

FECC issues Competition Agenda for Public Procurement

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Introduction

On 17 July 2018 the Federal Competition Commission (FECC) issued its Competition Agenda for Public Procurement, in which it presented its findings regarding competition issues that arise during the public procurement process. In the agenda, the FECC also proposed certain courses of action (both administrative and legislative) to promote effective competition in public procurement.

This is not the first time that the FECC has raised concerns over competition in public procurement. In 2015 it issued [recommendations to promote competition](#) in this market. Similarly, it concluded several investigations into the commission of absolute monopolistic practices in public procurement procedures (mainly public tenders), which resulted in penalties for the relevant economic agents. In particular, the FECC has undertaken several investigations into the following markets:

- media monitoring;
- latex gloves;
- condoms and probes; and
- polyethylene gloves.

The FECC recently initiated investigations into possible public tender collusions in several markets, including:

- public works for the Cuernavaca to Acapulco highway;
- steel;
- medicines;
- laboratory studies and blood banks;
- toothbrushes; and
- weatherometers.

Notably, competition issues in the public procurement sphere may be the result of acts of corruption between individuals or companies and public officials.

Key concerns and recommendations

The FECC has summarised its key concerns regarding public procurement as follows.

Collusion can happen as early as the market investigation phase

During the market investigation phase, companies may manipulate quotes submitted to the procuring entity to obtain the contract at a higher price than that prevailing under competition conditions by creating an artificially higher maximum reference price. This may reduce competition due to the disqualification of certain bidders that offer unnaturally low prices. Further, companies may coordinate to make it difficult for a greater number of companies to participate by inducing the

AUTHORS

[Lucía Ojeda Cárdenas](#)



[Felipe García Cuevas](#)



imposition of technical or other restrictions.

Exemption methods restrict competition and may encourage collusion

Public tenders are generally the preferred method of public procurement for promoting competition and are therefore the most effective way to obtain better conditions in terms of quality, price and opportunity. However, the Public Procurement Law provides certain circumstances in which public entities may be exempted from using such methods. Given that these circumstances are vague, they may be used excessively without a clear and valid justification and thus as a means to collude.

Subcontracting may be used as a mechanism to collude

Subcontracting has certain efficiencies (eg, it may aid the completion of high-impact projects or allow for a company's specialties to be taken advantage of). However, it may also facilitate collusion, as it can be used as a payment mechanism in a collusive agreement.

Companies of the same economic interest group may simulate competition

Under the Public Procurement Law, public entities must abstain from receiving proposals in a public procurement procedure regarding the same type of goods or services from two or more individuals linked by a common partner or associate. However, this prohibition is not applicable to economic agents that have no common partners, but are part of the same economic interest group.

The participation of bidders that belong to the same economic interest group could raise the following competition issues:

- The apparent existence of many bidders in the market investigation phase could limit the scope of a bid.
- In simultaneous supply bids, entities from the same economic interest group could coordinate positions, making it impossible for other agents to participate successfully.
- A winning company could refuse to sign a contract with the procuring entity to force the latter to sign the contract with the agent (which is part of the same economic interest group) that presented the second-best proposal at a higher price.

Using points or percentages to evaluate proposals may favour less-agreeable proposals

The current evaluation mechanism for evaluating proposals requires the procuring entity's discretion as:

- criteria that favour certain bidders with a greater presence or history in the market tend to be established in tender rules, to the detriment of new or recent rivals;
- the mechanism generates incentives to give a higher value to technical aspects that may be unnecessary and distort the economic offer;
- the mechanism is a high-maintenance mechanism; and
- the mechanism opens the way for unlawful interference by economic interest groups or agents that may incorporate unnecessary technical requirements in the tender rules in their favour.

