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JAPAN'S GOVERNMENT PROCUREMENT REGIMES FOR PUBLIC WORKS: A COMPARATIVE INTRODUCTION

*Shigeki Kusunoki**

ABSTRACT

In Japan, the Act for Promoting Quality Assurance in Public Works was enacted in spring 2005 and came into force soon thereafter. This is an epoch-making act in the history of Japanese public procurement regimes and practices, mainly in that, with respect to bidding procedures: (1) it declares that a comprehensive evaluation method shall generally be used for public works; (2) it permits procuring entities to dialogue with candidates to discuss improvement of their submitted technical proposals; and (3) it permits a cap on the estimated price to be set just before the scheduled date of bidding. The author will introduce Japan's basic public procurement regimes and the Act's impact on them, and describe Japan vis-à-vis the United States, European Union, and the Government Procurement Agreement of the World Trade Organization (WTO-GPA or GPA) on the issue of contractor award processes. The hurdles for implementing the WTO-GPA that Japan has to overcome will be addressed in the concluding remarks.

I. INTRODUCTION

As the result of the negotiations of the Uruguay Round for the General Agreement on Tariffs and Trade (GATT), as well as simultaneous multilateral trade negotiations, the Government Procurement Agreement of the World Trade Organization (WTO)¹ was signed in Marrakech, Morocco in 1994 and came into effect in January 1996.² In December 1995, just before it came into force, Japan ratified and then promulgated the Agreement.³

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1. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GPA], available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf. See generally SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO (2003) (discussing the GPA).

2. GPA, *supra* note 1, art. 24(1); ARROWSMITH, *supra* note 1, at 40.

3. Ministry of Foreign Affairs, Notice on the GATT Agreement on Government Procurement, Notice No. 665 (Dec. 8, 1995) (effective from Jan. 1, 1996).

Ten years have passed since the GPA entered into force. Until today, the member countries, as well as observers like China, have reformed their domestic government procurement regimes in an attempt to implement the GPA.⁴ Among them, Japan has grappled with many reforms and measures, including ones to tighten up the conditions for awards in cases of non-competitive tendering (single-source tendering)⁵ and to establish bid-protest institutions.⁶

Remarkably, as in other member and observer countries, not only the need to implement the GPA to fulfill international treaty obligations, but also particular domestic considerations, provided the impetus for Japan's recent legal and practical reforms with respect to public procurement. Specifically, the reforms in Japan needed to address not only the country's GPA obligations but also the country's specific institutional, historical, cultural, and social conditions, such as the group mentality deeply rooted in Japanese culture which has resulted in bid-rigging problems⁷ as well as the involvement of government officials in the majority of bid-rigging cases.⁸

As a starting point to address these obligations and specific conditions in Japan, the Act for Promoting Quality Assurance in Public Works (APQA) was enacted in spring 2005.⁹ Although the immediate effect of this important Act is limited as it covers only public works, it has the strong potential to be a breakthrough for the necessary reform of Japanese public procurement laws, regulations, and practices in general. Among its most notable provisions, the Act provides that the

4. See, e.g., Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 303 (1999) (discussing reforms in U.S. law to implement the GPA); Tong Xinchao, *Chinese Procurement Law: Current Legal Framework and a Transition to the World Trade Organization's Government Procurement Agreement*, 17 TEMP. INT'L & COMP. L.J. 139 (2003) (discussing China's efforts to bring its procurement laws more in line with the GPA).

5. See, e.g., Jean Heilman Grier, *Japan's Implementation of the WTO Agreement on Government Procurement*, 17 U. PA. J. INT'L ECON. L. 605, 631-33 (1996).

6. *Id.* at 643-56.

7. See, e.g., Guy de Jonquieres, *Take a Bite Out of Japan's Collusion Culture*, FIN. TIMES, May 31, 2005, at 17.

8. Regarding recent cases government officials involved in bid-rigging cases, see, e.g., *Bid-rigging Attitudes See Shift*, YOMIURI SHIMBUN [DAILY YOMIURI] (Tokyo), Dec. 10, 2006, at 3.

9. Kokyokōji no hinshitsu kakuho no sokushin ni kansuru hōritsu [Act for Promoting Quality Assurance in Public Works], Law No. 18 of 2005 [hereinafter APQA]. An English translation is available at the Web site of the Japanese Ministry of Land, Infrastructure and Transport, <http://www.hrr.mlit.go.jp/gijyutu/hinkaku/html/hou-english.html>.

“comprehensive evaluation” method, and not the “price-only competition” method, is to be generally employed;¹⁰ procuring entities and candidates may discuss and make adjustments to the technical proposals in competitive bidding procedures;¹¹ and the “maximum estimated price” usually set at the time of a bidding announcement may be set by procuring entities just before the date of bidding.¹² Until the end of the last century, the main aims of reforming public works regimes were to enhance competitiveness and to deter misconduct, responding to criticism against the frequent cases of bid rigging and bribery in the 1990s. After the enactment of the APQA, however, the movement for Japan’s procurement reforms could be boldly steered toward “flexibility” and “diversification.”¹³

This article aims at providing detailed information concerning the developments in Japan described above. It is hoped that this article will be useful to readers in deepening their understanding of Japan, and thereby contribute to smooth negotiations among WTO members. Moreover, it is hoped that the article will also be of use to academics and legal practitioners as a comparative analysis of laws and policies.

Hereafter, Part II surveys and highlights the basic legal schemes for government procurement in Japan. Part III introduces the APQA and its legislative history. Next, Part IV compares the relevant laws in Japan, the United States, and the European Union, and discusses the anticipated hurdles that Japan must overcome to implement the GPA fully. Finally, Part V contains the author’s conclusion.

II. CONTRACTOR SELECTION PROCESSES IN JAPAN’S PUBLIC PROCUREMENT

Generally speaking, there are two types of administrative agencies that handle government procurement, namely national agencies and local agencies. In Japan, different laws and regulations apply to the two types of administrative agencies. National agencies are regulated by the Accounting Act (AA)¹⁴ and its implementing Order Concerning

10. *Id.* art. 3; *see infra* Part III.B.3.

11. APQA, *supra* note 9, art. 13; *see infra* Part III.B.6.

12. APQA, *supra* note 9, art. 14; *see infra* Part III.B.7.

13. It is difficult to understand the meaning and impact of this legislation without knowledge of the Japanese laws and regulations concerning public accounts, including the basic provisions for public procurement procedures. These laws and regulations will be explained in Part II of this article.

14. Kaikeihō [Accounting Act], Law No. 35 of 1947 [hereinafter AA].

Budget, Auditing and Accounting (OBAA),¹⁵ and local agencies are regulated by the Local Autonomy Act¹⁶ and its implementing Order Concerning Enforcement of the Local Autonomy Act.¹⁷ However, these two sets of acts and orders are similar with respect to their basic framework for contractor selection processes. Therefore, this article will hereafter highlight only the main points of the legal provisions regulating national agencies and will mention the local agencies' regulations only when there is no equivalent for national agencies.

A. Contractor Selection Procedures

First, there is a set of rules concerning whether an award is to be made to a contractor through a competitive selection procedure, and if so, how competitive the process will be. This is the famous classification distinguishing "open competitive tendering," "designated competitive tendering," and "non-competitive (single-source) tendering."

Open competitive tendering is a procedure in which any qualified person may submit a tender. This is the general procedure provided in the relevant acts and orders, regardless whether national or local.¹⁸ However, this procedure does not mean that anyone may unconditionally take part in the bidding process. Laws and regulations obligate procuring entities to exclude from such process persons falling into certain categories¹⁹ and allow procuring entities to do so in certain cases.²⁰ Moreover, chief executives of procuring entities may from the outset impose conditions of qualification for participation in particular bidding procedures.²¹

Designated competitive tendering and non-competitive tendering may be used only if the conditions prescribed by the relevant laws and

15. Yosan kessan oyobi kaikeirei [Order Concerning Budget, Auditing and Accounting], Imperial Edict No. 165 of 1947 [hereinafter OBAA].

16. Chiho Jichihō [Local Autonomy Act], Law No. 67 of 1947.

17. Chiho jichihō Sekōrei [Order Concerning Enforcement of the Local Autonomy Act], Cabinet Order No. 16 of 1947.

18. AA, *supra* note 14, art. 29(3).

19. *See, e.g., id.* art. 29(3)(2); OBAA, *supra* note 15, art. 70 (providing, *inter alia*, for the exclusion of a person who is incompetent to contract and a bankrupt without any possibility of reinstatement).

