



Public Procurement 2010

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Japan

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Legislative framework

1 What is the relevant legislation and who enforces it?

Roughly speaking, procurements by the national government, local governments and quasi-governmental bodies (eg, state companies) are governed by the Account Act, the Local Autonomy Act (LAA), and the internal procurement rules of the relevant bodies, respectively. As Japan is a party to the Government Procurement Agreement (GPA), the corresponding Japanese legislation closely reflects the GPA. Moreover, the cabinet has adopted certain voluntary initiatives which go beyond the GPA. Voluntary initiatives also exist that specifically apply to certain products only (eg, supercomputers).

Japan does not have a centralised procurement system. The procurement rules are ultimately enforced by the ordinary courts. The Board of Audit of Japan is in charge of auditing the accounts of the national government, state companies and certain private companies in which the national government has made investments.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Before the GPA came into effect, the Diet and the cabinet approved many legislative changes to resolve discrepancies between the formerly existing legislation regarding public procurement and the GPA. As there had been no legislation applicable to state companies, etc, (see question 1), each company took independent measures to amend its internal rules concerning procurement to comply with the requirements of the GPA.

The Japanese government has taken voluntary initiatives, for example: to treat certain procurement contracts valued between 100,000 special drawing rights (SDR) (inclusive) and 130,000 SDR (exclusive) as if the GPA were applicable thereto; and to extend the tender notice period from 40 days (as stipulated in the GPA) to 50 days to the extent possible.

3 Are there proposals to change the legislation?

We are unaware of any important proposals that may change the legislation in the near future.

Various issues concerning target price are drawing the attention of the media and general public (see 'Update and trends' box), but it is still unclear if discussion of such issues will result in changes to the legislation.

4 Has the legislation recently been amended or has its application in practice been adjusted in response to the global economic and financial crisis? If so, are the amendments or adjustments limited in time?

We are unaware of any amendments or adjustments in the legislation or its application in response to the global economic and financial crisis.

5 Is there any sector-specific procurement legislation supplementing the general regime?

As to the procurement of supplies by the Ministry of Defence, the GPA applies only to supplies in certain Federal Supply Classification categories. Moreover, the Japanese government always has the discretion to invoke article 23, paragraph 1 of the GPA.

The Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services exempts certain procurements by the Ministry of Defence, including the procurement of military equipment, from the basic government procurement rules in compliance with the GPA. Military equipment is procured quite centrally, by the Equipment Procurement and Construction Office (EPCO). Some equipment and services are procured under the Foreign Military Sales system (eg, from the US government) pursuant to the Arms Export Control Act of the US.

As to the public passenger transport procurement, certain cases such as procurement related to the operation safety of transportation is exempted from the GPA, while construction of public passenger transport is not exempted.

Applicability of procurement law

6 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

As the relevant legislation in Japan is fairly clear, this question is inapplicable to Japan.

7 For which, or what kinds of, entities is the status as a contracting authority in dispute?

This question is inapplicable to Japan (see question 6).

8 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

All determinations about whether thresholds regarding the GPA or other legislation have been met are made based upon the 'target price' of the procurement contract. Contracts whose target price is very small shall not be exempted from procurement procedures, but selective or single tendering procedures may apply (see question 20).

Article 80, paragraph 1 of the Budget, Settlement of Account and Accounting Regulations (BSAAR), basically states that a target price shall be determined by the contracting officer for the total value of all goods or services to be offered for tender procedures. Paragraph 2 of the said article further states that the target price shall be reasonable, taking into account actual transaction prices, the prevailing supply and demand environment, difficulty or ease of performance, quantity, performance period, etc, with respect to the goods or services that are the subject of the contract.

- 9** Does the extension of an existing contract require a new procurement procedure?

Any extension of an existing contract will require a new contract to extend the existing one. The extension will require a new procurement procedure, unless the original contract terms contemplated such extension.

In practice, it has been quite common to use a single tendering procedure when entering into a new service contract with an existing service provider, because such providers are intimately aware of the relevant service. Such practice is criticised because large service providers may be able to tender a low bid for the first project year and thereafter negotiate with the government and propose a higher price in successive years.

An administrative circular issued by the minister of finance as of 25 August 2006 proposed that any contract that is reasonably expected to concern a multi-year task should generally be offered by way of an open tendering procedure (including the 'total evaluation method' (see question 32)) or 'competition through proposals' on a multi-year basis.

