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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Japan

-- Session V --

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Contact: H el ene CHADZYNSKA, Programme Manager of the Global Forum on Competition
Tel: +33 1 45 24 91 05; email: helene.chadzynska@oecd.org

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Japan --

1. The JFTC's Strict and Proactive Enforcement of the Antimonopoly Act against Bid Rigging

1. Bid rigging is typical cartel behaviour and one of the most serious breaches of the Antimonopoly Act ("AMA"). Therefore, the Japan Fair Trade Commission ("JFTC") has been strictly and proactively taking actions based on the AMA against bid rigging. In FY 2008, the JFTC ordered companies that violated the AMA to pay surcharges of 27.03 billion yen in total, including those of 2.89 billion yen for bid rigging cases. For the past five years, the JFTC ordered 913 companies that were involved in bid rigging to pay surcharges of 38.89 billion yen in total.

Table 1.

Fiscal Year	2004	2005	2006	2007	2008
Amount of Surcharge (billion yen)	11.15	18.87	9.27	11.29	27.03
For Bid Rigging (billion yen)	3.45	18.80	6.38	7.37	2.89
Number of Companies Surcharged	219	399	158	162	87
For Bid Rigging	194	392	137	132	58

2. This strict and proactive enforcement against bid rigging has served to maintain and promote fair and free competition in public procurement markets, thereby creating economic benefits such as a decline in contract prices. For example, following the initiation of investigations by the JFTC, the rate of contract prices to expected prices decreased by 18.6% on average in 22 bid rigging cases in which legal measures were taken between 1996 and March 2003.¹

3. The amendment of the AMA, which increased the surcharge rates and introduced a leniency programme and criminal investigative powers for the JFTC, came into effect in January 2006. Deterrent against violations of the AMA, including bid rigging, were strengthened and the amended AMA has shown successful results so far; for example, the leniency system² is being actively used in bid rigging cases and the JFTC has referred bid rigging cases to the prosecution agency by conducting criminal investigations.

4. In addition, another amendment of the AMA, which raised the surcharge rates for a party that has played a leading role in a violation, increased the maximum number of leniency applicants, extended the Statute of Limitations, increased the maximum jail term, etc., was approved by the Diet on June 3, 2009,

¹ The data was prepared based on materials and other items submitted by the procurement agencies during the investigations.

² The leniency programme in Japan does not stipulate exclusion of application when any persons or corporations are involved in bribery or corruption. However, if there are any facts demonstrating persons or corporations forced other parties to commit violations or hindered them to discontinue violations, the leniency programme cannot be applied. (Paragraph 17 of Article 7 (2) of the AMA).

and came into effect on January 1, 2010. The amendment aims to further enhance deterrent effects against violations of the AMA, including bid rigging.

2. The JFTC's enforcement of the "Involvement Prevention Act" against malfeasance by procurement agencies

2.1 Enforcement when procurement agencies are involved in bid rigging

5. Recently in Japan, there have been cases where the officials of procurement agencies were involved in bid rigging. (This kind of bid rigging is called "*Kansei-dango*" (i.e., bid rigging initiated by government officials).) While the AMA is applied to entrepreneurs and trade associations (including their executives), procurement agencies are normally regarded as the victims of violating actions of the AMA as bid rigging causes them to have no choice but to contract at a higher price than usual, etc. However, when procurement agencies are involved in bid rigging, measures taken against them can be as follows:

- In the case when entrepreneurs and their employees are accused of and prosecuted for being involved in bid rigging as a criminal case (Article 89 of the AMA), the procurement officers can be accused and prosecuted as conspirators;
- In the case when administrative measures (cease and desist orders or surcharge payment orders) are taken against a bid rigging case, as a general rule, the JFTC cannot take measures against procurement agencies based on the AMA. However, when the JFTC recognises certain kinds of involvement by the officials of procurement agencies, it may demand the procurement agencies to implement improvement measures based on the Act on Elimination and Prevention of Involvement in Bid Rigging, etc., and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. ("Involvement Prevention Act"). The Involvement Prevention Act was revised in December 2006, to introduce a criminal penal provision on the officials of procurement agencies and expand the scope of conducts that fall under illegal involvement in bid rigging, etc., as well as the types of procurement agencies to which the act applies.