20. *See, e.g., AA, supra* note 14, art. 29(3)(2); OBAA, *supra* note 15, art. 71 (providing, *inter alia*, that procuring entities may bar persons who are found to have violated the Anti-Monopoly Act from competitive bidding for a maximum period of two years).

21. OBAA, *supra* note 15, art. 72(1). These rules apply to designated competitive tendering. *Id.* art. 95. Open competitive tendering with these restrictions is called "conditional open competitive tendering."

regulations are met. Designated competitive tendering is a procedure in which only persons invited (i.e., designated) by the procuring entities may submit a tender.²² Designated competitive tendering may be used only in the following cases: (1) when, due to the nature or purpose of the contract, only a small number of operators are expected to participate in competitive bidding and the use of open competitive tendering is not necessary; (2) when, due to the nature or purpose of the contract, the use of open competitive tendering is deemed to be disadvantageous;²³ (3) when the estimated contract price is lower than the threshold level; or (4) in other cases where the order so provides.²⁴

Non-competitive tendering is a procedure other than the two competitive tendering procedures previously described. Typically, procuring entities using this procedure contact targeted operators individually, negotiate with them to calculate the estimated expenses to be submitted to the agency, and enter into a contract.

Non-competitive tendering may be used only in the following cases: (1) when the nature or purpose of the contract prohibits competition;²⁵ (2) when it is not possible to use a competitive selection method because of extreme urgency;²⁶ (3) when the use of competitive tendering is deemed to be disadvantageous;²⁷ (4) when the estimated contract price is lower than the threshold level;²⁸ or (5) in other cases where the order so provides.²⁹

Further, the relevant laws and regulations require procuring entities to select contractors as competitively as possible even in cases where the entities use designated competitive tendering or non-competitive tendering. That is, in designated competitive tendering cases, procuring

22. *See id.* art. 94.

23. AA, *supra* note 14, art. 29(3)(3) (providing for (1) and (2) above). An example of a case where the use of open competitive tendering is deemed to be disadvantageous is one where a “breach of contract will cause significant trouble to a government project.” OBAA, *supra* note 15, art. 104-4.

24. AA, *supra* note 14, art. 29(3)(5) (providing for (3) and (4) above). Article 94(1) of the OBAA specifies threshold levels for each procured object. OBAA, *supra* note 15, art. 94(1).

25. AA, *supra* note 14, art. 29(3)(4).

26. *Id.*

27. *Id.* An example of a case where “the use of competition is deemed to be disadvantageous” is one where “if an agency did not contract urgently, it would probably lose the chance to contract or it would be forced to contract at a significantly disadvantageous price.” OBAA, *supra* note 15, art. 104-4.

28. AA, *supra* note 14, art. 29(3)(4).

29. *Id.* art. 29(3)(5). Article 99 of the OBAA prescribes the cases where this procedure can be used, e.g., “the case where the government activity at issue needs to be kept secret.” OBAA, *supra* note 15, art. 99.

entities should designate at least ten operators if possible,³⁰ and in non-competitive tendering cases, procuring entities should collect written estimates from at least two operators if possible.³¹

B. The "Price-Only Competition" Method and the "Comprehensive Evaluation" Method

The issue of which type of contractor selection procedure a procuring entity should use, discussed in the previous section, can be said to be an issue concerning whether the selection process is "competitive" or not and how competitive it is, whereas the distinction between the price-only competition method and the comprehensive evaluation method relates to what candidates compete over, that is, the "factors of competition." First, the price-only competition method can generally be described as a method in which the bidder offering the lowest price will receive the award.³² Under the law, this method should be used in principle if a procuring entity uses a competitive tendering procedure, regardless whether it is "open" or "designated."³³ In contrast, the comprehensive evaluation method can be described roughly as a method where not only price but also other conditions such as quality, techniques, or skills are to be considered in the aggregate and the most advantageous candidate will be awarded the contract when a procuring entity selects a contractor. Under the law, this method should be used exceptionally, that is, only when certain conditions are met.³⁴

As will be mentioned later, the latter method is not considered exceptional in the U.S. or the E.U., whereas it is so considered in Japan. This exceptional treatment is emphatically reflected by the provision stating that "[m]inisters or chiefs of departments or agencies should consult with the Minister of the Department of Finance" when they wish to use this method.³⁵

30. *Id.* art. 97(1).

31. *Id.* art. 99(6).

32. *See* AA, *supra* note 14, art. 29(6)(1).

33. *Id.*

34. *Id.* art. 29(6)(2).

35. OBAA, *supra* note 15, art. 91(2). This "consultation" requirement was originally interpreted as requiring individual consultation for each procurement item, so the comprehensive evaluation method was seldom used. Later, the competent ministries and the Minister of the Department of Finance agreed that this requirement should be interpreted as not demanding individual consultation as long as there was a comprehensive agreement through comprehensive consultation and they applied this revised interpretation to public works. Thereafter, the "Guidelines for the Comprehensive Evaluation Method in Public Works" were released in 2000. Now, as long as the case falls within the purview of these guidelines, there is no need for consultation. This fact

C. Maximum Estimated Price

A specific characteristic of Japan's scheme for selection of public works contractors in comparison with other countries is the existence of an upper-limit "estimated price" over which a bid is deemed invalid and a government procuring entity may not contract. This is very strict and there is no exception.³⁶ This limitation is commonly applied regardless of the type of contractor selection procedure.³⁷

Under the law, a procuring entity shall estimate the bidding price or the contract price of the item at issue in accordance with its design and other specifications and other relevant characteristics,³⁸ and the estimated price shall be properly calculated through consideration of such relevant factors as actual market prices, the situation of supply and demand, the ease or difficulty of execution, the quantity, and the length of time necessary for execution.³⁹ This estimated price is generally characterized as "just an estimated cost calculated in advance." This characterization in itself is not the basis for the maximum nature of the estimated price. It could be based largely on the government's own ideas regarding the governmental budget and disbursement.

While the maximum estimated price eliminates prices that are too high, there are also schemes that forestall prices that are too low. The law allows a procuring entity to exclude a candidate whose bidding price is deemed to be so low that the contract might not be executed properly or that the contract would be considered improper because it is likely to disturb the order of fair trade.⁴⁰ In such a case, a procuring

is indeed one of the reasons for the recent increase in the number of cases using the comprehensive evaluation method. The exceptional nature of this method is further illustrated by Article 167-10-2(4) of the Order Concerning Enforcement of the Local Autonomy Act that provides that "procuring agencies shall consult with well-informed persons in advance" when the comprehensive evaluation method is used. Order Concerning Enforcement of the Local Autonomy Act, *supra* note 17, art. 167-10-2(4). About all of the above, see Shigeki Kusunoki, *Nyusatsudango ni taisuru shobatsu ni yoru kaiketsu to soreigaino kaiketsu [How Effective Are the Sanctions Under the Japanese Legislation and Regulations Governing Public Procurement to Address the Problem of Bid Rigging?]*, 40 SANDAI HOGAKU 1, 16 (2006) (Japan).

36. In the case of an auction, a minimum price limit will be set. AA, *supra* note 14, art. 29-6(1). As this issue is outside the scope of this article, a precise explanation is omitted.

37. *Id.* art. 26(6) (prescribing the estimated price for open competitive tendering and designated competitive tendering); OBAA, *supra* note 15, art. 99-5 (prescribing the estimated price for non-competitive tendering).

38. OBAA, *supra* note 15, art. 79.

39. *Id.* art. 80(2).

40. AA, *supra* note 14, art. 29(6)(1).

entity has an obligation to investigate the relevant facts.⁴¹ Moreover, as far as local governments are concerned, a minimum price limitation may be set.⁴²

D. Secondary Policies

The Act on Ensuring the Receipt of Orders from the Government and Other Public Agencies by Small and Medium-Sized Enterprises⁴³ (Public Agency Order Act or PAOA) was enacted in 1966 to implement the aims of the Basic Act Concerning Small and Medium-Sized Enterprises.⁴⁴ As the full name of the Act itself reflects, the Public Agency Order Act aims to enhance development of small and medium-sized enterprises by ensuring procurement by public agencies from them through measures to expand opportunities for such enterprises to receive orders.⁴⁵ This Act, composed of only seven articles, has long influenced Japanese public procurement practices.

