

Defence & Security Procurement

Contributing editor
Matthew L Haws



2018

GETTING THE
DEAL THROUGH

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Matthew L Haws
Jenner & Block LLP

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Preface

Defence & Security Procurement 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Defence & Security Procurement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Canada.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Matthew L Haws of Jenner & Block LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
February 2018

Japan

Kohei Masuda, Ryuichi Nozaki, Yuri Suzuki and Yuko Nihonmatsu

Atsumi & Sakai

Legal framework

1 What statutes or regulations govern procurement of defence and security articles?

Procurement by the Ministry of Defence is governed by a complex set of laws and regulations including the Public Accounting Act, stipulated at a country level, as well as official directives and circular notices stipulated independently by the Ministry of Defence. These laws, regulations, official directives, etc, are to undergo review in light of changes in social circumstances and the environment affecting defence and security procurement and other factors. In particular, on 1 October 2015, following the establishment of the Acquisition, Technology and Logistics Agency (ATLA), amendments were made to a large number of related rules and regulations. The main laws and regulations governing the procurement of defence and security articles are listed below.

Laws and regulations:

- Public Accounting Act;
- Act on Prevention of Delay in Payment under Government Contracts;
- Act on the Responsibility of Government Employees Who Execute the Budget;
- Cabinet Order on Budgets, the Settlement of Accounts, and Accounting;
- Temporary Special Provisions of Cabinet Order on Budgets, the Settlement of Accounts, and Accounting; and
- Rules on Administrative Handling of Contracts.

Official directives:

- Official Directive regarding the Implementation of Procurement of Equipment and Services;
- Official Directive regarding Supervision and Inspection of Procurement Items;
- Official Directive regarding Calculating Basis for Target Price of Procurement Items; and
- Detailed Regulations on Administrative Handling of Contracts under jurisdiction of the Ministry of Defence.

Official Directives of the ATLA:

- Official Directives regarding Contract Administration at the ATLA;
- Official Directive regarding Supervision and Inspections of Procurement Items procured by Central Procurement;
- Official Directive regarding the Administration of Target Price Calculation by the ATLA; and
- Official Directive regarding Cost Audit Administration by the ATLA.

Notices, circular notices, etc, of the ATLA:

- Outline of Contract Administration Handling;
- Administration Outline for Administration of Target Price Calculation by the ATLA;
- Administration Outline for Official Directive regarding Cost Audit Administration by ATLA; and
- Implementation Outline of System Investigation and Import Investigations, etc, for Central Procurement.

2 How are defence and security procurements identified as such and are they treated differently from civil procurements?

The procurement of defence and security articles is, for the most part, the responsibility of the ATLA. This agency is subject to official directives, circular notices, etc, stipulated independently by the Ministry of Defence or the ATLA, as outlined above. In this sense, procurement by the agency is treated separately from civil procurements.

3 How are defence and security procurements typically conducted?

According to The Guidance for Bid and Contract (ATLA Public Notice No. 1 of 1 October 2015), the procedures for defence and security articles procurement can be summarised as follows.

- As a rule, in order to become a procurement counterparty, one must apply for bid participation eligibility screening and go through the screening process. If eligible, the applicant's name is recorded in the register of qualified bidders, and notice is sent to the applicant with the results of the eligibility screening.
- Public notice is made in the case of a general competitive bidding, and notice is sent to the counterparty in the case of a designated competitive bidding or discretionary contract.
- The counterparty pays a bid deposit to the Chief Secretary Treasurer of the ATLA (revenue), unless exempted from deposit by public notice or regular notice.
- The bid participant or government counterparty negotiating a discretionary contract submits a bid document or an estimate. There is also an electronic bidding and bid-opening system (central procurement).
- The process of determining the successful bidder can be summarised as follows:
 - the bidder who offers the lowest tendered price equal to or lower than the target price (the target price or the target price plus the sum of the consumption tax rate and the local consumption tax rate, expressed as a percentage) will be the successful bidder;
 - however, if the bid is conducted by the comprehensive evaluation method, the bidder must indicate its price, performance, capability, technology, etc, in its application, and the successful bidder will be the bidder whose tendered price is within the target price and whose performance, capability, technologies, etc, relating to the bid (Performance) meets all the minimum requests and requirements critically required for the Performance specified in the publication or public notice of such bid (including the bid instructions related thereto) and that receives the highest score according to the Method of Comprehensive Evaluation; and
 - when the successful bidder is determined, or when negotiation results in agreement in the case of a discretionary contract, the counterparty submits a contract in accordance with the prescribed procedures, and pays the contract deposit (unless exempted). The contract is deemed concluded when the certifying officer certifies the contract and thereafter an officer in charge of 'acts to assume debts' signs and seals the contract together with the counterparty.

