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## **Global Forum on Competition**

### **FIGHTING CORRUPTION AND PROMOTING COMPETITION**

#### **Contribution from Japan**

-- Session I --

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## FIGHTING CORRUPTION AND PROMOTING COMPETITION

### -- Japan --

#### 1. Introduction

1. Public procurement is considered to be a typical domain in which the issues of fighting corruption and promoting competition are the particular concerns. Japan has long been taking various actions to ensure competition and fairness in public procurement and as a consequence, its public procurement system is, on the whole, competitive and fair. When compared internationally, Japan is considered to have a low number of corruption incidents associated with public procurement<sup>1</sup>. Nevertheless, bid-rigging cases do occur. Some of these are facilitated by the involvement of personnel of procurement agencies. To cope with these cases, the Japan Fair Trade Commission (JFTC) strictly enforces competition law, the public prosecutor offices and the police take proactive actions for cracking down on economic crimes, and lawmakers create special laws against the involvement in bid rigging. Japanese authorities have thus been taking actions closely corresponding to the above issues. The following outlines Japan's experience in this area, hoping that it proves to be useful reference for other countries.

#### 2. Regulations on Bid Rigging and Acts of Involvement

2. For punishing bid rigging, Japan has a provision in the Penal Code defining it as a criminal act<sup>2</sup> and a provision in the Antimonopoly Act for regulations on cartels as unreasonable restraint of trade. Yet the crime of bid rigging is not established without the purpose of preventing a fair determination of price or acquiring a wrongful gain<sup>3</sup>. It was therefore not necessarily easy to prosecute those involved in such acts without transfer of money for bid rigging. On the other hand, the regulation on cartels under the Antimonopoly Act has no such requirement. The JFTC has actively detected large-scale and other bid-rigging cases. Among them have been a number of cases regarding bid-rigging initiated or facilitated by procurement officials (what we call "kansei-dango"), in which personnel of the procurement agency inform bid participants of their wishes about the successful bidder or provide information about the target price, or other information helpful to determining bidding prices. If a procurement official receives a bribe on such an occasion, he or she could be punished under the Penal Code for accepting it<sup>4</sup>. Many of the

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<sup>1</sup> For instance, see Worldwide Governance Indicators (WGI) published by the World Bank although its indication on "Control of Corruption" relates to corruption in general <http://info.worldbank.org/governance/wgi/index.aspx#reports>

<sup>2</sup> Article 96-6 (1) A person who by the use of fraudulent means or force commits an act which impairs the fairness aimed at concluding a contract by a public auction or bid shall be punished by either imprisonment with work for not more than three years or a fine of not more than 2,500,000 yen, or by both. (2) The same shall apply to a person who colludes for the purpose of preventing a fair determination of price or acquiring a wrongful gain.

<sup>3</sup> For example, involvement in an act of transfer of money for bid rigging is considered to have the purpose of acquiring wrongful gain.

<sup>4</sup> Article 197 (1) A public officer who accepts, solicits or promises to accept a bribe in connection with his/her duties shall be punished by imprisonment with work for not more than five years; and when the official agrees to perform an act in response to a request, imprisonment with work for not more than seven years shall be

cases, however, were only involvement in bid rigging, etc. without acceptance of bribes. It was difficult to punish procurement officials involved in bid rigging unless they are charged with aiding bid rigging after the enterprise is accused of violation of the Antimonopoly Act.

3. Under these circumstances, the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (hereinafter the “Involvement Prevention Act” and abbreviated as IPA) was established in 2002 so that the JFTC would take the initiative in preventing and eliminating involvement of procurement agencies in bid rigging, etc. The JFTC has since been working not only to detect bid rigging cases but also to prevent and eliminate acts of involvement in bid rigging, etc.

4. The following gives an overview of the IPA and describes its enforcement and advocacy<sup>5</sup>.

### 3. Overview of the IPA

#### 3.1 Procurement agencies subject to the IPA (paragraphs (1), (2) and (3) of Article 2)

5. Procurement agencies subject to the IPA include not only the national government and local public entities but also corporations, etc. in which the national government or a local public entity has an equity of at least 50%.

