

Case study: the implementation of an Integrity Pact in Mexico's El Cajon and La Yesca projects¹

This annex describes how Integrity Pacts were implemented in Mexico's El Cajon and La Yesca Projects, in order to help other government agencies, NGOs and project implementers learn from the experience. It has been produced as part of *Integrity Pacts in the Water Sector: an implementation guide for government officials*, for knowledge-sharing and capacity-building purposes, and is not meant as an evaluation or an assessment of the case.

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Context

Transparencia Mexicana (TM) has extensive experience monitoring contracting processes, spanning almost 60 contracts with an approximate value of US \$30 million. In TM's view, an Integrity Pact (IP) is a tool that adds value by providing assurance to society and to participants in a tender procedure (both the authority and bidders) about the way contracting procedures operate, making public relevant information about the conditions under which the contracting procedure has taken place. In turn, this helps others to understand the reasons underlying government decisions. TM doesn't question policy decisions; rather, it focuses on introducing transparency and accountability to their implementation. Characteristic of TM's approach is the Social Witness (SW), the name given to the person who acts as monitor of the process.

The law

As a result of the impact created by TM's initiative in monitoring contracting processes, the government's Public Administration Department (*Secretaría de la Función Pública* or SFP) issued a decree in December 2004 establishing the mandatory use of SWs at the federal level in contracting procedures above a US \$54 million threshold, and requested that entities acting as SWs be registered with them. TM registered as the first SW, in March 2005. To date there is a total of around 30 registered SWs, two of whom are organisations, TM being one of them. Under this regulation, the SFP selects the SW that will be involved in each project.

The projects

In 2002 the CFE (*Comisión Federal de Electricidad*) began preparations for contracting the construction work and equipment supply for the 750MW El Cajón hydroelectric project (known as El Cajón) in the states of Santa Maria del Oro and Nayarit. In 2006 the CFE initiated procedures to contract the construction and equipment of a similar project, also foreseen in the national development plan and only 62km away from El Cajón, the La Yesca dam. The La Yesca project, located in the states of Nayarit and Jalisco, has an estimated cost of US \$760 million; its construction, which began in 2008, is expected to take four years. El Cajón began operating in March 2007. Both projects have interesting similarities (in magnitude and impact) and IPs were implemented in both by TM. Similarities in both projects' IP implementation justify examining them together. Both are also part of the hydrological system of the Santiago River, which includes a hydropower potential of 4,300 MW across 27 projects, of which six have already been built (<http://www.cfe.gob.mx/yesca/en/>). This document will refer to both of these projects as the 'Mexican experience', or it will refer to them individually as El Cajón or La Yesca.

Initiative

In 2002 the CFE approached TM to implement an IP in the contracting process for the construction and equipment of El Cajón. At that time, no regulation existed on SWs so TM established the terms of the pact's implementation through a service agreement. Four years later in 2006, when the construction work for La Yesca was being planned, the CFE again wanted an SW, and as the legislation regulating SWs had

¹ Case study prepared by Juanita Olaya for Transparency International, 2010.

been enacted in 2004, it requested that the Public Administration Department (SFP) assign the same SW as for El Cajon, due to its experience, credibility and high-quality work. In particular, the technical requirements of the project were very similar to El Cajon, so knowledge from the previous project would be useful. The SFP accepted the request and designated TM as SW, which in turn designated the Engineer José Manuel Covarrubias Solís as SW for La Yesca.

The decision to use the SW in El Cajon was taken by the highest authorities within the Mexican Federal Government, who instructed CFE. At that time, the system was unknown to CFE officials in charge of procurement. It is possible that concerns with the technical, social and political complexity of the project prompted such instruction. By the time preparations for La Yesca had started, the CFE already had experience with El Cajón; in addition, this being a Federal Government project, it was covered by the Decree of 2004: due to the value of the contract, the use of an SW was mandatory.

In both cases, the authorities' decision to implement the IP was encouraged by TM's reputation and experience.

