



APEC Procurement Transparency Standards in Mexico

Time to Engage the Private Sector



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Transparency International-USA (TI-USA) is a non-profit, non-partisan organization founded in 1993 to combat corruption in government and international business and development. TI-USA promotes systemic reform through collaboration with a global network of local chapters in almost 100 countries, high level collective action with government, private sector and international organizations, and extensive expertise in developing tools and approaches to combating corruption. www.transparency-usa.org.



The Center for International Private Enterprise (CIPE) strengthens democracy around the globe through private enterprise and market-oriented reform. CIPE is one of the four core institutes of the National Endowment for Democracy and an affiliate of the U.S. Chamber of Commerce. Since 1983, CIPE has worked with business leaders, policymakers, and journalists to build the civic institutions vital to a democratic society in more than 100 countries. CIPE's key program areas include anti-corruption, advocacy, business associations, corporate governance, democratic governance, access to information, the informal sector and property rights, and women and youth. www.cipe.org.



Transparencia Mexicana (TM) is a non-governmental organization that approaches corruption in Mexico from a comprehensive perspective. It does so through public policies and private stances that transcend political slogans to bring about specific changes in the institutional framework and build a rule-of-law culture in Mexico. TM was established in 1999 as the Mexican Chapter of Transparency International, the global coalition devoted to combating corruption. www.tm.org.mx.

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Abbreviations and acronyms

APEC	Asia-Pacific Economic Cooperation
APEC Standards	APEC Transparency Standards on Government Procurement
CFC	<i>Comisión Federal de Competencia</i> (Federal Competition Commission)
CIPE	Center for International Private Enterprise
COFEMER	<i>Comisión Federal de Mejora Regulatoria</i> (Federal Regulatory Improvement Commission)
GDP	Gross Domestic Product
IFAI	<i>Instituto Federal de Acceso a la Información Pública</i> (Federal Institute for Access to Public Information)
LAASSP	<i>Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público</i> (Law on Procurement, Leases and Services by the Public Sector)
LFPA	<i>Ley Federal de Procedimiento Administrativo</i> (Federal Law on Administrative Procedures)
LFPCA	<i>Ley Federal de Procedimiento Contencioso Administrativo</i> (Federal Law on Administrative Law Court Procedure)
LOPSRM	<i>Ley de Obras Públicas y Servicios Relacionados con las Mismas</i> (Law on Public Works and Related Services)
NBPs	Non-Binding Principles on Government Procurement
OECD	Organization for Economic Co-operation and Development
OECD Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
RFP	Request for Proposals
SFP	<i>Secretaría de la Función Pública</i> (Ministry of Public Administration)
SHCP	<i>Secretaría de Hacienda y Crédito Público</i> (Ministry of Finance and Public Credit)
SMEs	Small and Medium Enterprises
TI-USA	Transparency International-USA
TM	Transparencia Mexicana
UNCAC	United Nations Convention against Corruption

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Executive summary

Corruption damages economic development, hinders the growth of fair market structures and impedes the ability of developing countries to attract scarce foreign investment. Nowhere is the cost of corruption more evident than in public procurement. Mexico has endorsed a number of multilateral agreements and conventions – including the Inter-American Convention against Corruption, the OECD Convention against Bribery, and the United Nations Convention against Corruption – as part of its strategies for combating or preventing corruption, as well as for strengthening integrity in numerous government activities. In addition, as a member of the Asia Pacific Economic Cooperation (APEC), Mexico agreed to adopt the Transparency Standards on Government Procurement adopted by APEC in 2004.

Transparency International-USA (TI-USA), the Center for International Private Enterprise (CIPE) and Transparencia Mexicana (Mexican chapter of Transparency International) cooperated on a project to analyze Mexico's legal and practical implementation of the APEC Standards on Government Procurement.

The project analyzed the Mexican legal framework for public procurement and also carried out consultations with the private sector on whether those laws and regulations are implemented in practice. The results show that Mexican legislation corresponds adequately to the 11 principles set forth in the APEC Standards. However, consultation with the private sector reveals the need for improved implementation by the procuring entities of the procurement laws and significant changes by the private sector in the way it participates in public procurements. Action by the private sector is particularly important since the applicable legal framework is largely in place.

The review of the regulatory framework and the consultation with the private sector also highlighted the need for greater coordination between federal and regional legislation and implementation. Strengthening private sector collective action is also needed to demand greater compliance with the current legal framework, not only by government authorities but also by firms participating in the public procurement process. These key recommendations for both public and private sector emerged:

- The private sector needs to take action to strengthen its competitiveness and integrity and improve its knowledge of procurement rules and procedures.
- The government should enhance access to procurement information, making sure that information is consistent, impartial, readily accessible and easily understood.
- The government should strengthen the autonomy of regulatory agencies.
- The government should adopt measures to enhance private sector integrity and assist the private sector in improving its knowledge of procurement rules and procedures.
- Civil society should broaden its engagement in procurement monitoring.

Introduction

Government procurement typically accounts for the largest share of public expenditures aside from government salaries and social benefits. Government procurement is generally between 14 to 20 percent of a country's GDP, which on a global basis would be between \$8.16 trillion and \$11.65 trillion annually.¹ This massive spending goes, in large part, to essential public services such as clean water, education, healthcare and infrastructure. With estimates that corruption can add 10-25 percent to the cost of public procurement, and in some cases even 40 to 50 percent, the potential financial and social costs are staggering.²

Therefore, Transparency International ("TI") chapters around the world have made the reduction of corruption in government procurement a high priority objective. TI has published a *Handbook for Curbing Corruption in Public Procurement* and developed innovative approaches to enhance transparency and integrity in government and the private sector and to engage civil society in oversight.³

TI has promoted domestic and multilateral approaches that encourage transparent procurement rules and procedures as a crucial step toward reducing corruption. Greater access to information on public procurements increases predictability for the private sector, permits public oversight and provides greater assurance of the effective use of public resources. It also leads to greater government accountability, enhancing public trust.

The Asia-Pacific Economic Cooperation ("APEC") Transparency Standards on Government Procurement ("APEC Standards"), agreed upon in 2004 by the APEC member economies, represent an important government commitment with the potential to improve the integrity of public procurement. Their impact on raising the transparency of procurement, however, depends on implementation and application in practice.

This report is one in a series initiated by TI-USA to assess and promote implementation by APEC economies of the APEC Standards. It is based on the legal framework review carried out by Transparencia Mexicana ("TM") and the results of a business consultation conducted by TM, TI-USA and the Center for International Private Enterprise ("CIPE") in Mexico City. Section 1 outlines the background of the APEC

1. The World Bank estimates global GDP as US\$58.26 trillion in 2009. See <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>. The figure of 14-20 percent comes from the other country reports in this series.

2. The World Bank estimates that corruption can add 20 percent or more to the cost of public procurement. See <http://go.worldbank.org/VAT2EY5A00>. TI estimates that damage from corruption represents on average 10 to 25 per cent of a contract's value. See TI's *Handbook for Curbing Corruption in Public Procurement* (2006) at 13, available at http://www.transparency.org/publications/publications/other/procurement_handbook.

3. TI has developed an Integrity Pact, a tool aimed at preventing corruption in public procurement. See http://www.transparency.org/global_priorities/public_contracting/integrity_pacts. It has also produced "Business Principles for Countering Bribery" in cooperation with Social Accountability International and support of a Steering Committee drawn from international business, academia, trade unions and other non-governmental bodies including CIPE. These principles provide a framework for ethical business practices. Available at http://www.transparency.org/global_priorities/private_sector/business_principles.

Standards. Section 2 presents information on Mexico's economic situation and the context for public procurement. Section 3 includes an overview of the government procurement system. Section 4 details the key results of TM's study of the Mexican legal framework governing public procurement. Section 5 focuses on the consultation held with American Chamber of Commerce of Mexico member firms to gauge the business community's views on Mexico's commitment to the APEC Standards and private sector participation in strengthening the integrity of public procurement. Finally, section 6 presents the conclusions and recommendations for strengthening the transparency of public procurement process in general and Mexico's commitment to the APEC Standards in particular.

