Public Procurement World - Japan

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# 1. The Laws

## a. What is the applicable legislation?

In Japan, broadly speaking there are two different types of public procurement systems, one of which is implemented by the national government (the "Government") and the other, by local governments (e.g., prefectures or municipalities). As such, they are each regulated in different ways.

The Accounting Act (the "Accounting Act") and the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting (the "Cabinet Order on Budgets and Accounts") are the main laws and regulations regarding public procurement by the Government. The Accounting Act governs generally the Government's income, expenses and contracts, etc. The Cabinet Order on Budgets and Accounts sets forth detailed regulations under the scope of the Accounting Act.

The procurement systems implemented by local governments are governed under the procedures set up under the Local Autonomy Act and the Order for Enforcement of the Local Autonomy Act (the "Order for Autonomy").

In addition to these laws and regulations, the Government established Special Cabinet Orders for public procurement (the "Special Cabinet Orders for GPA") so as to correspond with the WTO's Agreement on Government Procurement (the "GPA") which took effect in 1996. The Special Cabinet Orders for GPA operate as exceptions to both the Cabinet Order on Budgets and Accounts and the Order for Autonomy.

Aside from these, there are a number of specific laws regarding public procurement, such as the Act on Prevention of Delay in Payment under Government Contract, etc., the Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities, the Act for Promoting Proper Tendering and Contracting for Public Works 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. (the "Act on Elimination and Prevention of Involvement in Bid Rigging").

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

As mentioned above, the Special Cabinet Orders for GPA were prepared to correspond with the GPA. For the most part, complying with the Special Cabinet Orders for GPA also entails compliance with the GPA.

However, not all of the provisions of the GPA are expressly covered by Japanese laws and regulations and, where not covered, Government institutions establish independent guidelines in order to address such portions of the GPA.

## c. What are the basic underlying principles of the legal framework?

For public procurement in Japan, the applicable general principles are economic efficiency, competitiveness, fairness and transparency.

Economic efficiency: To secure, from an economic perspective, the most efficient procurement, emphasizing the benefit to the taxpayers supporting the Government/local government.

Competitiveness: To promote competition through general competitive bidding (where discretionary contracts are the exception rather than the norm), and build mechanisms to prevent uncompetitive actions.

Fairness: To comply with any rules necessary to maintain the trust of the citizenry for appropriate accounting processes and to achieve equality opportunity between competitors acting as opposing parties for the purposes of public procurement.

Transparency: To build systems for the disclosure of information in order to promote external monitoring.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

Defence procurement is exempted from the application of the rules mentioned above because it meets the security exemption of the GPA (Article 23). To be more precise, referring to items 2 and 3 of Article 3 of the Special Cabinet Orders for GPA, the GPA can be applied only if the goods are designated by the Government as goods relevant to defence (see also: the GPA, Appendix 1, Annex 4). However, even if the goods are designated as such, procurement would likely be implemented by means of discretionary contracts rather than open bidding because the number of potential participants would be limited due to the special usage of such goods as well as the types of permissions required for such manufacturing involving advanced technology.

Aerospace procurement is regulated under the Space Activity Act and the Satellite Remote Sensing Act, which were enacted in 2016 to promote the pursuit of space businesses by private companies.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

The Accounting Act, which governs the Government's procurement, covers each ministry and agency of the Government (e.g., the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), the Ministry of Economy, Trade and Industry (METI), the Ministry of Defence or the National Police Agency) as the targeted public institutions. Generally speaking, the chiefs of such institutions (e.g. the Minister of MLIT, the Minister of METI, the Minister of Defence or the Commissioner General of the National Police Agency) are in charge of managing the contracts of such institutions, and are accordingly covered under such laws. As officers delegated by the aforementioned chiefs can also be in charge of contracts, they are covered by the laws as well.

On the other hand, the Local Autonomy Act, which governs the procurement activities of local governments, covers public institutions such as prefectures and municipalities.

