y la transparencia." In: L. Méndez (ed.), *Los grandes problemas de México* (Vol. 13, pp. 253-302). Mexico: Colegio de México (Políticas Públicas).
- Instituto Mexicano de Contadores Públicos (2012, 17 April). "Cifra IP en \$1.5 billones costo de la corrupción." In: *Síntesis informativa*. Mexico City: Instituto Mexicano de Contadores Públicos.
- KPMG Cárdenas Dosal. (2008). *Encuesta de Fraude y Corrupción en México 2008*. Mexico City: KPMG.
- KPMG Cárdenas Dosal. (2010). *Encuesta de Fraude en México 2010*. Mexico City: KPMG.
- Ley contra la Delincuencia Organizada para el Distrito Federal. (2004, 15 September). Amended 19 July 2010. *Gaceta Oficial del Distrito Federal*. Mexico: Government of the Federal District.
- Ley de Adquisiciones del Distrito Federal. (1998, 28 September). Amended 7 April 2011. *Gaceta Oficial del Distrito Federal*. Mexico: Government of the Federal District.
- Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público. (2000, 4 January). Amended 16 January 2012. *Diario Oficial de la Federación*. Mexico: Federal Government.
- Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público Estatal y Municipal. (2001, 9 February). Amended 30 March 2012. *Periódico Oficial del Gobierno Constitucional del estado de Puebla*. Mexico: Government of the State of Puebla.
- Ley de Cámaras Empresariales y sus Confederaciones. (2005, 20 January). Amended 9 June 2009. *Diario Oficial de la Federación*. Mexico: Federal Government.
- Ley de Instituciones de Crédito. (1990, 18 July). Amended 25 May 2010. *Diario Oficial de la Federación*. Mexico: Federal Government.

- Ley de Obra Pública y Servicios Relacionados con la Misma para el Estado de Puebla. (2003, 26 March). Amended 19 September 2012. Periódico Oficial del Gobierno Constitucional del estado de Puebla. Mexico: Government of the State of Puebla.
- Ley de Obra Pública y Servicios Relacionados con las Mismas. (2000, 4 January). Amended 9 April 2012. Diario Oficial de la Federación. Mexico: Federal Government.
- Ley de Obras Públicas del Distrito Federal. (1998, 29 December). Amended on 15 September 2008. Gaceta Oficial del Distrito Federal.. Mexico: Government of the Federal District.
- Ley de Participación Ciudadana del Distrito Federal. (2010, 30 November). Amended 26 August 2011. Gaceta Oficial del Distrito Federal. Mexico: Government of the Federal District.
- Ley de Protección de Datos. (2008, 3 October). Gaceta Oficial del Distrito Federal.. Mexico: Government of the Federal District.
- Ley de Responsabilidades de los Servidores Públicos. (1984, 29 June). Amended 2 January 2012. Periódico Oficial del Gobierno Constitucional del estado de Puebla. Mexico: Government of the State of Puebla.
- Ley de Transparencia y Acceso a la Información Pública del Distrito Federal. (2008, 28 March). Amended 29 August 2011. Gaceta Oficial del Distrito Federal. Mexico: Government of the Federal District.
- Ley de Transparencia y Acceso a la Información Pública del Estado de Puebla. (2004, 16 August). Amended 31 December 2011. Periódico Oficial del Gobierno Constitucional del estado de Puebla. Mexico: Government of the State of Puebla.
- Ley Federal Anticorrupción en Contrataciones Públicas. (2012, 11 June). Diario Oficial de la Federación. Mexico: Federal Government.
- Ley Federal contra la Delincuencia Organizada. (1996, 7 November). Amended 14 June 2012. Diario Oficial de la Federación. Mexico: Federal Government.
- Ley Federal de Responsabilidades Administrativas de los Servidores Públicos. (2002, 13 March). Amended 15 June 2012. Diario Oficial de la Federación. Mexico: Federal Government.
- Ley Federal de Responsabilidades de los Servidores Públicos. (1982, 31 December). Amended 9 April 2012. Diario Oficial de la Federación. Mexico: Federal Government.
- Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental. (2002, 11 June). Amended 8 June 2012. Diario Oficial de la Federación.

Mexico: Federal Government.

Ley Federal para la Protección a Personas que Intervienen en el Procedimiento Penal. (2012, 8 June). Diario Oficial de la Federación. Mexico: Federal Government.

Ley Federal para la Protección a Personas que Intervienen en el Procedimiento Penal. (2012, 8 June). Diario Oficial de la Federación. Mexico: Federal Government.

Ley Federal sobre Metrología y Normalización. (1992, 1 July). Amended 9 April 2012. Diario Oficial de la Federación. Mexico: Federal Government.