4 Are there significant proposals pending to change the defence and security procurement process?

At time of writing, no legislative bills have been submitted to the Diet.

5 Are there different or additional procurement rules for information technology versus non-IT goods and services?

The Ministry of Defence has established information security management standards by importing international standards commonly used by private companies inside and outside Japan. The Ministry requires companies that build information systems to implement measures pursuant to such standards, and also constantly reviews measures by monitoring international standards and social trends.

In particular, the Ministry of Defence contractually requires the counterparty company to implement the following measures, with the implementation of such measures ensured via voluntary audits by the company itself and audits conducted by the Ministry of Defence:

- implementation of information security management system for procurement consisting of three stages: Basic Policy ('securing information security of procurement of equipment and services'), Standards, and (Audit) Implementation Outline pursuant to international standards regarding information security management;
- companies that build information systems for the Ministry of Defence are required to establish an information security management system similar to the above; and
- there are audits by the Ministry of Defence pursuant to the (Audit) Implementation Outline to confirm that the information security management system built by the relevant company is in compliance with the Basic Policy and Standards implemented by the Ministry of Defence, and that the information security measures taken in accordance with the Implementation Outline prepared by the company are conducted properly.

In addition, considering the importance of information security, the Ministry of Defence also applies information security measures equivalent to those detailed above to the supply of certain equipment other than information systems.

6 Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

The Ministry of Defence is a procurement agent subject to the GPA, and procurement of defence and security articles is conducted in accordance with the GPA. Further, government procurement is regulated by economic partnership agreements with the following countries, and thus procurement must be conducted in accordance with the following:

- the Japan-Singapore Economic Partnership Agreement;
- the Japan-Mexico Economic Partnership Agreement;
- the Japan-Chile Economic Partnership Agreement;
- the Japan-Philippines Economic Partnership Agreement;
- the Japan-Peru Economic Partnership Agreement; and
- the Japan-Australia Economic Partnership Agreement.

Disputes and risk allocation

7 How are disputes between the government and defence contractor resolved?

In addition to regular litigation proceedings, complaints regarding government procurement can be resolved at the Office for Government Procurement Challenge System established by the Cabinet Office (CHANS: www5.cao.go.jp/access/japan/chans_main_j.html).

There are no special dispute resolution procedures applicable only to defence and security contractors.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

Litigation is the typical method used to resolve conflicts, and out-of-court dispute resolution is rarely used. Since 1996, there have been no cases filed with CHANS against the Ministry of Defence.

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

Indemnity by the government is conducted in accordance with article 29, paragraph 3 of the Constitution.

On the other hand, as a rule, the government is not allowed to enter into guarantee agreements with respect to liabilities owed by companies or other juristic persons (article 3 of the Act on Limitation of Government Financial Assistance to Juridical Persons). However, in a court precedent, a loss indemnity agreement by a local government was deemed null and void as being in breach of article 3 of the Act on Limitation of Government Financial Assistance to Juridical Persons.

The liability of a contractor under a defence and security articles procurement agreement is provided in the contract it enters into with the government, and thus depends on the individual case. However, the government would rarely claim indemnity from a contractor unless required in the Civil Code (defect liabilities, etc).

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

There are no laws or regulations that restrict the government from limiting the liability of a defence and security articles contractor under the contract, or restrict the defence and security articles contractor from recovering loss or damages from the government due to breach of contract. Limitations, if any, are subject to the terms and conditions of each contract.

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

When the government enters into a procurement contract, normally it must conduct an 'act to assume national treasury debts' (article 15 of the Fiscal Act), and as the necessary budget is secured by such act, there is basically no risk of non-payment.