1. Development of the APEC Transparency Standards on Government Procurement

APEC was formed in 1989 by 12 Asia-Pacific economies with the aim of becoming the region's leading economic forum. APEC has since grown to 21 members: Australia, Brunei, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Taiwan, Thailand, the United States, and Vietnam. Anti-corruption efforts in various areas have been a crucial part of APEC's mission to support sustainable economic growth and prosperity in the Asia-Pacific region. One area of focus is government procurement where systemic corruption commonly undermines competition, wastes public resources, and ultimately hampers economic growth and development.

In order to improve the efficiency of government procurement through sharing experiences and best practices, APEC economies established a Government Procurement Experts Group in 1995. In August 1999, the Experts Group completed the development of a set of Non-Binding Principles on Government Procurement (NBPs) for adoption by APEC economies on a voluntary basis.⁴ The NBPs focused on transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. At the same time, other working groups in APEC negotiated general transparency principles applicable to a variety of sectors, such as customs, trade, and investment.⁵ In 2004, APEC members incorporated transparency NBPs into the area-specific Transparency Standards on Government Procurement.⁶ The complete text is set forth in Annex 1.

4. APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement, available at <http://www.abanet.org/intlaw/committees/corporate/procurement/APEC%20Gov%20Proc.pdf>.

5. Leaders' Statement to Implement APEC Transparency Standards (Oct. 27, 2002), available at <http://www.america.gov/st/washfile-english/2002/October/20021028114159gomez@pd.state.gov0.1174127.html>.

6. 2004 16th APEC Ministerial Meeting (Nov. 17-18, 2004), available at http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2004/2004_amm.aspx.

The APEC Standards cover key aspects of public procurement:

- publication of, and access to, regulations governing public tender procedures;
- publication of draft regulations and opportunities to submit comments;
- access to invitations to public tenders;
- equitable treatment of bidders;
- requirements for publication of information concerning evaluation criteria and contract award decisions; and
- availability of review mechanisms for decisions involving tenders and prompt and impartial resolution of disputes.

The APEC Standards represent a political commitment by APEC members to transparency and integrity in government procurement. Implementation is crucial for spurring economic growth, facilitating financial stability, and promoting confidence in government actions. In principle, the availability of, and easy access to, public procurement information are key to conducting successful tenders and developing and strengthening sound economies that maximize the use of public resources. Availability and access to information also reduce the opportunity for discretionary action by government officials and therefore the potential for corruption.

At the 2007 APEC Ministerial Meeting in Sydney, Australia, member economies submitted reports on the assessment of implementation of the APEC Transparency Standards in various areas, including government procurement, and pledged to close the remaining implementation gaps. These reports showed general progress in implementation of the APEC Standards. However, they did not provide a full picture since they were written by the respective APEC economies without involving non-governmental stakeholders. Moreover, the reports focused on the harmonization of national laws and regulations with the APEC Standards rather than the examination of how those laws and regulations are implemented in practice.

The goal of this joint report is to provide private sector and civil society input into the degree to which the APEC Standards have been implemented in both law *and* practice in Mexico, and to produce recommendations on ways to improve implementation. Adding this new perspective widens the discussion on the implementation of the APEC Standards from an inter-governmental exercise to a broader multi-stakeholder effort that promotes concrete anti-corruption reforms. TI-USA, CIPE, and local TI affiliates conducted such evaluations of the implementation of the APEC Standards in three other APEC countries – Peru, Indonesia, and Vietnam – in order to compare the levels of implementation and determine whether there are common issues that can be addressed through additional action in APEC or other international fora. TI-USA also carried out a similar project in the Philippines as part of this series.

2. Mexico's Economic and Governance Context

Country Profile

Mexico is the world's 14th largest economy, with a GDP in 2009 estimated at US\$874,810 million⁷ and a per capita gross national income of US\$8,960 for the same period.⁸ Over the past few years, Mexico's economy has showed positive, albeit low, rates of growth (4.9 percent in 2006, 3.3 percent in 2007 and 1.5 percent in 2008).⁹ In 2009, however, GDP fell by 6.5 percent as a result of the international financial crisis and the downturn in the United States economy.¹⁰ Economic growth in 2010 was expected to reach five percent.¹¹

Mexico ranks 35th of the 183 countries surveyed by the World Bank for its annual Doing Business report, an improvement from 2010 when it ranked 41.¹² In areas where corruption often occurs, Mexico's ranking was mixed. It ranked 22 in dealing with construction permits, but 81 in enforcing contracts.¹³

Although Mexico's ranking has not changed much in the past few years, other governance indicators have deteriorated. The Worldwide Governance Indicators developed by the World Bank have decreased.¹⁴ For example:

- the score on Control of Corruption was 49.0 in 2009 compared to 54.4 in 2003;¹⁵
- the Government Effectiveness score was 60.5 in 2009 compared to 62.1 in 2003;
- the Voice and Accountability score was 53.6 in 2009 down from 55.3 in 2003;
- scores on Political Stability and Rule of Law decreased significantly from 42.3 in 2003 to 22.2 in 2009 and from 44.8 to 34.0, respectively.

The World Bank indicator on corruption shows that Mexico ranks in the 25th to 50th percentile, meaning that more than half of the 213 countries surveyed are better at controlling corruption than Mexico is. This is borne out by the latest Transparency International Corruption Perception Index, which ranks Mexico 98 out of the 178 countries reviewed, a drop from 2009 when Mexico ranked 89.¹⁶ In terms of the perceptions index, Mexico scored 3.1 in 2010, down from 3.3 in 2009.¹⁷

7. World Development Indicators database (October 15, 2010), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

8. World Development Indicators database (October 15, 2010), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>.

9. INEGI, Press Release No. 059/10 (February 2010), available at <http://www.inegi.org.mx/inegi/contenidos/espanol/prensa/boletines/boletin/Comunicados/PIB%20a%20precios%20constantes/2010/Febrero/comunica.pdf>.

10. Ibid.

11. OECD, Mexico - Economic Outlook 88 Country Summary, available at http://www.oecd.org/document/26/0,3343,en_33873108_33873610_4527004_2_1_1_1_1,00.html.

12. The International Bank for Reconstruction and Development/The World Bank, Doing Business 2011 – Mexico, available at <http://www.doingbusiness.org/-/media/fpdkm/doing%20business/documents/profiles/country/db11/mex.pdf>.

13. Ibid.

14. Kaufmann D., A. Kraay, and M. Mastruzzi 2009: Governance Matters VIII: Governance Indicators for 1996-2008, World Bank Research Working Paper 4978 (June 2009), available at <http://info.worldbank.org/governance/wgi/index.asp>.

15. The scale is from zero to 100, with the higher the number, the lower the level of corruption.

16. Corruption Perceptions Index 2010 at 8, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results. The 2009 data is available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

17. On a scale from 10 (highly clean) to 0 (highly corrupt). Denmark, New Zealand and Singapore were the highest scorers, each with 9.3.

Every two years, TM publishes the National Index of Corruption and Good Governance in Mexico, which consists of data gathered from home surveys on bribes paid to public officials during the year surveyed. The report measures corruption related to the use of public services by households.¹⁸ Among the report's findings were that in 2007, Mexicans spent 27 billion pesos (about US\$2.184 billion) on "acts of corruption," or an average of 8 percent of each Mexican family's annual income.¹⁹ Those surveyed reported 197 million "acts of corruption" in 2007, compared to 115 million in 2005.²⁰

In the face of continuing corruption, the Mexican Government has taken further steps to address the issue. In March 2011 President Calderón proposed two new laws that will not only punish individuals involved in corrupt acts, but will also reward those who report cases of corruption. The "Ley Federal Anticorrupción en Contrataciones Públicas" (Federal Law on Anticorruption Regarding Public Contracts) and revisions made to the "Ley Federal de Responsabilidades Administrativas de los Servidores Públicos" (Federal Law of Administrative Responsibilities of Public Servants) will obligate the government to follow a clear set of procedures that provide protection for the individuals who report fraud. They will also create a system of economic incentives and recognition to reward those that contribute to identifying corrupt officials and acts.²¹ The entry into force of these laws depends on the approval of the Chamber of Deputies.