- 10** Does the amendment of an existing contract require a new procurement procedure?

If the amendment involves a substantial change that completely alters the identity of the contract, generally such amendment would be viewed as the mutual termination of an existing contract and the formation of a new contract. In such case, the formation of the new contract would require the execution of a new procurement procedure, unless the original contract terms had contemplated such amendment.

In case of an amendment that does not involve substantial changes, the execution of a new procurement procedure is not necessary where two conditions are met: such non-execution is supported by a justifiable reason; and the non-execution is not against the spirit of free competition and economical procurement.

- 11** May an existing contract be transferred to another supplier or provider without a new procurement procedure?

The transfer of an existing contract is not permitted because it would invalidate the regulations regarding contractual procedure (this would not mean that the transfer of an existing contract by virtue of a merger or demerger would be prohibited).

- 12** In which circumstances do privatisations require a procurement procedure?

Generally, if the privatisation process involves entering into a contract, a procurement procedure is required. Privatisations are sometimes subject to special laws, which, for example, require any sale of shares or assets held by the government or a state company to be performed according to stipulated methods.

- 13** In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

If a contract is entered into, a procurement procedure will be required. As formation of PPPs would inevitably involve the formation of a contract, a procurement procedure would almost always be required.

Although it is not a legal term, 'public-private partnership' is considered to include outsourcing of certain facilities' operations and private finance initiatives. Both are becoming more commonly employed.

- 14** What are the rules and requirements for the award of services concessions?

A system somewhat similar to 'service concessions' as defined in the EU procurement directive has been introduced under the LAA. Under

the LAA, local governments can appoint a 'designated custodian' for public facilities. A designated custodian manages the public facilities and, depending upon the arrangement, can receive fees from users as its own income. However, it is different from 'service concessions', in that the system does not involve the concept of contract or require the procedures for public procurement. Because of this, it is said that most of the appointments of 'designated custodians' by local governments are made without involving open competition.

- 15** To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

If administrative matters are consigned to another local government pursuant to the LAA, contracts ancillary thereto may be entered into without enacting the procurement procedure; no further special rules exist. Therefore, the public procurement procedure must be performed for agreements under which a 'private entity' (including a company with 80 per cent of its shares held by local government) supplies services, while agreements to supply services between government ministries or two municipal councils may be entered into without enacting the public procurement procedure. Certain state companies subject to public procurement rules (see question 1) have been criticised (especially the former Japan Highway Public Corporation) for abusing the selective tendering procedure by only nominating 'family companies' during the course of selective tendering procedures.

The procurement procedures

- 16** Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

The Account Act and its subordinate ordinances specifically state that competition is the default method for any governmental procurement, but they do not specifically call for equal treatment or transparency. Equal treatment and transparency, however, are specifically referred to in the GPA and are considered very important principles for public procurement in Japan.

- 17** Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

As a matter of course, the relevant legislation requires the contracting authority to be independent and impartial. There are some provisions that obviously reflect such requirement. See question 18.

- 18** How are conflicts of interest dealt with?

Provisions have rarely been seen that directly prohibit the submission of a tender by a person whose participation in the process may give rise to a conflict of interest. Many procuring entities, however, have taken measures to prevent such conflicts, for example by determining award criteria in advance for the 'total evaluation method' (see question 32) or by opening tender offers in the presence of bidders or officials who are not responsible for the tender procedures, etc.

- 19** How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Under the Account Act, involvement of a bidder in the preparation of a tender procedure is generally not expected; indeed, such involvement is considered undesirable at the least. See article 6, paragraph 4 of the GPA.

In practice, procuring authorities sometimes lack sufficient knowledge of the appropriate specifications or other relevant matters. For that reason, authorities have been known to 'informally' ask for advice from potential bidders.

The Act on the Promotion of Quality Securement for Public Construction provides for an exception, being that the procuring authority shall make efforts to request that potential bidders make technical proposals. If an advanced technique is proposed, the procuring authority may take such technique into consideration in setting the target price subject to certain requirements (articles 12 and 14).

20 What is the prevailing type of procurement procedure used by contracting authorities?

The general public procurement method is an open tendering procedure, because it is the most transparent and economical way to procure. The particulars of the tendering procedures and the requirements are published in the official gazette (or its equivalent in the case of local governments). In many cases, certain qualifications must be met to enter a bid in an open tendering procedure.

