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V. Government procurement

A. Relevant law sources

The legal framework for government procurement is set out in two pieces of legislation, namely the Law of Public Acquisitions, Leases and Services of the Public Sector (Law of Acquisitions), and the Law of Public Works and Related Services (Law of Public Works), Both were published on January 2000, and on July 2005.

Those laws, having very similar contents, regulate the planning, programming, execution, budgeting, cost, conservation, maintenance, and control of acquisitions, lease of real property and goods, any type of service agreements, and public works, required by federal governmental entities, companies in which the federal government holds a majority ownership interest, and federal government-owned entities. Other laws and regulations in specific activities often detail the content, formalities, and obligations of the particular government procurement contracts.

In the event of contracts financed through external credit funds, which are granted to the federal government by international financial institutions, different procedures and requirements, as well as other provisions for awarding contracts, may be established in accordance with the opinions of the procuring entity, and the Ministry of the Public Function. Such requirements, procedures and provisions shall be stipulated in the invitation to bid, the solicitation documents, and the corresponding contracts.

In the event of a draw, preference will be given to disabled persons, or to companies in which 5 percent of their employees are disabled. The aforementioned percentage shall be determined in proportion to the total number of employees employed for a period of at least six months.

The agencies and entities may call for a public procurement procedure, only when there is a global or specific authorization issued by the Ministry of Finance, taking into consideration the respective public budget programs.

Before November 30th of each year, agencies and entities shall publish on their websites their annual program for acquisitions, leases, and services, or public works, as the case may be, for the next year.

Government entities and agencies may award contracts by virtue of any of the following procedures: (i) open bidding, (ii) restricted bidding, or (iii) single-source bidding.

The invitation to bid is published in the Official Federal Gazette, in a national publicized newspaper, as well as in the gazette of the procuring entity or agency. The solicitation documents (basis) for public biddings shall be available to the interested parties at the domicile designated in the invitation and on the website created for this purpose by the Ministry of the Public Function on the day the call has been published and until six calendar days before the ceremony of delivery and the opening proposals. Within that time period, it is the exclusive responsibility of the interested parties to acquire the solicitation documents.

Should the winning bidder be negligent on executing the contract, he would be disqualified and a fine would be imposed.

All states have their own laws regarding government procurement, which are normally inspired by federal laws and regulations.

B. Awarding contracts

As a general rule, contracts are awarded through a public bidding procedure. Any party that satisfies the solicitation documents may submit a proposal duly signed during the event for the delivery and opening of proposals or submit it by postal service, courier or electronic means.

The bid must include both a technical and economic proposal, incorporating guarantees, depending upon the nature of the project. Bids are first evaluated to ensure that all requirements are met, and any bid not satisfying the legal, technical and economic

requirements, including effective guarantees, outlined in the invitation to bid, is subject to disqualification.

After a detailed examination of both technical and economic proposals, the contract will be awarded to that bidder who satisfies the technical, legal and economic conditions required by the procuring entity, and satisfactorily guarantees compliance of the respective obligations. However, when two or more bidders are eligible, the contract will be granted to the cheapest bidder. In public procurement procedures related to acquisitions, leases and services, procuring entities may also award the contract to the best evaluated bidder in terms of points, percentage or cost/benefit criteria, which have to be previously set forth in the solicitation documents.

Contracts must be executed within 20 calendar days after the notice of the award. Otherwise, the contract may be awarded to the second best bidder. Additionally, the winning supplier or contractor shall grant a performance bond to assure compliance with the contractual obligations.

The laws also permit government agencies and entities to conclude restricted bidding under certain conditions. In which case, invitations must be extended to at least three prospective suppliers or contractors. Additionally, the laws articulate requirements for the use of restricted bidding. For example, restricted bidding is permitted when the contract can only be executed with a determined individual, since he is the holder of certain patent or trademark rights, or other exclusive rights.

If the entity or agency concludes that restricted bidding is not suitable, it may opt to award the contract directly through a single-source procurement procedure.

C. Foreign participation

Mexican law distinguishes between national and international bids. The bidding procedure is considered to be national when, only Mexican nationals are permitted to participate. Under the Law of Acquisitions, the assets to be acquired through a national procurement procedure must have been produced in the country and contain at least fifty percent of national content

On the other hand, the bidding procedure, is considered to be international when the contract may be awarded to either Mexican or foreign nationals.

International bidding procedures may be carried out only in the following cases:

1. Where it is obligated pursuant to a treaty;
2. Where the relevant entity or agency determines, after a market investigation, that the quantity or quality of national suppliers is not adequate, or that national contractors do not have the capacity to perform the work contemplated;
3. Where the contract cannot be awarded, because no bids were tendered, or the bids did not meet minimum requirements set forth under the bidding terms; or
4. Where required as a condition for the granting of foreign credits to the federal government, or its guarantor.

However, the applicable laws expressly give government entities and agencies the right to deny the participation of suppliers or contractors in any international tender, if they are nationals of nations with which Mexico has no international treaty, or in the case of nations in which reciprocal treatment is not provided to Mexican suppliers or contractors, or to Mexican products and services. Thus, nations that have entered into trade agreements with Mexico may hold a distinct advantage in obtaining government procurement contracts.