Importance of Public Procurement

The importance of transparent and streamlined public procurement in Mexico cannot be overstated given the relative weight of public expenditures in the economy. According to the Ministry of Public Administration (SFP), the total amount of procurement spending by the federal government (including state and local governments using federal resources) in 2008 equaled 663.971 billion pesos (about US\$53.175 billion) and rose to 970.314 billion pesos (about US\$78.498 billion) in 2009.²² This constituted about 18.4 percent of Mexico's GDP in 2008.²³ In 2008, five government entities accounted for almost 72 percent of all federal procurement: Pemex (45.6 percent); Comisión Federal de Electricidad and Compañía de la Luz y Fuerza Centro, the state electricity monopolies (11.3 percent); Instituto Mexicano del Seguro Social, the provider of health and social security services to private employees (6.6 percent, the Ministry of Transportation and Communications (4.8 percent) and Instituto de Seguridad y Servicios Sociales de Los Trabajadores del Estado, the provider of health and social security services to federal employees (3.6 percent).²⁴

18. Índice Nacional de Corrupción y Buen Gobierno 2007, "Informe ejecutivo," available at http://www.transparenciamexicana.org.mx/documentos/INCBG/2007/Presentacion_INCBG_2007.pdf. TM has conducted the 2009 survey but the report has not yet been published.

19. Índice Nacional de Corrupción y Buen Gobierno 2007, "Informe ejecutivo," available at http://www.transparenciamexicana.org.mx/documentos/INCBG/2007/Presentacion_INCBG_2007.pdf. TM has conducted the 2009 survey but the report has not yet been published.

20. Ibid. at 2.

21. Justice Mexico Project, "President Calderon Proposes New Initiatives to Fight Corruption," (March 11, 2011), available at <http://justiceinmexico.org/2011/03/11/president-calderon-proposes-new-initiatives-to-fight-corruption>.

22. Fourth Report of Activities of the Ministry of Public Administration ("SFP Fourth Report"), at 54, available at http://www.funcionpublica.gob.mx/images/doctos/TRANSPARENCIA/Informes_de_Labores_E/4to-informe-de-labores-sfp.pdf. US\$ figures in this report are converted at one peso = US\$0.0809, the rate applicable on January 1, 2011.

23. OECD, Roundtable on Collusion and Corruption in Public Procurement, DAF/COMP/GF (2010)6 (Oct. 15, 2010) at 245, available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF%282010%296&docLanguage=En>.

24. Ibid. The Compañía de la Luz y Fuerza Centro was liquidated in October 2009. See <http://sdpnoticias.com/sdp/contenido/nacional/2009/10/11/10/511177>.

The number of public procurement contracts equaled 76,123 in 2009, totaling 970.314 billion pesos (about US\$78.5 billion). In the first half of 2010, 31,507 public procurement proceedings were carried out for a total amount of 231.826 billion pesos (about US\$18.8 billion). Open tenders accounted for the largest shares of the total number of public procurement proceedings: 50.75 percent in 2008, 39.51 percent in 2009, and 41.19 percent in the first half of 2010. Their share is also sizable when it comes to the value: 60.8 percent in 2008, 60.82 percent in 2009, and 81.46 percent in the first half of 2010, in each case of the total annual procurement.²⁵ The following table shows the breakdown of federal procurement in 2010.

Number and Amount of Federal and Federally-funded Procurements²⁶

January 1 – June 30, 2010

(in millions of pesos)

Type of Procedure	National		International		Total	
	Number	Amount	Number	Amount	Number	Amount
Total	28,189	170,699	3,318	61,127	31,507	231,826
Open tender	11,558	136,898	1,421	52,384	12,979	189,282
Goods and services	5,552	98,518	1,344	37,928	6,896	136,446
Public Works and related services	6,006	38,380	77	14,456	6,083	52,836
Request for proposals from at least 3 providers	2,261	3,158	288	378	2,549	3,536
Goods and services	1,432	1,213	287	376	1,719	1,589
Public works and related services	829	1,945	1	2	830	1,947
Sole source (direct award)	14,370	30,643	1,609	8,365	15,979	39,008
Good and services	13,441	21,585	1,600	7,815	15,041	29,400
Public works and related services	929	9,058	9	550	938	9,608

25. SFP Fourth Report at 54.

26. Ibid. at 210-11.

3. Legal Framework for Public Procurement

Mexico is a federal constitutional republic, with 31 states and a Federal District that comprises Mexico City and is a separate governmental entity. Public procurement occurs at all levels of government, and each state has its own procurement laws and regulations. This report focuses on the national legal framework which applies to all procurements using federal resources, regardless of the level of government.

The Procurement Laws

Article 134 of the Mexican Constitution stipulates that the management and use of federal resources by states, municipalities, the Federal District and organs of territorial administration must take place in accordance with principles of efficiency, effectiveness, economic soundness, transparency, and integrity. In addition, Article 134 stipulates that, unless otherwise provided in law, purchase and lease of all types of goods and services, and the contracting of public works, must be conducted using the public tender mechanism to ensure the best possible terms as far as price, quality, timeliness, and other relevant factors. The Law on Procurement, Leases and Services by the Public Sector (LAASSP) and the Law on Public Works and Related Services (LOPSRM) – together the “Procurement Laws” – both passed in 2000 with subsequent amendments and implement Article 134 on the federal level.²⁷

Among the entities required to comply with the provisions of the LAASSP and LOPSRM are the various components of the Federal Public Administration – Federal Ministries, the Office of the Legal Advisor to the Federal Executive Branch, the Office of the Presidency, the Office of the Attorney General, decentralized and federal agencies, municipalities, plus all public entities using either total or partial federal funding. LAASSP and LOPSRM do not cover procurement by the Federal Judicial Branch.²⁸ Procurements by Pemex, the state-owned petroleum company, are also governed by a separate law, except for procurements that are not part of its core business.²⁹ Procurements by other state-owned enterprises are covered by the LAASSP and LOPSRM.

2009 Amendments to the Procurement Laws

In April 2009, the Mexican Congress approved the presidential decree amending the LAASSP, the LOPSRM, the Federal Law on the Administrative Responsibilities of Civil Servants and the Federal Criminal Code. These amendments, meant to make public procurement procedures more streamlined and efficient, were published in May 2009 in the *Federal Official Journal*.³⁰

27. LAASSP governs the acquisition and leasing of goods and services, while LOPSRM governs public works.

28. Art. 81 of the Organic Law of the Federal Judicial Police empower the Council of the Federal Judicature to issue General Resolutions by virtue of which the procurements, leases, divestitures, and provision of services and contracting of works are carried out by the Judicial Branch, with the exception of the Supreme Court.

29. Pemex Law, Arts. 51, 52, available at <http://www.pemex.com/files/content/LPM.pdf>.

30. See SFP Press Release “Agilizar el Gasto en Compras Públicas y Adquisiciones, meta de Reformas que Promulga Presidencia de la Republica,” (May 27, 2009), available at http://portal.funcionpublica.gob.mx:8080/wb3/wb/SFP/comunicado_270509.