6. The contents of the Involvement Prevention Act are as follows:

2.2 Outline of the Involvement Prevention Act

2.2.1 Improvement measures by the procurement agencies (Article 3)

7. When the JFTC recognises that the officials of procurement agencies³ have been engaged in "involvement in bid rigging, etc.,"⁴ in which they are involved to a certain extent, it may demand that the heads of the procurement agencies implement improvement measures based on the Involvement Prevention Act and will also implement elimination measures against companies based on the AMA. When the procurement agencies receive a demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

³ The procurement agencies to which the Act applies are 1) the national government, 2) local government and 3) a corporation in which the government or local governments have equity of 50% or more, etc. (Paragraphs 1, 2 and 3 of Article 2 of Involvement Prevention Act).

⁴ "Involvement in bid rigging, etc.," is specified in the Involvement Prevention Act (Paragraphs 5 of Article 2) as the following 4 types of conduct: (1) express indication for bid rigging; (2) indication that a specific party is preferred as the counterparty to the contract; (3) disclosure of secret information about ordering; and, (4) aiding a specific act of bid rigging, etc.

8. Although the above investigation and improvement measures are voluntary actions taken by the procurement agencies, they shall notify the results of the investigation and the contents of the improvement measures to the JFTC. When the JFTC finds it particularly necessary in such cases as there being significant discrepancies between the results of the investigations taken by the JFTC and by the procurement agencies, etc., it may express its opinion.

2.2.2 Claim for damage (Article 4) and disciplinary actions (Article 5)

9. The procurement agencies shall make the necessary investigation if the employees involved in bid rigging, etc., are liable to the government for damage, etc., and shall demand compensation for the damage promptly when the employees have caused damage due to wilful or gross negligence. And the procurement agencies shall perform the necessary investigation if it is possible to impose disciplinary actions upon the employees and shall publicise the results of these investigations.

2.2.3 Penalty for employees who harm the fairness of bidding, etc. (Article 8)

10. If an employee, in respect of concluding an agreement by bidding, etc., by public procurement, has conducted any acts that harm the fairness of such bidding, etc., by inciting any entrepreneur or person to conduct bid rigging, informing any entrepreneur or person the target price or any other secret concerning such bidding, etc., or by any other method, in breach of his/her duties, such employee shall be sentenced to imprisonment with labour not exceeding five years or punished with a fine not exceeding 2.5 million yen.

2.3 Cases to which the Involvement Prevention Act was applied

11. So far, the JFTC has demanded improvement measures concerning six cases based on the Involvement Prevention Act (see annex about the improvement measures by the procurement agencies).

2.3.1 The JFTC's demand to Iwamizawa City (January 30, 2003)

12. It was found that before putting a contract to tender, the employees of Iwamizawa City, with the consent or complicity of their supporting executives, had fixed the target amount for annual order placements allotted to each company, designated potential bid winners for each construction project to almost ensure the target amount for annual order placements and communicated the name of an expected bidder, as well as the rough amount of a contract, to the board members of trade associations, who then transferred the tip-off to each expected bidder. Based on the provisions of the Involvement Prevention Act, the JFTC demanded the mayor of Iwamizawa City to take necessary measures to confirm the elimination of the involvement in bid rigging, etc., in the procurement of the city's construction projects.

2.3.2 The JFTC's demand to Niigata City (July 28, 2004)

13. It was found that the employees of Niigata City continuously disclosed the expected construction prices, which should have been kept confidential, before bidding was conducted in response to the requests of companies who were selected by the bidders as the designated winner. The JFTC also found that a copy of the explanatory materials of proposals submitted to the contractor designation committee, which should have remained secret, had continuously been leaked to certain bidders who tendered for the order for jacking work and open-digging work. Therefore, the JFTC demanded the mayor of the city to implement improvement measures.

2.3.3 The JFTC's demand to the Japan Highway Public Corporation (September 29, 2005)

14. It was found that the employees of the Japan Highway Public Corporation (i) accepted the submission of "allocation tables," which showed the expected successful bidders for competitive bids of

construction projects for the upper part of steel bridges, from the retirees of the corporation and approved the allocation tables on each occasion, (ii) placed split orders for the construction projects, for which a bulk order had been originally planned, at the request of the retirees, and (iii) lowered the standard for order placement from 1.5 billion yen or more in the past to 1.0 billion yen or more at the request of the retirees. The purpose of these (i) to (iii) activities was to secure reemployment for retirees from the corporation, and the employees not only gave tacit approval to and authorised bid rigging, but also encouraged companies to engage in it. In addition, the employees were found to have disclosed unpublished information, such as the expected timing of placing orders. Therefore, the JFTC demanded the president of the corporation to implement improvement measures.

