International Comparative Legal Guides

Public Procurement 2020

A practical cross-border insight into public procurement

12th Edition

Featuring contributions from:

A&L Goodbody
Advokatfirmaet Berngaard AS
AKD
ALFARO, FERRER & RAMIREZ
Allen & Gledhill LLP
Anderson Mōri & Tomotsune
Ashurst LLP
Bignon Lebray Avocats
Blake, Cassels & Graydon LLP
BLOMSTEIN
Borenius Attorneys Ltd
BTG Legal
Fried, Frank, Harris, Shriver & Jacobson LLP
FSM Rechtsanwälte
Holding Redlich
JCLegal
Law Firm Neffat
Legance – Avvocati Associati
Mamo TCV Advocates
Mannheimer Swartling Advokatbyrå AB
Michailopoulos & Associates Law Firm
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Olaniwun Ajayi LP
Pinheiro Neto Advogados
Rahmat Lim & Partners
Stibbe
VASS Lawyers

ICLG.com

ISBN 978-1-83918-022-4
ISSN 1757-2789

Published by
global legal group
59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
www.iclg.com

Group Publisher
Rory Smith

Publisher
Jon Martin

Senior Editors
Rachel Williams
Suzie Levy

Editor
Oliver Chang

Creative Director
Fraser Allan

Printed by
Ashford Colour Press Ltd.

Cover image
www.istockphoto.com

Strategic Partners

International Comparative Legal Guides

Public Procurement 2020

12th Edition

Contributing Editors:
Euan Burrows & Edward McNeill
Ashurst LLP

Expert Chapters

Q&A Chapters

Japan


Reiji Takahashi


Makoto Terazaki

Anderson Mōri & Tomotsune

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 for 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 services.

1.2 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) the public and suppliers (tenderer), and (b) tenderers. In addition, in order to ensure "fairness", ensuring "transparency" is essential. 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.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

With respect to (i) the introduction of supercomputers, (ii) procurement of non-R&D satellites, (iii) public procurement of computer products and services, (iv) public procurement of telecommunications products and services, and (v) public procurement of medical technology products and services, the Japanese national government sets self-imposed regulations in an effort to improve accessibility for foreign companies to the Japanese market, which includes detailed contents of market research, specification documents, and public procurement procedures. These self-imposed regulations are required by "common consent among relating ministry as of March 31, 2014 (http://www.kantei.go.jp/jp/kanbou/26tyoutatu/huzokusiryou/h1-1.pdf (available only in Japanese))". Except for those described above, 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 the particular character of contracts for defence procurement, consideration for goods is determined by a cost calculation system. The definition of the proper "cost" often becomes a topic of discussion and is sometimes referred to a judicial court.

1.4 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 Act on Promoting Quality Assurance in Public Works (Act No.18 of 2005), the Criminal Act (Act No.45 of 1907) and the Antimonopoly Act (Act No.54 of 1947, as amended, "Antimonopoly Act") set regulations on frauds (such as bribery), the Act on Prevention of Delay in Payment under Government Contracts, etc. (Act No.256 of 1949) regulates timing (and delay) of payments by the 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 environmentally friendly procurement. 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).

With respect to IT governance and management for public procurement, there exists a special guideline for maintenance and management of information systems, named "IT Governance and Management Guideline for Government Information Systems", which provides common rules for public procurement of information systems and its project management.

1.5 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 (including "PROTOCOL AMENDING THE

AGREEMENT ON GOVERNMENT PROCUREMENT", as of March 30, 2012, the "Protocol", "GPA"). 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. The Protocol came into force in Japan on April 16, 2014. Between Japan and a country which has not accepted the Protocol, the previous agreement applies until the country accepts the Protocol.

In addition to GPA, Japan has executed economic partnership agreements ("EPA") with some countries. Between Japan and a country which is not a signatory to GPA but is a signatory to EPA (such as India, Thailand and Republic of the Philippines), governmental procurement rules in EPA (if any) apply.

Other than GPA and EPA, the Trans-Pacific Partnership Agreement ("TPP") also provides governmental procurement rules in its Chapter 15.