Ley General de Organizaciones y Actividades Auxiliares de Crédito. (1985, 14 January). Amended 3 August 2011. Diario Oficial de la Federación. Mexico: Federal Government.

Ley General de Sociedades Mercantiles. (1934, 4 August). Amended 15 December 2011. Diario Oficial de la Federación. Mexico: Federal Government.

Ley Orgánica de la Administración Pública Federal (1976, 29 December). Amended 14 June 2012. Diario Oficial de la Federación. Mexico: Federal Government.

Ley Orgánica de la Procuraduría General de la República (2009, 29 May). Amended 14 June 2012. Diario Oficial de la Federación. Mexico: Federal Government.

“Lineamientos generales para el establecimiento de acciones permanentes que aseguren la integridad y el comportamiento ético de los servidores públicos en el desempeño de sus empleos, cargos o comisiones” (2012, 6 March). Diario Oficial de la Federación. Mexico: Federal Government.

Mexican Institute for Competitiveness (IMCO) (2011). Competencia en las compras públicas: evaluación de la calidad de la normatividad estatal en México. Mexico City: IMCO.

Mexican Institute for Competitiveness (IMCO) (2012). Compras gubernamentales: visión del sistema de compras en México. Mexico City: IMCO.

Ministry of the Interior (2007). “Acuerdo de Coordinación que celebran la Secretaría de la Función Pública y el Estado de Puebla.” Diario Oficial de la Federación, 6 August. Mexico: Federal Government.

Ministry of Public Administration (2004). “Acuerdo por el que se establecen los lineamientos que regulan la participación de los testigos sociales en las contrataciones que realicen las dependencias y entidades de la Administración Pública Federal.” Diario Oficial de la Federación, 16 December. Mexico: Federal Government.

- Ministry of Public Administration (2006). Herramientas de integridad para fortalecer la competitividad de las empresas. Available at: http://www.programaanticorrupcion.gob.mx/web/doctos/integridad/indices/herramientas_de_integridad.pdf
- Ministry of Public Administration (2008). Participación de Testigos Sociales en las contrataciones de la Administración Pública Federal. Mexico: SFP, Subsecretaría de Atención Ciudadana y Normatividad.
- Ministry of Public Administration. (2009). Reglas claras, negocios transparentes: Convención de la OCDE para combatir el cohecho de servidores públicos extranjeros en transacciones comerciales internacionales. Available at: <http://www.programaanticorrupcion.gob.mx/web/doctos/integridad/indices/ocde.pdf>
- Ministry of Public Administration (2012). Construyendo un programa de integridad: el papel de los códigos de conducta. Available at: <http://www.programaanticorrupcion.gob.mx/web/doctos/integridad/indices/pi.pdf>
- Ministry of Public Administration (2012). La ética es un buen negocio. Available at: <http://www.programaanticorrupcion.gob.mx/web/doctos/integridad/indices/ebn.pdf>
- Ministry of Public Administration (2012). CompraNet [online portal]. Available at: <https://compranet.funcionpublica.gob.mx/>
- Ministry of Public Administration (2012). Cumplimiento de los lineamientos de integridad y ética al 20 de septiembre de 2012. Available at: <http://www.programaanticorrupcion.gob.mx/index.php/integridad-y-legalidad/lineamientos-de-integridad-y-etica-en-la-apf.html>
- Ministry of Public Administration. (2012). Empresa transparente: pasos para su construcción. Available at: <http://www.programaanticorrupcion.gob.mx/web/doctos/integridad/indices/et.pdf>
- Ministry of Public Administration. (2012). “Programa anticorrupción: integridad y Legalidad.” Available at: <http://www.programaanticorrupcion.gob.mx/index.php/integridad-y-legalidad.html>
- Ministry of Public Administration (2012). “Rendición de cuentas y compras de gobierno.” Cuadernos sobre Rendición de Cuentas 5. Mexico: SFP. Available at: <http://www.funcionpublica.gob.mx/web/doctos/transparencia/estudios/cuaderno-05.pdf>
- Morgan, R. (2008). “Una cuenta que empieza a saldar: transparencia y rendición de cuentas”. *Revista de Administración Pública*, 53 (September-December), pp. 57-68.

