

PANORAMIC

**DEFENCE & SECURITY
PROCUREMENT**

Japan



LEXOLOGY

Defence & Security Procurement

Contributing Editors

Mark Leach and Will Bryson

Bird & Bird LLP

Generated on: June 18, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Contents

Defence & Security Procurement

LEGAL FRAMEWORK

- Relevant legislation
- Identification
- Conduct
- Proposed changes
- Information technology
- Relevant treaties

DISPUTES AND RISK ALLOCATION

- Dispute resolution
- Indemnification
- Limits on liability
- Risk of non-payment
- Parent guarantee

DEFENCE PROCUREMENT LAW FUNDAMENTALS

- Mandatory procurement clauses
- Cost allocation
- Disclosures
- Audits
- IP rights
- Economic zones
- Forming legal entities
- Access to government records
- Supply chain management

INTERNATIONAL TRADE RULES

- Export controls
- Domestic preferences
- Favourable treatment
- Sanctions
- Trade offsets

ETHICS AND ANTI-CORRUPTION

- Private sector appointments
- Addressing corruption
- Lobbyists
- Limitations on agents

AVIATION

Conversion of aircraft
Drones

MISCELLANEOUS

Employment law
Defence contract rules
Personal information
Licensing requirements
Environmental legislation

UPDATE AND TRENDS

Key developments of the past year

Contributors

Japan

Oh-Ebashi LPC & Partners

OH-EBASHI
大江橋法律事務所

Go Hashimoto

Yoichiro Ono

Kumpei Ohashi

Naoya Kobayashi

yoichiro.ono@ohebashi.com

kumpei.ohashi@ohebashi.com

naoya.kobayashi@ohebashi.com

LEGAL FRAMEWORK

Relevant legislation

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

A complex set of laws and regulations governs defence and security procurement in Japan, including the Public Accounting Act, which is a national legislative framework, as well as a number of official directives, guidance and circular notices promulgated by the Ministry of Defense. These laws, regulations, official directives and other applicable official pronouncements have been going through fundamental dynamic changes due to the fast and dramatic shifts in the Japanese geopolitical environment in recent years. 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. More recently, since the publication in December 2022 of the 'Three Security Documents', that is the National Security Strategy of Japan, the National Defense Strategy and the Defense Buildup Program, it has become clear that a comprehensive review and upgrading of the defence and security-related legal framework will be carried out in the coming years. Against this political backdrop, developments in this area should be closely followed. The main laws and regulations governing the procurement of defence and security articles are listed below.

Laws and regulations:

- the Public Accounting Act;
- the Act on Prevention of Delay in Payment under Government Contracts;
- the Act on the Responsibility of Government Employees who Execute the Budget;
- the 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
- the Rules for Handling Contract Administration (Ordinance of the Ministry of Finance).

Official directives:

- the Official Directives on the Implementation of Procurement of Equipment and Services;
- the Official Directives on Supervision and Inspection of Procured Items;
- the Official Directives on Standards for Calculating Target Price of Procured Items; and
- Detailed Rules for Handling Contract Administration under the Ministry of Defense.

Official directives of the ATLA:

- Official Directives regarding Contract Administration at the ATLA;
- the Official Directive on Supervision and Inspections of Procured Items procured by Central Procurement;
- the Official Directive on Administration of Calculating Target Price by the ATLA; and

- the Official Directive on Cost Audit Administration by the ATLA.

Notices, circular notices, etc, of the ATLA:

- Principles for Bidding and Contracting;
- Detailed Guidelines for Administration of Calculating Target Price;
- Standards for implementing Cost Audit Administration by the ATLA; and
- Standards for implementing quality audit for Central Procurement.

Law stated - 1 5 2024

Identification

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

Defence and security procurement primarily fall under the authority and the responsibility of the ATLA. The ATLA is subject to official directives, circular notices, etc, promulgated by the Ministry of Defense or the ATLA, as outlined above. In this sense, defence and security procurements by the ATLA will usually have distinct features compared to civil procurements.

Law stated - 1 5 2024

Conduct

How are defence and security procurements typically conducted?

The Principles for Bidding and Contracting (ATLA Public Notice No.1 of 1 October 2015, as amended) (the Principles) is the primary source for rules governing the procedures for defence and security procurements. The procedures for defence and security articles procurement can be summarised as follows:

- as a rule, to become a procurement counterparty, a corporation must apply for bid participation eligibility screening and go through the screening process. If eligible, the applicant's name will be entered in the publicly available 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. In cases of a designated competitive bidding process, solicitation of bidding will be sent to the qualified bidders in the register;
- the bid participant pays a bid deposit to the contracting process management officer of the ATLA, unless exempted from deposit by public notice or regular notice; and
- 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.