Please see question 8.2 for details of the latest status of EPA and TPP.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The regulation of public procurement applies mainly to national and local governments. Government-affiliated organisations stipulated in the Annexes of GPA, 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 certain local governments but also to certain incorporated administrative agencies, public research institutes, government financial corporations, public corporations, and similar bodies.

With respect to third-sector companies, GPA does not apply directly to such companies, but it is recommended by the national government that such a company shall adapt regulation of public procurement in consideration of GPA regulation.

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.

The Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (Act No.101 of 2002) stipulates criminal penalties on certain collusive acts; covering acts in relation to bidding not only by (I) the national and local governments, but also by (II) corporations in which the government or local governments (or the government and local governments jointly) have equity of 50 per cent or over, and (III) business corporations which have been established by a special act and of which shares representing at least one third of the total outstanding shares or one third of the total voting rights owned by all shareholders are required by such special act to be owned by the government or a local government at all times.

2.2 Which types of contracts are covered?

The contracts covered by the regulation of public procurement are contracts which (1) result in the transfer of any economic value (generally money) of public entities, and (2) are entered into by public entities and private entities. The typical contracts covered are construction contracts, contracts which stipulate supplies of services (including completion of works) or transfers of properties rendered by a private entity.

Certain types of contracts, such as a build-operate-transfer contract and a public works concession contract, are not clearly stated by law as contracts covered by public procurement rules, but practically they are treated as such.

2.3 Are there financial thresholds for determining individual contract coverage?

With respect to the domestic level, no specific financial thresholds for determining individual contract coverage exist, except that expenditure under each contract shall be within the amount permitted in a budget 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 (which shall be adjusted every two years) are as follows (effective until March 31, 2020):

(I) National Government Entities:
- (i) Supplies: 100,000 Special Drawing Rights ("SDR") (15,000,000 yen).
- (ii) Construction Services: 4,500,000 SDR (680,000,000 yen).
- (iii) Architectural, engineering and other technical services: 450,000 SDR (68,000,000 yen).
- (iv) Other Services: 100,000 SDR (15,000,000 yen).

(II) Local Government Entities:
- (i) Supplies: 200,000 SDR (30,000,000 yen).
- (ii) Construction Services: 15,000,000 SDR (2,290,000,000 yen).
- (iii) Architectural, engineering and other technical services: 1,500,000 SDR (220,000,000 yen).
- (iv) Other Services: 200,000 SDR (30,000,000 yen).

(III) Government-affiliated Organisations:
- (i) Supplies: 130,000 SDR (19,000,000 yen).
- (ii) Construction Services by certain government-affiliated organisations categorised as Group A: 15,000,000 SDR (2,290,000,000 yen).
- (iii) Construction Services by certain government-affiliated organisations categorised as Group B: 4,500,000 SDR (680,000,000 yen).
- (iv) Architectural, engineering and other technical services: 450,000 SDR (68,000,000 yen).
- (v) Other Services: 130,000 SDR (19,000,000 yen).

Notwithstanding the foregoing, the Japanese national government sets self-imposed regulations in an effort to improve accessibility for foreign companies to the Japanese market, and thereby the above standard for the threshold amounts and the current values in yen is adjusted as follows (changed parts from GPA standard are underlined):

(III) Government-affiliated Organisations:
- (i) Supplies: 100,000 SDR (15,000,000 yen).
- (ii) Construction Services by certain government-affiliated organisations categorised as Group A: No change from GPA.
- (iii) Construction Services by certain government-affiliated organisations categorised as Group B: No change from GPA.
- (iv) Architectural, engineering and other technical services: No change from GPA.
- (v) Other Services: 100,000 SDR (15,000,000 yen).

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

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

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

As stated in question 2.2, public procurement rules are practically applied to concession contracts as well. In the PFI Act, there are rules on the "Right to Operate Public Facility, etc.", which is regarded as a type of right based on a concession contract.

The term "Right to Operate Public Facility, etc." means the right to implement "Public Facility, etc. Operation Project". The term, "Public Facility, etc. Operation Project" means a qualified project under the PFI Act; one in which a private company is given a right to operate a public facility (such as an airport), the ownership of which is held by a public entity, and receives usage fees as its own income.

