St. Martin Conference

RECENT TRENDS AND DEVELOPMENTS IN COMPETITION LAW AND POLICY 2013

Brno, 12-13 November 2013

Bid-rigging

The OECD experience with fighting collusion in public tenders

Antonio Capobianco

OECD Competition Division

OECD

BETTER POLICIES FOR BETTER LIVES

WHAT IS “BID RIGGING”?

- The OECD defines “bid rigging” as such:

  “Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.” (*OECD Bid Rigging Guidelines, 2009*)

- In all OECD countries bid rigging is illegal, and in some countries it is also criminal.

CEO SUMMIT
OBVIOUSLY IT'S ILLEGAL FOR COMPANIES TO RIG BIDS.
Dilbert.com DilbertCartoonist@gmail.com
BUT INTERESTINGLY, THE CRIME IS NEARLY IMPOSSIBLE TO PROVE WHEN NOTHING IS WRITTEN DOWN.
9-13-09 © 2009 Scott Adams, Inc./Dist. by UFS, Inc.
I'D LIKE YOU TO MEET EDDIE. PAY CLOSE ATTENTION TO HOW MANY TIMES HE STOMPS HIS HOOF.

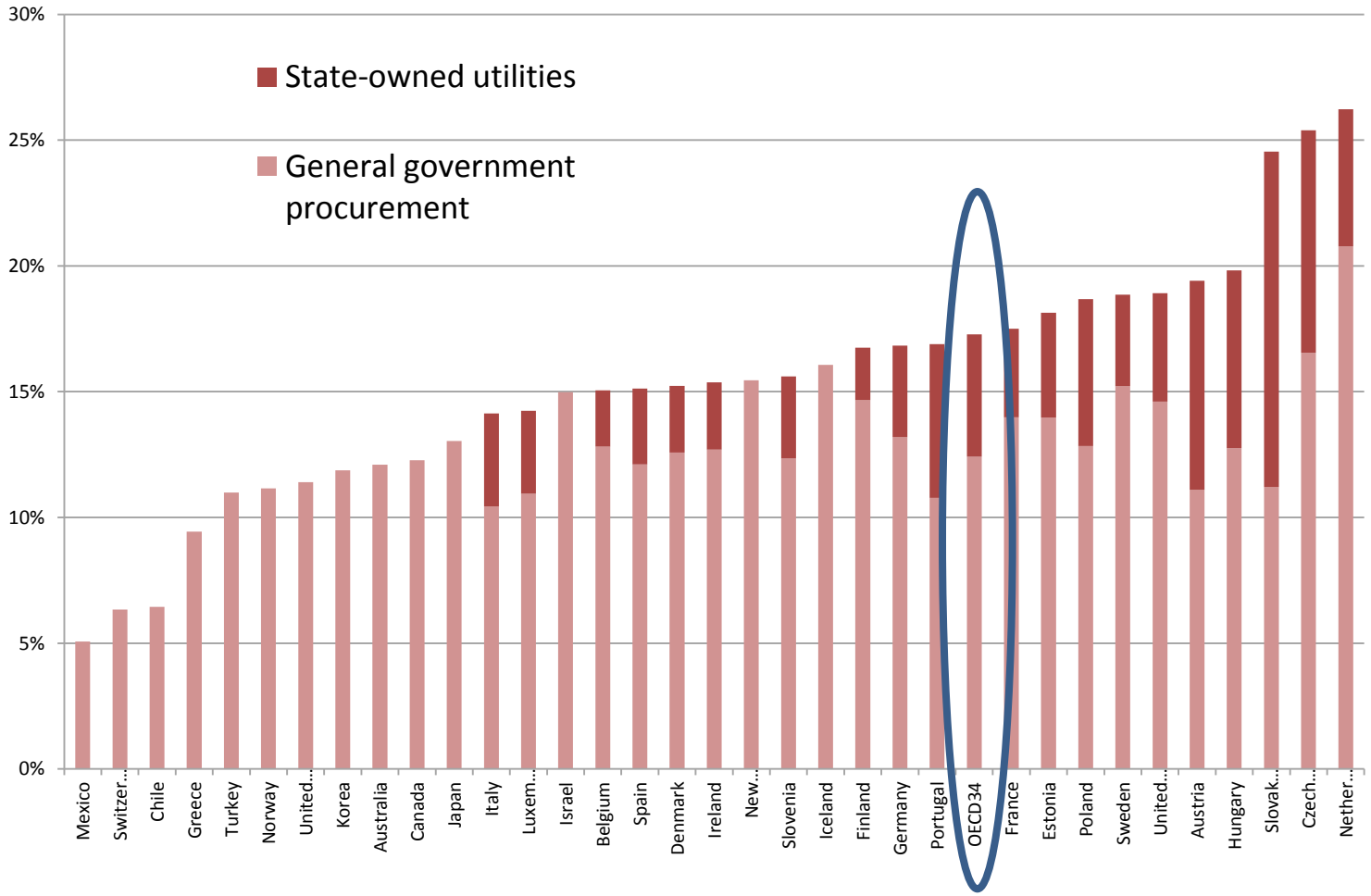
WHY WORRY ABOUT BID RIGGING?