2.3.4. The JFTC's demand to the MLIT (March 8, 2007)

15. It was found that the employees of the Ministry of Land, Infrastructure and Transport (MLIT) indicated their intentions regarding the expected successful bidders for floodgate projects to companies, which were referred to as "co-ordinators," and enabled the cartel to be conducted smoothly, before ordering the projects. The JFTC demanded the Minister of Land, Infrastructure and Transport to implement improvement measures.

2.3.5. The JFTC's demand to the City of Sapporo (October 29, 2008)

16. It was found that the employees of the City of Sapporo communicated their selection of the successful bidders to those designated as successful bidders for most of the special electric equipment construction ordered by the City of Sapporo before the bidding, and thereby had the participants in the bidding arrange the bid rigging. The JFTC demanded the mayor of the City of Sapporo to implement improvement measures.

2.3.6. The JFTC's demand to the MLIT (June 23, 2009)

17. It was found that the employees of the MLIT provided unpublished information, such as the names of the designated entrepreneurs for the applicable bidding or the names of the office where the applicable bidding was planned, etc., before the designation notices for annual designated competitive bidding for the applicable vehicle management jobs. The JFTC demanded the Minister of Land, Infrastructure, Transport and Tourism to implement improvement measures.

3. The JFTC's promotion to improve ordering systems for public procurement

18. Many aspects of public procurement systems are related to bid rigging. The JFTC has conducted questionnaire surveys, etc., regarding bidding systems, targeting procurement agencies, such as local governments, about the situation of reforms for the bidding systems and the measures to improve compliance between FY 2003 and FY 2008. The JFTC has compiled the results and published its views regarding ideal public procurement from the viewpoint of competition policy.

3.1 Report concerning the study group on public procurement and competition policy

19. In 2003, the JFTC held a study group on public procurement and competition policy from the viewpoint of creating a more competitive environment for public procurement and aiming at the effective prevention of bid rigging. The study group identified problems with bidding and contracting systems for public procurement and examined measures to improve the problems with the aim of enhancing competition in public procurement. The JFTC published a report summarising the results of the study in November 2003.

20. The report said that it was important to ensure as much competition as possible based on the basic idea of “value for money,” which means purchasing the most valuable with a certain amount of cost, for public procurement by the national and local governments. The report recommended (i) the use of bidding procedures in consideration of prices, technologies and qualities as specific measures (comprehensive evaluation bidding methods), (ii) the expansion of the scope of general competitive bidding (open tendering) and (iii) the improvement of ordering systems.

3.2. *Survey report on actual approaches, etc., to prevent bid rigging in public procurement.*

21. The JFTC conducted a questionnaire survey targeting 1) local governments (320 governments) and 2) government-sponsored corporations in which the national government had equity of 50% or more (210 corporations) to ascertain actual conditions surrounding efforts to prevent bid rigging as of July 2005. Based on the results of the survey, the JFTC published a survey report in October 2005.

22. The report proposed (i) to strive toward full dissemination and training of employees to prevent bid rigging, (ii) to formulate compliance manuals, (iii) to establish systems for organisationally examining bid rigging information and (iv) to improve the management of bid information.

3.3. *Survey Report on the Actual State of the Tendering and Contracting System in Public Procurement*

23. The JFTC conducted a questionnaire survey targeting local governments and government-sponsored corporations, in which the national government had equity of 50% or more with the aim of understanding (i) reforms of the bidding and contracting systems at procurement agencies and (ii) measures to improve the compliance of the officials of procurement agencies as of July 2006. Based on the results of the survey, the JFTC published a survey report in October 2006.

24. The report recommended that (i) in order to deal with complicated paperwork and difficulties in the elimination of bad/unqualified companies, which resulted from the growth of the general competitive bidding method, measures such as the rationalisation of paperwork through the introduction of information technology or the implementation of spot inspections against the companies may be effective, and (ii) efforts need to be made step-by-step where the national government and other large-scale procurement agencies gradually implement a comprehensive evaluation method, accumulate implementation experiences and then transfer their know-how to small-scale procurement agencies for the overall dissemination of such methods, etc. (see also (5) below).