## b. Which private entities are covered by the laws?

The Act for Promoting Proper Tendering and Contracting for Public Works can be applied to companies deemed to be "special legal entities". "Special legal entities" include corporations in which the Government has invested more than a certain threshold and corporations which continuously order construction works (based on their purpose of incorporation), such as Japan Tobacco and Japan Railway East. Legal entities other than said special legal entities are required to obey supervision by relevant regulators under applicable guidelines. In addition, private entities are subject to criminal law as applicable to obstructive bidding and bid rigging.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Co-operations between contracting authorities are exempted because Japanese procurement laws are basically designed to discipline between the Government or local governments on one side and non-public parties on the other side. However, where several local governments set up partial-affairs associations for establishing public facilities such as waste disposal center under the Local Autonomy Act (paragraph 2 of Article 284), the procurement by the associations will be governed by the public procurement laws including Local Autonomy Act and the Order for Autonomy.

Furthermore, the procurement law does not apply to public-public co-operation on provision of public services governed solely by considerations relating to the public interest.

## d. Which types of contracts are covered?

The Accounting Act and the Local Autonomy Act cover public contracts including sales contracts, lease contracts, construction contracts and other types of contracts. In this context, public contracts means contracts to which the Government or a local government is party and under which goods or services such as construction are provided for a fee by entities other than public institutions.

The Special Cabinet Orders for GPA stipulate the covered contracts somewhat more specifically, and is applicable where (i) a contract is executed for the procurement of certain goods or services by the Government and (ii) the value exceeds the applicable base amount set out below:

contracts for procuring goods: JPY 33 million (about USD 300,000)

contracts for procuring construction works: JPY 2.47 billion (about USD 22.45 million)

contracts for procuring services for construction, engineering services or other technical services: JPY 240 million (about USD 2.18 million)

contracts for procuring services other than listed above: JPY 33 million (about USD 300,000)

Please note, however, that the base amounts are reviewed every two years and the above figures should be used only for example purposes.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Each law and regulation relating to public procurement sets forth the details of the relevant required forms and conditions including in relation to the forms of applicable contracts, methods to determine contract prices, performance periods, due dates for payments, guarantees for performance, damages and penalty charges, and conditions related to assignment, termination, survey and supervision for proper performance. Any contracts not complying with the applicable forms and conditions will either not be executed or can be deemed null and void.

## f. What is the applicable regime for framework agreements?

Although there are no regulations particularly focusing on framework agreements, any such agreement would also be subject to the applicable requirements to comply with the abovementioned types of procedures and conditions (item 2(e), above).

## g. What is the applicable regime for public-private partnerships (PPPs)?

The Act on Promotion of Private Finance Initiative in 1999(the "PFI Act") is the main regulation applicable to public-private partnerships/private finance initiatives ("PFI"). The PFI Act regulates the general procedures for the promotion and conducting of PFI projects. We note that the PFI Act has been amended in large part in recent years, and that the "guidelines regarding concessions and PFI projects published by the Government, which addresses the major points in concessions and PFI projects, has become a key practical decision-making tool. The selection process of a preferred bidder of a PFI transaction is subject to general procurement rule discussed above. Usually price factor and proposal factor are evaluated in general.

## h. How are concessions dealt with?

In the case of conducting PFI projects, compliance with procedures of the PFI Act is required. The PFI Act provides certain procedures and conditions in relation to the offer, evaluation and selection of and disclosure regarding private business operators. Administrators of public facilities etc. are required to select private business operators for qualified projects by certain methods such as open invitation for participation (PFI Act, paragraph 1 of Article 8).

For conducting PFI projects, there are several applicable requirements, the basic elements of which are as follows (five rules and three principles):

*Rules*

the rule of being public: to target projects which have a sense of relevance to the public

the rule of using private management and private resources: to use the funds, management capability and technical capability of private business operators

the rule of efficiency: to achieve efficiency and effectiveness through respecting the autonomy and creativity of private business operators

the rule of fairness: to guarantee fairness in the selection of qualified projects and private business operators

the rule of transparency: to secure the transparency of projects throughout their whole processes

*Principles*

the principle of being objective: remaining objective in decision-making at each step of the process

the principle of contract: clarifying the details of contracts such as in relation to the division of responsibilities and apportionment of liability through clear drafting.

the principle of independence: maintaining the independent legal personality of relevant businesses entities and/or differentiating between applicable business sectors