Contracts will be awarded to the successful bidder as follows:

- the bidder who offers the lowest tendered price equal to or lower than the target price designated by the ATLA (the target price discounted by the amount equivalent to the sum of the consumption tax and the local consumption tax) will be the successful bidder;
- if the bid is conducted using the comprehensive evaluation method, the bidder is required to indicate its bidding price, specifications capability, technology, etc, in its application, and the successful bidder will be the bidder whose tendered price is at or below the target price and whose specifications, capability, technologies, etc, indicated in the bid meet all of the minimum requirements critically required for the performance specified in the publication or public notice of such bid (including the bid instructions relating to such bid) and that receives the highest score calculated 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 successful bidder or negotiated contractor submits a written agreement in accordance with the prescribed procedures and pays the contract deposit (unless exempt). The contract award is deemed final and complete upon certification by the responsible officer of the written agreement. Thereafter an officer in charge of ‘acts to assume debts’ executes and seals the written agreement together with the counterparty.

Law stated - 1 5 2024

Proposed changes

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

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

Law stated - 1 5 2024

Information technology

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

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

In particular, the Ministry of Defense requires the counterparty to implement the following measures, commonly by contractual provisions, subject either to voluntary audits by the company itself or audits conducted by the Ministry of Defense. Implementation of information security management system for procurement consists of three stages:

-

the following documentation will be required: basic information security policy, information security rules and information security implementation procedures;

- appropriate guidance and supervision shall be provided to subcontractors (all entities engaged in work related to the performance of the contract); and
- audits by the Ministry of Defense shall be conducted to ensure that the information to be protected is handled in accordance with the contractual provisions.

The Ministry of Defense is required by statutes, such as the Act on the Protection of Specially Designated Secrets and the Act on Protection of Secrets Incidental to the Mutual Defense Assistance Agreement Between Japan and the United States of America, to have contractual provisions with the counterparty supplier to establish an information security management system.

In addition, there are audits by the Ministry of Defense pursuant to the contractual provisions to confirm that the information security management system built by the relevant company is in compliance with the Information Security for Procurement of Equipment and Services implemented by the Ministry of Defense and that the information security measures prepared by the company are in fact enforced properly. These audits may include on-site audits.

Law stated - 1 5 2024

Relevant treaties

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 Defense commonly uses the national security exemption for security procurements. However, certain items such as procurement of equipment or supplies for power generation, medical equipment and facility equipment are subject to the GPA.

Law stated - 1 5 2024

DISPUTES AND RISK ALLOCATION

Dispute resolution

How are disputes between the government and defence contractor resolved?

In addition to regular litigation proceedings, complaints regarding government procurement can be brought to the Office for Government Procurement Challenge System established by the Cabinet Office (CHANS).

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

Law stated - 1 5 2024

Dispute resolution

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

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

Disputes have previously arisen from the termination of contracts by the Ministry of Defense. For example, a negotiated contract for a project to upgrade a fighter jet to a reconnaissance aircraft was terminated by the Ministry of Defense claiming that the schedule had been delayed and that it was unlikely to achieve upgrading that would meet the required performance (https://www.subaru.co.jp/press/file/uploads/news-en/pdf_en_111262.pdf

https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/jp/news/20160318_2.pdf). Another example is a case where a contract for procuring about 60 attack helicopters was terminated by the Ministry of Defense during the procurement, when only 13 helicopters had been delivered, claiming that the defence budget had been shrunk. (Toshiba provided the information regarding this matter only in the Japanese language, however, readers will find brief journalistic coverage of this matter on the following website: <https://alert5.com/2017/07/02/toshiba-to-settle-with-government-over-reconnaissance-f-15j-dispute/>).

Law stated - 1 5 2024

Indemnification

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 governed by article 29, paragraph 30f of the Constitution.

As a rule, the government is not prohibited from granting a contractual indemnity. Supreme Court case law confirms that even though article 3 of the Financial Assistance Limitation Act prohibits the government from incurring obligations by way of making guarantee, the word 'guarantee' has a different meaning from the word 'indemnification'. However, it is not usual for the government to grant contractual indemnities.