#### 3.2 Acts that fall under involvement in bid rigging, etc. (paragraph (5) of Article 2)

6. The IPA defines four types of acts of involvement in bid rigging committed by procurement officials.

a) Explicit instructions on bid rigging (item (i))

ex.: A procurement official attends a meeting of enterprises and presents the annual target amounts of orders to be placed with individual enterprises, and issues an instruction for coordination to meet the targets.

b) Indication of wishes of successful bidder (item (ii))

ex.: In response to an approach from an enterprise, a procurement official names the successful bidder or indicates a specific enterprise that should preferably win the bidding.

c) Leakage of confidential information concerning procurement (item (iii))

ex.: In response to an approach from an enterprise, a procurement official divulges the target price that should not be disclosed to enterprises or in response to a request from a third party, he or she divulges the target price that should not be made public.

d) Aiding specific bid rigging (item (iv))

ex.: A procurement official approves the table of allocation created by enterprises to facilitate bid rigging or changes the method of procurement by placing split orders or lowering the standards for procurement in order to aid bid rigging.

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imposed. (2) When a person to be appointed a public officer accepts, solicits or promises to accept a bribe in connection with a duty to be assumed with agreement to perform an act in response to a request, the person shall be punished by imprisonment with work for not more than years in the event of appointment.

<sup>5</sup> Annex 1 specifies main recent bribery cases related to public procurement that are not subject to the IPA. However, they are part of the cases reported in the media and the annex does not cover all relevant cases.

### **3.3 Criminal punishment (Article 8)**

7. Given that bid rigging cases initiated or facilitated by procurement officials occurred even after the IPA came into force, the IPA was amended in December 2006 to enlarge the scope of acts subject to regulation and to strengthen the regulation by, for example, introducing provisions for directly punishing employees committing an act of involvement in bid rigging.

8. That is, regarding the procurement agency's conclusion of a contract by bidding, if a procurement official instigates bid rigging, divulges the target price or other secret concerning the bidding, etc. or otherwise impairs the fairness of the bidding in violation of his or her duties, he or she will be punished by imprisonment of not exceeding five years or a fine of not exceeding 2.5 million yen.

### **3.4 Actions to be taken by relevant authorities**

#### **3.4.1 Demand for improvement measures from the JFTC and obligations of procurement agencies**

9. The IPA authorizes the JFTC to demand a procurement agency to implement necessary improvement measures for eliminating the act of involvement, if the JFTC recognized that its procurement officials have committed an act of involvement in bid rigging, etc. as a result of the JFTC's investigation into a bid rigging case.

10. In response to the demand for improvement measures from the JFTC, the procurement agency is required to investigate the facts on its own, implement improvement measures that are deemed necessary, publish the findings of its own investigation and the details of the improvement measures implemented, and report them to the JFTC. It also must conduct an investigation of its employee committing an act of involvement in bid rigging etc. with regard to whether or not he or she is liable for damages due to the said involvement in bid rigging in order to immediately make a claim for damages from the employee if he or she committed the act intentionally or by gross negligence, and to publish the findings of the investigation conducted by the procurement agency about his or her liability for damages.

11. The procurement agency also needs to investigate whether the employee's act of involvement in bid rigging, etc. constitutes a reason for disciplinary action, and make public the results of the investigation, although whether to penalize him or her is at the discretion of the personnel of the procurement agency with appointive power, or the equivalent of the said employees.

#### **3.4.2 Action taken by investigative authorities (i.e., police and prosecutors)**

12. Unlike the act of involvement in bid rigging, etc. discussed in 2. above, the act in violation of the provision in the IPA Article 8 does not presuppose the existence of an act that violates the Antimonopoly Act. Therefore, investigative authorities may independently investigate the act and institute prosecution.