## i. Are there anti-avoidance rules (including laws on bid rigging)?

In terms of measures for the prevention of bid rigging, in addition to the establishment of discrete crimes for (i) the obstruction of bidding and (ii) bid rigging, under criminal law, acts considered to be unfair restraint of trade can fall under a "Cease and Desist" order or "Administrative Surcharge Payment" order issued by the Japan Fair Trade Commission under the Anti-Monopoly Act. Furthermore, in 2002, the Act on Elimination and Prevention of Involvement in Bid Rigging was enacted, strengthening prohibitions on bid rigging in connection with public procurement involving the Government and/or local governments.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

There are basically three methods for public procurement by the Government, namely, general competitive bidding, selective bidding and discretionary contracts. The same applies to procurement by local governments.

First, "general competitive bidding" is a method in which the Government enter into contracts with the bidder who provided the best conditions for the Government through competition among an unspecified number of bidders. This method is equivalent to open bidding under the GPA.

Second, "selective bidding" is a method in which only participants designated by the Government may participate. In cases where the number of participants are limited or it is otherwise not suitable for open bidding due to the nature or purpose of the relevant contract, selective bidding can be employed (the Accounting Act, paragraph 3 of Article 29-3). For example, where it appears there is some risk that relevant business operators may obstruct a fair and open bidding process, selective bidding may be more suitable.

A "discretionary contract" is a type of contract not the result of open bidding or selective bidding, used where, due to the nature or purpose of the contract, or due to some urgent need or potential adverse effect, competition either cannot be held or is otherwise inappropriate.

In terms of priority, general competitive bidding comes first as a rule, and selective bidding or discretionary contracts can be used in exceptional cases.

## b. What status do electronic means/procedures have?

For procurement by the Government, it is possible to use the "electronic procurement system" to handle the whole process of procurement, including bidding, bid opening, establishing a contract, accepting orders, processing delivery inspections and claims. The electronic procurement system is operated as a common system used across many Government Ministries and Agencies. So long as the institution engaging in procurement is using this system, procurement procedures can be smoothly carried out using the unified processes of this system.

A handful of local governments have begun transferring their processes to similar electronic procurement systems.

## c. Where are contract notices, i.e. calls for bid, published?

Information regarding the Government's public procurement is published in Government journals and that of local governments' public procurement is set out in local journals, respectively. The "electronic procurement system" also discloses bidding information, and can be found at: <https://www.chotatujoho.go.jp/csjs/pr006/JohoInActionEN.do>

## c. Can certain prospective bidders be excluded from the competition?

Certain parties are not permitted to participate in bidding, including (i) any person who does not have the power to execute the relevant contract, (ii) any person who received an order of commencement of bankruptcy proceedings and has not had the its rights restored and (iii) any person relating to an Organized Crime Group (the Cabinet Order on Budgets and Accounts, Article 70).

Under the Cabinet Order on Budgets and Accounts, Article 71, if a person has (i) intentionally carried out construction, or manufacturing or any other service in a careless manner or acted fraudulently with regard to the quality or volume of an object in the course of performing a contract, (ii) obstructed the fair implementation of a tender or has hindered a fair price from being reached or colluded with others to obtain an unlawful profit, (iii) obstructed a successful bidder from entering into a contract or obstructed a party to a contract from performing the contract, (iv) obstructed an official from performing the official's duties in relation to a supervision or inspection, (v) failed to perform a contract without a justifiable reason, (vi) has intentionally claimed an excessive amount for a price based on false facts when, under a contract, the price is to be fixed subsequent to the signing of the contract or (vii) has employed a proxy, manager or other employee in the conclusion or performance of a contract who would not be eligible to participate in open bidding due to the foregoing (i) through (vi), such person can be prevented from participating in open bidding for a period of up to three years from the time of such behavior.

These restrictions are generally same in local governments' procurement (the Order for Autonomy, paragraph 2 of Article 167-4).

