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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT/BID RIGGING ISSUES

-- Japan --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.

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1. The JFTC's efforts to improve ordering systems for public procurement

1. The JFTC's major efforts to improve ordering systems for public procurement are as follows.

1.1 Report of the study group on public procurement and competition policy (2003)

2. 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 summarizing the results of the study in November 2003.

3. 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.

1.2 Survey report on the actual state of the tendering and contracting system in public procurement (2006)

4. 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 tendering 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.

5. 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 rationalization 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.

1.3 Relationship between measures based on the AMA and nomination suspension¹ by procurement agencies

6. The 2003 report 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.

¹ Nomination suspension is a measure taken by procurement agencies concerning public procurement to suspend entrepreneurs from bidding for a certain period because those entrepreneurs have been disqualified from accepting construction orders for falling under certain conditions, such as involvement in bid rigging, etc.

7. Moreover, the 2006 report 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 are issued and it is desirable to improve the process of nomination suspension measures accordingly.

8. The 2006 report also pointed out that, in response to the introduction of a surcharge leniency program, 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 program 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.

2. The JFTC's competition advocacy to procurement agencies

2.1 Meetings among liaison officers with the JFTC concerning public bids

9. Meetings among liaison officers with the JFTC concerning public bids are held for the purpose of facilitating procurement agencies of the central government to provide information on activities suspected by the JFTC to be AMA violations. Both the JFTC staff and directors of accounting affairs and other equivalent officers who have been designated as liaison officers in procurement agencies attend the meetings to exchange their opinions and information. Such meetings are held between the JFTC and liaison officers not only at the headquarter level but also at the local branch level.

2.2 Trainings for procurement officers to prevent bid rigging

10. To prevent bid riggings in procurements not only by the central government but also by local governments and public corporations, the JFTC has held training sessions for procurement officers of these procurement institutions. In addition, the JFTC is willing to dispatch its staff as lecturers to the workshops held by procurement institutions for the purpose of preventing bid riggings.

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

3.1 Enforcement when procurement agencies are involved in bid riggings

11. Recently in Japan, there have been cases where the officials of procurement agencies were involved in bid riggings. [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 co-conspirators.
- In the case when administrative measures (cease and desist orders or surcharge payment orders) are taken against bid rigging cases, as a general rule, the JFTC cannot take measures against procurement agencies based on the AMA. However, when the JFTC recognizes 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 the Elimination and Prevention of Involvement in Bid Rigging, etc., and Punishments for Acts by Employees that Harm the 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.

3.2 *Outline of the Involvement Prevention Act*

3.2.1 *Improvement measures by the procurement agencies (Article 3)*

12. When the JFTC recognizes that the officials of procurement agencies² have been engaged in “involvement in bid rigging, etc.”³ 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.

13. 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.

3.2.2 *Claim for damage (Article 4) and disciplinary actions (Article 5)*

14. 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 willful 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 publicize the results of these investigations.

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

15. 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 of 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 labor not exceeding five years or shall be punished with a fine not exceeding 2.5 million yen.

² 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 the Involvement Prevention Act.)

³ “Involvement in bid rigging, etc.” is specified in the Involvement Prevention Act (Paragraph 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.

3.3 *Cases to which the Involvement Prevention Act was applied*

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

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

17. 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.

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

18. 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 Niigata to implement improvement measures.

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

19. 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 authorized 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.

3.3.4 *The JFTC's demand to the MLIT (March 8, 2007)*

20. 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 "coordinators," and enabled the cartel to be conducted smoothly, before ordering the projects. Therefore, the JFTC demanded the Minister of Land, Infrastructure and Transport to implement improvement measures.

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

21. 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. Therefore, the JFTC demanded the mayor of the City of Sapporo to implement improvement measures.

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

22. 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. Therefore, the JFTC demanded the Minister of Land, Infrastructure, Transport and Tourism to implement improvement measures.

3.3.7 The JFTC's demand to the Ministry of Defense (March 30, 2010)

23. It was found that the employees of the Air Self-Defense Force (ASDF) of the Ministry of Defense set a target of procurement volume for certain office furniture for each of six manufacturers, indicated the company with which the ASDF wished to sign a contract and thereby had the six companies engage in bid rigging in order to meet their own procurement target. Therefore, the JFTC demanded the Minister of Defense to implement improvement measures.

3.3.8 The JFTC's demand to the City of Aomori (April 22, 2010)

24. It was found that a former employee of the City of Aomori was shown by an executive of a company the arrangement of designated companies which divided them into three groups in order to facilitate appointment of the designated successful bidder, and was requested to designate participants in the bid in accordance with the draft arrangement. Thus, even as the former employee acknowledged that coordination in receiving orders was being made among the participants, he directed the division in charge to make a three group arrangement of designated companies in line with the request in order to enable the participants to cooperate, and during the time period between April 2006 and April 23, 2009, when he retired, had generally had the division maintain the three group arrangement. Therefore, the JFTC demanded the Mayor of Aomori to implement improvement measures.

ANNEX

**MEASURES TAKEN BY ORDERING ORGANIZATIONS UNDER THE ACT ON
ELIMINATION AND PREVENTION OF INVOLVEMENT IN BID RIGGING, ETC. (AS OF
JULY 31, 2009)**

City of Iwamizawa	City of Niigata	Japan Highway Public Corporation (Note)
(Request Date) Jan. 30, 2003	Jul. 28, 2004	Sept. 29, 2005
(Submission Date) Jun. 11, 2003	Apr. 28, 2005	Feb. 16, 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 organization 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 organization culture - To assure a recording and publication system of upcoming bids and to establish an organization 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 behavior 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 privatized on October 1, 2005, and divided into three highway corporations (East/Central/West Nippon Expressway Company Limited).

Ministry of Land, Infrastructure, Transport and Tourism	City of Sapporo
(Request Date) Mar. 8, 2007	Oct. 29, 2008
(Submission Date) Jun. 18, 2007	Jul. 1, 2009
(Main Contents of Improvement Measures)	
<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 - Organization improvement: Establishing a compliance committee (tentative title) and establishing a section in charge of compliance promotion

(Claim for Damages)

At present, no claim for damages has been made against any staff member.

At present, no claim for damages has been made against any staff member.

(Disciplinary Measures)

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).

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.