## **4. Actual Enforcement of the IPA**

### **4.1 Actual Enforcement by the JFTC**

13. Until January 2014, there have been 10 cases in which involvement of procurement agencies in bid rigging, etc. were found as a result of a JFTC investigation and the JFTC demanded that the procurement agencies implement improvement measures, as shown in Annex 2.

#### 4.2 *Cases Where Criminal Prosecutions Were Separately Instituted for Breach of Trust among Cases Where the JFTC Took Action*

- A case concerning the construction of the superstructure of a steel bridge ordered by the Japan Highway Public Corporation (with demand by the JFTC for improvement measures issued to the president of the Japan Highway Public Corporation on September 29, 2005)

The JFTC found bid rigging concerning the construction of the superstructure of a steel bridge ordered by the Japan Highway Public Corporation (JHPC) and issued a recommendation for elimination measures to 45 bidding firms on September 29, 2005 and filed accusations against the vice president and the executive director of the JHPC for a criminal violation of the Antimonopoly Act in August 2005.

Specifically, first, the executive director granted approval for each table of allocation specifying prospective winners of orders in competitive bidding concerning the construction of the steel bridge superstructure presented by a former JHPC employee. Second, upon request from the former employee, the executive director gave instructions to place split orders for the construction for which JHPC had initially planned to place a lump-sum order. And third, in response to a request from the former employee, the executive director had the minimum construction order value applicable to a joint-venture style lowered from the initial level of 1.5 billion yen to 1.0 billion yen. The JFTC found that these acts were aimed at securing a position for reemployment of the former JHPC employee, and confirmed that the executive director not only gave tacit or retrospective consent to bid rigging as a whole but also incited the enterprises to conduct the bid rigging. The JFTC issued a demand to the JHPC president for improvement measures.

With regard to this case, the prosecutor's office prosecuted the vice president and the executive director of the JHPC at the Tokyo High Court for criminal violation of the Antimonopoly Act (co-principles) and breach of trust under Article 247 of the Penal Code, respectively.

#### 4.3 *Enforcement of the IPA by Investigative Authorities*

14. The act of violating the provision in the IPA Article 8 does not presuppose the existence of an act that violates the Antimonopoly Act. Investigative authorities (police and prosecutors) normally conduct their investigations and institute prosecution independently. The JFTC has recognized at least 21 such cases in the past five years. The case stated in Annex 3 is recent major examples of criminal cases in violation of the IPA.

#### 5. **Advocacy concerning the IPA**

15. According to the "Report concerning Measures Taken by Procuring Agencies to Prevent Procurement Officials from Being Involved in Bid-rigging" by the JFTC, the factors motivating procurement agencies to be involved in bid rigging include, first, the purposes of protecting and nurturing the industry and local businesses so that the local enterprises can stably and continuously receive orders and specialized enterprises that can properly deal with challenging projects are fostered, and second, the purpose of ensuring that reliable enterprises will win orders to secure the quality. For the purpose of deterring bid rigging initiated or facilitated by procurement officials, it is considered significant to raise awareness among procurement officials that these purposes do not justify involvement in bid rigging, etc. As a body that pushes ahead with competition policies, the JFTC organizes training seminars for procurement officials and liaison meetings with these agencies. The JFTC hopes that these advocacy

activities will help prevent involvement in bid rigging, etc. that could lead to acceptance of bribes and other corruption, and help provide a more competitive environment for public procurement.

### **5.1 Training Seminars for Procurement Agencies**

16. For increasing effectiveness of its efforts for prevention of bid rigging involved with procurement agencies, the JFTC organizes training seminars for procurement officials and dispatches lecturers to training seminars organized by procurement agencies. In FY2012, 235 such seminars took place across the country and a total of 18,620 personnel took part. At the seminars JFTC officials explained the IPA and the Antimonopoly Act, presented actual examples of bid-rigging cases and made known to the participants the procedures for notifying the JFTC after their discovery of an act suspected of violating the Antimonopoly Act. The textbook used in the training, titled “For preventing bid rigging”, is not only distributed in hard-copy format but also via download from the JFTC website. During FY2012, approximately 20,000 copies were distributed and there were 31,021 downloads.