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

As for criteria of bidder selection, the general practice is to use a price-based method which selects a bidder based only on the offered price. However, where entering a contract with the highest/lowest bidder is considered unsuitable, the Government (or the local government) can opt to enter into the contract with the second highest/lowest bidder. In the case of certain contracts such as asset exchange agreements, the Government (or the local government) can select a bidder based not only on price but also other conditions comprehensively.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

The Government's public procurement procedures require participants to obtain, in advance, an All-Ministry Consolidated Qualification (the "Qualification"). The Qualification is a common requirement for all types of public procurement by the Government. The Qualification can be obtained by non-Japanese companies on their own behalf, or it can be used by proxy (that is, by either (i) engaging a third-party (who holds the Qualification), or (ii) using a substitute entity (who holds the Qualification) to participate in the bidding process). For non-Japanese companies, the process of applying for the Qualification generally requires around two months.

In the process of applying for the Qualification, the applying company will be scored by criteria related to annual average production and sales, total amount of equity capital, cash flows, years in operation and amount of machinery and equipment (in the case of manufacturing goods), and the category of the Qualification will be determined based on the total score out of 100 (e.g., a company which scored more than 90 can participate in procurement matters worth more than JPY 30 million around USD 272,000).

On the other hand, as for procurement by local governments, non-Japanese companies are allowed to participate in procurement as conducted by certain designated cities. For such procurement, participants are commonly required to obtain relevant bidding qualifications specially applicable to particular projects, and in some cases, a would-be participant's place of business can be an item for consideration in connection with the bidding qualification procedures, under the Order for Autonomy.

Under the Cabinet Order on Budgets and Accounts and the Order for Autonomy, the chiefs or officers of each Ministry and Agency or local government can, where necessary, and depending on the type of contract and the relevant price, establish criteria for the bidding qualification related to manufacturing performance or sales, number of employees, amount of capital and other types of information relevant to business, in terms of scale and situation.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

In the case of Government procurement, a Mutual Reporting System has been adopted by which each Ministry and Agency can, by going through the Finance Minister, find records of improper actions of the types mentioned above. Once information about improper actions is shared between each Ministry and Agency under the Mutual Reporting System, this practically functions as a "blacklist".

However, even in the case of such improper actions, persons are not necessarily restricted from participation in open bidding. In cases where it is considered advisable for companies to keep many possibilities for participation, as an exception, companies may potentially not be restricted from participating in a bidding process, particularly in cases where the company has shown considerable indications that it will remedy the issue and not repeat such improper actions, or where it is considered unnecessary because the improper actions took place in an isolated branch of the company.

As mentioned above, a person can be prevented from participating in open bidding for a period of up to three years from the time of the applicable improper action. Following the lapse of such time period, the person is effectively "unlisted" from the Mutual Reporting System.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Although there may still be applicable bidding qualifications in an individual request for proposal which disqualify those who have worked for the government side in the set-up for the same procurement procedure, there are no particular provisions in the procurement legislations excluding companies from bidding procedures due to conflict of interest. However, the Cabinet Order on Budgets and Accounts and the Order for Autonomy provide that where it would be extremely inappropriate to conclude a contract with a company who would otherwise be the counterparty due to the likelihood that doing so would disrupt the establishment of a fair transaction, such a contract may be rejected. In such cases the company could be considered to be excluded from the bidding procedure based on these general provisions due to conflict of interest.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

There are two types of bidder consortia, consortia for service contracts of construction works and for allocating opportunity of accepting offers.

In PFI projects, the Government or local government will generally enter into a contract with a Special Purpose Company incorporated by members of a consortium or it may enter into contracts with each member of the consortium.

According to the bidding guidelines issued by the Japan Fair Trade Commission, bidder consortia who exchanged information about members of the consortia with other would-be participants, can be contrary to the Anti-Monopoly Act.

## g. Can members of a bidder consortium be changed during a procurement procedure?

Although there are no provisions regarding change of members of bidder consortia under the procurement legislations and the PFI Act, specific restrictions on the change of consortium members are normally established in the applicable bidding procedure documents.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Under procurement legislations and the PFI Act, there are no general limitations for participation of related bidders in the same procedure. However, limitations may be determined in relation to specific offering processes, as part of the selection process.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

Under the procurement legislations and the PFI Act, there are no special regulations or requirements for non-Japanese companies. However, such regulations or requirements may be determined in relation to specific offering process, as part of the selection processes.