Although many of the amendments aimed specifically to promote participation by small and medium-sized enterprises in public procurement, they made significant changes which help all bidders. The amendments with general effect include the following:

1. Reduction in the maximum period of time for making payment to providers from 45 to 20 days.
2. Bid documents will be available on Compranet free of charge.
3. Requirement to post on Compranet and the website of procuring entities information concerning registered suppliers, their products, services, and business history.
4. Reduction in time periods for resolving disputes.
5. Requirement to include in invitations to bid the causes for disqualification so that bidders have more legal certainty of their rights during the procurement process.
6. Adoption of a more transparent way to issue the award, so that all bidders know who won and why, as well as why the other bidders lost.
7. A clearer way to classify national and international public bids.
8. Clearer penalties for failure to complete public works on time.
9. Requirement that social witnesses – an independent civil society observer – participate in major government procurements, and their reports be made public.³¹

The adoption of the social witness provisions is an extremely important contribution to the transparency and integrity of the procurement process, and also a cost-saving measure.³² The program is the result of an initiative of TM to facilitate the participation by civil society as external observers in public procurements. Originally, social witnesses participated as a result of guidelines issued by SFP in 2004.³³ The guidelines stipulated that SFP keep a registry of individuals and non-governmental organizations which may participate in all stages of a procurement conducted by any institution of the Federal Public Administration.

Pursuant to the guidelines, at the conclusion of their participation, social witnesses are to issue a publicly available statement regarding the procurement proceedings. This statement includes the observations of the social witnesses on the transparency and credibility of the process and, as appropriate, their recommendations and is posted on the website of the procuring entity as well as on Compranet (www.compranet.gob.mx) and placed in the file of the tender. In addition, during the procurement process, the social witnesses are required to issue an alert if they detect any alleged irregularities.

For the executive branch of government at the federal level the Social Witness Program is publicly funded. The Procurement Laws state that social witness funding should reflect the value of a given procurement and its importance.³⁴

31. LAASSP Art. 60-70.

32. Joanne Cady, Tiago Peixoto and Mary McNeil, "Beyond Public Scrutiny: Stocktaking of Social Accountability in OECD Countries," World Bank Institute Working Paper at 9 and 106, available at <http://www.oecd.org/dataoecd/10/24/39608867.pdf>.

33. The Guidelines were published in the Federal Official Journal (Sept. 8, 2004), available at <http://200.34.175.29:8080/wb3/work/sites/SFP/resources/LocalContent/1019/3/adq18.pdf>.

34. LAASSP Art. 66.

Following the 2009 amendments, social witnesses are now legally required in major procurements – those valued at more than the equivalent of five million days of current general minimum wage in force in the Federal District³⁵ – or when the impact on the key programs of the agency or entity involved so warrants, and if so mandated by the SFP “designation committee.”³⁶

As of June 2010, SFP had registered 39 social witnesses for public procurement projects, five organizations and 34 individuals.³⁷ In the first half of 2010, these social witnesses participated in 67 procurements valued at 109.651 billion pesos (about US\$8.87 billion).³⁸

According to the SFP assessment, “[social witnesses] have had an impact on improving procurement procedures by virtue of their contributions and experience, to the point that they have become a strategic element for ensuring the transparency and credibility of the procurement system.”³⁹

Tendering Procedures

The Procurement Laws require that the Federal Public Administration conduct public procurements using one of three types of procedures depending on the circumstances: public tender, request for proposals from at least three suppliers, and sole source (direct award).

The general rule is that public procurements be conducted through open competitive tenders. Sole source and limited open tenders (with bids from three suppliers) are allowed under certain circumstances. Sole source procurement is permitted, for example, in emergency situations, for national security reasons, or when only one supplier exists, or the applicant is the sole possessor of the ownership of exclusive licensing of patents, copyrights or other proprietary rights.⁴⁰ Sole source and limited open tenders are also permitted if the procurement involves highly specialized services or goods, such as nuclear installations or biochemical equipment. The law also makes exception for certain groups, such as projects that involve rural or marginalized urban groups.

The open tender procedure in Mexico consists of the following stages:

1. posting a pre-RFP announcement on Compranet and in the Federal Official Journal;
2. issuance of a RFP;
3. registration of interested parties;
4. visit to the site where work is to be performed in the case of public works;

35. As of December 1, 2010, that amount is 287,300,000 pesos (US\$ 23,050,000), based on a daily minimum wage of 57.46 pesos (US\$ 4.61) as set out at Servicios Administración Tributaria, Salarios Mínimos 2010, http://www.sat.gob.mx/sitio_Internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/45_17119.html.

36. The designation committee oversees selection of social witnesses, including setting hourly rates, making suggestions to improve social witness participation and selection, and dismissing social witnesses who act contrary to the regulations. See, <http://www.funcionpublica.gob.mx/unaopSFP/comunes/testigo.htm>.

37. SFP Fourth Report at 124. The list of registered social witnesses is available at http://200.34.175.29:8080/wb3/wb/SFP/unaops_social.

38. SFP Fourth Report at 124-125.

39. Ibid.

40. For more detail, see LAASSP, Art. 41.

5. tender clarification meeting;
6. submission of bids and proposals;
7. opening of the proposals;
8. evaluation of the accepted proposals;
9. issuance of award decision; and
10. public announcement of the award decision.

According to the Procurement Laws, there are three types of public tenders: national public tenders, international public tenders conducted under international free trade agreements to which Mexico is a party, and open international public tenders. In national public tenders, only Mexican nationals may participate. The commodities covered by the tender must be produced in Mexico and their content must be at least 50 percent national origin.⁴¹

In international public tenders carried out in accordance with the procurement chapters of free trade agreements that Mexico is a party to, only Mexican bidders and foreign bidders from signatory countries may participate, under two distinct scenarios:

- first, when required by the provisions of such free trade agreement under which the given tender is covered;
- second, when a national tender has been declared void (either because no proposals were submitted or because none of the proposals presented satisfied the stipulated requirements, or none of the prices offered were acceptable).⁴²

In open international public tenders, both Mexican and foreign bidders may participate, regardless of the origin of the goods to be procured or leased and services to be contracted. In addition, when an international public tender carried out under a particular free trade agreement is declared void – because no bids met the tender’s technical criteria or the proposed prices were not acceptable – the tender may be reopened using the open international public tender mechanism.

In the first half of 2010, the total number of national public tenders, 11,558, accounted for 89 percent of the procurement procedures. However, measured by value – 136.898 billion pesos (about US\$11.1 billion) – national public tenders accounted for 72 percent of the total federal procurement, indicating that national public procurement contracts were more numerous but were of lesser value than international procurements. This trend was also visible in 2009 when national public tenders accounted for 87 percent of the total number and about 60 percent of the value.⁴³

Tender procedures in Mexico are regulated by a number of institutions with some shared responsibilities. SFP is authorized to ensure that the Federal Public Administration complies with regulations and

41. LAASSP, Art. 28(I) and LOPSRM Art. 30(I).

42. LAASSP, Art. 28(II) and LOPSRM Art. 28(II).

43. SFP Fourth Report at 210.

provisions governing tenders and to establish appropriate legislation. The Ministry of Finance and Public Credit (SHCP) reviews draft regulations and guidelines applicable to the procurement of goods and services and the implementation of public works overseen by SFP.⁴⁴ Finally, the Ministry of Economy has the authority to establish the rules for governmental agencies in the case of programs meant to promote the participation of national firms, particularly SMEs, in public procurement. In issuing those rules, the Ministry of the Economy is required to take into account the opinion of SFP.⁴⁵

4. Findings of the Legal Assessment

In addition to the Procurement Laws, there are a number of other laws that govern procurement practices in Mexico. For purposes of determining Mexico's implementation of the APEC Standards, TM reviewed the following laws and consulted the activity reports of the federal agencies charged either directly or indirectly with the application of these laws:

- Law on the *Federal Official Journal* and Governmental Newspapers;
- Federal Civil Code;
- Federal Code of Civil Procedure;
- Federal Law on Administrative Procedure;
- Federal Law on the Responsibilities of Civil Servants;
- Federal Law on the Administrative Responsibilities of Civil Servants;
- Federal Law on Transparency and Access to Government Public Information;
- Federal Law on Economic Competition;
- Federal Law on the Budget and Fiscal Responsibility;
- Law on the Protection of Constitutional Rights;
- Federal Law on Administrative Law Court Procedure.