Main Characteristics

FEATURE	CHARACTERISTICS
Participants	TM, as implementer and monitor, designates the engineer José Manuel Covarrubias Solís as SW in both El Cajon and La Yesca.
Form	Unilateral declaration signed by the bidders is part of the bidding documents. Government officials related to the bidding process sign a similar unilateral declaration. In El Cajon, it was mandatory; in La Yesca it was voluntary. Pro-forma agreement, i.e. the same text signed by all bidders. The text signed by government officials is also the same.
Signatures	Declarations were signed by all bidders in both projects. Government declarations were signed by a number of CFE staff and management related to both projects.
Monitoring system	Called a 'Social Witness', this is an independent third party (individual) engaged through an implementing agency (in this case, TM). The SW represents TM in the exercise of his duties.
Coverage	From the preparation of the bidding documents (review of the tender documents for pre-approval) until the award, and in some cases the signature of the contract.

Design

Who's who in El Cajon and La Yesca

TM acts as lead implementer and monitor. Its monitoring role is performed mainly through a Social Witness (SW), a knowledgeable, credible and independent individual with highly specialised technical expertise. The SW is engaged in the process through TM, and represents TM at all times. TM supports the SW in various ways, by:

- providing additional experts (lawyers, accountants, etc.) as needed
- providing institutional backup and support
- supervising and guarding the accountability of the SW. The SW reports back to TM during the course of his duties and discusses appropriate courses of action
- establishing standards which the SW must uphold in performing his duties
- contributing to the review of the draft bidding documents and other contracting documents.

The decision to withdraw from monitoring, and other decisions related to the course of action, are taken by TM on the basis of assessments provided by the SW. The SW produces only one single report at the end of the process, on termination of his duties. The report is published on TMs webpage and TM encourages the authority to publish it in the media.

The implementation arrangements

TM was engaged as lead implementer and monitor, firstly through a frame agreement (Memorandum of Understanding) with the authority. This agreement contains the general conditions for being involved as monitor in the contracting process. It then subscribes to an individual additional service delivery agreement for each process it actually monitors, in which it specifies who will act as SW and establishes the fees. These service agreements with the authority are subject to public procurement legislation. Their contents will vary depending on the level of the authority (federal, state or local), as different types of procurement legislation apply. At federal level, the SW role is now regulated, therefore these contracts are subject to law. For processes at regional or municipal level, where the federal law doesn't apply, implementation contracts are negotiated with each authority and contain clauses regarding withdrawal from the monitoring process, access to information and payment of the monitor, among others. In El Cajón, as the legislation was still not in place, TM subscribed to an implementation agreement with CFE, the contracting authority. For La Yesca, the contract followed the guidelines established in the newly enacted law.

The form of the Mexican IP

Bidders and government officials all sign Unilateral Declarations of Integrity (UDIs). Bidders are requested to present their UDI along with their bidding documents, on proposal submission. Government officials who must sign the UDIs include the head of the contracting agency, consultants and other advisors (even if they are not part of the agency staff), and the staff and other public officials who will be involved in the bidding process. These are standard texts in both cases.

The declaration signed by government officials contains:

- a general commitment to integrity
- an undertaking to abstain from any behaviour that directly or through third parties distorts or changes the proposals presented and their evaluation or the result of the procedures, or causes any other situation that would result in an advantage for any particular bidder
- the commitment to grant access to TM as social witness to all information generated through the process.

The declaration signed by bidders contains:

- an undertaking to abstain from any behaviour that directly or through third parties seeks to influence public officials or change the evaluation of the proposals or the result of the procedures, or causes any other situation that would result in an advantage for them as bidders.
- their consent for the monitor to access all relevant information regarding the bidding process, and his participation in all meetings.

Voluntary or mandatory?