# 5. Specifications

## a. Are there any rules on the specifications?

Article 10 of the Special Cabinet Orders for GPA stipulates that in case of open bidding or selective bidding (discussed at 3(a), above), the officer overseeing the contracting process shall provide the bidders with tender documentation describing the details of the bid process, upon the request of the bidders. Similarly, Article 6 of the Special Cabinet Orders for GPA stipulates that those documents shall include certain items required to be publicized pursuant to the Special Cabinet Orders for GPA including the specifications and other details regarding the goods or services to be procured.

In practice, tender documentation generally includes a summary of the nature of the construction, the requirements and qualifications for the tender procedure, timeline of the tender procedure, bid guarantees, contract deposits, rules on the award the winning bidder and other details related to the tender procedure.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Bidders are generally not allowed to change the applicable specifications or to submit their own standard commercial terms. In most cases, they are required to use such documentation as provided by the pertinent governmental authority.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

The Small and Medium-sized Enterprise Basic Act (the "Basic Act") and the Act for Ensuring the Receipt of Purchase Orders from the Government and Other Public Agencies by Small and Medium Enterprises are two key laws related to the protection of Small and Medium Enterprises ("SMEs "). In particular, Article 23 of the Basic Act stipulates that the Government shall take measures to expand the opportunity for SMEs' to gain access to orders from the public sector.

In addition to the above, Article 8 of the Act for Ensuring the Receipt of Purchase Orders from the Government and Other Public Agencies by Small and Medium Enterprises, which is derived from the Basic Act and legislated to give practical substance to the principles set out in the Basic Act, sets out the policies the Government is to take in relation to SMEs and also obligates local governments to take measures to expand opportunities for SMEs to gain access to orders from the public sector in line with these policies.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Article 29-6 of the Accounting Act sets out the lowest (or highest) price award principle, which is a rule to the effect that the bidder offering the lowest or highest (depends on the contract) price in the budget range shall be chosen as the contractor. This principle is also applicable to contracts involving local governments.

## b. Are there any limitations regarding the offered bid price?

Article 29-2 of the Accounting Act stipulates that, if it is deemed that there is some risk that the person would otherwise be chosen as the contractor for a contract will not satisfactorily perform the terms of the contract at the price offered, or, if the offered price is considered to be exceptionally low, such that there is some risk that concluding the contract with the offer or of such price would disrupt the establishment of a fair transaction, the officer overseeing the contracting process may, pursuant to the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting, select as contractor the person who offered the lowest price from among the offers falling within the range determined to be the target price range. Similarly, Article 234 section 3 of the Local Autonomy Act sets out an equivalent exception applicable to local governments in relation to the principle mentioned in 6(a), above.

## c. Are there any rules on alternative bids?

No, there is no rule specifically applicable to alternative bids in the Accounting Act. However, in cases where it is considered unsuitable or overly difficult to maintain adherence to the principle of awarding contracts to the bidder offering the lowest (or highest) price, an alternative to this principle (termed the "comprehensive evaluation method") may be applicable, depending on the nature or purpose of the contract at issue.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Yes, in certain conditions, on an exceptional basis, public procurement can be conducted by way of discretionary contract. Article 29-3 section 4 of the Accounting Act states that a contract whose nature or purpose of does not permit open bidding, a contract that cannot be put out for open bidding due to urgent circumstances or a contract that it is determined would be disadvantageous to put out to open bidding, may take the form of a discretionary contract, pursuant to the provisions of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting. Article 29-3 section 5 also states that if the target price of a contract is low, the contract may be put out to selective bidding or may take the form of a discretionary contract.

Similarly, in case of local governments, the Local Autonomy Act allows the used of discretionary contracts in same conditions as the Accounting Act. In addition, the Local Autonomy Act also allows the use of discretionary contracts where (i) it is there is an urgent need to conclude the contract, (ii) there was no bidder in the competitive bidding, (iii) the bidder who won the award did not execute the contract or (iv) the conditions of the discretionary contract are more favourable in terms of price (more favourable than fair market value).