12 Under what circumstances must a contractor provide a parent guarantee?

A parent guarantee would be necessary if it is clearly required under the bid terms. A parent guarantee may be required when procurement is conducted through a special purpose company, for example.

Defence procurement law fundamentals

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

When the government determines the successful bidder in a tender or the counterparty to a discretionary contract, the contract officer, among others, must prepare a written contract that includes the particulars of the purpose of the contract, contract price, performance period and contract guarantee and other necessary matters (article 29-8, paragraph 1 of the Public Accounting Act; article 100 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting). For the Ministry of Defence, a contract must be prepared for 'each successful bid, etc', and a contract must be prepared for all defence and security articles, without exception.

Further, a contract will not become final and binding until signed and sealed by both the contract officer and the counterparty, and the preparation of a written contract by such signing and sealing is one of the requirements for the conclusion of contracts.

There are no particular clauses that would be read into a contract without actually being included therein.

14 How are costs allocated between the contractor and government within a contract?

The General Terms and Conditions published by the Ministry of Defence (www.mod.go.jp/igo/procurement/pdf/kokoroe_bessiz.pdf) do not refer to contract expenses. It is considered normal for each party to bear its own expenses.

15 What disclosures must the contractor make regarding its cost and pricing?

The contractor must submit a bid form or an estimate sheet to the Ministry of Defence.

The contractor has no legal obligation to disclose any information, but when the government enters into certain contracts specified by cabinet order or statute that cause expenditures to be incurred by the national government, the government must publish information concerning the contract price, among other things.

16 How are audits of defence and security procurements conducted in this jurisdiction?

In order to improve the fairness and transparency of defence and security procurements, the Ministry of Defence takes measures to ensure the appropriateness of contracts and to enhance checks and balances.

First, as part of an effort throughout the government to 'ensure appropriateness of public procurement', the Ministry of Defence has been expanding the use of a 'comprehensive evaluation bid method' and streamlining its bidding procedures. In addition, in response to a number of cases in 2012 of overcharging and manipulation of product test results by contractors, the Ministry of Defence has been steadily working on measures to prevent recurrence of these problems, such as enhanced system inspections, reviewing penalties and ensuring the effectiveness of supervision and inspections, and otherwise putting more effort into prevention of misconduct, improvement of fairness and transparency and ensuring contracts are appropriate.

Further, with the aim of strengthening checks and balances, the ATLA has established an Audit and Evaluation Division to carry out internal audits, as well as conducting multilayered checks on the ATLA from both inside and outside through audits by the Inspector General's Office of Legal Compliance and deliberations at the Defence Procurement Council, whose members are outside intellectuals. Further, it is also making efforts towards raising compliance awareness by enhancing its education division and providing thorough education on legal compliance to its personnel.

In the case of defence and security procurement, the supplier's records of costs are inspected in relation to the production cost of procured defence and security articles, in accordance with the contractual terms, etc ('Special clause regarding securement of reliability of documents and implementation of system inspection', 'Special clause on securement of reliability of documents related to contracts concerning import goods, etc and implementation of import procurement inspections') (www.mod.go.jp/j/procurement/kadaiseikyujian/), and whenever needed, cost audits are conducted to confirm that the price of each item's cost and consumption quantity is appropriate.

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

Under the special terms published by the Ministry of Defence, any copyright works created during the performance of a contract are required to be transferred and a 'certificate of transfer of copyright' and 'certificate of non-exercise of author's moral right' to be submitted together with the work product.

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

No.

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

The process for forming legal entities is described below:

1. Advance preparations:
 - determine basic matters (such as organisational form, stated capital, business descriptions and succession of assets); and
 - check whether there is any other company of the same trade name at the same location of head office at the legal affairs bureau.