The Public Agency Order Act provides that the government and other public agencies “shall make efforts to expand opportunities for the receipt of orders by small and medium-sized enterprises, while giving due consideration to the proper execution of the budget” when public contracts are concluded.⁴⁶ The Act further provides that, as means to carry out these obligations, each year (1) the Minister of Economy, Trade and Industry shall, through consultation with the ministers and heads of other competent ministries and agencies, draft guidelines to expand opportunities for small and medium-sized enterprises to receive orders, taking into consideration the budget and project plans for the year;⁴⁷ (2) the Minister of Economy, Trade and Industry shall request approval by the Cabinet of the guidelines;⁴⁸ (3) the heads of each of the relevant ministries and agencies shall report their

41. OBAA, *supra* note 15, art. 86(1).

42. Order Concerning Enforcement of the Local Autonomy Act, *supra* note 17, art. 167-10(2).

43. Kankōju ni tsuitemo chūshō kigyōsha no juchū no kakuho ni kansuru hōritsu [Act on Ensuring the Receipt of Orders from the Government and Other Public Agencies by Small and Medium-Sized Enterprises], Law No. 97 of 1966 [hereinafter Public Agency Order Act (PAOA)].

44. Chūshō kigyō kihonhō [Basic Act Concerning Small and Medium-Sized Enterprises], Law No. 154 of 1963, art. 20 (providing that the government shall take necessary measures to ensure proper trade by small and medium-sized enterprises).

45. PAOA, *supra* note 43, art. 1.

46. *Id.* art. 3. Article 2 of this Act defines “small and medium enterprises.” *Id.* art. 2.

47. *Id.* art. 4(1)–(2).

48. *Id.* art. 4(2).

achievements of contracts with small and medium-sized enterprises to the Minister of Economy, Trade and Industry after the end of the fiscal or business year;⁴⁹ and (4) local self-governing bodies, applying national policies, shall endeavor to take actions to ensure opportunities for the receipt of orders by small and medium-sized enterprises.⁵⁰

In practice, government procuring entities have tried either to enhance small and medium-sized enterprises' entrance into the public procurement market by dividing works into smaller categories or dividing orders into smaller lots in order to make the contract price low enough,⁵¹ or to expand the receipt of orders by small and medium-sized enterprises through the use of designated competitive tendering or non-competitive tendering.⁵² In national procurement, small and medium-sized enterprises have received roughly forty to fifty percent of the total amount of governmental contracts during the past decade.⁵³

E. Practices to Adjust Opportunities Through "Designation:" Advantages and Disadvantages

The Japanese Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade⁵⁴ (Anti-Monopoly Act)—the equivalent of antitrust law in the United States or competition law in the European Union—was not actively enforced for a long time between its enactment in 1947 and the end of the 1980s. Many regulations limited newcomers' entry into many business fields such as transportation, electricity, and the media. This demonstrates that competition was not a basis of Japanese economic management.⁵⁵

49. *Id.* art. 5.

50. *Id.* art. 7.

51. *See, e.g., Jichitai ha kansei dango no ne wo tachikire [Local Governments Must Root Out Bid-Rigging with the Involvement of Government Officials]*, NIHON KEIZAI SHIMBUN, Dec. 3, 2006 (Morning Ed.), at 2.

52. *See id.*

53. Statistics are available at the Web site of the Small and Medium Enterprise Agency, http://www.chusho.meti.go.jp/koukai/shingikai/download/kankoju_matome_sankou.pdf (last visited Apr. 12, 2007).

54. *Shiteki dokusen no kinshi oyobi kosei torihiki no kakuho ni kansuru hōritsu [Japanese Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade]*, Law No. 54 of 1947.

55. Some commentators point out that Japanese tend to prefer "cooperation" rather than "competition" based on their cultural background. *See, e.g., THE JAPANESE MIND: UNDERSTANDING CONTEMPORARY JAPANESE CULTURE 195–97* (Roger J. Davies & Osamu Ikeno eds., 2002); YOSHIO SUGIMOTO, *AN INTRODUCTION TO JAPANESE SOCIETY (CONTEMPORARY JAPANESE SOCIETY)* (2d ed. 2003).

Japanese public procurement was not managed competitively either. As already stated in Section A of this Part, open competitive tendering is now adopted as a general rule. Until a decade ago, however, the majority of contractor selection procedures used designated competitive tendering.⁵⁶ Generally speaking, three reasons can be cited for this. First, it is advantageous if procuring entities can exclude improper candidates from contractor selection procedures through their designation.⁵⁷ Second, designated competitive tendering is an effective way to implement the Public Agency Order Act.⁵⁸ Third, there are paternalistic demands on the government to adopt designated competitive tendering to assure long-term stable profits for a limited number of companies which are expected to supply high-quality items or works.⁵⁹

As to the third reason, assurance of companies' long-term stable profits can be achieved not only through the use of designated competitive tendering, but also through a system of adjustment or distribution of profits, that is, bid rigging. The adoption of designated competitive tendering encourages candidates to engage in bid rigging because the number of candidates is limited through the designation, the list of designated candidates can frequently be fixed, and candidates can collude more easily.⁶⁰ Moreover, in many cases, procuring entities tacitly permit and sometimes actively get involved in bid rigging.⁶¹ Many commentators informally contend that competition is restrained by bid rigging in most procurement cases in Japan.⁶² Naturally, this anti-competitive characteristic of public procurement has supported a cozy relationship among politicians, bureaucrats, and businesspersons for a long time.⁶³

56. See, e.g., WTO Secretariat, *Japan: Policy Developments Affecting Trade and Investment*, WT/TPR/S/32 (Jan. 5, 1998) (stating that selective tendering had been a "previously pervasive" procedure), available at http://www.wto.org/english/tratop_e/gproc_e/japan.pdf.

57. See, e.g., Yasushi Ohno, *Kokyokōji ni okeru nyusatsu keiyaku hoshiki nokadai* [*Reconsidering Bidding and Contracting Methods of Public Works*], 27 KAIKEI KENSA KENKYU 159, 162.

58. See, e.g., Kusunoki, *supra* note 35, at 17.

59. See Ohno, *supra* note 57, at 161; Kusunoki, *supra* note 35, at 14–15. This idea is very controversial. Some commentators may insist that the more intense the competition, the higher the quality of the items and works the successful candidates will supply.

60. See, e.g., BRIAN WOODALL, *JAPAN UNDER CONSTRUCTION: CORRUPTION, POLITICS, AND PUBLIC WORKS* 38 (1996).

61. *Id.* at 39–41.

62. *Id.* at 27.

63. *Id.* at 39–41.

Criticisms of this problem have grown louder since a number of infamous bid-rigging and bribery cases, including one involving then Construction Minister Kishiro Nakamura and Kajima Corporation, the largest construction company in Japan, triggered the public's anger in the 1990s.⁶⁴ Designated competitive tendering then became a target of criticism as a hotbed of unjust activities.⁶⁵ Almost simultaneously, the sanction regime and the enforcement of the Anti-Monopoly Act were strengthened.⁶⁶ Furthermore, most national and some local administrative agencies started to treat open competitive tendering as the general rule for procurement to implement the WTO-GPA after it came into force in 1996.⁶⁷

The price-only competition method was, however, left as the general rule.⁶⁸ Public works is one of the fields most disadvantaged by this. Coupled with the long-term recession and the drastic curtailment of the public project budgets throughout the 1990s,⁶⁹ the change to open competitive bidding forced civil engineering and construction companies to compete much harder than before and this increased competition led to dumping. As a result, there have been many cases where the contract price was much lower than the estimated price that had been deemed to be reasonable.⁷⁰

64. A. Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38, 83–84 (1997). Nakamura was alleged to have received a bribe of ten million yen from Kiyoyama Shinji, a vice president of Kajima, in exchange “for Nakamura’s convincing the [Japanese] Fair Trade Commission [JFTC] not to pursue collusion charges against a cartel of construction firms in Saitama prefecture.” *Id.* at 83; see also WOODALL, *supra* note 60, at 126.

65. *Kokyokōji hōritsu mamori tomei ni* [Compliance and Transparency in Public Projects], NIHON KEIZAI SHIMBUN, Jul. 16, 2000 (Morning Ed.), at 18.

66. See, e.g., Shigeki Kusunoki, *Shaping an Anti-Monopoly Law Sanction Regime Against Cartels or Bid Collusion: A Perspective on Japan’s Choice*, 79 U. DET. MERCY L. REV. 399 (2002).