## b. What are the consequences for violation of the competitive bidding requirement?

If a discretionary contract is executed where the applicable conditions mentioned above have not been met, such discretionary contract would be in violation of law, and illegal. However, such an illegal discretionary contract is not always void merely by reason of violation of law. According to one of the leading cases in Japanese precedent (Judgement of Japanese Supreme Court on 19 May 1987), executed discretionary contracts are void/voidable only where there are special circumstances such as (i) the applicable conditions for the execution of the discretionary contract were obviously not met or (ii) the contractor knew or was in a position to know that the discretionary contract should not have been allowed in such case.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Consistent with the GPA, the Government in Japan has established an office responsible for handling concerns related to public procurement called the Office for Government Procurement Challenge System. Parties are free to submit complaints regarding public procurement through the complaint handling system managed by this Office. If the Office's grievance committee finds reasonable grounds in connection with such a complaint, the grievance committee will prepare and submit a report thereon, as well as a recommended proposal for the handling of the complaint, to the pertinent governmental authority involved in the procurement at issue. However, such reports and proposals are treated only as advisory opinions, and do not have the force of law.

In like manner, local governments have each also established grievance committees of their own for handling complaints related to public procurement conducted under their authority.

There are specialized dispute resolution system for public procurement in Japanese courts. If a party intends to raise a claim related to public procurement through the courts, normal court proceedings are to be used.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Depending on the context, a party may claim for damages caused by illegal procurement under the provisions of the State Redress Act. That party may bring an action for judicial review of a relevant administrative disposition pursuant to the provisions of the Administrative Case Litigation Act. We note, however, that it is quite rare that the court would rule in favour of the plaintiff and cancel the disposition in such cases because a selection process in a procurement procedure is not regarded as administrative action and rather contract process..

In addition to the above, in cases of procurement by a local government, an aggrieved party may file a suit against the local government in the way of citizens' suit (*Jyumin-Soshou*) as set out in the Local Autonomy Act.

## c. Is there a specific forum before which procurement disputes are heard?

As mentioned above, there are no specialized or compulsory dispute resolution systems for procurement disputes in the Japanese courts. Therefore a party seeking remedy is required to use normal court proceedings.

In case of disputes concerning contracts for construction work, a party may submit a request to the Committee for Adjustment of Construction Work Disputes to conduct mediation, conciliation and arbitration, based on the provisions of the Construction Business Act. In practice, it is common to stipulate in contracts for construction work a clause related to such dispute resolution mechanism, as set out in the Construction Business Act.

## d. Are there any timing requirements for the review?

According to Article 4 of the State Redress Act and Article 724 of the Civil Code, the right to demand compensation for damages in tort shall be extinguished by operation of law (i) if a relevant claim is not made within three years from the time when the injured party comes to know of the injury and the identity of the person who committed the tortious act, or (ii) when twenty years have elapsed from the time of the tortious act.

## e. What are the main preconditions for review?

Article 1 of the State Redress Act stipulates the main matters that must be raised by a plaintiff seeking redress from the Government or a local government, which are substantially equivalent to what is required in the case of normal torts. The plaintiff is required to show that (i) the act of the relevant public officer or employee was an inappropriate exercise of public authority, (ii) the act at issue was carried out either intentionally or negligently and (iii) the act at issue cause the claimed injury. Article 1 of the Act states that, where such is the case, "the State or public entity shall assume the responsibility to compensate therefor".

## f. What are admissible grounds for starting a review proceeding?

There is no specifically designated admissible grounds for starting a review proceeding. The party seeking review must file a suit in the pertinent court in accordance with ordinary civil procedure.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

A review proceeding does not affect an on-going tender procedure or an awarded contract, provided, however, that, if provisional disposition has been granted by a court, in certain conditions, an on-going tender procedure can be suspended. Having said that, practically speaking, it is possible that the Government or local government may spontaneously suspend the tender procedure, depending on the context of the dispute.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

If a party files a suit in accordance with the State Redress Act and the court has ruled in favour of such party, the remedy is limited to covering monetary damages and does not go as far as suspending or revoking an on-going tender process or already-granted award.