See question 7.1 concerning the "Right to Operate Public Facility, etc." and the relevant contract award procedure of Privatisations and PPPs.

2.6 Are there special rules for the conclusion of framework agreements?

There is no concept of framework agreements in the public procurement regulation in Japan.

2.7 Are there special rules on the division of contracts into lots?

There are no such special rules on the division of contracts into lots.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

In general, under applicable laws and regulations on public procurement, purchasers (public entities) do not owe particular obligations to suppliers (bidders) established outside Japan which are different from those of suppliers established in Japan. Note that, as mentioned in question 3.3 below, additional conditions for excluding/short-listing tenderers may be set by public entities. Such additional conditions sometimes contain qualification criteria which are relatively difficult for a foreign company to fulfil, such as the existence of an office or certain work experience in Japan.

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 two main types of award procedures: (i) general competitive bidding; and (ii) designated competitive bidding. General competitive bidding is used as a general procedure, and designated competitive bidding is 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 inquiries and/or on-site debriefing by a 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 tenderers qualified for submission will have already been appointed by a public entity and the 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 tender 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 sets 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 the case of procurement of construction, as a part of the 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 the qualification criteria, require tenderers to have their offices located in a specific city if such an additional requirement is regarded as appropriate and reasonable in light of the type and nature of the relevant contract.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

There is a principle that a tenderer who offers the best (from the perspective of the tenderee) price for a proposal and bid shall be generally appointed; that is, price has been the sole relevant factor. However, nowadays, a tenderer who offers the most benefit to the relevant public entity shall generally be appointed; i.e., that public entity shall consider various factors including not only price but other conditions (such evaluation method is called the "Comprehensive Evaluation Method"). Both methods for evaluation are provided in relevant national and local laws, and the Local Autonomy Act Enforcement Ordinance provides provisions to establish and disclose criteria for such evaluation, as there are no more specific rules in relevant national laws.

Especially for construction works by the national government, almost all the tenders are implemented though the Comprehensive Evaluation Method. In the Comprehensive Evaluation Method, factors other than price, like execution plan, experiences in similar work, and the ability of technical personnel, are set as evaluation criteria. For more detailed and complicated projects (especially PFI projects), more detailed and segmented criteria are set, and the evaluation process is often conducted by an independent committee consisting of various experts, such as academic experts, lawyers, accountants, although such an independent committee is not mandatory.

3.5 What are the rules on the evaluation of abnormally low tenders?

Under the Accounts Act and the Local Autonomy Act, if it is found likely that the person who should be the counterparty to the contract will not satisfactorily perform the terms of the contract for the price that the person has offered, or if it is found to be extremely inappropriate to conclude the contract with the person who should be the counterparty for the price that the person has offered because of the likelihood that doing so will disrupt the establishment of a fair transaction, national and local governments may select the person who offered the lowest price from among the other persons who made offers within the range determined by the target price, as the counterparty to the contract.

In addition, the Local Autonomy Act allows local governments to, when necessary, set a minimum contract price in their procurement process.

3.6 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.

3.7 What are the rules on debriefing unsuccessful bidders?

Although there is no specific statutory rule concerning debriefing, the Ministry of Land, Infrastructure, Transport and Tourism ("MLIT") has issued a notice which internally requires its regional development bureaux to establish a Bidding Monitoring Committee which, when a request for explanation is filed by an unsuccessful bidder, gives an explanation and conducts an investigation and issues its non-binding recommendation. The Ministry of Defence also has a similar committee: the Fair Bidding Investigation Committee. Local governments generally establish the same kind of organisation by their internal rules.

3.8 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 have executed agreements on the procedure of joint procurement and allocation of disbursement of the cost of the procurement procedure and the project, and subsequently implemented procurement procedures jointly.

3.9 What are the rules on alternative/variant bids?

The Act on Promotion of Securing Quality of Public Works (Act No.18 of 2005) sets the rules to promote a technical proposal from tenderers. This 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.

3.10 What are the rules on conflicts of interest?

There is no explicit rule on conflict of interest in public procurement regulation in Japan. However, it is often provided in the public notice of invitation or request for qualification that conflict of interest with a member of the evaluation team or unfair advantages are some of the reasons for disqualification.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Each of the national and local governments adopts its calculation standard of the target price of contract. In the application of their standards, public entities conduct market engagement or request potential bidders to provide their quotations as referential information.