Based on the results of this review of the legal framework, it seems that almost all of the principles set forth in the APEC Standards are present in the Mexican laws. As described below, the legal framework stipulates that public procurements must be governed by criteria such as open access, open competition, equal opportunity for tender participants, and fair dispute resolution in all stages of the process. These elements are crucial to maintaining integrity in the various stages of the government procurement process. The business consultation, however, revealed that implementation is not equally satisfactory and in specific areas insufficient.

1. Prompt publication of all laws, regulations, and procedures pertaining to public procurement

Both nationally and at the level of the Mexican states there exist a number of laws regulating the publication of, and access to, Mexican legislation in general and procurement-related legislation in particular. For any federal regulation to become effective, it must first be published in the *Federal Official Journal*, an official gazette where all laws, decrees, regulations, agreements and other rulings must be published.

44. Article 31, Organic Law of the Federal Public Administration.

45. LAASSP, Art. 8; LOPSRM, Art. 9.

In addition, the legal framework regulating the operations of the Federal Government and the various agencies and entities constituting the Federal Public Administration are available through the Normateca website, www.normateca.gob.mx. This website contains all laws, regulations, internal guidelines, administrative decisions and other information about the operation of the Federal Government. Its stated purpose is to promote transparency, provide access to information, combat corruption, and increase productivity of civil servants by streamlining their access to relevant information via electronic means.⁴⁶ As of December 31, 2009, there were a total of 710 legal documents posted, of which 165 were laws promulgated by Congress and 545 regulations were published by agencies within the Federal Public Administration.⁴⁷

In 2009, users of the Federal Normateca conducted a total of 503,284 searches of published regulations.⁴⁸ Normateca's User Satisfaction Index for 2009 received a score of 76 out of 100, a level higher than similar websites.⁴⁹

With regard to access to public information in general, which is a constitutionally guaranteed right,⁵⁰ the Federal Law on Transparency and Access to Government Public Information, in effect since 2002, created the Federal Institute for Access to Public Information (IFAI) to serve as an entity mandated with promoting access to and disseminating public information.⁵¹ In order to facilitate the procedure for requesting information on the Federal Government and more than 230 agencies of the Federal Public Administration, the IFAI created an online consultation system known as INFOMEX,⁵² which was also adopted by the Mexican Judicial Branch and by a number of federal agencies and state governments.

In addition, the Federal Regulatory Improvement Commission (COFEMER) is responsible for maintaining the Federal Registry of Procedural Steps and Services, an online public inventory in which agencies comprising the Federal Public Administration record their procedures and services.⁵³ Authorities may not implement procedures that have not been recorded.

At the state level, a substantial number of rules are published in individual official state gazettes. In addition, each state has its own system for providing access to public information, and as a result a number of state-specific INFOMEX services exist, for instance INFOMEX Chihuahua, INFOMEX Jalisco, etc.

46. Cinvestav, <http://www.cinvestav.mx/ingles/AboutCinvestav/Regulation/Normateca.aspx>.

47. Tercer Informe De Ejecución Del Plan Nacional De Desarrollo 2007-2012 ("Tercer Informe"), at 661, available at http://pnd.calderon.presidencia.gob.mx/pdf/TercerInformeEjecucion/5_4.pdf.

48. *Ibid.*

49. *Ibid.*, citing Foresee Results, <http://www.foreseeresults.com>.

50. Mexican Constitution, Art. 6.

51. Federal Law on Transparency and Access to Government Public Information, Art. 33.

52. Infomex Gobierno Federal, available at <https://www.infomex.org.mx/gobiernofederal/home.action>.

53. COFEMER, "¿Quiénes somos y qué hacemos?", available at <http://www.cofemer.gob.mx/contenido.aspx?contenido=29>.

2. Publication of either a positive or negative list of the procuring entities subject to its rules

As noted above, the Procurement Laws specify the entities that are subject to their provisions. These are all components of the Federal Public Administration: Federal Ministries, the Office of the Legal Advisor to the Federal Executive Branch, the Office of the Presidency, the Office of the Attorney General, decentralized and federal agencies, municipalities, plus all public entities using either total or partial federal funding.

3. Publication in advance of any procurement rules the government proposes to adopt and providing a reasonable opportunity for the public to comment on such changes

Governmental bodies in Mexico have an obligation to submit draft regulations (including those pertaining to public procurement) and regulatory impact assessment associated with them to the Federal Regulatory Improvement Commission (COFEMER) in order to be reviewed and submitted for public consultation.⁵⁴ COFEMER's purpose is to ensure that draft laws are uncomplicated and easy to implement. To that end, COFEMER receives for consideration comments from the general public on draft regulations, makes recommendations aimed at improving regulations in specific sectors, and promotes competition at the national level. Since 2001, the number of comments on draft laws submitted through the COFEMER mechanism has increased considerably, from 69 comments in 2001 to 8,062 in 2008 (although it should be noted that these comments do not predominantly refer to public procurement).⁵⁵

4. Providing information and responding to questions about actual or proposed procurement rules

Requests for federal public information, including information about proposed public procurement rules, can be made through INFOMEX and are regulated by the Federal Law on Transparency and Access to Government Public Information.⁵⁶

5. Notifying persons affected directly by administrative proceedings regarding public procurement

Articles 66 and 69 of LAASSP and Articles 84 and 87 of LOPSRM stipulate that SFP coordinate with entities involved in administrative proceedings so that they know their rights and can resolve disagreements arising from public procurement procedures in accordance with the existing legal provisions outlined in those laws.

54. 2009 APEC Economic Policy Report, Annex 3-1: Individual Economy Reports on Regulatory Reform Framework, p. 12, available at http://publications.apec.org/publication-detail.php?pub_id=942. See also Annex 3-1: Individual Economy Reports on Regulatory Reform Framework.

55. Most of the comments in 2008 focused on rules regarding the protection of the corn industry (7,089 comments).

56. Article 7 Section XVII, available at <http://www.ifai.org.mx/transparencia/LFTAIPG.pdf>.

6. Maintaining domestic procedures for prompt review and correction of final administrative actions

As a result of the 2009 amendments to the Procurement Laws, there are three mechanisms for resolving disputes involving public procurement: objection (*inconformidad*), reconciliation, and arbitration. The objection mechanism provides a means for challenging the stages of the procurement process up to the point of signing of the contract between the tendering authority and the successful bidder. Reconciliation and arbitration are mechanisms for resolving disputes involving the awarding of contracts.

“Objection” is a mechanism available to individuals or companies participating in a public tender or RFP extended to at least three suppliers to question the legality of any step in the procurement process. Bidders must provide proof of “legally valid interest” (*interés jurídico*), i.e., show that the irregularity being challenged legally harms their interests as participants in the tender procedure. The SFP must be notified of all objections through its Directorate General of Objections or the Internal Control Units pertaining to the national agencies with which the SFP has signed coordination agreements.

The time limits for filing objections vary in accordance with the action being challenged. For example, objection to the tender invitation and the clarification meetings must be filed within six business days following the conclusion of the most recent clarification meeting. Objections involving the submission and opening of proposals and granting of the award must be filed within six business days following the public hearing at which the award was announced, or following the feedback provided to bidders in cases not requiring a public hearing. Objections to the voiding of the tender must be filed within six business days following the notification of cancellation. Finally, objections to actions and omissions by the tendering authority that prevent finalization of the contract in accordance with the terms established in the tender invitation or the provisions of the LAASSP must be filed within six business days subsequent to the deadline established in the award for finalization of the contract or, in the absence thereof, by the legally stipulated deadline.