67. Until the end of the last century, however, the speed of the reforms was slow.

68. There has not been any change to AA article 29(6)(1) which provides that the price-only competition method is a general rule. AA, *supra* note 14, art. 29(6)(1).

69. The Junichiro Koizumi administration (2001–06) has been based on the concept of “a small government.” This concept has been the engine to budget curtailment. See, e.g., Haruki Sasamori, *Shift to Small Govt Accelerates*, YOMIURI SHIMBUN, Dec. 28, 2005, at 4.

70. In January 2007, the Fair Trade Commission started an investigation and an analysis of the situation concerning unreasonably low bidding. See *Koutori teikakaku nyusatsu de sujyussha chosa* [The FTC Investigates Dozens of Enterprises for Unreasonable Low Bidding], NIHON KEIZAI SHIMBUN, Jan. 5, 2007 (Evening Ed.), at 18.

III. NEW LEGISLATION ON PUBLIC WORKS: THE ACT FOR PROMOTING QUALITY ASSURANCE IN PUBLIC WORKS (APQA)

*A. Background of the Legislation*⁷¹

In response to the cries of construction companies in the wake of intense competition, the Liberal Democratic Party (LDP), the ruling party for a long time after WWII, started to move to address their hardships.⁷² In June 2003, the LDP launched an internal survey and a study group on the issue.

In the same month, the Japanese Fair Trade Commission (JFTC) launched "The Study Group Concerning Public Procurement and Competition Policy," which aimed to suggest new schemes and practices to deter bid rigging and maximize "value for money."⁷³ The recommendations of the study group's report published in November 2003 include "the positive active use of the comprehensive evaluation method" and "the introduction of the competitive dialogue method,"⁷⁴ both later incorporated into the provisions of the APQA.

The JFTC's report published simultaneously suggested that amendment of the Anti-Monopoly Act was needed to strengthen the sanctions against various types of misconduct.⁷⁵ This added fuel to the LDP members' sense of an impending crisis because they thought the stricter sanctions would lead to an increase in dumping by construction

71. Information about the background and legislative history of the APQA can generally be found only in specialized newspapers written in Japanese.

72. The construction industry is one of the LDP's important money pipelines and one of its power bases. See WOODALL, *supra* note 60, ch. 3.

73. For a discussion of the basic concept and understanding of "value for money," see U.K. NAT'L AUDIT OFFICE (NAO) & OFFICE OF GOV'T COMMERCE (OGC), GETTING VALUE FOR MONEY FROM PROCUREMENT: HOW AUDITORS CAN HELP, *available at*, [http://www.ogc.gov.uk/documents/Value_for_Money_\(VFM\)_in_Procurement_-_The_Role_of_Auditors.pdf](http://www.ogc.gov.uk/documents/Value_for_Money_(VFM)_in_Procurement_-_The_Role_of_Auditors.pdf). This report explains that value for money "is defined as the optimum combination of whole life costs and quality." *Id.* at 3. Guidelines for implementation of the value for money policy in the United Kingdom are set out in HER MAJESTY'S TREASURY, GOVERNMENT ACCOUNTING 2000, ch. 22 (as amended) (U.K.), *available at* <http://www.government-accounting.gov.uk/current/frames.htm> (click "Contents"; then scroll down left side of page for link to ch. 22).

74. JAPAN FAIR TRADE COMM'N, REPORT FROM THE WORKSHOP REGARDING PUBLIC PROCUREMENT AND COMPETITION POLICY, *available at* <http://www.jftc.go.jp/pressrelease/03.november/03111801.pdf>.

75. JAPAN FAIR TRADE COMM'N, REPORT OF THE STUDY GROUP ON THE ANTIMONOPOLY ACT, PART 1: COMPREHENSIVE REVIEW OF ENFORCEMENT SYSTEMS (Oct. 28, 2003), *available at* <http://www.jftc.go.jp/e-page/reports/survey/2003/1.pdf>; <http://www.jftc.go.jp/e-page/reports/survey/2003/2.pdf>; <http://www.jftc.go.jp/e-page/reports/survey/2003/3.pdf> (English "tentative" translations of Nov. 21, 2003).

companies. The LDP therefore rushed to enact new legislation on public works.

In autumn 2004, Diet⁷⁶ members introduced a bill to enact the APQA at the same time the Cabinet submitted a bill to amend the Anti-Monopoly Act. The former was enacted three weeks after the latter in spring 2005.⁷⁷

B. Introduction to the Contents of the APQA

1. Purpose

Article 1 of the APQA states that its purpose is to “set[] forth a basic philosophy for ensuring the quality of public works in order to clarify the responsibilities of the central government and other stakeholders” and “basic policies to promote quality in public works in order to improve the public welfare and contribute to the sound development of the national economy.”⁷⁸

2. Definition of “Public Works”

Article 2 provides that the “public works” that are covered by the APQA are “as defined in Article 2.2 of the Act for Promoting Proper Tendering and Contracting for Public Works.”⁷⁹

3. Basic Philosophy

Article 3 of the APQA describes the basic philosophy of the Act as follows:

1. In that public works, providing social capital that supports the well-being and economic activities of the public, have important socioeconomic implications, the central and local governments, as well as other entities that place and receive orders for public works,

76. “The Diet” in Japan, which is composed of the House of Representatives and the House of Councilors, is equivalent to the Parliament in the United Kingdom.

77. Law No. 35, 2005. The APQA came into force on April 1, only one day after the bill was passed. APQA, *supra* note 9, art. 1, appx.

78. *Id.* art. 1, *translated in* Ministry of Land, Infrastructure and Transp., Bill for Ensuring the Quality of Public Works, <http://www.hrr.mlit.go.jp/gijyutu/hinkaku/html/hou-english.html> (last visited Apr. 10, 2007). All subsequent citations to the APQA are to this English translation.

79. *Id.* art. 2; *see* Kokyokōji no nyusatsu oyobi keiyaku no tekiseika no sokushin ni kansuru hōritsu [Act for Promoting Proper Tendering and Contracting for Public Works], Law No. 127 of 2000, art. 2(2) (“[I]n this Act, ‘public works’ means construction works ordered by the central government, the semi-governmental special corporations and the local governments.”).

should ensure the quality of public works for present and future generations of the Japanese people in fulfilling their respective roles.

2. In that construction work has such unique characteristics as that its quality can be confirmed only after structures are provided for use, its quality depends to a great degree upon the technological capabilities of contractors, and its conditions differ significantly between individual projects, various factors in addition to price should be considered to ensure the quality of public works; due consideration should also be given to economic efficiency, resulting in the conclusion of contracts that comprehensively consider pricing and quality.

3. In that work efficiency, safety, environmental impact and other factors are important considerations in ensuring the quality of public works, quality assurance should employ the most appropriate technologies available.

4. To ensure the quality of public works, due attention should be given to ensuring the transparency of tendering and contracting processes and the content of contracts, the fairness of competition for contracts, the removal of construction companies that are not qualified as contractors, the elimination of improper activities such as collusion and bid-rigging, and the use of proper construction practices.

5. To ensure the quality of public works, due consideration should be given to the private companies employed in public works projects, including the proper evaluation of their capabilities; the proper reflection of these capabilities in tendering and contracting; and the use of their technical proposals (herein meaning proposals on technology utilization submitted for public works contracts to be awarded competitively), originality, and ingenuity.

6. To ensure the quality of public works, due attention should be given to the conclusion of fair contracts based on agreements between parties negotiating on an equal footing, and to the good-faith implementation of these contracts.