3.4. *Report concerning the Study Meetings on the Measures and Promotion of Reform in Public Procurement*

25. The JFTC held meetings referred to as “Study Meetings on the Measures and Promotion of Reform in Public Procurement” (hereinafter referred to as “the Study Meetings”) beginning in November 2007. The aim of the Study Meetings is to exchange information concerning the status of efforts made by procurement agencies for enhanced compliance and reforms of bid tendering systems, by inviting officials in charge at national and prefectural governments, etc., and to further promote effective measures by studying the issues and problems that the procurement agencies faced in the course of implementing their reform measures, through discussions including outside experts. The JFTC compiled the results of the meetings into a report and published it in May 2008.

26. The report proposed (i) to enhance compliance in procurement agencies, (ii) to implement a comprehensive evaluation method so that participating bidders do not have any suspicions that the evaluation was arbitrarily conducted or suchlike, (iii) to ensure competition in setting regional

requirements and (iv) to take measures to make bidding more competitive concerning the issue of participation by only one bidder or failure of bids to materialise.

3.5. Relationship between measures based on the AMA and nomination suspension⁵ by procurement agencies

27. The above mentioned report published in 2003 recommended that “Concerning suspension from bidding measures, it is important that significant differences do not exist among procurement agencies and it is appropriate to take nomination suspension measures after the final judgments by the JFTC are issued”, etc.

28. Moreover, the report published in 2006 showed that while almost all prefectures, etc., took nomination suspension measures at the point when cease and desist orders, etc., were issued, other local governments did not do so. Because cease and desist orders as administrative measures will be issued in case violations of the AMA are found, it was recommended in the report that it is appropriate to take nomination suspension measures, as a general rule, at the point when cease and desist orders were issued and it is desirable to improve the process of nomination suspension measures accordingly.

29. The above mentioned report in 2006 also pointed out that, in response to the introduction of a surcharge leniency programme, about 90% of prefectures, etc., and about 50% of other parties had stipulated or were planning to stipulate a provision to shorten the suspension period of the entrepreneurs’ nomination. Based on this result, the report stated that it was advisable to work to ensure consistency between the surcharge leniency programme and nomination suspension measures for the promotion of bid rigging prevention by the government as a whole through the initiative of both national and local governments.

4. The JFTC’s efforts to prevent bid rigging

30. From the viewpoint that the effort of procurement agencies is very important to prevent bid rigging, the JFTC has held meetings for the procurement officers of procurement agencies, co-operated in dispatching lecturers to and providing materials for seminars for procurement officers, which are held by the national and local governments, and has held seminars for procurement officers of public corporations. The JFTC formulated and published the “Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids” (“Public Bids Guidelines”) to promote the correct understanding of the AMA in related industries. See Japan’s contribution to the breakout sessions of COLLUSION and CORRUPTION in PUBLIC PROCUREMENT for further details.

⁵ Nomination suspension is a measure taken by procurement agencies concerning public procurement to suspend entrepreneurs from bidding for a certain period, because those entrepreneurs are disqualified from accepting construction orders for falling under certain conditions, such as involvement in bid rigging, etc.

**ANNEX - MEASURES TAKEN BY ORDERING ORGANISATIONS UNDER THE ACT ON
ELIMINATION AND PREVENTION OF INVOLVEMENT IN BID RIGGING, ETC.**

