

Amendment to the Mexican Procurement Law and its impact on competition matters

The Mexican Procurement Law ("LAASSP" by its Spanish acronym) establishes that, by general rule, all governmental acquisitions of goods and services must be procured through public tenders. Only in exceptional situations, it shall be allowed to do said acquisitions through a direct award or a tender restricted by invitation. Nonetheless, according to the LAASSP, public tenders may have three different scopes: (i) national, in which only Mexican suppliers or those which offer goods or services with at least 50% of national content are able to participate; (ii) international under the coverage of treaties, aimed both for national suppliers and foreign ones that belong to a country that has a free trade agreement celebrated with Mexico; and (iii) open international, where national and foreign suppliers may participate regardless of their nationality. In principle, governmental agencies and entities shall prefer a national public tender and only in cases in which it is declared void or other exceptional situations, the scope of the public tender may be broadened.

On early July 2020, the Federal Economic Competition Commission ("COFECE") issued a public statement through which it proposed, along with other civil organizations, to enact a new Procurement Law that aimed to strengthen mechanisms to foster competition and reduce risks of corruption.¹ In general terms, this proposal included 6 main topics:

1. Development and creation of a National Platform for Public Procurement and the National Institute for Public Procurement. This institutional structure shall allow to organize and consolidate all acquisitions into one system to prevent disparities between acquisition systems that may be implemented by local authorities.
2. Establish mechanisms for the evaluation of corruption risks in the purchasing process, as well as for the identification and prevention of possible conflicts of interest that affect the integrity of public contracts.
3. Strengthen the rules for planning public contracting. In particular, to conduct them in a timely and feasible manner, based on budget availability and complete market research.
4. Introduce mechanisms to increase competition for contracts. In particular, limiting the causes for awarding contracts directly, and sanctioning with disqualification companies that collude in public tenders.
5. Incorporate specific processes for the planning, execution and monitoring of these contracting procedures that allow having controls for "large-scale contracts" and granting more time for market research and submission of offers. Among these specific processes, it is proposed to empower COFECE to issue a binding prior opinion on the proposals, in addition to requiring the participants to accredit their corporate integrity policies.

¹ <https://www.cofece.mx/comunicado-conjunto-06-07-2020/>

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6. Improve monitoring mechanisms in the execution of contracts by public entities. For this, it is recommended to start external and internal audits based on risks, as well as to expand the scope of participation of social witnesses and citizens to monitor compliance with the conditions agreed in the contracts.

This proposal was presented to the Congress, as part of the open parliamentary sessions organized by the Transparency and Anticorruption Commission of the Deputies Chamber. Nonetheless, it was not considered for the amendments to the LAASSP the Congress ended up discussing. Instead, the Congress decided to solely addition one paragraph to the current LAASSP, focused on the procurement of health goods or services. This amendment to article 1 of the LAASSP was published in the Federal Official Gazette on 11 August 2020 and became effective the next day. By virtue of this amendment:

1. The procurement of health goods or services incurred by agencies and entities with international intergovernmental organizations (such as the United Nations Office for Project Services, "UNOPS") is excluded from the application of the LAASSP.
2. Instead, previously established collaboration mechanisms will define how the procurement with international intergovernmental organizations shall be done up to the extend it is demonstrated that these mechanisms apply the principles set forth in the Political Constitution.

This amendment allowed the recently created Health Institute for Wellness ("INSABI") to celebrate an agreement with the UNOPS, on 31 July 2020, for the acquisition of various health inputs (except vaccines) for 2021-2024. Nonetheless, the terms of this agreement are not public and the INSABI still lacks operation rules. Regardless, on 25 August 2020, the UNOPS issued a public open invitation for all companies interested in participating in the corresponding tender procedure.

Acquisitions may be international, but may not be on an "even ground"

The amendment allows that the health goods and/or services that are procured through tenders conducted by international intergovernmental organizations may be acquired from foreign suppliers, without having to credit that a tender with a national scope is not feasible. This modification allows that more suppliers, from all over the world, can offer their goods and/or services. With more options of suppliers, competition may be improved. Nonetheless, for this improvement to actually take place, bidders must compete on an "even ground" from a regulatory standpoint. In particular, no undue advantage must be given to those coming from a foreign country in detriment to the national pharmaceutical industry.