7. To ensure the quality of public works, the quality of surveys on and designs for public works shall be ensured in accordance with the principles set forth in the preceding paragraphs, in that the quality of such surveys and designs significantly affect the quality of public works.⁸⁰

80. APQA, *supra* note 9, art. 3.

4. Responsibilities

Articles 4, 5, 6, and 7 of the APQA provide for the responsibilities of the national and local governments, procuring entities, and contractors. Article 4 provides that the national government “shall assume responsibility for formulating and implementing comprehensive measures to ensure the quality of public works.”⁸¹ Article 5 commands the local governments to assume the same responsibility “in cooperation with the central government, while giving due consideration to local needs.”⁸² Article 6 provides that the procuring entities “shall properly perform . . . the production of written specifications, evaluation of prices, determination of tendering and contracting methods, selection of the contractor, supervision and inspection of work, and confirmation and evaluation of the progress of construction during the work period and at the time of completion.”⁸³ Finally, Article 7 requires public works contractors to perform their work “pursuant to the basic philosophy, and shall improve their technological capabilities to that end.”⁸⁴

5. Basic Principles

Articles 8, 9, and 10 provide for basic principles and responsibilities pursuant thereto to be established by the national government. Article 8 directs the national government to set forth, and then give public notice of, “basic principles for the comprehensive implementation of measures to ensure the quality of public works,” giving “consideration to the autonomy of quasi-governmental agencies . . . and of local governments.”⁸⁵ Article 9 prescribes the obligation of the heads of ministries and agencies, heads and representatives of quasi-governmental and independent administrative agencies, and local government heads to “implement necessary measures to promote the quality of public works in accordance with basic principles.”⁸⁶ Finally, Article 10 provides that the national government “shall establish systematic cooperation between concerned administrative organizations” in formulating and implementing the basic principles.⁸⁷

81. *Id.* art. 4.

82. *Id.* art. 5.

83. *Id.* art. 6.

84. *Id.* art. 7.

85. APQA, *supra* note 9, art. 8.

86. *Id.* art. 9.

87. *Id.* art. 10.

6. Evaluation of the Technical Capabilities of Bidding Participants and Technical Proposals

Articles 11 through 13 are provisions concerning the evaluation of the technical capabilities of and technical proposals from the participants in competitive bidding for public works contracts. First, Article 11 requires procuring entities to review the capabilities of candidates, "including their experience in constructing public works, their past construction experience and the expertise of the[ir] engineers."⁸⁸ Next, Article 12 requires procuring entities generally to request that candidates submit technical proposals, and in cases where technical proposals are requested, the entities "shall give public notice of both the request and the method of evaluating proposals in advance;" "shall properly examine and evaluate" the proposals, "implement[ing] measures to ensure . . . neutrality and fairness," including complaint resolution measures; and generally "shall subsequently make public the results of their evaluations."⁸⁹ Finally, Article 13 prescribes the dialogue method for improvement of technical proposals. Specifically, it states that a procuring entity may request contractors to improve submitted proposals or give them the opportunity to do so, and, in such a case, the procuring entity shall "provide an overview of the technical proposal improvement process."⁹⁰ This latter provision is meant to keep the process of technical proposal improvement transparent.

7. Ex Post Facto Determination of a Maximum Estimated Price

Article 14 of the APQA provides for the ex post facto determination of a maximum estimated price following evaluation of technical proposals. Specifically, in a case where a procuring entity "request[s] technical proposals that involve advanced technologies," it may set a cap on the estimated price "based on the results of its evaluations of proposals."⁹¹ Moreover, "[i]n examining technical proposals," the procuring entity is obligated to "seek the opinions of knowledgeable persons who can offer fair judgments from a neutral position."⁹²

8. Assistance from Other People and Organizations

Procuring entities need sufficient administrative skills and experience to handle bidding procedures in order to carry out public works

88. *Id.* art. 11.

89. *Id.* art. 12.

90. *Id.* art. 13.

91. *Id.* art. 14.

92. APQA, *supra* note 9, art. 14.

properly. In cases where the contents of works are highly specialized and complicated techniques are needed, however, many procuring entities, especially those of local governments, do not have sufficient skills. Article 15 of the APQA therefore provides that the procuring entities are obligated to entrust performance of their duties to other people or organizations that have sufficient skills and experience.⁹³

C. Significance and Impact of the New Act

1. Comprehensive Evaluation Not to Be an Exception in Public Works

Under the APQA, the comprehensive evaluation method will be used more often than before, in place of the price-only competition method, which has been used on a regular basis. As the quotation of Article 3(2) above indicates, this provision of the Act provides that various factors in addition to price should be considered to ensure the quality of public works.⁹⁴

It is said that the LDP inserted the vague expression “various factors in addition to price” into this article because it wanted to weaken pressure from the Democratic Party of Japan (DPJ), the largest opposition party, in order to speed up passage of the legislation. The dominant opinion of the members of the DPJ—a party which depends heavily on the support of local and small-sized enterprises—was that “quality” should be defined to include various factors such as contributions to local events, contributions to charities, and contributions to disaster measures.⁹⁵ These are all activities that local and small-sized enterprises actively pursue in their home areas. As a result, it is uncertain exactly *how* comprehensive the comprehensive evaluation method will actually turn out to be in practice.

2. Dialogue Method

Article 13 of the APQA, which, as explained above, provides for a method of dialogue between a candidate and a procuring entity to improve a submitted technical proposal, can be said to be the core of the Act. Under the Accounting Act, the Local Autonomy Act, and related

93. *Id.* art. 15(1)–(3).

94. *Id.* art. 3(2).

95. There are many criticisms of this vagueness. *See, e.g.*, Tarou Sawaki, *Hinkakuho eno aru huan* [Uneasiness About the Act for Promoting Quality Assurance in Public Works], 54 (4) CE (CIVIL ENGINEERING) 33 (2005) (explaining the main text’s story between the LDP and the DPJ).

orders, the holding of a dialogue between the time of notice and that of bidding are neither permitted nor prohibited in competitive tendering procedures.⁹⁶ Article 13, however, encourages and can be used as justification for the use of the dialogue method by clearly describing the process for dialogue between a candidate and a procuring entity to improve a submitted technical proposal prior to the bidding date.

One potential problem is arbitrariness on the part of procuring entities in cases where the dialogue method is used. In this regard, Article 13 makes it obligatory for procuring entities to make public an overview of the process for improvement of technical proposals. The APQA, however, does not provide any further details.

3. Estimated Price: Ex Post Facto Determination

The method of determining estimated prices was drastically changed by Article 14, which provides that a procuring entity “may cap estimates based on the results of its evaluations of proposals” in cases where it requests “technical proposals that involve advanced technologies.”⁹⁷ In such cases, the time of determination is expected to be several days prior to the day of bidding.⁹⁸ Generally, estimated prices are determined at the stage of the procurement notice. As to such prices, the Order Concerning Budget, Auditing and Accounting requires the entity to estimate price “on the basis of the specifications and the design documents” and related factors concerning the item, and to “keep the document in which this estimated price is written or recorded at the time when submitted bids are opened.”⁹⁹ If there is a very large informational gap concerning the technical proposals between the procuring entity and candidates and if the need for dialogue to improve the submitted proposals is very strong, this means that the procuring entity lacks sufficient data to determine the estimated price and it cannot make such a determination in advance. In such a situation, an ex post facto determination of the estimated price is inevitable.

96. See AA, *supra* note 14, art. 29(1)–(12) (ch. 4); Local Autonomy Act, *supra* note 16, ch. 9, § 6; OBAA, *supra* note 15, arts. 68–102 (ch. 7); Order Concerning Enforcement of the Local Autonomy Act, *supra* note 17, ch. 5, § 6. There is no provision concerning “negotiation” in the competitive bidding procedures. Indeed, a few procuring entities had used the dialogue method before the APQA came into force.

97. APQA, *supra* note 9, art. 14.

98. In one previous case, the estimated price was determined four days before the day of bidding.

99. OBAA, *supra* note 15, art. 79.

4. Monitoring and Bid Protests

To assure the quality of public works, it seems appropriate to adopt a flexible system of procurement methods. The greater the number of various methods available, however, the more important the procedures for monitoring procuring entities become. In competitive tendering, where price is the sole evaluated item, there are no serious problems because the successful bidders are determined automatically based only on the prices that they submit. In competitive tendering where the comprehensive evaluation method is adopted—especially in cases where candidates submit technical proposals, they and the procuring entities hold discussions, and the estimated price is determined *ex post facto*—the need for monitoring procuring entities increases and the techniques for undertaking such monitoring are complicated. In Japan, third-party institutions like the Committee for the Oversight of Bidding, which consists of part-time members including lawyers, scholars, and journalists, tend to be emphasized.

Moreover, it is expected that the more varied and flexible the procuring methods are, the greater the number of unsuccessful candidates who will make complaints.¹⁰⁰ Unsuccessful candidates are supposed to be the most effective monitoring parties because they are the most interested parties who are close to the procuring entities. Therefore, establishment of sufficient and effective bid-protest procedures is one of the most urgent tasks in government procurement regimes.