2. Preparation of articles of incorporation:
 - determine the purposes, trade name, location of the head office, minimum amount of contributed assets, name or organisational name and address of the incorporator (matters required to be stated in the original articles of incorporation) and other matters.
3. Notarisation of articles of incorporation by notary public.
4. Contribution:
 - the incorporator pays the money to be contributed in full or tender all property other than monies with respect to the shares issued at incorporation without delay after subscribing for such shares issued at incorporation.
5. Appointment of officers at incorporation:
 - the incorporator appoints directors at incorporation without delay after the completion of capital contribution;
 - in the case of a company with company auditors, company auditors are appointed; and
 - appointment of officers at incorporation is determined by a majority of the voting rights of the incorporators.
6. Examination by directors at incorporation:
 - directors at incorporation examine whether the capital contribution has been completed and whether any incorporation procedures are in breach of any laws and regulations or the articles of incorporation.
7. Appointment of directors at incorporation:
 - in the case of a company with a board of directors, a representative director at incorporation is appointed (as decided by a majority of the directors at incorporation).
8. Registration of incorporation:
 - registration of incorporation must be made within two weeks from the later of the date of termination of examination by the directors at incorporation and the date designated by the incorporator.
9. Notification to the relevant government agencies:
 - tax office, prefectural tax office, municipal government (tax or national pension), labour standards office (employment insurance, workers' accident compensation insurance), pension office (health insurance, employee pension), etc.

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

In accordance with the Act on Access to Information Held by the Administration, any person may request the head of an administrative organ to disclose administrative documents, and the head of such administrative organ who receives such request for disclosure must disclose such administrative documents except in the following cases:

- Information concerning an individual (excluding information concerning the business of an individual who operates the said business), where it is possible to identify a specific individual from a name, date of birth or other description contained in the information concerned (including cases where it is possible to identify a specific individual through comparing the said information with other information), or when it is not possible to identify a specific individual, but disclosure of the said information is likely to cause harm to the rights and interests of an individual. This is provided however, that the following information shall be excluded:
 - information that is made public, or information that is scheduled to be made public, pursuant to the provisions of laws and regulations or by custom;
 - information that is found necessary to be disclosed in order to protect a person's life, health, livelihood or property; and
 - if the said individual is a public officer; officers and employees of the incorporated administrative agencies; local public officers; and officers and employees of the local incorporated administrative agencies. And when the said information pertains to the performance of his or her duties, the portion of the said information pertaining to the job of the said public officer etc, and the substance of the said performance of duties.
- Information concerning a juridical person or other entities (excluding the state, incorporated administrative agencies, local public entities and local incorporated administrative agencies, hereinafter referred to as a 'juridical person'), or information concerning

the business of an individual who operates the said business, which corresponds to the following, provided that information that is found necessary to be disclosed in order to protect a person's life, health, livelihood, or property shall be excluded:

- information that, when disclosed, is likely to cause harm to the rights, competitive position or other legitimate interests of the said juridical persons or of the said individual;
- information customarily not disclosed by the juridical person or the individual, which has been voluntarily provided in response to a request by an administrative organ on the condition of non-disclosure, or information for which it is found reasonable to set such a condition in light of the nature of the information or the circumstances at the time.
- Information for which there are reasonable grounds for the head of an administrative organ to find that disclosure is likely to cause harm to national security, cause damage to the relationship of mutual trust with another country or an international organisation, or cause a disadvantage in negotiations with another country or an international organisation.
- Information for which there are reasonable grounds for the head of an administrative organ to find that disclosure is likely to cause impediments to prevention, suppression or investigation of crimes, the maintenance of prosecutions, the execution of punishment, and other matters concerning maintenance of public safety and public order.
- Information concerning deliberations, examinations or consultations internally conducted by or mutually conducted between state organs, incorporated administrative agencies, local public entities and local incorporated administrative agencies, where disclosure is likely to cause unjust harm to the open exchange of opinions or the neutrality of decision-making, cause unjust confusion among citizens, or bring unjust advantages or disadvantages to specific individuals.
- Information concerning the affairs or business conducted by a state organ, an incorporated administrative agency, a local public entity or a local incorporated administrative agency, where disclosure is likely to have the following risks or is likely to hinder the proper execution of the said affairs or business due to the nature of the said affairs or business:
 - risk of making it difficult to accurately understand facts concerning affairs pertaining to audits, inspections, supervision, examinations, imposition or collection of tax, or facilitating wrongful acts regarding such affairs, or making it difficult to discover such acts;
 - risk of causing unjust damage to the property benefit of the state, an incorporated administrative agency, local public entities or a local incorporated administrative agency concerning affairs pertaining to contracts, negotiations or administrative objections and litigations;
 - risk of causing unjust hindrance to the fair and efficient execution of affairs pertaining to research and study;
 - risk of causing hindrance to the maintenance of impartial and smooth personnel practices in the affairs pertaining to personal management; and
 - risk of causing damage to the legitimate interests arising from corporate management with regard to the business of an enterprise managed by the state or a local public entity, an incorporated administrative agency, or a local incorporated administrative agency.