## i. How long does a judicial proceeding for review take?

It varies widely depending on the situation. Taking into account the possibility of appeal, it is common to require several years (potentially including more than a decade) to settle such a dispute.

## j. Must unsuccessful bidders be notified before the award? If so, when?

No, there is no law or rule requiring notification to the unsuccessful bidders.

## k. Are review proceedings common?

Considering that review process poses a heavy burden for the would-be plaintiff in light of cost and time, the pursuit of review proceedings is uncommon in Japan.

## l. Are damage claims in relation with procurement procedures common?

No. As claims for damages in relation to public procurement procedures require significant expenditures of cost and time, they remain uncommon in Japan.

## m. What are the leading court decisions involving procurement disputes?

As mentioned in 8(m), while there are few cases/court decisions involving procurement disputes, we can point out the Tokyo District Court (TDC) Decision of June 27, 2011, which is one of the most commonly-known cases regarding public procurement. The TDC states that a contract will not always be void even if such contract has been concluded by the means of a collusive act, but that, if such collusive act "is against the public policy" (Article 90 of Japanese Civil Code) such contract would be considered void. In the end, the TDC did find in the case that the contract should be voided because the collusive act in question was against public policy.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

The "Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities" provides that, in procuring goods and services, the state and any other governmental body must endeavour to select eco-friendly goods.

The "Act for Promoting Proper Tendering and Contracting for Public Works" provides the basic framework regarding the promotion of proper tendering and contracting procedures for public works.

In addition to these, the National Government Asset Act regulates the obtaining, maintaining, preserving and disposing of national property.

## b. Does a specific contract law apply for public contracts?

The "Act on Prevention of Delay in Payment under Government Contracts, etc." stipulates that, where the Government or a quasi-government entity proceeds with public procurement, it is required to set out in advance the content of the relevant contracts to be executed, including details on pricing terms, timing of payment, management of task progress, processes for inspection, amount of damages and dispute resolution procedures.

In addition, where such public procurement relates to construction work, the Construction Business Act applies to the effect that the parties to a contract for construction work shall include provisions on certain additional items when making a contract based on the principles of the preceding Article, including in respect of the timing of the commencement and conclusion of the construction.

Also of note is that Article 29-4 of the Accounting Act requires any person seeking to participate in an open bidding procedure to deposit five percent or more of the quoted contract price as a security deposit.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

The Cabinet Secretariat set out voluntary measures for the promotion and facilitation of competition regarding public procurement in certain IT sectors, such as for super-computers, high-tech gadgets or services provided through IT (or IoT). These measures are designed to maintain fairness between domestic or foreign products and services and competition in relation to procurement thereof and to promote transparency and openness with the public.

## b. Are there any specific laws or practices that apply in the defense sector?

There are no specific procurement related laws that apply to the defence sector. However, the Special Cabinet Orders for GPA are often inapplicable to the defence sector. In addition, when it comes to defence, it is common that procurement processes are conducted by way of discretionary contract rather open or selective bidding.

## c. Are there any specific laws or practices that apply in the health care sector?

Similar to the case of the IT sector, as mentioned in 10(a), the Cabinet Secretariat has established certain voluntary measures for the promotion and facilitation of competition regarding public procurement in the health care sector. The "Law on Securing Quality, Efficacy, and Safety of Pharmaceuticals, Medical Devices, Regenerative and Cellular Therapy Products, Gene Therapy Products, and Cosmetics" provides the general principles and regulations relevant to the medical goods.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

In order to conduct construction work for public procurement, would-be service providers are required to be appropriately certified as "Construction Business Operators" through the evaluation process for the management of Construction Business Operators, as set out in the Construction Business Act.

It also should be noted that in case of the manufacturing sector, business operators are required to manufacture and produce their goods and services in accordance with the requirements of the Japanese Industrial Standards (JIS), as set out in the Industrial Standardization Act.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

As mentioned in 1(d), on March 4, 2016, the Government achieved cabinet approval for two new aerospace-related bills: (i) a bill related to the launching and management of satellites and (ii) a bill related to the proper handling of data from satellite remote sensing. With the continuing development of space-related laws, there will be continuing discussions regarding public procurement in the realm of the aerospace sector.

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