There are two exceptional methods for public procurement: the selective tendering procedure and the single tendering procedure. In selective tendering procedures, only a relatively small number of potential bidders selected beforehand are permitted to participate in the tendering procedure. The selective tendering procedure is allowed where not many potential bidders exist, where the open tendering procedure may be to the disadvantage of the procuring entity or where the target price of the contract is below a certain figure provided in the BSAAR.

A single tendering procedure (contract after negotiation) is allowed where any of the following statements are true:

- it is necessary to keep state acts confidential;
- the target price is below a specific criterion provided in the BSAAR (which is lower than that provided for by the selective tendering procedure);
- it is necessary for the purpose of protecting and promoting industries; or
- any other specified reason exists in this regard.

Although the single tendering procedure is categorised as ‘exceptional’, traditionally the single tendering procedure has nevertheless been widely used by certain contracting authorities, such as the EPCO. The single tendering procedure may be used after negotiations have been completed with multiple parties. For more details, visit the following webpage of the Ministry of Foreign Affairs: www.mofa.go.jp/policy/economy/procurement/q-a.pdf.

Furthermore, it may be necessary to participate in a formal authorisation procedure (eg, to acquire the consent of the municipal diet).

21 Are there special rules or requirements determining the conduct of a negotiated procedure?

See the description of the single tendering procedures in question 20.

22 When and how may the competitive dialogue be used?

Japanese legislation recognises only three types of contract procedures (see question 20). Therefore, competitive dialogue is not permitted from a legal viewpoint. In practice, it is becoming common for something like ‘competitive dialogue’ to be employed to arrange appointments for consultants and designers for construction (eg, ‘competition through proposal’). From a legal viewpoint, however, only a single tendering procedure would be used for such a contract.

23 What are the requirements for the conclusion of a framework agreement?

Although there is no provision which specifically allows for the use of a framework agreement, the use of a unit price contract (in our understanding being similar to a framework agreement) is permitted

and is employed. Roughly, a unit price contract must have the continuous provision of supplies or services as its subject and contain an advanced estimate of the number of units to be procured.

24 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

Generally, on the condition that the requirements listed in question 23 are satisfied, a single contracting authority may conclude multiple unit price contracts. Without any special requirements to the contrary, no additional competitive procedures are necessary when concluding several unit price contracts.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Formation of joint ventures (JVs) for the purpose of public construction is quite common. After tendering a bid, any change in the JV members would not be allowed as such change would result in a change to the tendered bid, which is prohibited under the Account Act. Before tendering a bid, a change in the (proposed) JV members is allowed. Nonetheless, it should be noted that contracting authorities may have distinct requirements which can prohibit certain practices, such as a prohibition on bids from any unregistered JV. In contrast, non-members of consortia that are expected to be commissioned for certain services may be changed, even after a bid is tendered, depending upon the tender specifications.

26 Are unduly burdensome or risky requirements in tender specifications prohibited?

No such prohibitions are listed explicitly within the text of the relevant legislation. Unduly burdensome and unduly risky requirements, however, are considered to be against the spirit of the legislation concerning public procurement. Such requirements would therefore be naturally prohibited.

27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

There is little room for the contracting authority to exercise discretion. In assessing qualifications, each of the various factors (such as average annual turnover, amount of capital, number of employees, years of operation, etc) are transformed into numerical points, and qualifications are determined in light of the total number of points. Qualifications are determined by classifying successful applicants into certain categories (such as grade A, grade B, grade C, etc, based upon the total number of points). Moreover, in the case of certain procurements by the national government, qualifications are totally unified and the applicant must file only one application.

28 Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

As a matter of practice, there are some mechanisms to further the participation of small and medium enterprises in the procurement procedure. Classification of applicants into certain categories (see question 27) is usually conducted to sort applicants according to the types of projects they would be suitable for. For example, a procuring authority may require that only grade B qualifiers be allowed to submit a tender for a medium-sized construction project, or alternatively require that only grade C qualifiers be allowed to submit a tender for a small-sized construction project.

29 What are the requirements for the admissibility of alternative bids?

There is no provision in the relevant legislation regarding treatment of alternative bids. It is expected that such bids will be considered invalid unless the public procurement notice expressly permitted alternative bids.

30 Must a contracting authority take alternative bids into account?

Basically, no. See question 29.

31 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Section 76 of the BSAAR states that any bid in violation of the conditions of a tender invitation shall be null and void. Although very minor violations in a contract may be corrected when entering into a contract, the kind of bid referred to in this question would be null and void and incapable of acceptance.