Any unfair conduct, such as leakage of a target price which is not disclosed in the procurement process, could constitute an offence under the Penal Code (Act No.45 of 1907) and the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (Act No.101 of 2002).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Laws relating to public procurement apply to public entities and contracts specified in questions 3.1 and 3.3, and there is 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 concerning "in-house" arrangements. Any contract between national or local governments is classified as an "administrative contract" and is considered conceptually different from the contract by which a procurement regulation would be applicable.

5 Remedies

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

As a general rule, 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).

In addition to the filing of a lawsuit against the government in the courts, as regards 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. This challenge system is called the "Government Procurement Challenge System" ("CHANS").

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 the same procurement, re-evaluating the tenders, and awarding a contract to another supplier or terminating the contract.

With respect to more details of CHANS, please see the website of the Cabinet Office of the Japanese government (http://www5.cao.go.jp/access/english/chans_main_e.html).

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

The procedure of explanation, investigation and non-binding recommendation by the Bidding Monitoring Committee or similar organisation established by local governments described in question 3.6 constitute possible remedies.

5.3 Before which body or bodies can remedies 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?

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 knew or should have known the basis of the complaint.

5.5 What measures can be taken to shorten limitation periods?

No measures are available to shorten limitation periods.

5.6 What remedies are available after contract signature?

As stated in question 5.1, the State Redress Act (Act No.125 of 1947) provides monetary compensation for loss. Under the State Redress Act, 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.

Concerning the remedies (though not-binding) available under the system of the Government Procurement Challenge Review Board, see question 5.1.

5.7 What is the likely timescale if an application for remedies is made?

The Government Procurement Challenge Review Board will review the complaint within 10 working 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 five 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 to suspend the contract procedure promptly, within 10 days after the filing of the complaint. If a complaint is filed within 12 working 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 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, EPA and other equivalent treaties. If the board finds that the procurement was made in breach of GPA, EPA and other equivalent treaties, the board will prepare its recommendation for remedial actions, taking into account 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, EPA and other equivalent treaties, 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 does not follow the recommendation, it must notify the board thereof with a reason within 10 days (60 days in the 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 – it usually takes more than a year.

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

In the case which IBM Co. Ltd. (Japan) filed with the Government

Procurement Challenge Review Board in relation to the procurement information-processing system by MLIT in 2008, the board issued its report dated December 25, 2008, in which the board found 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 re-evaluate the proposal by tenderers.

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

If the procurement entity has been required by the board to suspend execution or performance of a contract because a complaint has been filed, they may override such a requirement if they determine that they cannot adhere to such a requirement because of urgent and compelling circumstances.

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) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

There is no explicit rule on changes during the procurement procedure.

However, the general understanding is that changes to specifications or contract conditions, etc. are basically not permitted during and after a procurement procedure, as such factors are deemed as a prior condition, so that if changes to contract specification, timetable and contract conditions are regarded as material, then public entities are required to restart that procurement procedure reflecting those changes. In the case of Contracts at Discretion, such changes are generally more easily permitted.

Concerning changes to the membership of bidding consortia, although there is no explicit rule, the general understanding is that the changes to the membership are not allowed without prior approval of the government, and the government gives its approval only when there is a compelling reason.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

After the submission of a final tender, changes to the final tenders and the terms of the contract are basically not permitted during a procurement procedure and after a contract award, unless such a change is *de minimis*.

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

There is no explicit rule concerning the changes after contract signature.

In practice, the general understanding is that changes are permitted if such changes are mutually agreed, have justifiable reason and are not material.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

There is no explicit rule concerning the transfer of a contract.

The contract used in public procurement in Japan generally contains a provision which prohibits a contracting party from transferring its rights and obligations under the contract without prior approval of the contracting authority.

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 details of the procurement procedure applicable to privatisations and PPP. There exist documents named as "guideline" published by the Cabinet Office, which holds jurisdiction over the PFI Act: (I) its guideline of the "Right to Operate Public Facility, etc." ("Concession Guideline"), which is regarded as a type of right based on concession contract; (II) the model contract of privatisations and PPPs; and (III) its guideline of the model procedure.