Neither a monitoring scheme nor a bid-protest scheme is addressed in the APQA. Only the supplementary resolutions for the bill by the respective committees on Land and Transport in the House of Representatives and the House of Councilors deal with these matters, providing in identical language that one of the objectives of the measures the government should implement to enforce the law is “[t]o properly reflect the opinions of third parties such as knowledgeable persons regarding the tendering and contracting process for public works, and to properly handle complaints from concerned parties, including the enactment of legislation where necessary.”¹⁰¹

To implement the WTO-GPA, in 1995 Japan established the Office for the Government Procurement Challenge System (CHANS) to deal

100. As the author mentions later, there is the marked tendency in the Japanese community for people to think that “a dispute is best avoided.” Therefore, the author has reservations concerning the effectiveness of any bid-protest scheme that is established.

101. Resolution on the Bill for Quality Assurance of Public Works art. 2 (as drafted by the House of Councilors, Comm. on Land & Transp. (Diet), Mar. 29, 2005) (Japan), available at http://www.cgr.mlit.go.jp/hinkaku/quality_050412_e.htm.

with bid protests involving national procuring entities. However, this system had seldom been used as of July 2006.¹⁰² This is probably due to the Japanese anti-competitive and cooperative mindset ingrained in the domestic construction and civil engineering industries. The examining committee in this system (the Government Procurement Review Board), like the Committee for the Oversight of Bidding, is a third-party institution consisting of part-time members.¹⁰³ Moreover, as of the same date, few local governments had established bid-protest procedures.¹⁰⁴

D. Practical Responses

Generally speaking, as of July 2006, most government agencies had not yet sufficiently prepared for the enforcement of the APQA.¹⁰⁵ In August 2005, the Cabinet endorsed the basic principles provided in Article 8 of the Act.¹⁰⁶ The Ministry of Land, Infrastructure and Transport (MLIT) then published guidelines concerning the enforcement of the Act in September 2005.¹⁰⁷ Regional branches of the MLIT, other national agencies, and local governments are currently considering or beginning to undertake measures to implement the Act.

102. Cabinet Office, Office for Gov't Procurement Challenge Sys., Public Release of Status of Receipt and Review of Complaints (Japan), *available at* http://www5.cao.go.jp/access/english/chans_main_e.html (last visited Jan. 28, 2007) (follow "Public Release of Status of Receipt and Review of Complaints" hyperlink).

103. *See* Cabinet Office, Government Procurement Review Board Members (Japan), <http://www5.cao.go.jp/access/english/chans/chans-member-e.html> (last visited Mar. 7, 2007).

104. Due to time and space limitations, this article does not address the subject of legal review because the author believes that it would be very complicated to organize and examine country and regional regulations and practices for a comparative analysis of the United States, the European Union, and Japan. The author of course recognizes the importance of this matter.

105. *See, e.g.*, Interview by Kensetsu Kogyo Shimbun with Masashi Waki, Member of the Diet (Feb. 15, 2006), *available at* <http://www.waki-m.jp/column/column060217.html>.

106. *See* CABINET OFFICE, GUIDELINES (2005), *available at* <http://www.skr.mlit.go.jp/etc/hinkaku/pdf/7.pdf>.

107. MINISTRY OF LAND, INFRASTRUCTURE AND TRANSP., GUIDELINES CONCERNING ENFORCEMENT OF THE ACT FOR PROMOTING QUALITY IN PUBLIC WORKS (2005), *available at* <http://www.mlit.go.jp/tec/nyuusatu/keiyaku/170930/01.pdf>.

IV. JAPAN VIS-À-VIS THE UNITED STATES, THE EUROPEAN UNION,
AND THE WTO-GPA

This Part analyzes the Japanese laws in comparison with the corresponding U.S.¹⁰⁸ and E.U. laws¹⁰⁹ (in part E.U. member states' laws)¹¹⁰ and points out the hurdles that Japan must overcome to implement the WTO-GPA fully.

A. Comparison with the United States and the European Union

1. Contractor Award Process

With regard to the contractor award process, a notable characteristic of the relevant Japanese laws is that the comprehensive evaluation

108. The U.S. federal procurement regimes consist of the Armed Services Procurement Act, 10 U.S.C. §§ 2202, 2301–14, 2381, 2383 (2006), and the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended at 41 U.S.C. §§ 251–53d, 253f–54, 254b–66a (2006) and scattered sections of other titles, especially 40 U.S.C.), which generally regulate procurement processes; the Buy American Act, 47 Stat. 1520 (codified as amended at 41 U.S.C. §§ 10a–10d and scattered sections of other titles), which obligates procuring agencies to purchase U.S. domestic products; the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 601–13, 5 U.S.C. § 5108, and scattered sections of 28 U.S.C.), which provides procedures for resolution of disputes; and the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, Title VII, 98 Stat. 1175 (codified as amended at 31 U.S.C. §§ 3551–56, 41 U.S.C. §§ 253a–53b (2006), and in scattered sections of other titles) which aims at assuring competitiveness in public contracts. Pursuant to these acts, the General Services Agency, the Department of Defense, and the National Aeronautics and Space Administration (NASA) jointly established the Federal Acquisition Regulation (FAR), 48 C.F.R. pts. 1–53 (2006), which broadly regulates the whole of the federal procurement processes including bid protests (FAR part 33). See W. NOEL KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL chs. 1, 33 (4th ed. 2004).

109. Public procurement in the member states of the European Union is regulated by the member states' respective laws and regulations. These must be consistent with any E.U. directive adopted and promulgated by the Council of the European Union. See Treaty Establishing the European Community (Nice consolidated version), Dec. 24, 2002, 2002 O.J. (C 325) 33, art. 249. The currently valid directive concerning the award of public works, supply, and service contracts, which applies to the awarding of contracts equal to or greater than a certain amount, is European Parliament and Council Directive 2004/18/EC, 2004 O.J. (L 134) 114. See European Commission, Public Procurement Legislation: New Directives (Legislative Package), http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm#current (last visited Mar. 7, 2007). See generally CHRISTOPHER BOVIS, PUBLIC PROCUREMENT IN THE EUROPEAN UNION (2005).

110. For a comparative analysis of the U.S. and E.U. regimes, see Jean-Jacques Verdeaux, *Public Procurement in the European Union and in the United States: A Comparative Study*, 32 PUB. CONT. L. J. 713 (2003).

method has not been adopted as the general rule for either national or local government procurement.¹¹¹ Prior to the enactment of the APQA, this was true even for items where sophisticated techniques were needed in public works, such as in airport or dam construction. Procuring entities have generally dealt with problems concerning quality or techniques not by adoption of the comprehensive evaluation method but instead by use of designated competitive tendering.¹¹² Though the law provides that designated competitive tendering may be adopted exceptionally, in practice the reverse has continued for a long time.¹¹³ As previously pointed out, one basis for the APQA's enactment was the increasing difficulty in excluding incompetent contractors from public procurements through "designation" because designated competitive tendering was considered to be a vice as a result of the aforementioned Nakamura and other bid-rigging and bribery scandals that broke out in the 1990s.¹¹⁴ Therefore, procuring entities became obligated to use open competitive tendering as the rule and this has led to cut-throat competition among candidates.¹¹⁵

As a result of the enactment of the APQA, the basic contractor award procedure for public works in Japan changed from the combination of "designated competitive tendering with a price-only evaluation method" to "open competitive tendering with a comprehensive evaluation method." As will be shown, this change has brought Japanese law more in line with U.S. law and practice. It must be remembered, however, that this change in Japanese procedure currently affects only public works, due to the limited applicability of the APQA.

Unlike in Japan, neither U.S. nor E.U. law differentiate between the procedure for government procurement of public works and that for other types of items or works. In the United States, the generally used "full and open competition" procedure, equivalent to the primary procedure of "open competitive tendering" in Japan, uses two types of evaluation methods, namely, the "sealed bidding" method,¹¹⁶ in which the contract is awarded to the bidder with the lowest price,¹¹⁷ and the

111. In the last few years, only the Ministry of Land, Infrastructure and Transport has tried to use the comprehensive evaluation method on a regular basis. As a whole, however, this method is exceptionally used.

112. About use of designated competitive tendering in order to maintain quality of public works, see *supra* Part II.E.

113. *See id.*

114. *See id.*

115. *See supra* Part III.A.

116. 48 C.F.R. pt. 14 (2006).