**Table: Facts about training seminars on the IPA**

<b>Fiscal Year</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Training seminars conducted	165	178	235
Cumulative total participants	12,495	12,682	18,620
Downloads of the textbook for training	9,546	16,758	31,021

### **5.2 Liaison Officers' meetings**

17. The JFTC has held liaison officers' meetings regarding bids for public works participated in by the liaison officers of each procurement agency since FY1993 where the liaison officers are the designated personnel of each procurement agency. Their duties are to provide information to the JFTC regarding any possible violation of the Antimonopoly Act and other relevant works. The purpose of the meeting is to prevent any violation of the Antimonopoly Act such as bid rigging by means of ensuring that the liaison officers provide information to the JFTC smoothly and establishing a system for cooperation between each procurement agency and the JFTC. The meetings at the Tokyo head office and regional offices were held ten times in FY 2012.

## ANNEX 1

**Recent Major Bribery Cases Related to Public Procurement**

No.	Contract	Bribe Taker	Bribe Giver	Acts Committed	Sentence and Date
1	Tunnel work and Sewerage work	Prefectural governor	Construction contractor	Designation of business winning the contract and receipt of money	Imprisonment with labor for three years, suspended for four years, and 10 million yen forfeit (2007)
2	Harbor and port work	Minister of state	Construction contractor	Provision of favors in securing the contract and receipt of money	Imprisonment with labor for two years and six million yen forfeit <sup>6</sup> (2010)
3	Dam work	Prefectural governor	Construction contractor	Provision of favors in securing the contract and receipt of money	Imprisonment with labor for two years, suspended for four years (2012)
4	Street work	Mayor	Civil engineering constructor	Relaxation of standards for designation, provision of favors in securing the contract and receipt of money	Imprisonment with labor for 2.5 years, suspended for four years, and two million yen forfeit (2013)

Note 1: The table gives a partial list of cases learned of by the JFTC from media reports.

Note 2: The year stated represents that in which the sentence was issued.

<sup>6</sup> The total forfeit by this sentence is 11 million yen. The forfeit regarding harbor and port work is, as described in the table, six million yen.

## ANNEX 2

**The list of cases that the JFTC requested improvement measure to procurement agency**

No.	Procurement agency	Request date by the JFTC	Target for bid rigging	Involved department	Involved employee's post	Former employee's involvement (note1)	Request from outside of procurement agency (note1)
1	Iwamizawa City	Jan. 30, 2003	Construction works	In charge of ordering	Executive, general employee	—	—
2	Niigata City	Jul. 28, 2004	Construction works	In charge of ordering	Manager, general employee	—	✓
3	Japan Highway Public Corporation(Government financed corporation)	Sep. 29, 2005	Construction of the upper part of a steel bridge	In charge of ordering	Executive, manager, general employee	✓	✓
4	Ministry of Land, Infrastructure, Transport and Tourism	Mar. 8, 2007	Construction of Watergate facilities	In charge of ordering	Manager, general employee	✓	—
5	Sapporo City	Oct. 29, 2008	Installation of electrical equipment	In charge of ordering	Manager	—	—
6	Ministry of Land, Infrastructure, Transport and Tourism	Jun. 23, 2009	Management of vehicles (driving of public vehicles)	In charge of ordering	Manager, general employee	✓	—
7	Air Self-Defense Force, Ministry of Defense	Mar. 30, 2010	Furniture and fixtures	In charge of ordering	Manager	—	—
8	Aomori City	Apr. 22, 2010	Engineering works	In charge of contracts	Executive	—	✓
9	Ibaraki Prefecture	Aug. 4, 2011	Engineering and pavement works	In charge of ordering	Manager	—	✓
10	Ministry of Land, Infrastructure, Transport and Tourism(note2)	Oct. 17, 2012	Engineering works	In charge of ordering	Manager	—	✓

(Note1) The mark of "✓" means what was confirmed in fact findings by the JFTC.