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

As a condition of participating in competitive bidding (other than for construction work), any person who meets the following conditions may not participate in competitive bidding:

- Any person who falls under the descriptions of articles 70 and 71 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting (article 70 of the foregoing Cabinet Order);
- If a sales, lease, contracting, or other contract is put out to tender pursuant to article 29-3, paragraph (1) of the Public Accounting Act (hereinafter referred to as an 'open tender'), the contract officer may not permit a person who falls under any of the following items

to participate, unless there are special grounds for doing so, for example:

- a person who is incapable of concluding the relevant contract;
- a person who received an order of commencement of bankruptcy proceedings and has not had the person's rights restored;
- a person who falls under any of the items of article 32, paragraph (1) of the Act on Prevention of Unjust Acts by Organised Crime Group Members (Act No. 77 of 1991) (article 17 of the foregoing Cabinet Order);
- If a contract officer determines that a person who wishes to participate in an open tender falls under any of the following items, the contract officer may prevent the person from participating in open tenders for a period of not more than three years. The same applies to the proxies, managers and employers of such a person:
 - if the person has intentionally carried out construction, manufacturing or any other service in a careless manner or acted fraudulently with regard to the quality or volume of an object in the course of performing a contract;
 - if the person has obstructed the fair implementation of a tender or has hindered a fair price from being reached or colluded with others to obtain an unlawful profit;
 - if the person has obstructed the successful bidder from entering into a contract or obstructed a party to a contract from performing the contract;
 - if the person has obstructed an official from performing the official's duties in a supervision or inspection;
 - if, without a justifiable reason, the person has not performed a contract;
 - if, under a contract, the price is to be fixed after the signing of the contract, and the person has intentionally claimed an excessive amount as such price based on false facts;
 - if the person has employed a proxy, manager or other employee who is not eligible to participate in an open tender pursuant to this paragraph (not including this item) in the conclusion or performance of a contract; and
- Any person who currently faces a de-nomination under the 'Outline of de-nomination, etc. concerning procurement of defence and security articles, etc. and services'.

There are no specific rules regarding supply chain management and anti-counterfeit parts relating to defence and security procurements.

International trade rules

22 What export controls limit international trade in defence and security articles? Who administers them?

With regard to export controls that limit international trade in defence and security articles, the Foreign Exchange and Foreign Trade Act stipulates certain provisions relating to security trade controls, which are enforced by the Ministry of Economy, Trade and Industry.

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

There is no mechanism for applying domestic preferences to defence and security procurements. For the acquisition of defence and security articles, a number of acquisition methods are currently adopted, including domestic development, international co-development or production, domestic production under licence, utilisation of civilian goods, import, etc. The appropriate method is selected depending on the characteristics of the particular defence and security articles in question. The Analysis and Assessment of the Acquisition Program, the new Acquisition Strategy Plan and Acquisition Plan published by ATLA on 31 August 2017, adopts a policy of domestic development, production and maintenance for certain items.

The Guidance for Bid and Contract (ATLA Public Notice No. 1 of 1 October 2015) contains provisions pursuant to which foreign business operators may apply for screening of eligibility for participation in tender, which indicates that it is possible for foreign companies to directly participate in procurement tender. However, in the case of procurement from a foreign company, this is usually done by a Japanese trading company on their behalf.

24 Are certain treaty partners treated more favourably?

There are no treaty partners that are treated more favourably.

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?**Export**

There are export controls that require the permission or approval of the Minister of Economy, Trade and Industry.