Between September 2009 and June 2010, SFP received 1,504 filings of objections, of which 713 involved procurement of goods, 437 involved services procurement, six involved lease contracts, and 348 involved public works contracts.⁵⁷ During that time, the average time required for resolving an objection was 45 business days, reflecting SFP’s efforts to resolve disputes expeditiously. SFP resolved 1,587 objections in that same period, 646 through agreement of the parties, 564 were denied and 377 resulted in partial or total nullification of the procedures.⁵⁸

“Reconciliation” applies after the contract has been awarded. It seeks to resolve disputes arising from the interpretation of, or compliance with, contracts involving the procurement of goods, services, leases or public works. Either providers or the procuring entity may submit a petition

57. SFP Fourth Report at 148.

58. *Ibid.*

for reconciliation to the SFP. Subsequently, SFP is supposed to establish a date and time for the reconciliation hearing, which must be held within fifteen business days following the date of receipt of the petition, and issue a summons to the parties to appear at the hearing.

Between September 2009 and June 2010, SFP presided over 198 reconciliation hearings. In 126 of them the parties willingly reached a mutual agreement, in 48 cases the requirements to proceed were not met or the parties decided not to proceed, and in 24 the rights of the parties remained unchanged.⁵⁹

Arbitration is a mechanism for resolving disputes arising between parties out of the interpretation or implementation of long-term service contracts involving multiple fiscal years, in accordance with the provisions of the Mexican Commercial Code. Arbitration may be provided through a specific clause in a contract or an agreement drawn up subsequent to contract implementation. The advisability of including such a clause or of signing an arbitration agreement is determined by the designated public official in accordance with public procurement policies, regulations, and guidelines.⁶⁰

In addition to the provisions of the Procurement Laws, post-award disputes can be resolved through court proceedings and appeal processes. For example, depending on the case involved, one might seek reparation at the level of Mexico's highest judicial authority – the Mexican Supreme Court – by means of the *Juicio de Amparo* (Petition for the Protection of Constitutional Rights).⁶¹

Finally, disputes related to bid-rigging, collusion and other anti-competitive actions can be brought to the Federal Competition Commission (CFC). The CFC is responsible for preventing, investigating and combating monopolies, anticompetitive practices, and concentrations pursuant to the Federal Law on Economic Competition.

7. Publishing public procurement opportunities in a transparent manner accessible to all suppliers

Information regarding public procurement for the agencies comprising the Federal Public Administration, as well as the 32 federal entities and 788 local governments are available on Compranet. This e-system is accessible free of charge to the general public and anyone seeking information on what tenders are currently being held. Available searchable information includes tender procedures, requests for proposals and history of awards, notes, and contracts. Also available is information on providers and tendering authorities, the annual procurement program, complaints filed with procuring entity's Internal Control Units,⁶² electronic tenders, and applicable laws and regulations. Additional information can be found on the website of each tendering authority.

59. Ibid.

60. LAASSP, Art. 81; LOPSRM, Art. 99; Mexican Commercial Code, Art. 1423.

61. The protection of constitutional rights (amparo) is the highest appeal mechanism in the Mexican judicial system. It is a legal proceeding functioning as a mechanism for monitoring constitutionality, related to the legislative hierarchy, legal interpretations and protection of individual guarantees.

62. Each federal procuring entity has an office to monitor and audit compliance with procurement rules.

In 2009, Compranet averaged 22,400 visits per day and had 110,000 registered users.⁶³ In 2009, 73,977 procurements were posted, with a value of 966.324 billion pesos (about US\$78.175 billion), a growth of 45.5 percent over 2008.⁶⁴ The Compranet website also includes information on state procurements, but content in this regard is dependent on each state.

All RFPs issued by entities subject to the Procurement Laws must be made available on Compranet. As previously mentioned, access to bidding opportunities depends on the type of tender: only Mexican suppliers can participate in the national tenders, whereas foreign firms can participate in tenders carried out under the rules of free trade agreements and open international tenders. The Procurement Laws stipulate that within those tender categories procurement requirements may not constrain open access or open participation by any bidder; publication of procurement opportunities must be promoted; and economic competition must be encouraged.⁶⁵

Additionally, the Procurement Laws specify that prior to publication of a call for public tenders with estimated contract budget exceeding 10,000 times the general minimum wage in the Federal District,⁶⁶ the draft notice must be disseminated through Compranet at least ten working days in advance. During this time interested parties can submit comments through the Compranet website aimed at improving the draft RFP. In the case of bids involving lesser amounts, the pre-publication of the call for tenders is optional.⁶⁷

The time periods for submission of bids and opening of bids are extended for tenders open to foreign companies.⁶⁸ In addition, foreign companies have an equal ability to register on Compranet, providing contact data and goods and services offered in the same way that national suppliers do.

8. Making available to all suppliers all the information required to prepare a responsive bid

The Procurement Laws specify that the tendering authority must make available to bidders all information required for preparing a responsive bid, including the stages involved in the tender procedure, relevant authorities, nature of the product or service being requested, technical requirements, amount and delivery time, where to obtain additional documentation, where to submit bids, and contact data for requesting additional information.

9. Maintaining transparent criteria for evaluating bids; evaluating bids and awarding contracts strictly in accordance with the criteria

63. Tercer Informe at 600.

64. Ibid.

65. Ibid.

66. Equal to about US\$46,100. See footnote 35.

67. LAASSP, Art. 29; LOPSRM, Art. 31.

68. LAASSP, Art. 32; LOPSRM, Art. 33.

The Procurement Laws require that all calls for tenders must include the criteria by which bids will be evaluated, preferably with the use of scores/percentages or cost-benefit criteria.⁶⁹ The procurement notice must include the stages of the procurement procedure and technical requirements. The procuring entity must maintain records of all procurement proceedings carried out for a period of three years in the event there is a challenge.⁷⁰

10. Awarding contracts in a transparent manner

Procuring entities must publish on Compranet the name of the winning bidder, the amount of the bid, and the reasons why the bid was selected. The procuring entity must notify unsuccessful bidders of the reasons why they were not selected.

11. Treatment of confidential information

The last APEC Standard requires APEC members to protect commercially sensitive information provided by suppliers during a public procurement. Mexican law implements this Standard in a number of ways. As a general principle, confidential information submitted in a tender is protected.⁷¹ This is the case whether the information is submitted electronically or in hard copy. For example, when tenders are submitted through Compranet, envelopes will be generated through the use of technologies that protect the confidentiality of information such that the information in the envelopes is protected from improper disclosure. Similarly, the procuring entity is prohibited from including confidential information in its tenders.⁷²

Mexico's public procurement laws also include two other aspects related to the protection of confidential information that are also relevant to the development of the tender procedure. These aspects, however, do not refer specifically to information provided by bidders and/or suppliers. Both aspects are exceptions having to do with information that is privileged or confidential in nature, in the terms established by the Federal Law of Transparency and Access to Public Government Information. The first exception refers to the case when each agency and entity makes available information to the general public through Compranet or its website, its annual program of procurement, leases and services. Any of this information that is privileged or confidential in nature cannot be made public.⁷³

69. LAASSP, Art. 29(XIII) and 36; LOPSRM, Art. 31 (XXII) and 38.

70. LAASSP, Art. 56; LOPSRM, Art. 74.

71. LAASSP Arts. 27 & 34.

72. LAASSP, Art. 37.

73. LAASSP, Arts. 21, 41X.

5. Results of the Private Sector Consultation

TM, TI-USA, and CIPE conducted a consultation in Mexico City with domestic and multi-national firms with the help of the American Chamber of Commerce of Mexico to obtain the business community's perspective on whether the APEC Standards are implemented in practice. The consultation also sought to gather recommendations from the private sector on what the Mexican Government and the companies themselves can do to improve compliance with the APEC Standards and integrity in public procurement. Representatives came from diverse sectors, such as consulting, legal services, energy, pharmaceuticals, and information technology.