City of Iwamizawa	City of Niigata	Japan Highway Public Corporation
Request Date: 30 January 2003	28 July 2004	29 September 2005
Submission Date: 11 June 2003	28 April 2005	16 February 2006
Main Contents of Improvement Measures <ul style="list-style-type: none"> • To prepare, disseminate and enforce the “Manual to prevent the introduction of bid rigging” so as to thoroughly reform the consciousness of the staff • To separate the project dept. and bidding dept. to construct an effective system and organisation for appropriate bidding • To largely extend the designation suspension period for the enhanced supervisory system for any violation against the Antimonopoly Act • To increase competitive bidding so as to assure fair and free competition in bidding • To restrict entrepreneurs’ access to the sections involved in ordering • To restrain the retired city staff from working for companies in the related industries 	<ul style="list-style-type: none"> • To prepare and disseminate a compliance manual and to provide training so as to reform the consciousness of the staff and organisation culture • To assure a recording and publication system of upcoming bids and to establish an organisation in charge of compliance so that compliance is observed and staff ethics are maintained • To extend the designation suspension period and cancel the qualification for bidding as enhanced measures to prevent bid rigging • To cover a wider range of bids with competitive bidding methods and to abolish regional requirements so that the transparency and competitiveness of the bidding and contract system are assured • To restrict entrepreneurs’ access to the sections involved in ordering • To restrain the retired city staff from working for companies in the industries concerned and to prohibit them from approaching city officials 	<ul style="list-style-type: none"> • To make the ethical standards of behaviour stricter and provide lectures so that the consciousness of the officers and staff members is improved • To collect written oaths on compliance from the officers and staff for higher compliance consciousness and to establish a compliance committee and in-house consultation desk • To largely extend the designation suspension period and raise the amount of penalties • To increase the use of competitive bidding, to abolish designated bidding in principle and to improve and enhance comprehensive evaluation methods • To request the entrepreneurs to restrain from promotional activities • To restrain the retired staff from working for companies in the related industries and to review the custom of early retirement
Claim for Damages According to the report, a civil expert said (March 2003), “There was no damage to the City of Iwamizawa,” so no claim for damages was made against any staff member.	At present, no claim for damages has been made against any staff member.	In July 2008, damages of about 8,683 million yen in total were claimed as a joint and several obligation with the entrepreneur, against two executives of the corporation at the time who were found to be involved in bid rigging
Disciplinary Measures The top 3 municipal officers and 18 of the city’s executives were punished (by reducing the mayor’s salary to 1/10 (for 4 months), etc.)	The top 3 municipal officers, executives and other staff found to have been involved in bid rigging (70 persons in total) were punished (by reducing the mayor’s salary to 50/100 (for 3 months), etc.)	The corporate division manager, branch manager and other staff found to have been involved in bid rigging at that time (53 persons in total) were punished (by suspending the Director-General of the Toll Road Dept. at that time from duty for 3 months, etc.).

Note: The Japan Highway Public Corporation was privatised on October 1, 2005, and divided into three highway corporations (East/Central/West Nippon Expressway Company Limited).

(As of July 31, 2009)

Ministry of Land, Infrastructure, Transport and Tourism	City of Sapporo
Request Date: 8 March 2007	29 October 2008
Submission Date: 18 June 2007	1 July 2009
<p>(Main Contents of Improvement Measures)</p> <ul style="list-style-type: none"> • To prepare, disseminate and enforce the “Manual to maintain the law of the land for ordering parties” and to provide training courses and lectures • To establish “Compliance Desks” inside and outside and to record the contents of inappropriate approaches from outside and publish measures taken • To strengthen measures such as the suspension of business activities under the Construction Business Act and designation suspension as the ordering party • To adopt various ordering methods; increase the use of competitive bidding; enhance the general evaluation system; and introduce bidding bonds for higher competitiveness, transparency and fairness in bidding and contract procedures • To restrain the staff in charge of bidding and contracts from working at the same post for a long time • To restrain the staff from working for any corporation that has been involved in a bid rigging case 	<ul style="list-style-type: none"> • Proper ordering of drainage work: Improvement of estimation method of design, review of qualification for bidding, strict information management in designing and adding-up, establishing of a committee to enforce discipline and improvement of the work environment • Enhanced supervising system: Strengthening whistle-blowing system, investigation on the relation between the bid rigging initiated by the government officials and parachuting of retired officials • Enhanced restraint of retired staff from working for related industries • Improved staff culture: Training courses on compliance, personnel transfer to prevent the negative influence of working at the same post for a long time • Organisation improvement: Establishing a compliance committee (tentative title) and establishing a section in charge of compliance promotion
<p>Claim for Damages</p> <p>At present, no claim for damages has been made against any staff member.</p>	<p>At present, no claim for damages has been made against any staff member.</p>
<p>Disciplinary Measures</p> <p>The Deputy-Director of the Kanto Regional Development Bureau at the time of the involvement in bid rigging was suspended from duty for 2 months, and 7 other staff members, including a vice-minister, were punished (reprimand, admonition and oral warning).</p>	<p>Salary and regional benefits were reduced by 50% for the mayor, 30% for the vice mayor in charge of the construction bureau and 20% for other vice mayors for one month respectively.</p>