32 What are the award criteria provided for in the relevant legislation?

The general principle is that the contract will be awarded to the bidder who provides the best price within the limitation of the target price. If there are multiple bidders who offer identical bids at the best price, the winner will be determined by means of a lottery.

The 'total evaluation method' is becoming more commonly used, especially for tendering procedures conducted by the Ministry of Land, Infrastructure, Transport and Tourism, where factors other than price (such as technical levels, security, efficiency, etc) are also considered as award criteria. Guidelines for the application of this total evaluation method have been formulated by the national government, each local government and each quasi-governmental body. A contracting authority or officials in charge of public procurement shall rationally determine the award criteria in accordance with these guidelines. While these guidelines have no binding effect from a legal viewpoint, material deviation from them may be considered an important factor which may lead to a conclusion that the procuring authority abused its discretion.

33 What constitutes an 'abnormally low' bid?

The current legislation does not contain a definition of an 'abnormally low' bid.

34 What is the required process for dealing with abnormally low bids?

For the purpose of low bid investigation systems, which have been adopted by the national government, and may be adopted by local governments (both exclusively with respect to service contracts), certain criteria are established by which the government can determine whether the lowest bidder could appropriately perform the contract within the bid amount tendered. If such criteria cannot be met by the lowest bidder, depending upon the results of investigation, the bidder who tendered the second-best price may win the contract.

When employing 'lower limit' systems, which only local governments can adopt with respect to service contracts, any bid that is lower than the lower limit is automatically disqualified and excluded.

There is no legal standard for percentage thresholds to trigger such systems, but it is typically somewhere between two-thirds and 85 per cent of the target price.

35 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is 'self-cleaning' an established and recognised way of regaining suitability and reliability?

In the event that a bidder meets the requirements for suspension of selection and is suspended, passage of a certain amount time is

generally required for the bidder to regain the status of a suitable bidder. Past irregularities such as criminal convictions, receipt of a cease-and-desist order or an order to pay surcharges from the Japan Fair Trade Commission (or both), or other grave misconduct, will generally result in the suspension of the participants from the selective tendering procedure (see question 20). The period for suspension of selection generally ranges from one month to two years.

Availability of 'self-cleansing' depends upon the reason for exclusion. However, in the case of suspension of selection (in which exclusion is most likely based on irregularities), self-cleansing will be practically difficult as the purpose of the system is to exclude certain parties for a certain period.

Review proceedings and judicial proceedings**36** Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Japanese courts have the authority to finally determine the legality of public procurements. It is possible to appeal against judgments of the lower courts (generally up to two times).

The Government Procurement Complaint Review Committee (GPCRC), which was established by a cabinet resolution dated 1 December 1995, exists to review complaints regarding government procurement in violation of the GPA. Please note that the procedures before the GPCRC have nothing to do with the Japanese court system and that review decisions of the GPCRC are not appealable.

In addition, article 10 of the Ministerial Ordinance Stipulating Special Procedures for Government Procurement of Products or Specified Services (MOSSP, applicable only to procurement by the national government subject to the GPA) requires that each ministry or agency designate an official responsible for review of complaints.

37 How long does an administrative review proceeding or judicial proceeding for review take?

Where judicial proceedings are concerned, no legal time limit exists for review procedures. If the case is argued up to the Supreme Court, it may take more than five years.

Section 6(1) of the Complaint Handling Procedures Regarding Government Procurement (CHP) states that the GPCRC shall prepare a report on the results of any review within 90 days (50 days in the case of public construction) of an application being filed.

38 What are the admissibility requirements?

In the case of judicial proceedings, complainants must seek a form of relief that has some value. For example, it is generally unproblematic to seek monetary damages, whereas it is quite difficult to solely claim for a declaratory judgment proclaiming the illegality of a certain procurement procedure.

In the context of GPCRC procedures, a complaint will not be admitted where the complaint is:

- filed after the deadline (see question 39);
- unrelated to the GPA or other related rules or guidelines;
- negligible;
- filed by a non-supplier; or
- otherwise unsuitable for review by the GPCRC (section 5(2) of the CHP).

39 What are the deadlines for a review application and an appeal?

As to judicial proceedings, the relevant statute of limitations (which varies depending upon the cause of action) would apply.