TM initially made the signature of UDIs mandatory, meaning that bidders who wouldn't sign were excluded from the bid for not fulfilling the technical requirements. In time, TM changed this approach, realising that in the Mexican context and regulatory framework, it was more productive to leave it as voluntary. Not signing would still have a consequence, as it would be recorded in the public report submitted by the SW at the end of his duties. To date, all bidders have signed unilateral declarations. In El Cajón, the signature of UDIs was mandatory; in La Yesca, it was voluntary.

Implementation Procedures

Initial concerns

In El Cajón, the CFE managers in charge of the contracting process received instructions from the highest level to implement an IP. Initially they didn't know how it worked: this was their first such experience. Timing was one of their major concerns. By the time the construction of La Yesca was about to start, El Cajón was already in operation and had been built on time. The 2004 law requiring an IP in such processes had by then been enacted, but CFE officials interviewed say they would have requested the implementation of an IP again anyway.

Duration of the monitoring

In El Cajón, TM joined the process before the bidding started and remained until the contract was awarded, as did the SW engaged as monitor. The implementation contract and the monitoring contract termination dates were also tied to the date set for the award in the bidding documents. For La Yesca, the SW remained in place until contract signature, at his own request.

Process and results; keys to success

During the bidding process, as reported by the SW, 31 companies acquired terms of reference but only three consortia (10 companies in total) presented bids. The flexibility shown by the Authority (CFE) in clarifying and explaining the terms of reference, listening to doubts and concerns, and adjusting the terms of reference accordingly, gave additional assurances of technical accuracy and avoided unnecessary conflict. Transparency and the equal treatment of the bidders are important principles of the process and of the SW's work. The SW leaves a clear message in his recommendations on the importance of the monitoring and control that will be undertaken during the execution of the contract (the construction phase). The technical specifications were designed transparently, ruling out corrupt pre-bidding arrangements.

The bidding process for La Yesca began in 2006 but had to be reissued as the proposals presented didn't fulfil all technical requirements. The second bid took place in 2007 with some changes to the technical specifications. In general, the La Yesca process built on lessons learnt during El Cajón and the bidding terms were improved accordingly. It also used the same approach and principles. Seventeen companies acquired the terms of reference and three consortia presented proposals. The procedure also took place through the *Comprasnet* (e-procurement system), although no proposals were presented through this mechanism.

In La Yesca, the UDI was signed by 26 officials involved in the bid, ranging from the CFE President to the Resident in Charge of the Preparatory Activities, and including consultants and advisors.

Communications

TM has an important role in IP implementation of supporting the SW in performing his monitoring role. It makes certain information public:

- At the end of the monitoring process, TM delivers a report signed by the expert SW, which is published on its website and often in the media as well
- TM's involvement as monitor is made public through its website and often in the media
- TM presents its experience at different conferences and forums
- A special section of TM's website is dedicated to this topic (see TM's homepage on IPs, www.pactosdeintegridad.org.mx, where the SW reports and other documents can be found).

While the contracting process is ongoing, TM has a strict communications policy of not making public declarations through the media. This protects the monitor and discourages the use of his work for political purposes. Only in exceptional circumstances would TM address the press in place of the SW. (One such circumstance would be in case of withdrawal from monitoring.) Once the report has been issued publicly, interaction by the monitor and TM with the media is possible again. However, the government and bidding companies are free to report to the media throughout the process. This policy has worked well so far, and is the result of TM's longstanding monitoring experience.

Sanctions

The La Yesca and El Cajón IPs don't contain additional sanctions to those established by the law in cases of corruption. However, procedures for the swift reporting of wrongdoing increase the deterrent effect: TM informs authority officials at the highest level, is able to withdraw from the process, and reports directly to the public and the relevant authorities any failure to comply with the agreement.

Dispute resolution mechanisms and the imposition of sanctions

The IP doesn't contain additional sanctions to those included already in the law, and therefore doesn't include a special process for their application. In this case, only the relevant prosecuting authorities and the

courts can impose sanctions, and the process for doing so is left to established legal procedures. The IP only establishes that TM would inform the authorities and report to the public and the prosecutors cases of violation, and is able to withdraw from the process. This didn't occur in either El Cajón or La Yesca.