The liability of a contractor under a defence and security procurement agreement is usually provided in the agreement with the government, and thus depends on the individual case. The government would, however, rarely claim indemnity from a contractor.

Law stated - 1 5 2024

Limits on liability

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 prevent the government from limiting the liability of a defence and security contractor under the applicable agreement, or restrict the defence and security 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.

Law stated - 1 5 2024

Risk of non-payment

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 defence and security procurement agreement, normally it must conduct an 'act to assume national treasury debts' (article 15 of the Public Finance Act). Such act would secure necessary budget for the procurement, and thus there is generally no risk of non-payment.

Law stated - 1 5 2024

Parent guarantee

Under what circumstances must a contractor provide a parent guarantee?

A parent guarantee would be necessary if it is clearly required by the terms of the bid. A parent guarantee may be required when a contractor provides the goods or services procured under the contract through a special purpose vehicle, for example.

Law stated - 1 5 2024

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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 awards a contract, whether by general competitive bidding or by negotiated contract arrangements, the contract officer must prepare a written contract that includes the particulars of the purpose of the contract, contract price, performance period, guarantee and other necessary matters (article 29(8), paragraph I of the Public Accounting Act; article 100 of Cabinet Order on Budgets, the Settlement of Accounts, and Accounting). The Ministry of Defense must prepare a written agreement for 'each successful bid, etc' and is required to prepare written agreements for all defence and security articles, without exception.

Furthermore, a contract will not become final and binding until a written agreement is prepared, executed and sealed by both the contract officer and the counterparty, which is one of the requirements for the conclusion of contracts.

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

Law stated - 1 5 2024

Cost allocation

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

The General Terms and Conditions published by the Ministry of Defense do not refer to contract expenses. It is customary for each party to bear its own expenses.

Law stated - 1 5 2024

Disclosures

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

The contractor must submit [a filled form](#) of a bid sheet or an estimate sheet to the Ministry of Defense.

The contractor has no legal obligation to disclose any information regarding costs and pricing. However, when the government enters into certain contracts pursuant to a cabinet order or a statute that cause expenditures to be incurred by the national government, the government must publish information concerning the contract price. In addition, the ATLA publishes certain information such as the contract price, the contract date, the name, quantity and unit of procured goods or services, the name of the contact officer and the contract company.

Law stated - 1 5 2024

Audits

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

To maintain the fairness and transparency of defence and security procurements, the Ministry of Defense takes measures to ensure the appropriateness of contracts and to apply an appropriate level of checks and balances.

First, as part of a government effort to 'ensure appropriateness of public procurement', the Ministry of Defense has been expanding the use of the '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 Defense has been steadily working on measures to prevent recurrence of these problems, such as enhanced system inspections, reviewing penalties, 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.

Furthermore, 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 Defense Procurement Council, whose members are external academics. 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 (eg, 'Special clause regarding securement of reliability of documents and implementation of system inspection' or 'Special clause on securement of reliability of documents related to contracts concerning import goods, etc, and implementation of import procurement inspections'), and whenever needed, cost audits are conducted to confirm that the price of each item's cost and consumption quantity is appropriate.

Law stated - 1 5 2024

IP rights

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

Article 2 of the National Property Act states that intellectual property arising from contracts with government expenditure becomes national property, despite the exception included in the Official Directive for Handling Intellectual Property Rights Pertaining to Research Consignment Contracts, Work Contracts of a Research Consignment Nature and Prototype Contract.

From 1 May 2024, a new non-disclosure patent application system prevents the disclosure of certain sensitive technologies that could result in a detrimental impact to security, including technologies applied to the above exception.

Under the special terms published by the Ministry of Defense, any copyright computer program created during the performance of a contract is 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.

Law stated - 1 5 2024

Economic zones

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.

Law stated - 15 2024

Forming legal entities

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

The process for forming legal entities is described below:

- advance preparations:
- determine basic parameters (such as selected entity form, stated capital, business purpose and succession of assets); and
- conduct trade name and company name search in the applicable region, which is usually the area covered by the same legal affairs bureau;
- preparation of articles of incorporation:
- determine the business activities, trade name, location of the head office, 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;
- notarisation of articles of incorporation by notary public;
- capital contribution:
- the incorporator pays the money to be contributed in full or transfer all property other than monies with respect to the shares issued at incorporation without delay after subscribing for such shares issued at incorporation;
- 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;
- 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;
- 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);

- registration of incorporation:
- registration of incorporation must be made within two weeks from the later of the date of completion of examination by the directors at incorporation and the date designated by the incorporator; and
- 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) and pension office (health insurance, employee pension), etc.