The CHP in section 5(1) states that complaints shall be filed within 10 days of the date on which the complainant knew or should have reasonably known of the violation of the GPA or other related

Update and trends

It appears that a considerable number of Japanese government officials are hesitant to stop looking for loopholes in the public procurement requirements. In March 2010, the Board of Audit of Japan requested the Ministry of Agriculture, Forestry and Fisheries of Japan (MAFF) to introduce an open tendering procedure method on the procurement of services of car safety inspections for office cars. According to the Board of Audit, the MAFF and its local offices entered into 3,990 contracts for the services of car safety inspection for office cars from April 2007 to March 2009, the total amount of which is more than ¥330 million, and 99.7 per cent of those were procured by using a single tendering procedure. A single tendering procedure is only allowed under certain requirements (eg, the target price is below a specific criterion provided in the BSAAR) (see question 20). According to the Board of Audit, however, the MAFF and its local offices divided an order into several contracts based on their location and time in order to meet such requirements.

rules or guidelines. Note that section 5(4) states that the GPCRC is able to accept a delayed complaint if a justifiable reason exists for the delay. There is no appeal procedure under the CHP.

- 40** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Judicial proceedings should not have any automatic suspending effect. A provisional disposition may be granted upon the filing of an application by the complainant, in addition to the merits proceedings.

If an application is filed before the relevant contract is entered into, the GPCRC shall, within 10 days of an application being filed, request that the relevant procuring authority refrain from entering into the contract, unless an urgent and unavoidable reason exists to the contrary. If the application is filed within 10 days of entering into the relevant contract, the GPCRC shall request that any performance of the contract be suspended for the complaint handling period, unless an urgent and unavoidable reason exists to the contrary. If such request is made, the procuring authority shall promptly comply with the request, unless an urgent and unavoidable reason exists not to comply (section 5(6) of the CHP).

- 41** Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Article 7 of the MOSSP states that when open or selective tendering procedures have been adopted and a contract has been awarded, the unsuccessful bidders shall be informed in writing of the fact that a

contract has been awarded within seven days of the awarding of the contract, along with the name and address of the successful bidder and the value of the successful bid.

- 42** Is access to the procurement file granted to an applicant?

Although no direct access to the procurement file is provided for, section 5(9) of the CHP states that the procuring authority shall, within 14 days of receipt of a copy of the complaint, file a report on the procurement which contains certain matters including specifications, bidding documents, descriptions of the relevant facts, proposals of the relevant procuring authority, and explanations responding to all the matters stated in the complaint. This report is subject to secrecy considerations to protect other suppliers' interests.

- 43** Is it customary for disadvantaged bidders to file review applications?

It is rare for disadvantaged bidders to file review applications. During the 13 years leading up to December 2009, only seven complaints were filed with the GPCRC, of which two were rejected without substantive review for lack of admissibility.

- 44** May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

Generally, a contract that is against good morals and the public order shall be null and void. However, unsubstantial violations of the public law should not result in the nullification of a contract. Therefore, if a dispute is filed in a Japanese court, the court will probably review all the relevant factors and decide if the circumstances justify nullification.

In the GPCRC procedure, while the procuring authority is generally required to comply with the proposal of the GPCRC (if the GPCRC makes a proposal after finding a violation of the public procurement rules), the procuring authority can refuse to do so provided that it submits a report explaining the reason for the refusal within 10 days (60 days in the case of public construction) of receipt of such proposal.

- 45** Is legal protection available in cases of a de facto award of a contract, namely an award without any procurement procedure?

A person who was reasonably able to supply the relevant supplies or services is considered a 'supplier' for the purpose of the CHP, and therefore is allowed to file a complaint.

Legal protection by way of a civil lawsuit may also be available to such person; however, it is not easy to obtain.

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| Cartel Regulation | Patents |
| Climate Regulation | Pharmaceutical Antitrust |
| Construction | Private Antitrust Litigation |
| Copyright | Private Equity |
| Corporate Governance | Product Liability |
| Dispute Resolution | Product Recall |
| Dominance | Project Finance |
| e-Commerce | Public Procurement |
| Electricity Regulation | Real Estate |
| Environment | Restructuring & Insolvency |
| Franchise | Securities Finance |
| Gas Regulation | Shipping |
| Insurance & Reinsurance | Tax on Inbound Investment |
| Intellectual Property & Antitrust | Telecoms and Media |
| Labour & Employment | Trademarks |
| Licensing | Vertical Agreements |
| Life Sciences | |

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