Defence and security articles that require permission include export of 'weapons, articles related to weapons of mass destruction, articles related to conventional weapons and articles that are likely to be used for development, etc of weapons of mass destruction or conventional weapons'. 'Articles related to weapons of mass destruction' refers to articles related to nuclear, chemical weapons, biological weapons and missiles, and 'articles related to conventional weapon' refers to state of the art materials processing, electronics, computers, communication devices, sensor or laser, navigation equipment, marine related equipment and propulsion devices.

Those subject to approval include all exports of articles bound for North Korea as the place of destination.

Import

Primary import controls applicable to defence and security articles include restriction on specified regions under which approval is required for import from specified countries of origin or places of shipment. Pursuant to this restriction, approval of the Minister of the Economy, Trade and Industry is required for import of weapons of which the country of origin or place of shipment is Eritrea, and Type I Designated Substances defined in the Act on the Prohibition of Chemical Weapons and the Regulations of Specific Chemicals (Chemical Weapons Control Act) of which the counties of origin or the places of shipment are specified countries or regions. Further, in terms of current economic sanctions, the approval of the Minister of the Economy, Trade and Industry is required for the importation of any articles for which the country of origin or the place of shipment is North Korea, and the importation of weapons for which the country of origin or the place of shipment is Liberia, are effectively prohibited as a result.

Articles that require approval regardless of the country of origin or the place of shipment include:

- explosives;
- military aircraft, engines for military aircraft, tanks and other armed vehicles and components thereof, warships, military armaments, guns and other firearms, other weapons, bombs, swords, spears and other similar weapons, and components of the foregoing items; and
- specified substances under the Chemical Weapons Control Act.

2017 Amendments to the Foreign Exchange and Foreign Trade Act (FEFTA)

The amendments to the FEFTA were promulgated in 24 May 2017 and came into effect on 1 October 2017. These, in particular, strengthen (i) penalties for the regulations concerning the import/export and trade of technologies and (ii) administrative sanctions concerning import/export regulations.

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

There are no trade offsets at the moment, although the Ministry of Defence is considering their introduction.

Ethics and anti-corruption**27 When and how may former government employees take up appointments in the private sector and vice versa?**

There are no restrictions preventing former public officers from taking-up appointments in the private sector, or vice versa.

However, the following is a summary of appointments that are prohibited as a rule:

- a public officer currently in office, engaging in communications with an 'interested enterprise' (including enterprises defined by law), who has executed, offered or is obviously intending to offer to execute a contract for defence and security articles (excluding

those where the total amount of the contract is less than ¥20 million) for the purpose of assuming a position in such enterprise or its subsidiary corporation (in summary, a corporation directly or indirectly holding a majority of voting rights);

- a public officer engaging in communications with an enterprise (not limited to the 'interested enterprises') for the purpose of having another public officer or former public officer assume a position in such enterprise or its subsidiary corporation; and
- a former public officer who currently holds a position in the enterprise demanding or requesting performance or non-performance of acts in the course of his or her duties in relation to a contract for such enterprise, or in relation to administrative measures against such enterprise (the scope of prohibited acts differs depending on the position the public officer had at the time of office) to the division within the government agency where said public officer had held a position while he or she served as a public officer. The prohibition period after departure from public office is unlimited with respect to the execution of contracts and administrative measures that said former public officer himself or herself handled, and is two years with respect to other cases.

Getting a position at an enterprise immediately after leaving public office will lead to suspicion of a breach of the foregoing restrictions on communications. In practice, there is a cooling-off period of at least three months before assuming a position in the private sector after leaving office as public officer.

The above-mentioned restrictions also apply to public officers with fixed terms of office, and public officers hired on a public-private personnel exchange.

Further, in order to ensure transparency, public officers or former public officers must file notices with certain prescribed persons including the Minister of Defence in cases where:

- (i) they promise, while in office, to assume a position in an enterprise after leaving office; and
- (ii) after having held a managerial position in public office, they assume a position in an enterprise within two years after retirement (except where a notice in relation to item (i) has already been filed).

Certain information, contained in notices filed as above, is also made public.