117. Under sealed bidding, contracts are awarded "to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Govern-

“competitive proposal” method,¹¹⁸ in which the candidate presenting the proposal “that represents the best value” is awarded the contract.¹¹⁹ Sealed bidding may be used only in cases where certain conditions are met.¹²⁰ In the European Union, on the other hand, combinations of the “open procedure with a price-only evaluation method,” the “restrictive procedure with a price-only evaluation method,” the “open procedure with a comprehensive evaluation method,” or the “restrictive procedure with a comprehensive evaluation method” may be used on a case-by-case basis.¹²¹ The European Union’s “open procedure” and “restrictive procedure” are equivalent, respectively, to open competitive tendering and designated competitive tendering in Japan. Among the four methods, there is no designation as to which should be used as a general rule and which should be used as an exception.¹²²

Another important development in the Japanese public procurement regimes, discussed previously, is that the APQA permits the use of dialogue in both types of competitive tendering procedures.¹²³ This may be understood as an approach similar to the U.S. regimes. Namely, under U.S. law, both the “full and open competition” and

ment, considering only price and the price-related factors included in the invitation.” 48 C.F.R. § 14.101(e) (2006). The price-related factors that may be applicable and would therefore be included in a bid solicitation are listed at 48 C.F.R. § 14.201-8 (2006).

118. 48 C.F.R. §§ 6.401(b), pt. 15 (2006).

119. 48 C.F.R. § 15.302 (2006); *see* 48 C.F.R. § 15.304 (2006) (describing the factors and “significant subfactors” of evaluation of a proposal).

120. 48 C.F.R. § 6.401(a) (2006). This subpart provides:

“Contracting officers shall solicit sealed bids” if the four following conditions are met:

- (1) Time permits the solicitation, submission, and evaluation of sealed bids,
- (2) The award will be made on the basis of price and other price-related factors,
- (3) It is not necessary to conduct discussions with the responding offerors about their bids, and
- (4) There is a reasonable expectation of receiving more than one sealed bid.

Id.

121. In practice, the member states might treat the open procedure as a general rule and the restrictive procedure as an exception or vice-versa.

122. European Parliament and Council Directive 2004/18/EC, 2004 O.J. (L 134) 114 arts. 28, 53. However, this does not mean the laws and regulations of all member states that implement the Directive distinguish between the rule and the exception(s) on this point.

123. *See* APQA, *supra* note 9, art. 13.

“full and open competition after exclusion of sources”¹²⁴ procedures allow the use of the competitive proposal method in which negotiation¹²⁵ between the procuring entity and candidates is expected.¹²⁶ In the European Union, neither the open procedure nor the restricted procedure inherently anticipate negotiation. Instead, the “competitive dialogue” method in which procuring entities negotiate with candidates in a competitive environment was introduced by a new directive issued in 2004.¹²⁷

To the extent that a method by which a procuring entity and a candidate can hold discussions as part of a competitive procedure exists in public procurement law, however, the United States, the European Union, and Japan currently concur.

2. Maximum Estimated Price and Reasonable Price

Among the United States, the European Union, and Japan, the concept of capping the estimate for a contract price in public procurement exists only in Japan.¹²⁸ The Japanese public procurement regimes are therefore special in this respect. Although in a given case in the United States the procuring entity calculates a price it deems reasonable in light of the specifications of the targeted items and unit prices of mate-

124. It should be noted that in the United States, procuring agencies designate certain entities that are excluded from the award competition, not those that may participate in it. On the other hand, as mentioned in the text accompanying note 123, Japanese designated competitive bidding is similar to the restrictive procedure of the European Union.

125. “Negotiation” means “a procedure that includes the receipt of proposals from offerors, permits bargaining, and usually affords offerors an opportunity to revise their offers before award of a contract.” KEYES, *supra* note 108, at 269. The FAR provides that “[b]argaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.” 48 C.F.R. § 15.306(d) (2006).

126. See 48 C.F.R. pt. 15 (“Contracting by Negotiation”).

127. Article 29 of European Parliament and Council Directive 2004/18/EC provides the process for the competitive dialogue. European Parliament and Council Directive 2004/18/EC, 2004 O.J. (L 34) 114 art. 29. The Directive defines “competitive dialogue” as:

a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

Id. art. 1(11)(c).

128. See *supra* Part II.C.

rials, this price is the standard of suitability, not the upper limit.¹²⁹ If the price offered by the most advantageous candidate exceeds this reasonable price, the procuring entity then examines whether this price is still within the reasonable range.¹³⁰

Since, as aforementioned, procuring entities may dialogue with candidates to enable them to improve their proposed techniques pursuant to the APQA, it does not make sense to set the estimated price at the time of the invitation notice. The Act permits the estimated price to be set after holding discussions,¹³¹ thereby rendering the estimated price extremely flexible, and procuring entities may consider many complicated factors in addition to budgetary restrictions when determining a suitable estimated price.

3. Secondary Policies

Secondary policies (policies other than those based on economic reasonableness) are commonly considered in public procurement law and practice around the world. In the United States, policies of protection of small and medium-sized enterprises and creation of jobs are reflected in several public procurement laws which provide special budgets for certain projects,¹³² using the “full and open competition after exclu[sion of] . . . sources” procedure.¹³³ For example, the Small Business Act¹³⁴ establishes a program that authorizes the Small Business Administration to enter into contracts with other agencies and thereafter subcontract their performance to firms eligible for program

129. As to the United States, see 48 C.F.R. § 15.404-1(b) (2006). European Parliament and Council Directive 2004/18/EC mentions neither the reasonable price nor the upper limit.

130. See 48 C.F.R. § 14.404-2(f) (2006) (“Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price.”); see also 48 C.F.R. § 14.408-2(a) (“The contracting officer shall determine . . . that the prices offered are reasonable before awarding the contract.”).

131. See APQA, *supra* note 9, art. 14.

132. 48 C.F.R. §§ 6.203–6.205 (2006).

133. 48 C.F.R. § 6.200 (2006).

134. 15 U.S.C. §§ 631–57f (2006).

participation¹³⁵ based on different considerations than the usual “most favorable offer” evaluation standard.¹³⁶

The E.U. directive does not contain any provisions concerning secondary policies; instead, the matter is left up to the member states. Generally speaking, member states’ national laws tend to support small and medium-sized enterprises and entities which usually must compete with large enterprises and entities at a disadvantage. In Germany, the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*)¹³⁷ provides that “[t]he interests of small and medium-sized undertakings shall primarily be taken into account in an appropriate manner by subdividing contracts into trade-specific and partial lots.”¹³⁸ In France, the Code of Public Contracts (*Le Code des Marchés Publics*) provides that “[i]n the event of identical prices or equivalent bids for a contract, a preferential right is granted to bids submitted by a workers’ production cooperative, an agricultural producers’ group, a craftsman, a craftsmen’s cooperative society or an artists’ cooperative society or an adapted company.”¹³⁹ It appears to the author that concerns for secondary policies are not involved in the “most economically advantageous” evaluation standard.¹⁴⁰

In applying the guidelines drafted pursuant to the Public Agency Order Act, government procuring entities in Japan, as in the European Union, tend to carry out secondary policies through specially designed entity-specific programs. In addition, certain projects are designated for award to small and medium-sized enterprises only. This system is abstractly similar to the aforementioned U.S. “full and open competi-

135. 15 U.S.C. § 637(a) (2006); see 48 C.F.R. §§ 6.204, 19.800 (2006). For secondary policies, see the Small Business Research and Development Enhancement Act of 1992, 15 U.S.C. § 638 (2006), and the HUBZone Act of 1997, 15 U.S.C. §§ 631 note, 657a (2006).

136. It is much different at the E.U. member state level. In the famous *Burma/Massachusetts* dispute, a secondary policy concern (political commitment) was included in the award criteria. See ARROWSMITH, *supra* note 1, at 343.

137. Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition], June 27, 1957, BGBl. I 1081, July 12, 2005, BGBl. I 1954, available at <http://bundesrecht.juris.de/bundesrecht/gwb/gesamt.pdf> [hereinafter *GWB*]. An English translation of this law is available at the government Web site, http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf.

138. *GWB*, *supra* note 137, art. 97(3) (English translation).

139. C. MARCHÉS PUB., art. 54(I) (Fr.) (English translation, Legifrance (government) Web site, <http://195.83.177.9/code/liste.phtml?lang=uk&c=28&r=1411> (last visited Jan. 28, 2007)).