Withdrawal

TM has included the possibility of withdrawal in all its IP implementation agreements with the authorities. However, the Decree of 2004 which regulated SW involvement eliminated this possibility at federal level. The instrument of withdrawal is still included and used at municipal and regional levels, where other legislation applies. There is a risk of abuse of the discretionary use of withdrawal that may be bigger in the case of individuals than in the case of organisations acting as SW, as in the latter such a decision would be taken collectively. Perhaps for this reason, the federal SW regulation restricts the possibility of withdrawal, as both individuals and organisations can be registered as the SW. This is contrary to the case of TM, where such a decision is not taken by the SW on his own, but by the organisation as a whole. Such a decision would then have institutional backup.

An example of withdrawal clauses can be found in the agreement signed between TM and the authority in the Municipality of Queretaro, where TM implemented an IP for the construction and equipment of the water distribution system (Acueducto II). In that agreement, the withdrawal clause reads: "In case that 'TRANSPARENCIA MEXICANA' through its 'Social Witness' considers that its involvement is not contributing to the transparency of the process, it will be entitled to withdraw publicly at any time." However, the clause was not implemented, as withdrawal did not occur.

At both federal and local levels, the public report issued by the SW also has an important deterrent effect.

The monitor adding value

In La Yesca, the monitor was involved when the bid was first opened in 2006. Public officials then faced a difficult decision, as the bids presented did not sufficiently fulfil the technical requirements. The monitor gave his own technical opinion, which supported the need to close the tender and reopen it for new bids under different terms. The new bid was reopened in 2007, the contract was awarded and construction began in January 2008. In general, monitors perform an important role that translates into better management of conflict and differences during the contracting process. They help seek clarification and identify points of uncertainty, and provide the contracting process with credibility and legitimacy.

The monitoring system

Regulating the SW in Mexico: the Administrative Decree of December 2004

TM first introduced to Mexico the SW instrument and the contract monitoring component of the IP in around the year 2000. After several IP experiences, there was increased demand for SWs in contracting processes. Additionally, the Federal Procurement Law and the Public Works Law required an SW in processes above a certain threshold of value. In 2004 Mexico's Public Administration Authority (SFP) issued a decree regulating the SW. The purpose of the decree is to 'establish general guidelines that regulate the participation of Social Witnesses in the contracting processes undertaken by agencies and entities of the Federal Public Administration'. The Decree was issued to ensure minimum quality standards, as new social witnesses were taking part in projects under different criteria from those followed by TM.

The regulation establishes selection requirements, a selection and designation process, and a public registry for persons who can be designated as social witnesses, and determines the SW's requirements, functions and capacities. It also establishes minimum obligations regarding access to information to which the authorities are subject when SWs are in place. It enables both individuals and organisations (NGOs) to perform as SWs and requires that the request to have one be made before the bidding documents have been approved or the contracting process already fulfilled. The most recent reforms to the Mexican Procurement Law and to the Public Works Law issued in May 2009 require the use of SWs on contracting processes above a minimum of five million salary days for procurement processes and 10 million salary days for public works (approximately US \$20 million and US \$40 million respectively). It also enables authorities

to request their involvement in other projects, irrespective of the value, when the authorities consider the project of strategic relevance.