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

There are no special restrictions related to bribery that specifically target government procurement. Such matters are generally covered under the offence of bribery under the Criminal Code. The main crimes under the Criminal Code regarding bribery and applicable to enterprises are the giving, offering or promising of bribes, as listed below:

- any bribe to a public officer in relation to the performance of his or her official duties;
- any bribe, upon request, to a potential public officer in relation to the performance of official duties for which he or she is expected to be responsible;
- any bribe, upon request from a public officer in relation to the performance of his or her official duties, to a person other than said public officer (who is not required to be a public officer);
- any bribe to a former public officer in relation to said former public officer having conducted an unlawful act or refraining from conducting a reasonable act upon request while in office; or
- any bribe to a public officer as a reward for said public officer arranging or having arranged for another public officer to conduct an unlawful act or refrain from conducting a reasonable act in the course of his or her duties upon request.

In the procurement of defence and security articles, the specifications thereof are generally very specific and there is no market price. In many cases, contracts are executed upon calculating an estimated price using cost accounting with a view to preventing overcharging by contractors. Contractual special clauses are generally required for cost accounting and management for the purpose of preventing overcharging by contractors, and cost audits are conducted. See question 16 for more details.

Other than the above, cartels (bid-rigging) and other similar acts are prohibited under the Anti-Monopoly Act, obstruction of auctions is prohibited under the Criminal Code, the Unfair Competition Prevention Act and the Act on Elimination of Involvement in Bid Rigging etc. There are also punishments for failure to act, and criminal penalties or administrative monetary penalties apply in the case of violation.

Any enterprise that has violated any of the restrictions or requirements stated above, or otherwise engaged in acts unfairly or in bad faith, making false statements in tendering documents, performing a contract negligently without due care, or breaching a contract will be de-nominated from procurements for defence and security articles for a certain period (one month to three years depending on the degree of seriousness of the violation, and in the case of refusal to comply with system research, until the same resumes) (www.mod.go.jp/j/procurement/kadaiseikyujian/pdf/20130801_1.pdf). In addition, enterprises that have capital ties or personal relationships with an enterprise that was de-nominated may be barred from participation in open and selective tendering procedures for agreements for similar types of defence and security articles (www.mod.go.jp/j/procurement/shotatsu/naikyoku/nyuusatsu_seifu/2016/09/01a.html).

Public officers are subject to the National Public Service Ethics Code in order to ensure public trust in the fairness with which public officers execute their duties. Pursuant to this Code:

- the following acts with interested parties (defined in the Code, including enterprises with which a public officer has executed, offered to execute or obviously intends to offer to execute a contract for defence and security articles in relation to which such public officer is involved in administering. Any interested parties to a post that a public officer served within the past three years shall continue to be regarded as interested parties for at least three years after the transfer. In addition, where any interested party of a public officer contacts another public officer, such interested party will also be regarded as an interested party of the other public officer depending on the expectation of influence asserted by such interested party) and as such prohibited as a rule from:
 - receiving a gift of money, goods or real estate;
 - borrowing money;
 - receiving services free of charge;
 - receiving assignment of private equity;
 - receiving entertainment and paid dining;
 - going on a trip, playing golf and other entertainment (such as mahjong) together (including in the case of splitting the bill);
 - demanding any interested party have a third party conduct any of the above; and
- it is not prohibited to dine together if the public officer pays his or her own costs, but where the cost of their respective payments exceeds ¥10,000, notice needs to be filed with the Ethics Supervisory Officer, except in certain specific cases such as buffet parties.

Any public officer who has violated the foregoing is subject to disciplinary action. There are no provisions on sanctions that would be directly applicable on the interested party side.

29 What are the registration requirements for lobbyists or commercial agents?

There are none.

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

No.

Aviation

31 How are aircraft converted from military to civil use, and vice versa?

In August 2010, the Ministry of Defence finalised guidelines for the design of a system for conversion to civil use, and in 2011 put in place a system for companies wishing to conduct conversion to civil use. Up to now, technical documents for conversion to civil use of F7 engines loaded onto US-2 rescue flying-boats and P-1 fixed-wing patrol aircraft have been disclosed and published upon request from commercial enterprises. In December 2016, ATLA announced that it had entered into an agreement with IHI Corporation on conversion to civil use in respect of F7-10 engines loaded onto P-1 fixed-wing patrol aircraft in order to sell them to the Japan Aerospace Exploration Agency (JAXA). The Ministry of Defence rarely procures aircraft configured for civilian use for conversion to military use, preferring instead to purchase equipment that has already been converted for military use.

