

Japan

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The public procurement system in Japan operates according to the concept that, once the tendering phase begins, participants may not propose revisions or improvements to the procurement specifications established by the procuring entity. All participants must submit their tenders in complete accordance with the established specifications, and the contract is awarded based on price. This may simplify the administrative work of public procurement; and generally speaking, Japan has been able to handle public procurement effectively by achieving high-quality procurements with a relatively small number of personnel on the procuring-entity side. In addition, Japan has historically used the selective tendering procedure broadly, whereby the selection can be made by the procuring entity basically at its sole discretion. This may motivate suppliers/participants to achieve and maintain good quality in order to be continually selected in prospective procurements.

This means that, once the tendering procedure for a procurement begins, in practice, there is no room for the procuring entity to use its discretion. A potential disadvantage is that this may make it difficult effectively to procure complicated supplies/services, and may make the procurement more expensive. In addition, such procuring entity's wide discretion at the selection phase and such pure price competition at the tendering phase, without any room for the participants to propose any revisions or improvements in the tendering specifications, may tempt the parties to engage in collusion (ie, bid-rigging).

Japan is trying to improve its tendering procedures by expanding the procuring entity's discretion at the tendering phase and thereby furthering competition among suppliers/participants, while also retaining the upsides already successfully achieved by the system.

1. General overview of the legal regime

1.1 Legislative framework

The applicable legislative framework in Japan reflects the two-tier structure found in procuring entities (ie, governmental agencies). One layer applies to the national central government, and the other to local government. The Accounts Law (Law No 35, 1947, as amended) governs public procurements by the national central government, while the Local Autonomy Law (Law No 67, 1947, as amended) governs those made by local governments.

Japan is a party to the Agreement on Government Procurement (GPA) which

entered into force on January 1 1996. Prior to this, however, Japan voluntarily adopted the rules consistent with – and, as described below, in some aspects more advanced than – the GPA via the Cabinet Comprehension in 1994 (“1994 Cabinet Comprehension”). The direct subject matter of the 1994 Cabinet Comprehension is procurement by the national central government (and some institutions related thereto). It is also “recommended” that sub-central local governments comply with this instrument. In practice, for the purpose of certain types of public procurements to which the GPA and the 1994 Cabinet Comprehension are dually applicable, the latter 1994 Cabinet Comprehension and its subordinate rules and regulations govern.

The 1994 Cabinet Comprehension substantially follows the GPA (on the front-loaded basis, as above) in that it is applicable to:

- the central government (and certain other related entities, including public utilities) to which the GPA is also applicable;
- construction services and other services relating to construction (eg, planning, designing, or consulting) to which the GPA is also applicable; and
- procurements whose values are above the relevant threshold values (which are identical with those provided in the GPA).

With respect to the threshold value, under the GPA, the following are provided in relation to central government entities:

- 130,000 SDR for “Supplies”;
- 4,500,000 SDR for “Construction services”;
- 450,000 SDR for “Architectural, engineering and other technical services” covered by the GPA; and
- 130,000 SDR for “Other services”.

The thresholds are directly applicable to domestic practices in Japan, and the amounts equivalent thereto in Japanese yen are to be announced by the competent governmental entities every other year. (For example, for the purpose of central government entities, the announcements are made by the Ministry of Finance.) Such amounts are defined as the value of the procurement in question estimated by the procuring entity, or, in Japanese, *Yotei Kakaku* (see below).

The 1994 Cabinet Comprehension, further to the GPA, also prescribes that with respect to matters of the national treatment and non-discrimination provided in article VIII(b) thereof, when a procuring entity evaluates a foreign firm for the purpose of the conditions for participation in the tendering procedure, it must consider the number of engineers, the relevant period of business activities, project achievements and so on, of such foreign firm on a global basis, to make it clearer by explicitly listing the items to be taken into account. Particularly in the context of construction, this is called the Evaluation on Management Matters (*Keiei Jiko Shinsa*). In addition, the 1994 Cabinet Comprehension provides for measures to prevent unfair practices including bid-rigging. It does so by strengthening the power of the regulatory authority of the industry to redress such unfair practices and to take measures to prohibit a firm which the Japan Fair Trade Commission (JFTC) has found

to be in violation of the Antimonopoly Act (Law No 54, 1947, as amended (JAMA)) from participating in tendering procedures (eg, by establishing guidelines for public procurements, and by preparing a manual on how a procuring entity can report to the JFTC the existence of any unfair practice in its procurement procedure).

With respect to goods, supplies or services other than those relating to construction (such as computers and related services), for the purpose of procurements above, the GPA should be directly applicable in relation to the relevant threshold values. For administration purposes, with respect to those procurements to which the GPA is applicable, the cabinet orders prescribing special provisions to make necessary arrangements and amendments for the rules under the Accounts Law, and the ordinance of the ministry for the same purpose, have been enacted and are in effect.

The same rule applies to procurements by local governments, subject to the direct application of the GPA and the “recommendation” by the 1994 Cabinet Comprehension.

1.2 Procurement procedure

Article VII of the GPA provides for three types of procurement procedures:

- open tendering;
- selective tendering; and
- limited tendering.