The principal issues and changes described in the guidelines above are as follows:

(I) Principal issues in the new guideline of the "Right to Operate Public Facility, etc.":
  (i) How to establish the "Right to Operate Public Facility, etc." and the contents of such a right.
  (ii) How to conduct the public facilities operation project by the holder of "Right to Operate Public Facility, etc."

(II) Principal changes in the guideline of a model contract:
  (i) How to allocate various risks in a concession contract of the public facilities operation project implemented by the holder of "Right to Operate Public Facility, etc."

(III) Principal changes in the guideline of model procedure:
  (i) How to evaluate properly any proposal of a tenderer which proposed a privatisation project before the procurement procedure started when the public entity adopted such a proposal.
  (ii) Whether negotiation of contract is acceptable under the current system of procedure.

In order to promote concession projects in Japan further, the PFI Act was amended as of June 20, 2018, and accordingly the Concession Guideline was amended as of October 18, 2018. Main features of these amendments are as below:

(i) Enforcement of assistance by the government for both public and private entities to promote privatisations: both public and private entities which take on concession projects may consult directly with the Cabinet Office, and the Cabinet Office can provide answers or advice, which was not permitted before these amendments.

(ii) Special exemptions of the Local Autonomy Act in case of privatisations: these amendments exempt some procedures required under the Local Autonomy Act for concession projects of certain types and make it easier to proceed.

(iii) Special exemption of cancellation compensation for early redemption of municipal bonds in case of privatisations of water supply: at present, local governments manage water supply projects by themselves with a loan from the central government in the form of municipal bonds, and such municipal bonds prevent local governments from promoting concession projects of water supply since such concession triggers cancellation compensation for early redemption of the municipal bonds. These amendments exempt the relevant cancellation compensation and make it easier to take on water supply concessions.

Other than the PFI Act, there is no explicit rule applicable in common to the privatisation of public enterprises. In Japan, when a certain public enterprise is to be privatised, the government usually establishes a special act applicable to the privatisation.

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. Within the general rules and regulations of public procurement, the guidelines of the PFI Act discuss how to apply those rules and regulations appropriately to PFI/PPP projects, as 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?

The Digital Procedural Act (Act No.16 of 2019) was enacted on May 24, 2019 and promulgated on May 31, 2019. It will be fully implemented by the end of February 2020 at the latest. The purpose of this Act is to digitalise administrative procedures by the government and local governments, which will have a certain impact on procurement procedures, while specific conditions of such procurement procedures are to be provided by government and ministry ordinances and notifications in the future.

In addition, regarding the procurement of government information systems that have been carried out independently by each ministry and agency up to now, the Japanese government has stated that, from this financial year, it will start to partially manage the projects throughout the year from the budget request stage to the execution stage altogether under the Cabinet Secretariat (one of the ministries of the government) and will expand the scope further. This may have an impact on procurement practices. The details will be also determined by government and ministry ordinances and notifications in the future.

8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

After the United States' withdrawal from intercompany negotiations for the (old) TPP, the remaining 11 countries (Japan, Vietnam, Brunei Darussalam, Malaysia, Singapore, Australia, New Zealand, Chile, Peru, Mexico and Canada) agreed on the revised version of the TTP, the Comprehensive and Progressive Agreement for New Trans-Pacific Partnership (so-called "TTP 11"). TTP11 is a free trade agreement involving the above 11 countries, which includes provisions regarding less restrictive access to markets, equal treatments between nationals and foreigners, and freedom of investments into signatory countries. It became effective on December 30, 2018.

In relation to public procurement, TTP11 provides (i) non-discriminatory treatments for overseas companies, (ii) introduction of fair and transparent procurement procedures, and (iii) efforts to use English upon announcement of the procurement plan. The Japanese government has announced that no amendments/additions need to be made on the existing laws, orders and ordinances relating to public procurement because TTP11 is almost equivalent to GPA, which has already applied to public procurement in Japan. Further attention, however, will still be required as to whether previous practices (in particular, lower and internal rules in each governmental organisation and each local government) for the public procurement will change or not, since there are some differences between TTP11 and GPA.