The introduction of a mandatory SW in certain projects has been a welcome reform in the country; however there are concerns over whether the government will have the capacity to attend to all demands and to properly ensure the quality of their performance. To illustrate this point, the SFP registry currently contains 22 SWs, one of which is TM. In contrast, TM's basic network of experts includes 40 individuals with capacities to perform as SW; this means their capacity is almost double that of the SFP, although they only participate in a few selected projects. The full text of the Decree is available at: <http://200.34.175.29:8080/wb3/work/sites/SFP/resources/LocalContent/1019/3/adq18.pdf> and the SW registry at the SFP is available at: http://200.34.175.29:8080/wb3/wb/SFP/unaops_tsocial

The monitor's functions

The monitor:

- has access to all documents during the bidding process, including the evaluation documents, and is in direct contact with the evaluating committee
- participates in all ordinary and extraordinary (formal and informal) meetings
- participates actively in clarification meetings. The CFE holds clarification meetings to discuss and answer questions on the bidding documents, and in which amendments to the bidding documents are considered
- makes site visits to potential bidders
- attends meetings to present the project
- channels within the agreed process concerns and allegations of corruption
- reviews the terms of reference before they are pre-approved by the procurement committee
- makes recommendations during those meetings and raises issues or concerns
- reports findings back to TM.

In El Cajón according to the SW report, the monitor performed the following activities: two site visits; four clarification meetings; one meeting to present the project and five informal meetings for information exchange on the bidding terms. In clarification meetings, 1,124 questions were answered. As a result of the discussions during these meetings with bidders and the CFE, the terms of reference were modified to adopt some of their feedback. The deadlines initially established for the process were also modified equally for all bidders.

For La Yesca, the SW participated in one of two site visits. Six clarification meetings took place, where 738 questions were asked and then responded to in writing. The SW made random visits to the evaluation committee and also reviewed all documentation.

The monitor's report at the end of the project is published on TM's website and also often published in the local media.

The profile of the El Cajón and La Yesca monitor

The expert who acted as SW in El Cajón and La Yesca is a well-known and highly regarded civil engineer, with ample experience in the private sector, particularly in hydroelectric projects. He was the Treasurer of the *Universidad Nacional de México*, where he also teaches various graduate and undergraduate courses. In his duties as SW, he was supported by TM's team of professionals, in particular the leader of the Public Contracting group, whose expertise derives from having implemented almost 60 IPs in different sectors. In addition, other public sector and legal experts were engaged by TM to contribute to the monitoring of the projects and to the work of the SW.

Costs

Social Witnesses in Mexico are paid for their role. The public would view non-payment with suspicion ("Where are they getting their money from?") and so TM places great emphasis on ensuring that individuals performing as SWs be paid. The amount is less than a full commercial rate, but is nevertheless

substantial (about US \$95 per hour, with a cap depending on project type). An average IP will demand about 50 to 90 hours work, and could last over the course of a year. Currently, under the regulations issued by the SFP in Mexico, the entire cost is covered by the authority. Before the regulation was issued, TM used three different ways of funding the costs associated with implementing an IP and with the SW:

- 100 per cent of the cost was covered by the authority
- 50 per cent was paid by the authority and 50 per cent by the winning bidder (or different proportions). The contributions by the bidders could be voluntary or mandatory
- 100 per cent of the cost was paid by the winning bidder.

In a few cases, TM paid the implementation costs from its own resources. Before the regulation was issued, about 70 per cent of the 60 IPs that TM implemented had been paid for by the authority, and about 25 per cent of cases had been funded by the winner. TM paid for the others with its own funds.

The amount received by TM includes the SW's fees, direct costs involved in the IP and an overhead. Of the full costs, about a third corresponds to the SWs fees, which are based on hourly rates up to a maximum amount pre-established in the contract. TM oversees that the declared hours worked correspond to reality. In El Cajón, the payment mechanism included a combination of funds from the CFE and voluntary (fixed) contributions by the bidders (only a few of whom actually paid). For La Yesca the costs were covered entirely by the CFE. TM's service delivery contract for La Yesca established minimum and maximum prices, determined by the final amount of hours taken, on the basis of an hourly service rate. The final cost of the IP (including the monitor fees) for La Yesca was 903,900 Mexican pesos (approximately US \$68,000).