Public procurement accounts for approx 15-20% of GDP in OECD countries

Bid rigging can raise prices significantly (up to 20% or more)

POTENTIAL DAMAGES FOR TAX PAYERS CAN BE SIGNIFICANT !!

PUBLIC PROCUREMENT AS % OF GDP



SURVEYS OF CARTEL OVERCHARGES

Reference	Number of Cartels	Mean Overcharge (percent)	Median Overcharge (percent)
Cohen and Scheffman (1989)	5-7	7.7-10.8	7.8-14.0
Werden (2003)	13	21	18
Posner (2001)	12	49	38
Levenstein and Suslow (2002)	22	43	44.5
Griffin (1989)	38	46	44
OECD (2003), excluding peaks	12	15.75	12.75
Weighted average	**102-104**	**36.7**	**34.6**

HOW TO FIGHT BID RIGGING EFFECTIVELY

- Effective cartel laws and regulations
- Effective leniency program
- Effective enforcement procedures and institutions
- Effective sanctions

Other ways:

Raise awareness of procurement officials and bidders concerning the risks of bid rigging (Checklists and Guidelines)

IN PRACTICE WHAT DOES THIS MEAN?

Procurement Rules

- Coordinated efforts to develop best practices

Advocacy

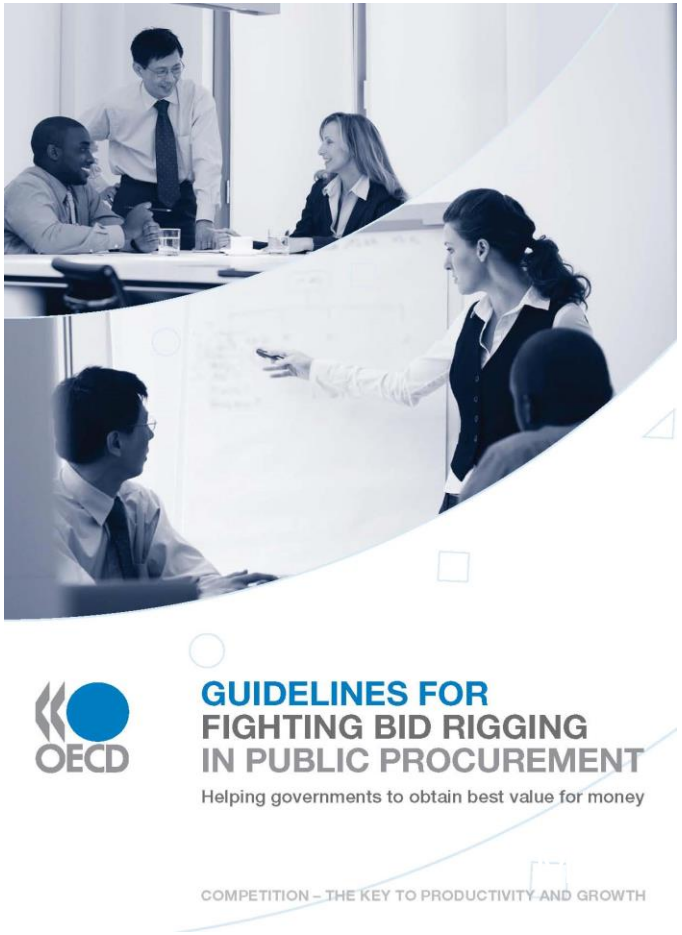
- Education of officials, business, media
- Advocacy to government and legislators