Role of the private sector

The participants recognized that the way companies behave during the procurement process is of great consequence for promoting integrity and fair competition among bidders. Ultimately, it is up to the companies to properly prepare themselves for submitting more competitive and corruption-free bids. Participants were asked about their corporate anti-corruption programs. The answers were inconsistent, perhaps indicating a lack of familiarity with the international anti-corruption principles. Most said that they have anti-corruption programs in place and their purchasing and sales departments have a special policy dealing with bribes. When asked whether they had a program in place to comply with the 10th Principle of the United Nations Global Compact, only a few participants affirmed. According to this Principle, "Businesses should work against corruption in all its forms, including extortion and bribery."⁷⁴

Yet, there seems to be a disconnect between adoption of anti-corruption principles and implementation. Participants agreed that it is very hard for companies to do the right thing when it comes to procurement as currently conducted. They expressed concern that collusion among bidders is common. The level of collusion varies widely by industry, as do the formal and informal industry rules for monitoring and ensuring competition among firms in a given sector.

The quality and dissemination of regulatory provisions

Those present at the discussion were in agreement that the public procurement regulatory framework in Mexico is generally of high quality and more than adequate. Relevant regulations are published in the Federal Official Journal and available on government websites such as Normateca. However, the participants identified two problems in this area:

- Different levels of development between legislation at the federal and state levels; and
- The need to make timely regulatory changes whenever legislative amendments are made.

74. Voluntary UN initiative launched in 2000 through which firms commit to aligning their strategies and operations with ten universally accepted principles in four areas: human rights, labor standards, environment, and anti-corruption. United Nations Global Compact, available at <http://www.unglobalcompact.org>.

Many of the participants noted that the procurement rules are very complex and companies are required to expend considerable resources on understanding the procurement process and preparing bids that comply with all the requirements. Some firms have the available human resources and expertise, but others do not and it is very costly to acquire that expertise. According to some, it is easier to disregard the law than it is to comply with it. More importantly, the participants noted that in many cases companies feel that if they do not engage in corrupt activities to win government bids, others will.

Compliance with the legal framework

The fact that relevant laws and regulations are on the books is only the first step in improving transparency and integrity in government procurement. Compliance is key and there are many aspects to improve in this respect. From a government point of view, there is uneven compliance at the federal level, depending on the training and interest of officials at the procuring entities. Participants commented on the degree of discretion by public officials, citing the example of two tendering authorities interpreting the same law differently. They expressed a perception that some companies receive preferential treatment in open tenders while the bids of others are subjected to excessive scrutiny where failing to take care of even a minor detail can invalidate the whole proposal. The participants stressed the need for greater consistency in the application and enforcement of procurement rules.

Advertisement of procurement opportunities

Participants agreed that procurement opportunities are promptly advertised in the *Federal Official Journal* and on Compranet as required by law. The online dissemination of procurement opportunities, however, has some shortcomings. Views differed on how to evaluate Compranet. Some stated that it benefits SMEs by making access to procurement opportunities easier for them. Others considered Compranet to hinder participation by SMEs because using it requires reliable access to the Internet and a certain degree of sophistication in using information technology.

Participants also pointed out that the way information about open bids is made available on Compranet can be manipulated by public officials to the advantage of select companies. For instance, calls for tenders can be listed in categories different from the appropriate ones, so that potential bidders will be unable to find them unless they have insider information. The firms that know the “correct” category are able to benefit, since they will have little competition in the tender process. In general, then, participants concluded that Compranet is useful, but has loopholes that create corruption opportunities and it has yet to be made fully functional.

Open participation and fair competition

The participants agreed that even though the Procurement Laws guarantee equal treatment of bidders, some firms have better chances than other. To a degree unequal treatment is related to the corrupt practices such as bribery or insider information that give some companies unfair advantages in the bidding process. Yet, the participants noted that, in part, unequal access to open tenders also has to do

with companies not investing sufficient time and resources in understanding the Procurement Laws and regulations, researching particular tenders, and learning more about the procurement process in order to increase their competitiveness.

Many firms fail to take advantage of the legal means available to them for requesting public information or for filing legal challenges. In addition, despite the fact that firms are aware that the same procurements are conducted year after year, they fail to anticipate this and do not prepare their proposals ahead of the tender deadline. Some participants noted that it is more attractive for many companies to engage in corruption in order to win bids rather than to comply with applicable regulations and participate in procurement processes in a transparent manner.

The reason is that those companies believe that investing in information gathering and staff training necessary to prepare a successful bid actually costs more than bribery. As a result, the informal, corruption-prone practices are more attractive to business than the formal procurement process. The participants were in agreement that the more complicated it is for firms to participate in public procurement, the less incentive they have to compete in terms of quality and price.

Bidding process

Most participants noted problems involving clarification meetings and evaluation of proposals. For example, at clarification meetings, many procuring officials do not actually provide clarification but simply refer the bidder back to the bidding documents. Others do not have the technical expertise in order to answer questions. The participants felt there was no culture of constructive clarification meetings. Companies either obtain procurement information outside the formal process, perpetuating information asymmetries between competitors, or they do not ask for clarifications at all and consequently lose bids. There was an estimate that 50 to 70 percent of bids are lost because the bidders did not ask questions to clarify the requirements.

A crucial concern is that the evaluation process is handled by officials with inadequate subject matter expertise. As a result, they often do not understand the technical nature of a particular bid and have little to go on other than price. Participants thought that evaluation of bids should instead be conducted under the aegis of specialists with expertise in the product or service covered by a particular tender.

Dispute resolution

The companies were knowledgeable about the system for resolving disputes involving public procurement. Despite their knowledge and all the potential review procedures, most participants were of the opinion that, in order to avoid incurring costs (in terms of time, money, and human resources), companies prefer not to file legal challenges to tender proceedings even if they have a valid grievance.

6. Conclusions and Recommendations

The Legal Framework

The legal review found that, in the various stages of the procurement process, applicable Mexican laws and regulations mandate impartiality, competition, public notification and open access. In addition, the applicable laws and regulations are available to the public on websites such as Normateca Federal and Compranet, among others.

Laws and regulations exist to provide access to public information, consultations with the procuring entity, mechanisms to allow the public to comment on draft tender invitations and on relevant regulatory provisions, and challenge mechanisms during the procurement process and after the contract is awarded.

Mexico also has in place institutions whose mandate includes enforcing and verifying compliance with applicable laws and regulations, such as the SHCP, SFP, IFAI, and the Ministry of the Economy through COFEMER and the Federal Competition Commission (CFC). Apart from administrative regulations, Mexican legislation also includes regulations governing judicial processes, including mechanisms for filing appeals and seeking enforcement of constitutionally protected rights. Those legal protections are reinforced by Mexico's international commitments in the area of anti-corruption. Mexico has ratified the Inter-American Convention Against Corruption, as well as the UNCAC and the OECD Convention.

Given all these existing legal and regulatory provisions directly or indirectly helping to safeguard transparency and combat corruption in public procurement, the report concluded that the 11 APEC Transparency Standards on Government Procurement are well covered in Mexico's various existing normative provisions. However, the subsequent consultation with the private sector revealed serious gaps in the implementation of those laws and regulations.

Implementation of the Legal Framework

The consultation with the business sector highlighted a number of issues regarding government implementation of the Procurement Laws and business participation in the procurement processes.

Issues arise with respect to government implementation in all aspects of procurement. Interpretation of the rules and compliance are inconsistent both among federal agencies and between the federal, state and local government levels. Compranet can be manipulated to favor suppliers with inside information. Further information asymmetries arise because officials are not forthcoming in clarification sessions or do not have the technical knowledge to respond to questions. This leads bidders to be reluctant to even ask questions. Evaluation remains a problem, again due in part to the lack of technical expertise by procuring officials.

The private sector, however, plays a large role in perpetuating the shortcomings in transparency and integrity of public procurement. While participants acknowledged that manipulation of tenders, especially for big contracts, is never going to disappear entirely, there is an opportunity for companies to improve their behavior when it comes to procurement.

Recommendations

All governments need transparency and integrity in public procurement to ensure that competition on price and quality form the basis for procurement decisions, not connections to government officials. Considering the results of the legal review and the business consultation in Mexico, TI-USA, CIPE and TM make the following recommendations to strengthen the transparency and integrity of public procurement procedures in general and the level of Mexico's implementation to APEC Standards in particular.