140. European Parliament and Council Directive 2004/18/EC, 2004 O.J. (L 134) 114 art. 53(1)(a).

tion after exclusion of sources.” As pointed out above, the frequency of the use of the designated competitive tendering procedure has decreased significantly in recent times. Carrying out secondary policies through designation has therefore become difficult. To counter this in the future, the author believes that the language of the relevant laws and regulations can be interpreted to include secondary policy concerns as part of the comprehensive evaluation standard. Indeed, the APQA provides that “various factors in addition to price should be considered to ensure the quality of public works”¹⁴¹ and the interpretation of the vague term “various factors” has not yet been made clear. The interpretation is likely to be influenced heavily by future practices. It cannot be denied that the APQA could bypass secondary policies, but one should remember that the Public Agency Order Act still exists. If concerns of secondary policies are included in the factors to be taken into account under the comprehensive evaluation method, Japan would be much different from the United States and the European Union with respect to this point.

4. Monitoring and Bid Protests

The more complicated the evaluation process to award contracts, the stronger the need to monitor procuring entities. Furthermore, the need to provide procedural protection of losing candidates to appeal, i.e., to make a bid protest, is also stronger. Although the APQA opened the door for flexibility and complexity in public works procurement, the necessary complementary monitoring and bid-protest mechanisms have not yet been sufficiently established. As mentioned previously, the existing monitoring and bid-protest institutions in Japan consist of part-time outsiders.¹⁴² Whether such institutions work well is doubtful.

Due to the varying national schemes within the European Union, only a comparison between Japan and the United States is made here.¹⁴³ In the United States, competition advocates¹⁴⁴ and officials of

141. See APQA, *supra* note 9, art. 3(2).

142. See *supra* Part III.C.4.

143. The E.U. directive does not make concrete suggestions concerning the monitoring institutions or bid-protest procedures in the member states. The member states must decide these matters on an individual basis. It is therefore difficult to analyze the E.U. regimes concerning these matters comparatively with Japan and the United States because of the inconsistency among the E.U. member states. It should be noted, however, that there are several interesting points in the E.U. member states concerning monitoring institutions and bid-protest procedures. For example, in Germany, the specially-established office for bid protests is part of the Federal Cartel Office (Bundeskartellamt), equivalent to the Federal Trade Commission and the Antitrust Division of the Department of Justice in the United States, the Competition Director-

the Offices of the Inspector General of the various government agencies supervise government agency procurement activities.¹⁴⁵ Notably, the Office of the Inspector General is a body highly independent from any other government agency, and controlled directly by the President.¹⁴⁶ The officials of the Offices of the Inspector General and competition advocates are the inside government officials.¹⁴⁷ In the United States, therefore, public entities or officials monitor other public entities or officials. This clearly differs from the state of affairs in Japan.¹⁴⁸

The U.S. Federal Acquisition Regulation,¹⁴⁹ which comprehensively regulates federal procurement activities in the U.S., devotes an entire chapter to bid protests.¹⁵⁰ Compared with Japan, it is remarkable that in the United States not only procuring entities but also the General Accountability Office, which is responsible for the public accounts, work as institutions handling bid protests.¹⁵¹ This means that a public entity checks another public entity as to bid protests as well as monitoring. In Japan, the Board of Audit,¹⁵² equivalent to the U.S. General Audit Office, does not play such a role.

ate-General in the European Union, and the Fair Trade Commission in Japan. For German public procurement review procedures, see *GWB, supra* note 137, pt. IV, ch. 2 (§§ 102–24).

144. 48 C.F.R. §§ 6.501, 6.502(b).

145. The Inspectors General serve generally to perform audits and investigations of their respective agencies' operations and to promote, among other things, economy and efficiency. 5 U.S.C. app. 3 §§ 2, 4 (2006).

146. 5 U.S.C. app. 3 § 3(a)–(b) (2006). The position of Inspector General was established by the Inspector General Act of 1978, 5 U.S.C. app. 3 § 3 (2006).

147. *See* 48 C.F.R. pt. 6, sec. 5 (2006); 5 U.S.C. app. 3 (2006).

148. To avoid expanding the analysis in this article beyond its intended scope, the author has intentionally excluded references to court cases involving bid protests as a comparative analysis of such cases would be very complex. It should be noted that, because going to court is the last step in making a bid protest, these must not be ignored. The author intends to write another article with a comparative analysis of bid-protest litigation in the future. Here, the author only points out that the courts strongly tend to dismiss the claims of unsuccessful candidates in Japan. It might be interesting to compare the state of affairs respecting this issue in Japan with those of the U.S. and E.U. countries.

149. 48 C.F.R. pts. 1–53 (2006).

150. 48 C.F.R. pt. 33 (2006).

151. *See* 48 C.F.R. § 33.104 (2006) (“Protests to GAO”); *see also* 4 C.F.R. pt. 21 (2007) (“Bid Protest Regulations [GAO]”).

152. The Board of Audit was established by *Kaikei kensain ho* [Board of Audit Act], Law No. 73 of 1947.

B. The Hurdles for Japanese Laws to Implement the WTO-GPA

As far as public works are concerned, the Japanese public procurement regimes have become closer to the framework of the WTO-GPA since the APQA was enacted. Namely, both open tendering and selective tendering under the WTO-GPA,¹⁵³ which respectively correspond to open competitive tendering and designated competitive tendering in Japan, permit a dialogue between procuring entities and candidates similar to the method sanctioned by the APQA in Japan.¹⁵⁴ Additionally, the APQA and the WTO-GPA are in accord on the point that there is no disproportionate emphasis on price in the contractor award procedure.¹⁵⁵

Despite some similarities as described above, there are also some differences between the two. For example, in the WTO-GPA, only limited tendering¹⁵⁶ is treated as an exception, whereas not only non-competitive tendering, the equivalent of limited tendering, but also designated competitive tendering are considered to be exceptions under the Japanese laws.¹⁵⁷ Furthermore, as aforementioned, the Japanese regimes include an estimated price system which does not exist under the WTO-GPA.

This comparison is only a superficial analysis. The more important matter is how the Japanese regimes work effectively in implementing the WTO-GPA. The harmonization of the frameworks is merely a tool for that purpose. There are still major hurdles to be overcome in the Japanese public procurement regimes, two of which will now be addressed.

The main targets of the WTO-GPA for free and fair international trade can be said to be: (1) non-discrimination, (2) transparency, and (3) removal of unnecessary trade restrictions.¹⁵⁸ The APQA should be complemented by legal rules implementing these targets and their practices. However, entry barriers can still be set up and procuring entities can still arbitrarily treat certain candidates unfairly even as part of the flexible and complex processes established pursuant to the APQA. In fact, the complexity of the processes actually reduces their

153. GPA, *supra* note 1, art. VII (3)(a), (b).

154. *Id.* art. XIV.

155. *Id.* art. XIII(4)(b).

156. *Id.* art. VII(3)(c) (“Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV [of the GPA].”).

157. *See supra* Part II.A.

158. ARROWSMITH, *supra* note 1, at 168–71.

transparency. To overcome these problems is thought to be the real target for implementing the WTO-GPA. This is the first hurdle.

A second hurdle is the treatment of secondary policies. As noted above, it is probable that in the future, secondary policy concerns will be considered as part of the comprehensive evaluation method.¹⁵⁹ Regarding the WTO-GPA, there has been a debate about the approved range of secondary policies under Article 23(2).¹⁶⁰ The greater the importance procuring entities attach to secondary policies, the higher the trade barriers will be. This causes a conflict with the aims of the WTO-GPA. Whatever the secondary policies it allows to be considered, the Japanese government must respond sufficiently to the need to assure transparency concerning practices under the APQA.

V. CONCLUDING REMARKS

Japan is now at the halfway point in undertaking reforms of its government procurement regimes. It is uncertain how the APQA will be enforced in practice because of its short history since enactment. The public's tendency to regard only price as a credible standard even in the public works field is still deeply rooted in Japanese society. The possibility that the price-only competition method will continue to be the primary one used in fields other than public works in the future cannot be denied.

This article presented a comparative analysis of the relevant legal provisions in Japan, the United States, and the European Union and pointed out several matters Japan should keep in mind when implementing the WTO-GPA. Considering its present industrial and social environments, how will Japan advance toward this goal? A great number of hurdles must be overcome.

159. *See supra* pt. III.C.1.

160. ARROWSMITH, *supra* note 1, at 345–46.