

Mexico's Crackdown On Corruption In Gov't Contracting

Law360, New York (October 12, 2012, 3:43 PM ET) -- Mexico has joined a growing number of Latin American countries that have enacted anti-corruption laws aimed at cracking down on public corruption. Mexico's Federal Law Against Corruption in Public Procurement (Ley Federal Anticorrupcion en Contrataciones Publicas or the Anti-Corruption Law), which took effect on June 12, 2012, is analogous in many respects to the U.S. Foreign Corrupt Practices Act.

The Anti-Corruption Law holds individuals and companies accountable for offering money or gifts to obtain or maintain a business advantage in the procurement of public contracts with the Mexican government. Further, the Anti-Corruption Law mirrors the extraterritorial footprint of the FCPA by prohibiting any such actions by Mexican entities or individuals with respect to foreign (non-Mexican) authorities and public officials, whether directly or indirectly. Violators are subject to heavy administrative sanctions, including the imposition of significant monetary fines and the prohibition of future participation in federal procurement contracts for up to a decade.

Provisions of the Anti-Corruption Law

The law applies broadly to Mexican and non-Mexican companies and individuals engaged in federal government contracting in Mexico, including bidders, participants in tenders, request for proposal recipients, suppliers, contractors, permit holders, concessionaires and their shareholders, and agents. The acts and omissions prohibited by the Anti-Corruption Law include, but are not limited to, the following:

- promising, offering or delivering money or gifts to a public official or a third party — regardless of whether the money or gift is accepted — so that the public official will either act or refrain from acting in his or her official capacity, in order to obtain or maintain an advantage in procuring public contracts;
- engaging in acts or omissions with the purpose or effect of participating in federal public contracting when prohibited from participating under the law or relevant regulations; and
- engaging in acts or omissions with the purpose or effect of evading the rules or requirements established in federal contracting procedures.

The Anti-Corruption Law also criminalizes bribery of non-Mexican government officials.

The Anti-Corruption Law sets forth a two-tiered procedure for enforcement, handled primarily by the Ministry of Public Administration (Secretaria de la Funcion Publica). The first investigation phase, during which enforcement authorities can request confidential information in a short turnaround of five to 10 days, is followed by an administrative proceeding.

If individuals or companies are found to have violated the Anti-Corruption Law, they may be subject to substantial monetary penalties. Fines are calculated relative to the daily minimum wage for Mexico City but range from roughly \$5,000 to \$250,000 for individuals and \$50,000 to \$10 million for companies. Unlike the FPCA, the Anti-Corruption Law does not provide for the disgorgement of profits.

However, the maximum fine may be increased by up to 50 percent if the benefit obtained by the illegal conduct exceeds the maximum fine. Offenders may also be prohibited from future participation in government contracting — up to eight years for individuals and 10 years for companies. Notably, fines may be reduced by up to 70 percent for offenders who self-report violations to Mexican authorities.

Implications

Although it does not appear that any enforcement action has been taken under the Anti-Corruption Law, its enactment is another indication that Mexico's enforcement efforts are increasingly focused on anti-corruption. The Ministry of Public Administration recently conducted an investigation that revealed irregular activities in connection with the acquisition of \$116.3 million in computer-related assets and services by the Comision Federal de Electricidad (CFE) — the Mexican state-owned electric utility company — which is the subject of the FCPA prosecution of Lindsey Manufacturing Co.

The Ministry concluded that CFE significantly overpaid for the computer assets and services and that there should have been a public bidding process open to all vendors, instead of a direct invitation to only one vendor, which, although permitted under certain circumstances by law, was not warranted in this instance. The Ministry thereafter suspended high-level officials from CFE, imposed multimillion-dollar fines on them, and notified Mexico's Attorney General's Office of the results of its investigation. It is yet to be determined whether the Ministry will impose any sanctions under the Anti-Corruption Law as a result of this or similar investigations.

Organizations doing business in Mexico should ensure that their anti-corruption compliance programs meet the elements of an effective compliance program under the U.S. Federal Sentencing Guidelines. By implementing and maintaining such a program, organizations can detect and prevent corrupt conducts, limiting their risk under the growing number of international anti-corruption laws, such as Mexico's Anti-Corruption Law, the FCPA and the UK Bribery Act.

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