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public procurement

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Procurement procedures of the national government of Japan are generally regulated by the Accounts Act (Act No.35 of 1947, as amended, "Accounts Act"), the Cabinet Order concerning the Budget, Auditing and Accounting (Imperial Ordinance No.165 of 1947), the National Property Act (Act No.73 of 1948) and the Contract Management Regulations (Ministry of Finance Ministerial Ordinance No.52 of 1962). Procurement procedures of local governments are generally regulated by the Local Autonomy Act (Act No.67 of 1947) and the Local Autonomy Act Enforcement Ordinance (Government Ordinance No.16 of 1947). As to public private partnerships or privatisation, the Act on Promotion of Private Finance Initiative (Act No.117 of July 30, 1999, as amended, "PFI Act") constitutes a part of the regulation on public procurement. In addition, the Act on Reform of Public Services by Introduction of Competitive Bidding (Act No.51 of 2006) provides procedures and regulation for market testing of public service.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Acts such as the Promoting Proper Tendering and Contracting for Public Works Act (Act No.127 of 2000), the Criminal Act (Act No.45 of 1907) and the Antimonopoly Act (Act No.54 of 1947, as amended, "Antimonopoly Act") set regulations on fraudulences (such as bribery), the Act on Prevention of Delay in Payment under Government Contracts, etc. (Act No.256 of 1949) regulate timing (and delay) of payments by government, and the Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities (Act No.100 of 2000) promotes procurement of environmental-friendliness. In addition, information relating to public contracts may be disclosed in accordance with the Act on Access to Information Held by Administrative Organs (Act No.42 of 1999).

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Japan is a signatory to the WTO Agreement on Government Procurement ("GPA"), and to implement the provisions of GPA, special provisions are stipulated in the Cabinet Order Stipulating

Special Procedures for Government Procurement of Products or Specified Services (Government Ordinance No.300 of 1980), the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services in Local Government Entities (Government Ordinance No.375 of 1995) and other ministerial ordinances for government procurement subject to GPA.

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The key underlying principles of the regimes are ensuring "economic efficiency" (including competitiveness) and "fairness" (i.e. equal treatment) between both (a) public and suppliers (tenderer) and (b) tenderers. In addition, in order to ensure "fairness", ensuring "transparency" has been strongly required. These underlying principles are the lens through which any interpretation of the legislation must be made, and legislative politics are determined in accordance with such principles.

1.5 Are there special rules in relation to defence procurement or any other area?

No special rules are provided relating to defence procurement, however, many contracts for defence procurement are awarded at the discretion of the relevant governmental body ("contracts at discretion") and not on a competitive basis because the number of suppliers for defence goods is limited and goods for defence procurement require high technology and security. Due to such character of contracts for defence procurement, consideration for goods is determined by a cost calculation system. What is the proper "cost" often becomes a topic of discussion and sometimes is referred to a judicial court.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

The regulation of public procurement applies mainly to national and local governments. Government-affiliated organisations, such as incorporated administrative agencies, usually have internal rules similar to the legislative regulations for public procurement. Apart

from domestic regulation, GPA is applicable not only to national and local governments but also to incorporated administrative agencies, public research institutes, government financial corporations, public corporations, and similar bodies.

2.2 Which private entities are covered by the law (as purchasers)?

As a general rule, public-interest corporations or stock corporations which are established by local governments pursuant to the Civil Code (Act No.89 of 1896) or Corporation Act (Act No.86 of 2005) are not covered. However, those corporations sometimes have internal rules similar to the legislative regulation for public procurement. GPA has a list of private entities wholly or partly owned by the national government, to which GPA is applicable.

2.3 Which types of contracts are covered?

Contracts, with national and local public entities and other public organisations as one party, which stipulate supplies of services (including completion of works) or transfers of properties rendered by private entity as other party, are covered.

2.4 Are there financial thresholds for determining individual contract coverage?

With respect to domestic level, no specific financial thresholds for determining individual contract coverage exist, except that expenditure under each contract shall be within the amount permitted as appropriation resolved by the council.

Special regulations are provided for goods and services with a value of the threshold amount stipulated in the Annexes of GPA. The threshold amounts and the current values in yen are as follows:

- (1) National Government Entities
 - (i) Supplies: 130,000 SDR (19,500,000 yen).
 - (ii) Construction Services: 4,500,000 SDR (675,000,000 yen).
 - (iii) Architectural, engineering and other technical services: 450,000 SDR (67,500,000 yen).
 - (iv) Other Services: 130,000 SDR (19,500,000 yen).
- (2) Local Government Entities
 - (i) Supplies: 200,000 SDR (30,000,000 yen).
 - (ii) Construction Services: 15,000,000 SDR (2,250,000,000 yen).
 - (iii) Architectural, engineering and other technical services: 1,500,000 SDR (225,000,000 yen).
 - (iv) Other Services: 200,000 SDR (30,000,000 yen).