Following up suspected corruption

During the El Cajón bidding process, TM received an email indicating that there had been irregularities and that privileged information had been given to one bidder before the process was begun. In response to a request for an explanation, CFE informed TM that it had posted information on its website about the project five months ahead of the tender, requesting feedback on the project from all interested stakeholders. TM and the social witness sought the informant in order to obtain more details and identify the possible misconduct, but the informant never responded and further allegations were not made. After the award, news was released through the press that the winning bidder did not fulfil one of the bidding requirements. In addition, the bidder in second place requested a meeting with the SW and argued that it had lost unfairly, showing documents claiming it had offered better financial terms for the project. Once analysed by the SW, the documents proved to have no legal force and the allegations were considered unfounded, so the matter was dismissed. None of the bidders complained thereafter about the qualification criteria or about the legal framework for the contracting process. According to TM there were no unresolved complaints in relation to the project.

Selecting the monitor

TM designates the SW following a rigorous selection process. The SW cannot be a member of TM's staff and is specifically appointed for each process. The individual should have experience in the sector to which the specific IP applies, so that they are capable of contributing not only to the process but also to the substance, inputting to the drafting of the bidding documents and during the contracting procedure. They represent TM and therefore should understand and share the organisation's spirit, values and philosophy. TM has developed a knowledge network currently of 40 experts, which continues to grow and specialise.

Since the legal reform of 2004, the SFP designates the SW who will operate in each individual case from a list of previously registered SWs. The same regulation stipulates that when those chosen are not individuals but legal entities, they are in charge of designating an actual individual who will act as SW. TM was the first SW to register under the SFP registry in 2005.

The monitor's accountability

As implementer and monitor, TM exercises close oversight of the work of the individual engaged as SW; the SW represents TM and is directly accountable to it. TM also supports the SW, providing technical assistance from other experts and an institutional backbone for the role. Therefore the way in which the monitor is held accountable is more a notion of responsibility than one of control. The human and

professional qualities of the monitors selected by TM also ensure that they feel their role as a personal responsibility and a duty in which they represent society. Although there is no formal arrangement, TM communicates to its SWs policies and guidelines to follow in their duties and explicitly requires that they abstain from entering situations of conflict of interest at least one year before and one year after performing their duties as SW, and that they abide by TM's communication policies, among others.

In addition, the usual systems of verifying actual hours of work apply. If TM is informed of misconduct in one of its SWs, it informs its Managing Board which decides on the appropriate response. To date, there have been no instances of sanctioning or removing an SW.

Protecting SW independence

There are various mechanisms under which TM protects the SW and his independence, including the policy by which the technical opinion of the SW can't be revoked by any of TM's staff, management or Managing Board, and the restriction on the SW not to communicate his findings with the media until he issues his final report. The qualities of the individual selected as SW are also relevant: TM seeks individuals who are not in, and are not likely to enter into, situations of conflict of interest.

Additional tools

For El Cajón, TM requested that bidders elaborate a risk map, identifying aspects of the process where they expect to encounter irregularities, so that special attention could be given to them. In TM's experience, this tool is most useful at the beginning of the process, when implementers and authorities want to build capacity and knowledge in tackling these problems.

Impact and application

In TM's experience, although it is not entirely possible to rule out corruption, the role of the SW in the process reduces the risk of corruption.

An important outcome in the Mexican case is that it was possible to complete two projects of strategic, economic and social importance while protecting their credibility and legitimacy. The absence of scandal is crucial in projects that span long lengths of time.

While price reductions are desirable, they are not unequivocal indicators of success. In El Cajón the winning bid was 8.5 per cent less (approximately US \$64 million) than the expected price, based on previous bidding trends.

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- Monica Gabriela Ramirez
- Eduardo Bohorquez
- Ingeniero José Manuel Covarrubias, SW for La Yesca and El Cajón
- Ingeniero Fernando Ortiz Monasterio, SW for Saltillo and Acueducto Querétaro
- Jesús Franco, CFE. In charge for CFE of the bidding processes for El Cajón and La Yesca
- C.P. Carlos Alcazar Guzmán, Gerente de Licitaciones y Contratación de PIF

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