Modification of agreements facilitates a distortion of the competition process

Under the Public Procurement Law, agreements can be modified with regard to the volume of goods or services by up to 20%. Further, under the Public Works Law, agreements can be modified as long as the volumes or deadlines do not exceed 25% of those agreed in the original contract and no substantial changes are made to the original project. However, such modifications may restrict competition, as a contract extension may impede a supplier from offering its services, even when it may offer the government better conditions.

Modifications of concessions, permits and contracts used to avoid competing

The granting of extensions for concessions and permits is not subject to transparency rules; therefore, this may be used as a mechanism for concessionaires to extend the temporality of their titles without competition. Further, most modifications of conditions or clauses include a renegotiation to the original terms of the adjudicated contract.

Disqualification needed to deter collusion

The FECC imposes administrative fines for collusive acts, which acts as a deterrent. However, such

finances must be complemented with other mechanisms, such as disqualification from participating in public tenders, in order to increase the incentive for companies to comply with competition law. Despite the fact that the FECC has, in some cases, notified the Ministry of Public Affairs of a collusive act, the ministry appears to have initiated no investigations.

Laws and rulings that govern public procurement contain obstacles to competition

In a 2016 study, the FECC concluded that there are 32 different legal frameworks in the Mexican states, which contain several obstacles to competition – namely:

- preference margins for local suppliers in the adjudication of contracts;
- the existence of local public tender processes;
- the lack of an obligation to carry on a market investigation phase prior to a public procurement procedure; and
- the possibility of modifying the calls for proposals five business days prior to the submission of proposals.

As a result, the FECC issued two types of recommendation:

- executive actions, which require no legislative amendment; and
- non-executive actions, which require legislative amendments.

Executive actions

Executive actions, which require no legislative amendment, include:

- requiring the FECC to participate in relevant public tenders;
- creating a virtual market for small purchases of homogenous goods acquired by public agencies of the Federal Public Administration;
- impeding the negative effects of subcontracting and joint offers through adequate identification;
- increasing the standards for approving or amending agreements (eg, with regard to deadlines, values and quantities);
- ensuring that modifications of concessions, permits and contracts are transparent and avoiding discretion in this regard; and
- disqualifying economic agents which have been penalised for collusion from participating in future public procurement procedures.

Non-executive actions

Non-executive actions, which require legislative amendments, include:

- undertaking and publicising transparent market investigations;
- limiting the circumstances in which companies can be hired through procedures other than public tenders;
- eliminating the exemption provided in the Public Procurement Law and the Public Works Law for public procurement between public agencies and entities;
- allowing other bidders interested in restricted procedures to participate;
- restricting the simultaneous participation of companies that belong to the same economic interest group to avoid competition simulation;
- replacing the points or percentages mechanism with a two-phase mechanism (during the first or technical phase, the bidder must comply with a minimum objective and transparent and clear requirements for different items, using a binary criterion of compliance or non-compliance to qualify them; during the second or economic phase, bidders' economic proposals are evaluated on the same basis, considering those that obtained the minimum required points in the technical phase); and
- developing a General Public Procurement Law (procurement and public works) in line with international standards.

Comment

The FECC's Competition Agenda for Public Procurement is an important tool for minimising the possibility of collusive agreements and the preferential treatment of certain economic agents that

restrict competition. This is especially relevant considering that multiple FECC investigations have uncovered the existence of collusion in the public procurement sphere.

Further, the FECC's agenda aligns with two key objectives of the recently elected President Andres Manuel Lopez Obrador, who will take office in December 2018:

- fighting corruption (usually linked to absolute monopolistic practices and collusion); and
- generating savings for the government.

Both of these objectives could be achieved through the implementation of the recommendations set out in the Competition Agenda for Public Procurement.

For further information on this topic please contact [Lucía Ojeda Cárdenas](#) or [Felipe García Cuevas](#) at SAI Consultores SC by telephone (+52 55 59 85 6618) or email (loc@sai.com.mx or fgc@sai.com.mx). The SAI Consultores website can be accessed at www.sai.com.mx.

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