- Nájera, C. X. (2008). "La transparencia en las adquisiciones gubernamentales." *Revista de Administración Pública*, 53 (September-December), pp. 187-210.
- Nava, A. (2007). *Derecho Administrativo Mexicano*. (3a. ed.). Mexico: Fondo de Cultura Económica.
- Office of the Comptroller General (CGU) et. al. (2010). *La responsabilidad social de las empresas en el combate a la corrupción*. Brasilia: CGU.
- Organisation for Economic Co-operation and Development. (2012). "La eficiencia de la gestión pública." México: mejores políticas para un desarrollo incluyente. Mexico: OECD (Serie Mejores políticas), pp. 17-20.
- Organisation for Economic Co-operation and Development. (2012). "La competencia y el combate a los monopolios públicos y privados." In: México: mejores políticas para un desarrollo incluyente. Mexico: OECD (Serie Mejores políticas), pp. 44-46.
- Paz, M. A. (2008). "Una nueva oportunidad: transparencia 2.0." *Revista de Administración Pública*, 53 (September-December), pp. 175-186.
- Political Constitution of the United Mexican States (1917, 5 February). Amended on 15 October 2012. *Diario Oficial de la Federación*. Mexico: Federal Government.
- Presidency of Mexico (2007). *Plan Nacional de Desarrollo 2007-2012*. Mexico: Federal Government.
- Presidency of Mexico (2011). *Quinto Informe de Gobierno*. Mexico: Federal Government.
- Presidency of Mexico (2012). *Sexto Informe de Gobierno*. Mexico: Federal Government.
- Private Sector's Center for Economic Studies (CEESP). (2007). *Mala regulación y falta de transparencia como promotores de la corrupción*. Mexico: CEESP.
- Private Sector's Center for Economic Studies (CEESP). (2008, 29 September). "Panorama general". *Análisis Económico Ejecutivo*, p.1.
- Private Sector's Center for Economic Studies (CEESP). (2010, 1 November). "Panorama general". *Análisis Económico Ejecutivo*, p.1.
- Private Sector's Center for Economic Studies (CEESP). (2012, 10 September). "Panorama general". *Análisis Económico Ejecutivo*, p.1-2.
- Private Sector's Center for Economic Studies (CEESP). (2012, 24 September). "Panorama general: Corrupción: un obstáculo para el crecimiento". In: *Análisis Económico Ejecutivo*, p.1-2.
- Ruelas, A. L. & Pérez, MC. P. (2006). "El gobierno electrónico: su estudio y perspectivas de desarrollo." Available at: <http://www.razonypalabra.org.mx/anteriores/n52/27RuelasyAramburo.pdf>

- Secretariat of Economy. (2013). "Competitividad y Normatividad: Normalización."
Available at: <http://www.economia.gob.mx/comunidad-negocios/normalizacion>
- Transparencia Mexicana (2010). Índice Nacional de Corrupción y Buen Gobierno: Resultados nacionales por entidad federativa. Mexico City: Transparencia Mexicana.
- Transparencia Mexicana (2011). "Informe Ejecutivo 2010". Índice Nacional de Corrupción y Buen Gobierno. Mexico City: Transparencia Mexicana.
- Transparency International and the Centre for International Private Enterprise (2011). APEC Procurement Transparency Standards in Mexico. Time to Engage the Private Sector. Washington D.C.: Transparency International USA, CIPE and Transparencia Mexicana.
- Transparency International. (2011). Corruption Perceptions Index 2011. Berlin: Transparency International.
- Transparency International. (2010). Global Corruption Barometer 2010. Berlin: Transparency International.
- Transparency International (2010). Impacto de la corrupción en diferentes sectores e instituciones: todos los países 2010. Berlin: Transparency International.
- Transparency International. (2011). Bribe Payers Index Report, 2011. Results by Sector. Berlin: Transparency International.
- Transparency International. (2010). Corruption Perceptions Index 2010. Berlin: Transparency International.
- Transparency International. (2011). Las empresas de dos gigantes económicos emergentes, China y Rusia, son las más propensas a pagar sobornos en el extranjero. London/Berlin: Transparency International.
- Transparency International. (2010). Los ciudadanos opinan que la corrupción ha empeorado y quieren hacer algo al respecto, según el Barómetro Global de la Corrupción 2010: El aumento más considerable se registra en América del Norte y Europa. Berlin: Transparency International.
- UNCITRAL Model Law on Public Procurement (2011, 1 July). Vienna: United Nations Commission on International Trade Law.
- United Nations Convention against Corruption (2003, 31 October). New York: General Assembly of the United Nations.
- United Nations Global Compact (2000). United Nations.
- United Nations Office on Drugs and Crime (UNODC) (2012, 3-6 September). Seminario de Preparación para la Reunión de Expertos de la Academia Internacional Anticorrupción. Mexico: UNODC.
- World Economic Forum (2011). The Global Competitiveness Report 2011-2012. Geneva: World Economic Forum.

- World Economic Forum (2012). The Global Competitiveness Report 2012-2013. Geneva: World Economic Forum.
- Yáñez, E. O. (2008). "Los Testigos Sociales y sus contribuciones a la gestión pública". *Revista de Administración Pública*, 53 (September-December), pp. 69-107.



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