D. Right to administrative review

Any interested party may, within ten days after the winner is decided, may file a complaint before the Ministry of the Public Function for any breach within the procurement procedure. The party may submit its complaint when the violation relates to any of the following:

I. The invitation to bid, its terms, or the clarification meeting, provided that the interested party had acquired the terms and conditions, and manifested his objections, arguments, and legal reasoning, at the clarifications meetings. Under this assumption, the interested party may only file its claim within ten business days of the celebration of last clarification meeting;

II. Actions or omissions committed during the opening and presentation of the proposals, and at the moment of the award. In this case, the bidding party may only present the claim within ten business days of the notification of that action or omission;

III. Actions or omissions by the procuring entity, which impede the execution of the contract in accordance with the terms established in the invitation to bid, or within the applicable law. In this case, only the awarded contractor may file a claim. The claim shall issued within ten business days after the day on which the contract should have been executed.

The Ministry of the Public Function shall not admit complaints presented against actions or omissions in different moments of the procurement procedure. Likewise, it shall reject the complaint, when records show that the complaining party did not attend the relevant clarification meeting, or when the complaining party attended, but did not express at that moment his objection, arguments, and legal reasons, with respect to the alleged breach.

Those parties who filed a complaint, with the only evident purpose of delaying the procurement procedure, will be subject to a fine. All complaints shall be filed, at the discretion of the interested party, in writing, or through electronic means, as established by the Ministry of the Public Function.

The Ministry of the Public Function may suspend the procurement procedure when it is notified that there may have existed, or may exist, actions or omissions contrary to the terms of the applicable law, or where continuing with the procurement procedure may produce damages to the corresponding entity or agency, and where a suspension would not harm the public interest and would not oppose to the public order. Furthermore, all applicants requesting said suspension must grant an adequate bond to guarantee any potential damages derived from the suspension. Likewise, any interested party affected by the suspension, may grant an indemnity bond in an amount equivalent to the amount of the bond granted by the person who filed the inconformity claim, and therefore, be able to postpone the suspension, and continue with the implementation of the contract.

The resolution issued by the Ministry of the Public Function may have any of the following consequences:

I. The nullification of the action or omission; establishing, when applicable, the necessary guidelines to replace that action or omission as established by the law;

II. The nullification of the procurement procedure;

III. A declaration of lack of grounds for the complaint; or IV.

IV. The guidelines for the execution of the contract.

The final decision of the Ministry of the Public Function must be issued within twenty business days. The resolution issued by the Ministry of the Public Function may be challenged by filing a remedy as established by the Federal Law of Administrative Procedure, or by challenging, it, before a court.

Severe penalties may be imposed on government officials and private parties who participate in an infringement to the Law of Acquisitions or the Law of Public Works.

Private parties that infringe upon those laws may be sanctioned with fines from 50 to 1,000 times the minimum salary in force in the Federal District. Additionally, those parties will temporarily be unable to participate in procurement procedures, or execute contracts regulated by the mentioned laws.

The Federal Law on Administrative Procedure also provides for a remedy to challenge a resolution that levies a fine or disables a contractor or supplier.

E. Projects for the Provision of Services (PPS)

In the last years, the Federal Government has encouraged schemes of public-private investment inspired by the UK's Public Private Partnerships (PPP). In Mexico these schemes

that allow the financing of public services by the private sector are known as Projects for the Provision of Services (PPS).

In March 2003, the rules for the implementation of PPS were published in the Official Federal Gazette and were updated in April 2004.

A PPS is implemented through a long term service contract, which is awarded after a public bidding procedure in order to ensure best value for money. The services hired under a PPS contract must improve the services that would have otherwise been provided by a public entity and must be delivered to the entity's budget. The high quality services must be rendered with assets supplied by the private investor under the terms and conditions stipulated in the long term contract

In the most complex cases, the supplier may be in charge of the design, financing, construction, operation, and maintenance of the assets and related services. The main features of PPS are as follows:

- PPS imply the execution of a long term services contract between a public entity and a private supplier.
- The services provided under the contract shall enable public entities to better fulfill their mission or the public services provided by them, in accordance with the applicable laws and regulations and the National Development Plan.
- A cost/benefit analysis of the PPS project must be conducted in order to assess its appropriateness.
- The risks associated with the project are distributed efficiently between both sectors.
- The services must be rendered with assets constructed or provided by the supplier.
- The value of the contract shall depend on the availability and quality of the services rendered. Once the criteria set forth in the contract are complied with, the government has the obligation to make the corresponding payments.
- It may be stipulated in the contract that the public entity may acquire the assets constructed or provided by the supplier.

In its initial phase in Mexico, the PPS initiative has focused on highways, health and education. The Federal Government will continue to identify projects and sectors where important benefits can be generated by the utilization of the PPS scheme.

The applicable legislation for PPS is the Rules for the Implementation of Projects for the Provision of Services, published in the Official Federal Gazette on April 9, 2004, which are supplemented by (i) the Law of Public Acquisitions, Leases, Services, Public Works and Related Services, and its regulations; (ii) the Law of Budget, Accountancy and Federal Public Expenses, and its regulations; as well as (iii) other rules that may be applicable in light of the nature and scope of the relevant PPS contract.