In addition, Japan-EU EPA became effective on February 1, 2019. Japan-EU EPA incorporates GPA as basic rules for government procurement, but added some rules to GPA. Such additional rules are intended to enhance equal access to public procurement in Japan. For example: (i) procurement plans need to be uploaded to the Internet; (ii) the relevant prior experience in Japan may not be required for participation; (iii) technical qualification certified in the EU must be accepted in Japan; (iv) EU companies may not be treated in a discriminatory manner upon review under the relevant laws and regulations; and (v) complaints from suppliers need to be reviewed in a non-discriminatory, timely and transparent manner. At present, certain services provided by Annex 10 of Japan-EU EPA have become the target of the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services (Government Ordinance No.300 of 1980) by its recent amendments. Other amendments to existing laws, orders and ordinances in Japan have not been found, so it would be advisable to continue monitoring the situation. Japan and the United States have also reached a final agreement on the Japan-United States Trade Agreement on September 2019 in line with movements towards a free trade system such as TPP11 and Japan-EU EPA. The existence of matters related to government procurement is unclear, and it will be necessary to keep an eye on future developments.

Reiji Takahashi

Admitted: Japan 1997; New York 2002.

Education: The University of Tokyo (LL.B., 1995); the Legal Training and Research Institute of the Supreme Court of Japan (1997); and University of Virginia, School of Law (LL.M. 2001).

Social Activities: Assistant Professor, University of Tokyo School of Law (2007–2010); Adjunct Lecturer, University of Tokyo School of Law (2010–2016); and Member of Study Group of Contract Management, Ministry of Defence (2010–present).

Professional Experience: Anderson Mōri & Tomotsune (1997–present); and Allen & Overy, London Office as a foreign associate (2001–2002). His practice areas of focus include PFI, PPP, privatisation, public procurement, project finance and structured finance. He is native in Japanese and fluent in English.

Anderson Mōri & Tomotsune
Otemachi Park Building
1-1-1, Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1051
Email: reiji.takahashi@amt-law.com
URL: www.amt-law.com/en

Makoto Terazaki

Admitted: Japan 2007.

Education: The University of Tokyo (LL.B., 2004); the University of Tokyo School of Law (J.D., 2006); and the Legal Training and Research Institute of the Supreme Court of Japan (2006–2007).

Social Activities: Adjunct Lecturer, University of Tokyo School of Law, 2008–2010; and worked for MLIT Civil Aviation Bureau (December 2011–June 2013).

Professional Experience: He is co-supervising editor of translation for "FIDIC Conditions of Contract for Construction Multilateral Development Bank Harmonised Edition (For Building and Engineering Works Designed by the Employer) (FIDIC Red Book MDB)" (AJCE August 2011); and (co-)author of other various publications. His practice areas of focus include corporate and M&A, PFI, trade and regulation, finance and litigation. He is native in Japanese and fluent in English.

Anderson Mōri & Tomotsune
Otemachi Park Building
1-1-1, Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1170
Email: makoto.terazaki@amt-law.com
URL: www.amt-law.com/en

Anderson Mōri & Tomotsune has approximately 450 Japanese lawyers (*bengoshi*), 40 lawyers qualified in foreign jurisdictions, approximately 210 other professional staff including patent lawyers, immigration lawyers, foreign legal trainees, translators and paralegals, and approximately 350 other general staff members as of October 1, 2019.

Anderson Mōri & Tomotsune has a wide-ranging public sector transaction practice including privatisation, PPP and PFI. We have acted for national and local governments in relation to many PFI/PPP projects in various sectors, including airports, satellites, prisons, hospitals, water, sewage, waste disposal, renewable energy, etc. We provide extensive legal services covering not only implementation of various projects through public procurement procedure but also disputes in public procurement. Our attorneys have experience working in many public entities, including ministries and quasi-governmental organisations, and include the former Deputy Secretary of Ministry of Economy, Trade and Industry and the former Director-General of the Cabinet Legislative Bureau.

www.amt-law.com/en

ANDERSON MŌRI & TOMOTSUNE

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

@ICLG_GLG

The International Comparative Legal Guides are published by:

global legal group