Strengthen the Competitiveness and Integrity of the Private Sector

In order to enhance its competitiveness and the integrity of the public procurement system, the private sector needs to (i) increase its knowledge of the Procurement Laws; (ii) take advantage of the rights given to businesses under the Procurement Laws to comment, ask questions, seek clarification, and contest procurement decisions; and (iii) build a culture of compliance with the Procurement Laws. The private sector has both local and international reach. Therefore, increasing the knowledge of businesses participating in public procurement and promoting ethical conduct would contribute to the greater competitiveness of the private sector and the integrity of public procurement processes not just domestically but around the world. We propose the following actions by the private sector:

- Take advantage of existing rights under the Procurement Laws, for example adopting measures such as:
 - Assigning employees to identify annual procurements of interest to the company and prepare standard responses to RFPs for these annual procurements;
 - Obtaining a copy of the standard bidding document from Compranet and keeping it up to date to save time when a procurement opportunity comes up;
 - Encouraging employees to seek bid clarifications when needed, challenge procurement decisions, and seek debriefing when a bid fails.
- Use trade associations, sectoral organizations or committees within the national and foreign chambers of commerce to review and comment at every stage of procurement, such as review of proposed tenders, development of evaluation criteria, and clarification of bids.

- Encourage all companies, regardless of size, to adopt codes of conduct such as those set out in the TI Business Principles for Countering Bribery or the APEC Code of Conduct for Business⁷⁵ and provide training through universities, schools of business, trade associations, chambers of commerce, and civil society organizations on drafting, implementation, and enforcement of codes of ethics.

Enhance Equal Access to Public Procurement Information

Action in this area is needed by both government and the private sector. All information should be available on Compranet in a readily accessible format. The government should take the following steps:

- Improve the quality of bid clarification meetings by ensuring that persons with technical knowledge are available to answer questions.
- Audit the postings on Compranet by procuring entities to ensure that these entities are making public all required information in a way that can be found by all potential bidders.
- Ensure that officials involved in preparation of bid specifications and evaluation have substantive technical expertise.

Give Regulatory Agencies the Authority to Implement Policy Decisions

Many of the important economic regulatory agencies in Mexico are limited to recommending policy changes and implementing enforcement efforts to the relevant ministries. These include the Federal Commission on Competition, COFEMER and the Federal Commission on Energy Regulation. Many of their recommendations are ignored at the ministerial level for political reasons. In order to enhance the integrity of the public procurement process, these important economic regulatory agencies should be given the autonomy and authority to implement policy decisions directly, instead of just recommending changes and carrying out enforcement efforts.

Strengthen Government Action to Enhance Private Sector Integrity

The government can improve transparency and accountability in public procurement by clearly stating its expectations for anti-corruption controls that bidders should have. Such requirements can be tailored to the size of bidders in order not to adversely impact SME eligibility:

- Require bidders to have in place a code of conduct, training programs, and internal controls commensurate with their size and level of risk of corruption.

75. "Complementary Anti-Corruption Principles for the Public and Private Sectors," available at <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/Anti-Corruption-and-Transparency-Experts-Task-Force.aspx>.

Broaden the Engagement of Civil Society in Procurement Monitoring

The role of civil society is crucial in ensuring full implementation of the APEC Standards. The Social Witness Program has proved to be a very effective tool but it is appropriate only in high value procurements because of the cost associated with the outside monitoring of procurement procedures in a particular tender. Civil society groups involved in government procurement, transparency and anti-corruption should join forces and find additional ways to promote transparency and integrity in government procurement. These groups should:

- Create a forum to share best practices about monitoring public procurement, share training materials on anti-corruption, and develop new monitoring tools.
- Encourage more technical training for social witnesses to further enhance their effectiveness.

ANNEX 1 – APEC TRANSPARENCY STANDARDS ON GOVERNMENT PROCUREMENT

1. Consistent with paragraph 1 of the Leaders' Statement, each Economy will:

(a) ensure that its laws, regulations, and progressively judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set asides for certain categories of suppliers), procedures and practices (including procurement methods) related to government procurement (collectively referred to as "procurement rules") are promptly published or otherwise made available, for example, via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them;

(b) designate an official journal or journals and publish the procurement rules in such journals on a regular basis and make copies of the journals readily available to the public (e.g., via the Internet); and

(c) promote observance of the provisions of this paragraph by the regional and local governments and authorities within its customs territory.

2. Each economy will disseminate information on its procurement rules, for example, by:

(a) publishing either a positive or negative list of the procuring entities subject to its rules; and

(b) providing a description of its procurement rules on the APEC Government Procurement Experts Group Home Page and linking its government procurement Home Page, where available, with the APEC Government Procurement Experts Group Home Page.

3. Consistent with paragraph 2 of the Leaders' Statement, when possible each Economy will publish in advance any procurement rules that it proposes to adopt; and provide, where applicable, interested persons a reasonable opportunity to comment on such proposed procurement rules.

4. Consistent with paragraph 3 of the Leaders' Statement, each Economy will endeavor upon request from an interested person or another Economy to promptly provide information and respond to questions pertaining to any actual or proposed rules. Each Economy will also establish contact points for such inquiries.

5. Consistent with paragraph 4 of the Leaders' Statement, in administrative proceedings applying to any procurement rule, each Economy will ensure that:

(a) wherever possible, persons of another Economy that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit; and

(c) its procedures are in accordance with domestic law.

6. Consistent with paragraph 5 of the Leaders' Statement, where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding matters covered by these Standards, that:

(a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the matter;

(b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;

(c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and

(d) ensure, subject to appeal or further review under domestic law, that such decisions are implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

7. Each Economy will endeavour to maximize transparency in access to procurement opportunities. This should be accomplished where possible by:

(a) where open tendering is adopted, publishing procurement opportunities in a medium readily accessible to suppliers (e.g., on the Internet);

(b) making the same information on procurement opportunities available in a timely manner to all potential suppliers;

(c) publishing contact details of purchasers, and their product/ service purchase interests, for suppliers wishing to register their interest in being notified of bidding opportunities that may not be publicly advertised;

(d) making available early advice of complex high-value procurement needs through staged procedures such as public requests for information, requests for proposals and invitations for pre-qualification, and allowing adequate time for interested suppliers to prepare and submit a response;

(e) making publicly available requirements and procedures for pre-qualification of suppliers; and

(f) any time limits established for various stages of the procurement process.

8. Each Economy will make available for suppliers all the information required to prepare a responsive offer. This should include where possible:

(a) providing in procurement notices the following information: the nature of the product or service to be procured; specifications; quantity, where known; time frame for delivery; closing times and dates; where to obtain tender documentation, where to submit bids, and contact details from which further information can be obtained;

(b) providing any changes to participating suppliers; and

(c) providing tender documentation and other information to suppliers promptly on request.

9. Each Economy will maintain transparent criteria for evaluating bids and evaluate bids and award contracts strictly according to these criteria. This should be done where possible by:

(a) specifying in procurement notices or tender documentation all evaluation criteria, including any preferential arrangements; and

(b) maintaining, for a predetermined period proper records of decisions sufficient to justify decisions taken in the procurement process.

10. Each Economy will award contracts in a transparent manner. This should be accomplished where possible by:

(a) publishing the outcome of the tender including the name of the successful supplier and the value of the bid; and

(b) as a minimum promptly notifying unsuccessful suppliers of the outcome of their bids and where and when contract award information is published, and debriefing unsuccessful suppliers on request.

11. Consistent with paragraph 11 of the Leaders' Statement, an Economy does not need to disclose confidential information where such disclosure would impede law enforcement, the enactment of laws, or that would be contrary to the public or national interest, or compromise security of the economy concerned or that would prejudice the legitimate commercial interests of particular persons or enterprises. Each economy will keep commercially sensitive information secure and prevent its use for personal gain by procurement officials or to prejudice fair, open and effective competition.

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