(Note2) As described in No.21 of Annex3, In that case, the employees were prosecuted of Article 8 of the Involvement Prevention Act.

## ANNEX 3

## Examples of Recent Criminal Cases Pertaining to the Involvement Prevention Act

No.	Procurement Agency	Description of the Case
1	Urayasu City, Chiba Prefecture (2008)	An employee of the Urayasu City Board of Education was charged with violation of Article 8 after divulging the target price in association with the bidding for leasing of computers and other equipment and received a summary order to pay a fine of 500,000 yen.
2	Kasukabe City, Saitama Prefecture (2008)	An employee of the Kasukabe City Board of Education was charged with violation of Article 8 after divulging the target price to a specific company in connection with the bidding for outsourcing of management of the cultural hall and allowing the company to win the contract in the guise of a fair bidding by advising the company to collect bidding forms from other nominated contractors, and received a summary order to pay a fine of one million yen.
3	Tenkawa Village, Nara Prefecture (2009)	An official in the Tenkawa Village Government was charged with violation of Article 8 and obstruction of biddings after ensuring that a specific constructor would win the contract for construction work in the bidding by setting the date of selecting the winning bidder after its suspension of business operation was lifted and by divulging the lower limit price to an employee of the constructor and received a summary order to pay a fine of one million yen.
4	Tenkawa Village Government, Nara Prefecture (2009)	Another official in the Tenkawa Village Government, different from the person mentioned in Case No. 3, was charged with violation of Article 8, obstruction of biddings and aggravated acceptance of a bribe after divulging the target price and the lower limit price for construction work contract to be placed by the village government to a specific constructor and receiving money, and sentenced to imprisonment with work for three years (with suspension for five years) and forfeit of 1,0750,000 yen.
5	National Institute of Infectious Diseases (NIID) (2010)	An employee of NIID was charged with violation of Article 8 and bribery, for leaking target price, etc. in regard to the order of office building renovation work and sentenced to 2-year imprisonment (suspended for 3 years) and 2 million yen forfeit.
6	Saitama City, Saitama Prefecture (2010)	An employee of Saitama City was charged with violation of Article 8 and bribery, for leaking estimated costs and names of bid participants, etc. and accepting bribe in return in regard to the order of facility repair work and sentenced to 2-year imprisonment (suspended for 4 years) and 750,000 yen forfeit.
7	Japan Pension Service (former Social Insurance Agency) (2010)	An employee of Japan Pension Service was charged with violation of Article 8, for leaking budgetary materials by which the target price can be presumed in regard to the order of pension record collating service and fined 800,000 yen (summary order).