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

Under the Aircraft Manufacturing Industry Act, airplanes and rotorcraft with a structure that people cannot board and with a gross weight of 150 kilograms or over are included in the definition of 'aircraft' subject to restrictions on the method of manufacturing and repair. Below are the primary restrictions:

- the manufacturing or repair (including modification) of aircraft is subject to a licensing system. Permission of the Minister of Economy, Trade and Industry is required for each plant;
- manufacturing or repair must be conducted by permitted business operators in a manner approved by the Minister of Economy, Trade and Industry, which must also be confirmed by an aircraft inspector; and
- permitted business operators may, as a rule, only deliver a manufactured or repaired aircraft to others along with a manufacturing confirmation document prepared by an aircraft inspector.

On 10 December 2015, the Ministry of Economy, Trade and Industry announced it would request manufacturers, importers and sellers of



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unmanned aircraft to make voluntary efforts to ascertain the owner of unmanned aircraft.

Miscellaneous

33 Which domestic labour and employment rules apply to foreign defence contractors?

Labour and employment rules are domestic laws and as such do not apply unless a contractor has an office and employs employees in Japan. If an enterprise has an office and employs employees in Japan, it must pay Japanese labour insurance and employee pension insurance. Having the proper labour insurance and employee pension insurance policies in place and not being slack in payment of premiums will generally be a requirement for qualification to participate in open and selective tendering procedures.

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

No.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

Not applicable.

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

One trigger for disqualification from bidding is being a 'juridical person or other organisation in which a designated organised crime group member serves as an officer thereof' (see question 21). As a result, enterprise bidders are required to submit a pledge at the time of bidding, declaring that none of their 'officers, etc' belongs to an organised crime group.

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

There are no registrations or licensing requirements.

38 What environmental statutes or regulations must contractors comply with?

Green Purchasing Act

The Green Purchasing Act came into force in 2001.

In the procurement process, the national government must endeavour to select 'eco-friendly goods' with low environmental impact (in particular: recyclable resources; products that have low environmental impact based on the ability to reuse or recycle or through the use of raw

materials or parts with low environmental impact; and services that have low environmental impact). In response to this, the Ministry of the Environment has established a basic policy applicable to all governmental agencies in respect of a wide variety of procurement items. The Ministry of Defence has also set its own corresponding procurement goals (www.mod.go.jp/j/procurement/shotatsu/buppin/kanky02016.html) for 2016. However, the procurement goals of the Ministry of Defence primarily target stationery, office supplies, air conditioners, lighting, general official vehicles, etc. In regard to goods and services that are key defence and security items, the targets are limited to construction of public facilities, tires for passenger cars, two-stroke engine oil, disaster supplies, etc.

Green Contract Act

The Green Contract Act (came into force in 2007).

Moving forward further than the Green Purchasing Act, the Green Contract Act requires the national government to endeavour to promote procurement contracts with serious consideration for the reduction of greenhouse gas emissions, etc. In response thereto, the Cabinet has established a basic policy that covers six types of contracts:

- the purchase of electricity;
- the purchase and lease of automobiles;
- the procurement of vessels;
- the design of governmental building renovations that include a guaranteed reduction in the cost of electricity and fuel, etc, by operation of governmental buildings that is greater than the renovation cost;
- other building designs; and
- industry waste disposal.

In response to the above, specific fuel economy and other environmental performance requirements may be specified in procurement specifications for many defence articles, among other things.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

As mentioned in question 38, for the six types of contracts covered by the Green Contract Act, requirements for specific fuel consumption and other environmental performance may be provided in the specifications for bidding. In such cases, enterprises must submit bids that meet such requirements. Evaluation will be conducted by the ATLA, which is the agency managing procurement.

40 Do 'green' solutions have an advantage in procurements?

Nothing other than that which is specified in question 38.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
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