2.5 Are there aggregation and/or anti-avoidance rules?

Although there is no specific provision explicitly prohibiting the disaggregation, the intentional disaggregation of contract for the purpose of avoiding the application of the public procurement regulation is regarded as illegal. GPA explicitly prohibits intentional disaggregation.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

There is no special rule for concession contracts.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are mainly two types of award procedures: (i) general competitive bidding; and (ii) designated competitive bidding. General competitive bidding is placed as general procedure, and designated competitive bidding as exceptional and permitted only when relevant ordinances etc. specify as such under certain circumstances.

The main stages of general competitive bidding are as follows:

- (a) Public notice for invitation.
- (b) Responses to inquires and/or on-site debriefing by public entity.
- (c) Confirmation of qualification for submission and notice thereof.
- (d) Submission of proposals and bidding by tenders.
- (e) Evaluation of proposals and bidding, and notice of appointee.
- (f) Conclusion of agreement between appointee and public entity.

In cases of designated competitive bidding, (a) and (c) are omitted because tenders qualified for submission will have already been appointed by public entity and public entity shall prepare and disclose the list for such qualified tenderers.

In addition to two types of award procedures, contracts at discretion are available when strict conditions set by regulation are satisfied.

3.2 What are the minimum timescales?

For procurements subject to GPA, generally there must be a period of at least 40 days between the date of public notice for invitation to the tenderer and the deadline for submission of tenders. This period will be extended to 50 days in most cases. For procurements to which GPA is not applicable, this period is 10 days.

3.3 What are the rules on excluding/short-listing tenderers?

There is an explicit provision of law which set a list of conditions that tenderers must satisfy. Additional conditions for excluding/short-listing tenderers may be set by public entities and such additional conditions shall be established and disclosed to the public. In case of procurement of construction, as a part of qualification criteria, public entities usually require tenderers to obtain a certain grade of their capability from relevant public entities in accordance with their performance record, size of company, number of employees, etc. As to procurement by local governments to which GPA is not applicable, local governments may, as a part of qualification criteria, require tenderers to have their offices located in a specific city, if such additional requirement is regarded as appropriate and reasonable in light of type and nature of relevant contract.

3.4 What are the rules on evaluation of tenders?

There is a principle that a tenderer who offers the best (from the perspective of the tenderee) price for proposal and bid shall be generally appointed; that is, price had been the sole relevant factor. However, nowadays, a tenderer who offers the most benefit to the relevant public entity shall be generally appointed; that is, that

public entity shall consider various factors including not only price but other conditions. Both methods for evaluation provided in relevant national and local laws, and Local Autonomy Act Enforcement Ordinance, provides provisions to establish and disclose criteria for such evaluation, while there are no more specific rules in relevant national laws.

3.5 What are the rules on awarding the contract?

The contracting authority may establish its own criteria for each tendering process, and may request in the notice for invitation of bids that the bidders submit necessary materials to prove that they satisfy such criteria before submission of a bid. The contracting authority may deem any bid submitted by those who do not meet such criteria invalid.

3.6 What are the rules on debriefing unsuccessful bidders?

There is no specific rule.

3.7 What methods are available for joint procurements?

There is no explicit rule on joint procurements and joint procurements are rarely implemented in practice. However, in several PFI projects, plural public entities executed agreements on the procedure of joint procurement and allocation of disbursement of the cost of procurement procedure and the project, and then jointly implemented procurement procedures.

3.8 What are the rules on alternative bids?

The Act on Promotion of Securing Quality of Public Works (Act No.18 of 2005) sets the rules to promote technical proposal from tenderers. That Act provides that when public entities require tenderers to submit technical proposals, such public entities must publish the criteria by which they will evaluate such proposals. The Act further provides that if any proposal submitted by tenderers relies on novel techniques or innovation, public entities may change the target price.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

Laws relating to public procurement apply to public entities and contracts specified in questions 3.1 and 3.3, and no other specific rule regarding the principal exclusions/exemptions.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

There is no explicit rule. Any contract between national or local governments is classified as an "administrative contract" and is considered conceptually different from the contract by which procurement regulation would be applicable.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

As to public procurement to which GPA is applied, Japan has established a system to provide non-discriminatory, timely, transparent and effective procedures to file complaints. The national system will handle complaints about procurements by the national government and related entities. Complaints about procurements by local governments and related entities to which GPA is applied are handled by each local government. The rules of challenge procedures of the national system have been established under the authority of the Cabinet.

Under those rules, any supplier who believes that a specific case of government procurement has breached the provisions of GPA or other prescribed stipulations may file a complaint with the Government Procurement Challenge Review Board. If the board finds that the procurement was made in breach of GPA, etc. the board will prepare its recommendation for remedial actions such as starting a new procurement procedure, redoing same procurement, reevaluating the tenders, and awarding a contract to another supplier or terminating the contract.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

There is no other system outside the legislation.

5.3 Before which body or bodies can remedies/enforcement be sought?

As stated in question 5.1, under the complaint system, a complaint shall be filed with the Government Procurement Challenge Review Board.