8	Otsu City, Shiga Prefecture (2010)	Two employees of Otsu City was charged with violation of Article 8 and obstruction of biddings, for designing bidder designation favorable to a particular enterprise and leaking to the enterprise information on the designated bidders and the target price in regard to the order of hospital janitorial/management service and fined 700,000 yen and 500,000 yen respectively (summary orders).
9	Ministry of Land, Infrastructure, Transport and Tourism (MLIT) (2011)	An employee of the Dam Construction Office, Kyushu Regional Development Bureau, the MLIT was charged with violation of Article 8 and bribery, for transmitting the standard price for lower bid inspection to enterprise X that eventually won the tender via an executive of enterprise Y that supplies materials to X and accepting bribe from Y in return, in regard to the order of optical fiber laying work and sentenced to 2 year and 6 months imprisonment (suspended for 4 years) and 4 million yen forfeit.
10	Ikeda Town, Hokkaido Prefecture (2011)	An employee of Ikeda Town was charged with violation of Article 8 and obstruction of biddings, for selecting bid participants in a way that allowed a particular bidder to win, in regard to the order of reconstruction work for school building and gym and fined 1 million yen (summary order).
11	Forestry Agency (2011)	Three employees of Kinki Chugoku District Forestry Agency were charged with violation of Article 8, obstruction of biddings and aggravated receipt of bribe, for producing technical proposal materials on behalf of an enterprise; leaking to the enterprise unit prices that can be converted to the target prices; and accepting gift certificates in return in regard to the orders of forestry improvements and other works and respectively sentenced 2 year imprisonment (suspended for 4 years) and about 230,000 yen forfeit; 2 year imprisonment (suspended for 4 years) and about 210,000 yen forfeit; 2 years and 6 months imprisonment (suspended for 4 years) and about 750,000 yen forfeit.
12	Takamatsu City, Kagawa Prefecture (2011)	An employee of Takamatsu City was charged with violation of Article 8, for leaking to an enterprise by phone target price that can be the basis for calculating the floor price in regard to the order of park pavement work and fined 1 million yen (summary order).
13	Nikko City, Tochigi Prefecture (2012)	An employee of Nikko City was charged with violation of Article 8, obstruction of biddings and aggravated receipt of bribe, for leaking to an enterprise target price and accepting gift certificates in return in regard to the order of distributing reservoir construction work and sentenced to 2-year imprisonment (suspended for 4 years) and 100,000 yen forfeit.
14	Itoshima City, Fukuoka Prefecture (2012)	An employee of Itoshima City was charged with violation of Article 8, for leaking to an enterprise a price close to the floor price and letting the enterprise win in regard to the order of sewerage work and sentenced to 1 year imprisonment (suspended for 3 years).
15	Meiwa Town, Gunma Prefecture (2012)	An employee of Meiwa Town was charged with violation of Article 8 and bribery, for leaking to an enterprise the names of designated bidders and target price and accepting a set of golf clubs and 200,000 yen in return in regard to the order of sewerage work and sentenced to 2-year imprisonment (suspended for 4 years) and about 380,000 yen forfeit.

16	Kagoshima City, Kagoshima Prefecture (2012)	An employee of Kagoshima City was charged with violation of Article 8, for indicating the closest price to target price out of those estimated by an enterprise by finger pointing and letting the enterprise win in regard to the order of roadside tree maintenance work and fined 500,000 yen (summary order).
17	Shizuoka Prefecture (2012)	An employee of Shizuoka Prefecture was charged with violation of Article 8, bribery and others, for leaking to an enterprise estimated costs which can be the basis for its bid price; leaking to another enterprise estimated costs, etc.; and accepting TV in return in regard to the order of equipment inspection work and sentenced to 1 year and 6 months imprisonment (suspended for 3 years).
18	Ministry of Defense (MOD) (2013)	Two employees of the MOD were charged with violation of Article 8, for leaking to an enterprise draft specifications and internal documents of its competing enterprises in regard to the order of UH-X development and fined 1 million yen (summary order).
19	Chiba Prefecture (2013)	An employee of Chiba Prefecture was charged with violation of Article 8 and obstruction of biddings, for having his/her subordinate draft bidder designation favorable to a particular enterprise and accordingly determining bid participants in regard to the order of construction work for road safety and sentenced to 2-year imprisonment (suspended for 3 years).
20	Shimonoseki City University (2013)	An employee of Shimonoseki City University was charged with violation of Article 8 and obstruction of biddings, for letting a particular enterprise select those to be designated as bid participants in regard to the order of toilet renovation work and fined 1 million yen.
21	Ministry of Land, Infrastructure, Transport and Tourism (Note 2)(2013)	Employees at the Shikoku Regional Development Bureau of the Ministry of Land, Infrastructure, Transport and Tourism were prosecuted on suspicion of violation of Article 8 for alleged involvement in bid rigging in an bidding for a civil engineering contract placed by the ministry.

Note 1: The table gives a partial list of cases learned of by the JFTC from media reports.

Note 2: With regard to this case, the JFTC issued a demand for improvement measures to the procurement agency as mentioned in No. 10 in Annex 2.