Enforcement

- Strong sanctions
- Inter-agency co-operation

NCAs GUIDELINES FOR FIGHTING BID RIGGING

OECD GUIDELINES FOR FIGHTING BID RIGGING



OECD GUIDELINES FOR FIGHTING BID RIGGING

Source	Best practices in OECD countries
Better tender design	Help procurement officials design public tenders to reduce bid rigging (Design Checklist)
Tougher law enforcement	Help procurement officials detect bid rigging when it occurs (Detection Checklist)

CHECKLIST FOR DESIGNING TENDERS

- Learn about the market and about your suppliers
- Maximize participation of potential bidders
- Define requirements clearly and avoid predictability
- Reduce communication among bidders
- Raise awareness of the risks of bid rigging, provide training

CHECKLIST FOR DETECTING BID RIGGING

Procurement officials should be alert for:

- Opportunities that bidders have to communicate with each other
- Relationships among bidders (joint bidding and sub-contracting)
- Suspicious bidding patterns (e.g. ABC, ABC) and pricing patterns
- Unusual behavior
- Clues in documents submitted by different bidders

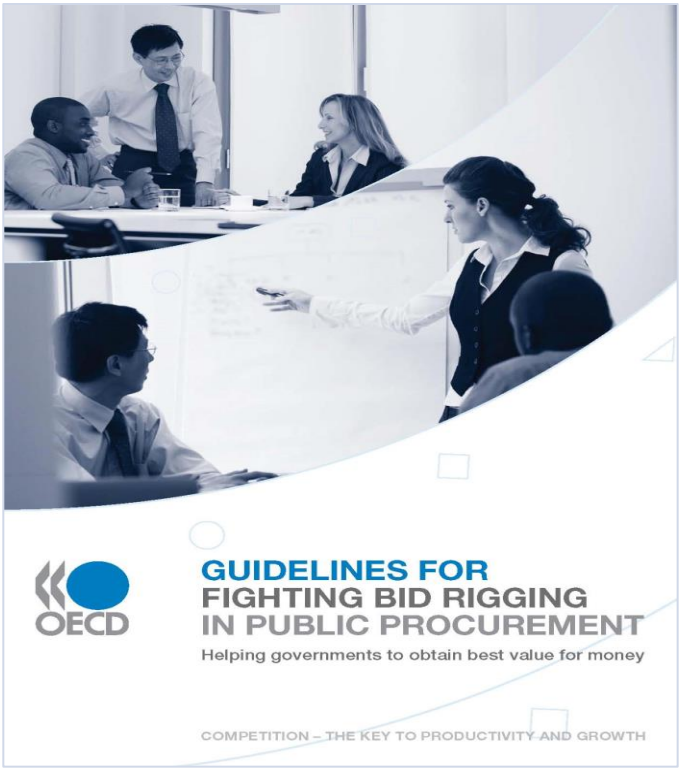
WHERE TO FIND THE OECD GUIDELINES?

Web link: www.oecd.org/competition/bidrigging

Antonio Capobianco - Antonio.Capobianco@oecd.org

Translations available in 25 languages!