The open tendering procedure is one under which all interested suppliers may submit a tender. Under the selective tendering procedure, consistent with the relevant provisions (including, but not limited to, paragraph 3 of article X) of the GPA, those suppliers invited to do so by the procuring entity may submit a tender. And, under the limited tendering procedure, the procuring entity invites suppliers individually, only under conditions specified in article XV of the GPA.

In Japan, similar to the situation under the GPA above, in practice, there are basically three types of procurement procedures: the *Ippan Kyoso Nyusatsu* (“IK Tendering”), the *Shimei Kyoso Nyusatsu* (“SK Tendering”), and the *Zui-i Keiyaku* (“ZK Procurement”). While each procedure is to some extent similar to its respective GPA equivalent, there are certain specific differences which should be noted.

First, under Japanese law, IK Tendering basically means that the procuring entity invites an unspecified number of the general public (firms) to participate in the tendering, and the procurement is awarded to one of the firms tendering in response to such invitation. IK Tendering corresponds to the open tendering procedure, in that it is expected that IK Tendering basically allows all interested suppliers to submit a tender. However, article 29^{ter}, paragraph 2, of the Accounts Law allows the procuring entity to establish certain prerequisites and thereby exclude any suppliers which are incapable of performing their contractual duties from participating in the tendering. Even with such allowance, this still can be regarded as a kind of IK Tendering. Generally, this procedure maintains the situation where essentially all of the interested firms may participate, and therefore it retains the nature of the open tendering procedure under the GPA. However, considering that it does not literally

allow all interested firms to participate, it could be argued that IK Tendering with certain prerequisites should rather be classified under the selective tendering procedure under the GPA.

IK Tendering is the primary option for procurements by both the national central government regulated by the Accounts Law and those by local government which are regulated by the Local Autonomy Law. The Accounts Law and the subordinate rules and regulations for the purpose of the national government's procurement provide for the requirements of the other procurement procedures, SK Tendering or ZK Procurement, and the Local Autonomy Law and the subordinate rules and regulations provide the same for the purposes of local government tendering.

SK Tendering is a tendering procedure where the procuring entity lists the qualified suppliers by evaluating the interested parties in advance. Then, at the time of respective procurements, it selects would-be participants from among the listed suppliers at its discretion. It is said that SK Tendering is equivalent to the selective tendering procedure under the GPA, in that under SK Tendering only those suppliers invited by the procuring entity can participate in the tendering. Subject to such requirements, the SK Tendering is usually available only in circumstances where, due to the purpose or nature of the procurement, the number of firms participating in the tendering procedure would be small, and it would make it "unnecessary" or "disadvantageous" for a procuring entity to apply the open tendering procedure. However, under the Accounts Law (ie, for the purpose of the procurement by the national government), SK Tendering may also be used if the situation constitutes any of the exceptions specified by the cabinet order including, but not limited to, situations where the value of the relevant procurement is low. Historically, it has been said that procuring entities had a tendency to use this exception more frequently than originally expected, by taking the position that the SK Tendering may be more "advantageous" for such procuring entities. The advantage occurs due to the fact that it is easy for such procuring entities to exclude incapable or inappropriate firms from the tendering procedure. Therefore, SK Tendering is the primary option in practice. However, it has also been argued that SK Tendering may induce firms participating in the tendering procedure to engage in unfair practices. For example, because the number of firms participating in the tendering procedure is limited as a matter of course, it may induce such participating firms to rig the bid. And, following the trend in Japanese society against conspiracy or bid-rigging, which may be coincidental with the amendment of the JAMA in 2007 under which the leniency programme was introduced (see below), the idea that IK Tendering should be the primary option seemingly appears to be spreading and filtering into Japanese procurement practices.

As a matter of practice, there is an intermediate type of tendering procedure between IK Tendering and SK Tendering. According to a literal translation, it could be described as an SK Tendering of a type in which "public participation is invited" (*Kobo-gata Shimei Kyoso Nyusatsu*). While there are some variations, generally, it is recognised as a kind of SK Tendering with additional characteristics. The effect is that the procuring entity selects the suppliers that are qualified to participate, by inviting the potential candidates to submit technical documents. The procuring entity then

selects the suppliers to participate in the tendering from among their number. It is still classified as SK Tendering in that the suppliers to participate in the tendering are selected at the procuring entity's discretion. On the other hand, if the procuring entity's discretion is restricted and, as far as such prerequisites are met, all such interested applicants are selected as participants, it may rather be regarded as a kind of IK Tendering. In parallel with the trend towards increased use of IK Tendering, this intermediary procedure is widely regarded as one of the options to be taken.

ZK Procurement is basically a form of procurement in which no tendering procedure is used to specify the supplier with which the contract is to be executed. The procuring entity contacts the supplier individually (ie, not through the tendering procedure). Therefore, the ZK Procurement is regarded as being equivalent to the limited tendering procedure under the GPA. Under the Accounts Law and the Local Autonomy Law, ZK Procurement may be available only if:

- the purpose or nature of the procurement is irreconcilable with competition;
- it is impossible to offer competitive tendering because immediate procurement is necessary;
- offering competitive tendering is disadvantageous; or
- the situation constitutes any of what are specified by the cabinet order as exceptions including, but not limited to, the situation where the value of the procurement is a small sum.