5.4 What are the limitation periods for applying for remedies/enforcement?

The complaint filed with the Government Procurement Challenge Review Board must be filed (if at all) within 10 days from the date when the supplier knows or should have known the basis of the complaint.

5.5 What remedies are available after contract signature?

If a bidder suffers loss due to an intentional act or negligence of the public officer in charge of the bidding procedures, the bidder can file a lawsuit against the government to seek compensation for the loss based on the State Redress Act (Act No.125 of 1947). The plaintiff is required to prove that: (a) the public officer intentionally or negligently violated the provisions of the law; (b) the plaintiff has suffered loss; and (c) the causation between the intentional act or negligence and the loss.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

The Government Procurement Challenge Review Board will review the complaint within 7 business days and may dismiss the complaint if: (a) the complaint was not filed within the prescribed

period; (b) the complaint is not related to GPA; (c) the complaint is meaningless or the violation is *de minimis*; (d) the complaint is not filed by a supplier; or (e) the complaint is not appropriate for review by the board. If the board accepts the complaint for review, the board will notify the complaining party and the procurement entity thereof, and publicly announce the filing of the complaint. The procurement entity is required to participate in the proceeding. Any supplier interested in the government procurement subject to the complaint can participate in the proceeding by notifying thereof to the board within 5 days after the public announcement.

If a complaint is filed before signing a contract for the procurement, the board will as a rule make a request to the governmental entity not to make a contract promptly within 10 day after filing of the complaint. If a complaint is filed within 10 days after the making of a contract for the procurement, the board will as a rule make a request to suspend the performance of the contract promptly. Within 14 days after the date of the receipt of a copy of the complaint, the government entity is required to file a report containing tender documents, an explanation in response to the complaint and additional information necessary for the resolution of the complaint. The board will ask the complaining party and the government entity to submit assertions, explanation and evidence, and review the complaint. The board may call a witness or expert or have a public hearing on the contents of the complaint. The board will prepare a report on its findings within 90 days (50 days in case of a complaint involving public construction work). The board may expedite the proceeding on application by the complaining party or the procurement entity.

In the report, the board will decide whether all or part of the complaint is upheld and whether the procurement was made in breach of GPA. If the board finds that the procurement was made in breach of GPA, the board will prepare its recommendation for remedial actions, taking into account of such circumstances as the degree of defect in the procurement procedures, the degree of disadvantage caused to the suppliers, the degree of breach of GPA, the extent of the performance of the contract already made, the degree of the burden on the government, the urgency of the procurement and the effect on the business of the procurement entity. The procurement entity, as a rule, is required to follow the recommendation by the board, although the recommendation by the board is regarded as not legally binding. If the procurement entity will not follow the recommendation, it must notify the board thereof with a reason within 10 days (60 days in case of public construction work) after the receipt of the recommendation.

As to a lawsuit against the government to seek compensation for the loss based on the State Redress Act, the length of the period until obtaining a court order depends on the complexity of the case and it usually takes more than a year.

5.7 Is there a culture of enforcement either by public or private bodies?

Since the introduction of the Government Procurement Challenge Review Board in 1996, only 9 complaints have been filed. Lawsuits against the government to seek compensation for the loss are rare.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

In the case which IBM filed with the Government Procurement Challenge Review Board in relation to the procurement

information-processing system by the Ministry of Land, Infrastructure and Transportation ("MLIT") in 2008, the board issued its report dated December 25, 2008, in which the board find that the evaluation criteria were not appropriate in light of relevant rules set in relation to GPA and the board further issued its recommendation requiring MLIT to reevaluate the proposal by tenderers.

5.9 What mitigation measures, if any, are available to contracting authorities?

Mitigation measures are not available.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) pre-contract signature? If not, what are the underlying principles governing these issues?

There is no explicit rule on changes during procurement procedure. The general understanding is that, if changes to contract specification, timetable and contract conditions are regarded as material, then public entities are required to re-start that procurement procedure reflecting those changes.

6.2 To what extent are changes permitted post-contract signature?

See question 6.1.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The PFI Act provides a very general idea of procedures for privatisations and PPP, but there is no provision which specifically provides the detail of procurement procedure applicable to privatisation and PPP. It is expected that the Cabinet Office, which holds jurisdiction over PFI Act, will publish its guideline of the model procedure of privatisation and PPP. The principal issues are (i) how to evaluate properly any the proposal of a tenderer who proposed a privatisation project before procurement procedure started when the public entity adopted such proposal, and (ii) whether negotiation of contract is acceptable under current system of procurement procedure.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

In Japan, privatisations and PPPs are not singled out for special treatment and no other issues arise, other than those stated in question 7.1.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Committee on Public Services Reform, established under the supervision by Government Revitalization Unit, published the Public Services Reform Program in April 2011. The Committee

examined the reform of procurement/contracting systems, the foundation of propelling public service reform, and the reform of local public services. The programme stipulates urgent issues such as improvement of method of evaluating tenderer's proposal, introduction of competitive negotiation procedure, etc. Based on the programme, it is expected that the national government will start to consider any changes in the public procurement regulation.



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