OECD WORK ON BID RIGGING

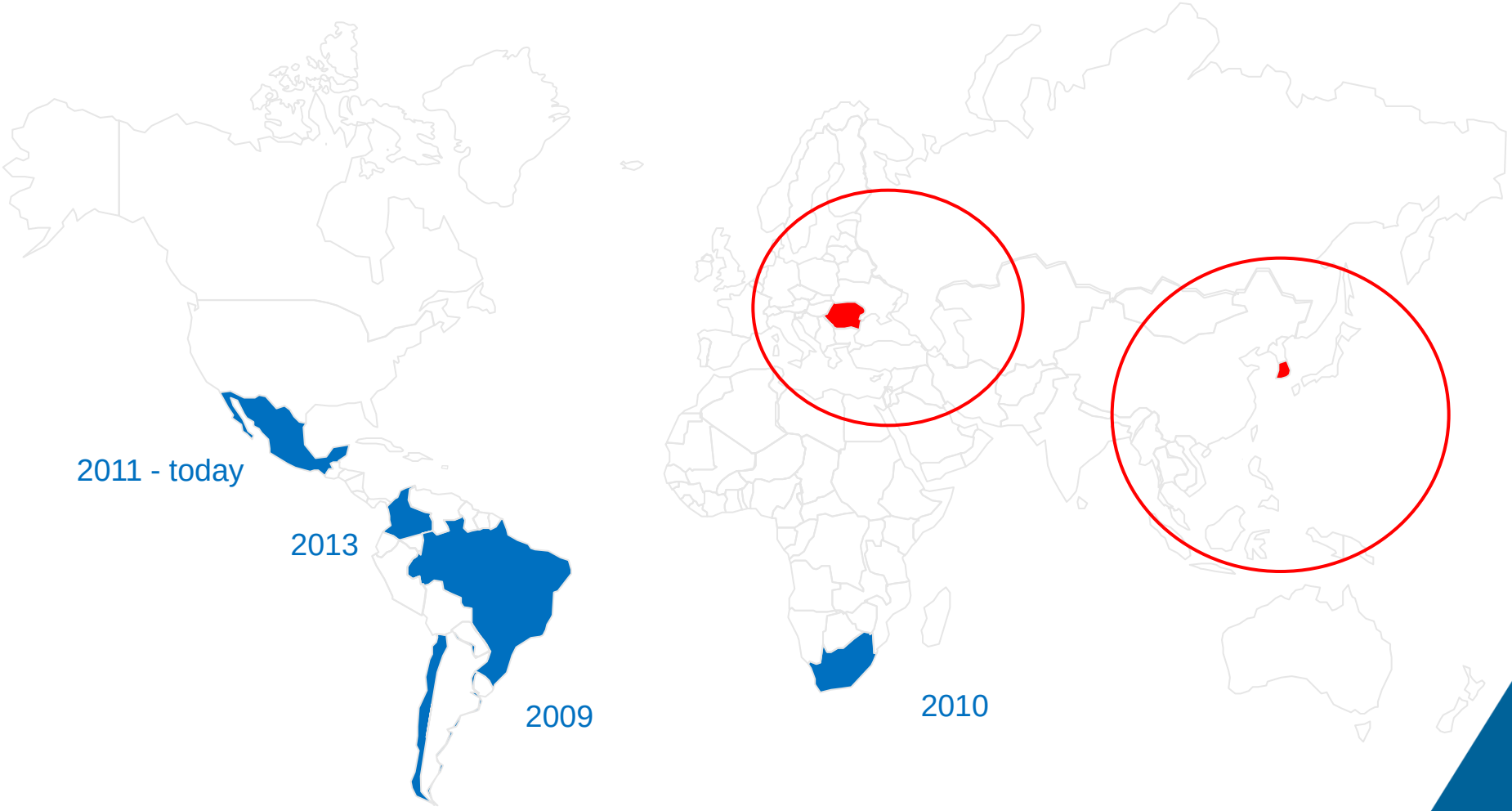


2009

2009 - today

http://www.oecd.org/daf/competition/fightingbidriggninpublicprocurement.htm

OECD MAIN BID RIGGING PROJECTS



MEXICO BID RIGGING PROJECTS

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COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA

IMSS

2011

CVLTVRA LIBERTAD TRABAJO

2012

ISSSTE

2013

CFE

2014

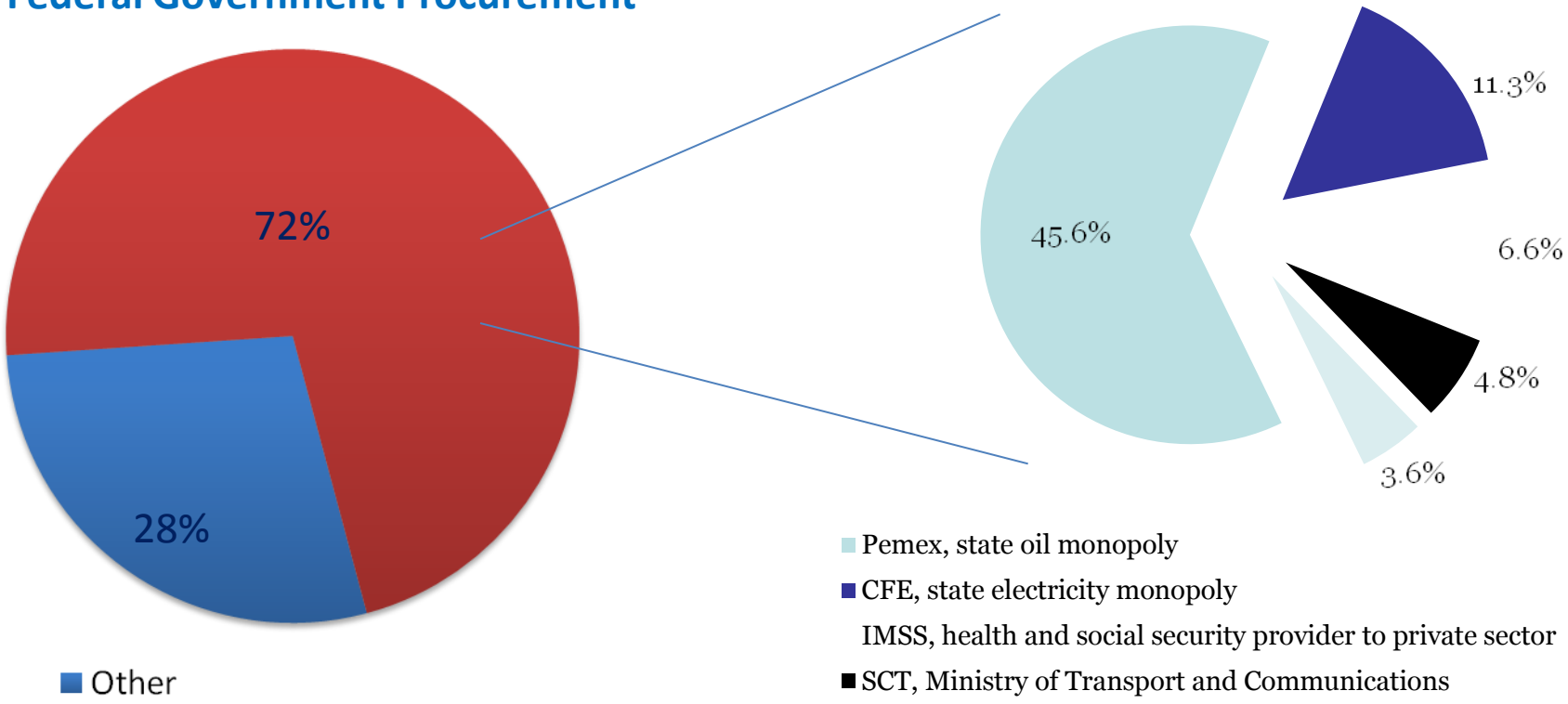
PUBLIC PROCUREMENT IN MEXICO

- In 2008, public procurement accounted for 18.4 % of GDP distributed as follows:
  - Public entities: 8.7 %
  - State and municipal governments: 5.5 %
  - Federal government: 2.9 %
  - Social Security: 1.5 %