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On that regard, it is worth to highlight that the Mexican Government:

1. Previously issued two agreements² that allow Mexican agencies to import medicines from abroad without having to bear the same sanitary requirements for obtaining a marketing authorization that are mandatory for companies that produce and/or commercialize medicines in the Mexican territory in accordance with the national regulation.
2. Also issued an agreement³ through which it eliminates all technical and administrative autonomy of the Federal Commission for the Protection against Sanitary Risks ("COFEPRIS"), which is the governmental agency in charge of issuing marketing authorizations for health goods and monitoring compliance with applicable sanitary requirements. Due to this agreement, COFEPRIS became subordinated to the Health Secretariat.

It should be analyzed whether any regulatory distinctions between national and foreign products is duly justified and does not compromise the effectiveness, traceability, and safety of health inputs. Indeed, it could represent an un-even ground in detriment of companies that have already obtained governmental authorization to produce and or commercialize health goods in Mexico. Moreover, it is advisable to monitor how this new administrative organization of COFEPRIS is implemented in practice in order to ensure that the agency is not being used for political purposes. For example, by unduly providing regulatory advantages to certain suppliers or blocking the entrance of others.

Public tenders may no longer be the general rule, but the exception

Even though the LAASP requires that public tenders are the general rule, most of the procurement of health goods and services during this administration has been done mostly through direct awarding and not by public tender procedures. For example, in 2019, 80% of medicines procurement was made through direct awards. This year, the number rises to 90%.⁴ These acquisitions have been criticized for their lack of transparency on the criteria to select the providers and for their overprices.

The Federal Economic Competition Commission has indicated that open tenders are generally the most favorable procedures for competition and free market access and, therefore, the most effective way to obtain products with the best quality and price.⁵ In addition, international treaties to which Mexico is party⁶ also

² Published in the Federal Official Gazette on 29 March 2019 and 1 January 2020.

³ Published in the Federal Official Gazette on 19 August 2020.

⁴ According to data from the Pharmaceutical Institute, INEFAM.

⁵ COFECE (2018), "Competition agenda for a complete procurement exercise". Available in Spanish at: <https://www.cofece.mx/wp-content/uploads/2018/07/CPC-ContratacionesPublicas.pdf>

⁶ For instance, the Merida Convention of the United Nations against Corruption, which entered into force in December 2015.

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require that acquisitions are mostly done through open public tenders that are competitive and privilege objective criteria for awarding. Hence, the governmental entities should always prefer them over other mechanisms of procurement. However, with the amendment, not only the wrongful trend of awarding directly will most likely continue, but it will be legally accepted. Thus, it is not clear how the inapplicability of the LAASSP by virtue of the amendment is the best way to procure health inputs more efficiently rather than a proper application of the LAASSP.

Participants of the industry must monitor how, in practice, constitutional principles are safeguarded

The Constitution provides that the collaborative mechanisms at least shall protect:

- The constitutional right to free market access and economic competition;
- The principles of efficiency, effectiveness, economy, transparency and honesty.

It will be necessary to observe how these constitutional provisions are applied in each specific case, since this will determine whether the procurement would present any constitutional irregularities that could be challenged through litigation procedures. For that purpose, it is indispensable that there is transparency in the agreements celebrated with these international intergovernmental organizations.

Relevant aspects are not being addressed

From the amended text, it is not possible to foresee the criteria nor the mechanisms to decide which and when specific health inputs shall be procured through international intergovernmental organizations. Such uncertainty in the criteria allows that any health procurement can be made outside the scope of the LAASSP without necessarily having mechanisms for transparency. By being able to decide it through arbitrary criteria, it is easier for corruption to arise.

Moreover, it is not clear why it would be necessary to involve international intergovernmental organizations in order to enable better procurement processes or why these potential improvements cannot be achieved with the LAASSP. Indeed, the purpose of these international intergovernmental organizations is to help countries with low demand capacity to obtain better conditions from suppliers with large bargaining leverage. However, Mexican health institutions do have a significant demand capacity that allows them to negotiate on a fair basis with its suppliers.

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In addition, these organizations deliver the acquired goods to a specific location (i.e. an airport); their distribution and storage is responsibility of the federal government. On that regard, the President informed that a new governmental distributor will be created to replace the services currently provided by various private entities. Yet, this governmental distributor still does not exist, and it has been questioned whether it will have the necessary technical knowledge and capacity to be solely in charge of this monumental task.

Finally, given that the LASSP will no longer be applicable to procurement processes with international intergovernmental organizations, there is no certainty on which would be the obligations that parties in a procurement process must comply with or the consequences in case of breach. They shall be defined arbitrarily on a case-by-case basis.

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