- In 2008, 70,230 federal public procurement contracts were registered adding up to USD 59 billion:
  - 65.2 % for acquisition of goods and services
  - 34.8 % for public works

PUBLIC PROCUREMENT SHARE AT FEDERAL LEVEL

Federal Government Procurement



MEXICAN COMPETITION LAW

- Article 28 of the Mexican Political Constitution prohibits monopolies and monopolistic practices
- Article 134 establishes that public procurement must be done through sealed-bid tenders
- Article 9 of the Federal Law of Economic Competition (FLEC) prohibits “absolute monopolistic practices”

FEDERAL LAW OF ECONOMIC COMPETITION

- Bid-rigging is a per se prohibition under the FLEC- no efficiency defence
- Individuals engaged in absolute monopolistic practices are subject to punishment of three to ten years in prison
- Entities may be fined 10 percent of annual sales or the value of their assets
- Recidivists face increased fines and potential structural re-organisation

CFCE COMMITMENTS TO COLLABORATE

- Collaboration between the CFCE and federal government agencies to identify anticompetitive practices in public procurements
- Collaboration with Mexican states and federal agencies to identify anticompetitive regulations and modify procedures
- International collaboration with the OECD to raise awareness and study procurement practices to reduce bid-rigging

OECD BID RIGGING STUDIES

- Three procurement studies by the OECD:
  - ❖IMSS – 2011
  - ❖State of Mexico (GEM) – 2012
  - ❖ISSSTE – 2013
- Recommendations for changes in national and state procurement legislation/regulations and internal, agency-specific practices
- Agreement signed in December 2012 with the Federal Electricity Commission (CFE) to review its procurement practices

COMMON ISSUES AFFECTING COMPETITION IN TENDERS

- Market studies are critical precursors to competitive tenders
- Consolidation of tenders and using a variety of procurement approaches can reduce collusion
- Limitations on bidders by regions or nationality reduce competition and may facilitate collusion
- Transparency rules may facilitate collusion
- Joint awards, splitting contracts and sub-contracting may facilitate collusion

OECD RECOMMENDATIONS ABOUT LEGISLATION

- Remove provisions that discriminate against certain suppliers
- Limit the use of procurement procedures other than public tenders
- Eliminate the requirements to hold clarification meetings and to establish a “convenient price”
- Ensure disclosure requirements do not facilitate collusive activity
- Require suppliers to submit signed certificates of non-collusion
- Enhance the role of “social witnesses” in procurement processes
- Revise the current legal framework regarding guarantees and penalties

CONTINUING COLLABORATIONS IN MEXICO

- Consultation with the Secretariat of Public Administration (SFP) about changes to the Procurement Act and Public Works Act to make procurements more competitive
- Work with the SFP to design training programs
- Review of the SFP Procurement Manual to identify potential anti-competitive requirements
- Mexican Institute for Competitiveness study, “Competition on Public Procurement” (2011), reviewed and ranked the regulations in the 31 Mexican states and the Federal District with respect to enabling/promoting competition in procurement
- Training by the CFCE and OECD regarding bid-rigging
- Adoption of the OECD Guidelines for Fighting Bid Rigging

LESSONS LEARNED

- Successful collaborations require high-level commitment, sufficient resources and a willingness to be open and candid
- Training and education of public procurement officials is absolutely necessary and pays immediate dividends
- Procurement officials demonstrate an eagerness to be a part of the solution
- Recommendations in procurement studies/reports must be tailored to the specific department/agency and commitments must be long-term
- Implementation plans are critical

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