Law stated - 1 5 2024

Access to government records

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 Administrative Organs, 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 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 the name, date of birth or other descriptive details of the individual, contained in the information concerned, 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 are 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 to protect a person's life, health, livelihood or property; and
- the portion of the information pertaining to the job of the public employee, and the substance of the performance of duties, in the case that the individual is a public employee, an officer and employee of the incorporated administrative agencies, or an officer and employee of the local incorporated administrative agencies, and when the information is one pertaining to the performance of their duties;
- information concerning a corporation or other organisations (excluding the state, incorporated administrative agencies, local public entities and local incorporated administrative agencies (the Corporations)), or information concerning the business of an individual who operates the business, which corresponds to the following, provided, however, that information that is found necessary to be disclosed to protect a person's life, health, livelihood or property shall be excluded:
- information which, when disclosed, is likely to cause harm to the rights, competitive position or other legitimate interests of the Corporations or of the individual; and

- information customarily not disclosed by the Corporations 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 adequate 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 adequate 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 national government 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; and
- information concerning the affairs or business conducted by a notional government 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 affairs or business owing to the nature of the affairs or business:
 - risk of making it difficult to understand accurately facts concerning affairs pertaining to audits, inspections, supervision, examinations, imposition or collection of tax, or facilitating illegal or wrongful acts regarding such affairs, or making it difficult to discover such acts;
 - risk of causing unjust damage to the economic benefit of the party concerned 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 incorporated administrative agency, a company managed by a local public entity, or a local incorporated administrative agency.

Law stated - 1 5 2024

Supply chain management

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

As a condition of participation, any person who meets the following conditions may not participate in open tender:

- 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, 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:
 - 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; or
 - a person who falls under any of the items of article 32, paragraph I of the Act on Prevention of Unjust Acts by Organised Crime Group Members.
- 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; and
 - 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.

In addition, the heads of the Ministry of Defense may determine the eligibility required of persons participating in open tenders, with regard to particulars related to performance such as construction, manufacturing and sales, number of employees, amount of capital, and other particulars related to the scale of management and management circumstances, for each type of contract in terms of construction, manufacturing, the purchase of objects, and other contracts, in accordance with the price, etc of the contract.

The Ministry of Defense stipulates 'Outline of de-nomination, etc concerning procurement of defence and security articles, etc and services' and may not permit a person who currently is suspended under such outline.

Furthermore, the Ministry of Defense has clarified that the following special covenants will be stipulated to address supply chain risk response for procurement of information systems:

- maintain a quality control system prescribed by the Ministry of Defense, including system of its subcontractors, with controls to ensure that no unintended changes or theft of information;
- limit the number of employees engaged in the performance of the contract to the minimum required and notify the Ministry of Defense of the information of these employees;
- accept and cooperate with audits conducted by the Minister of Defense as necessary;
- make effort to meet the standards prescribed by the Minister of Defense for the equipment under the contract; and
- notify the list of workers and obtain confirmation in case of working in the facilities of the Ministry of Defense.

Law stated - 1 5 2024

INTERNATIONAL TRADE RULES

Export controls

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

The 'Three Principles on Transfer of Defense Equipment and Technology' were introduced by the cabinet on 1 April 2014, consisting of:

- clarification of cases where transfers are prohibited;
- limitation to cases where transfers may be permitted as well as strict examination and information disclosure; and
- ensuring appropriate control regarding extra-purpose use or transfer to third parties.

Under such principles, the Foreign Exchange and Foreign Trade Act and other laws stipulate certain provisions relating to security trade controls, which are enforced by the Ministry of Economy, Trade and Industry.

Law stated - 1 5 2024

Domestic preferences

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

As a rule, the 'Principles for Bidding and Contracting' (Public Notice No.1 of the ATLA on 1 October 2015, as amended on 6 October 2023) contain 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 on their behalf by a Japanese trading company.

The Act on Strengthening Infrastructure for Development and Production of Equipment Procured by the Ministry of Defense was introduced to ensure the stable manufacture of equipment and make equipment transfers that contribute to such stable manufacture appropriate from a security perspective. In accordance with the above Act, the Basic Policy on Enhancing Defense Production and Technology Bases was formulated on 12 October 2023 by the Ministry of Defense. The policy clarifies that, when acquiring new defence equipment, procurement of domestic products is pursued by focusing on the following areas:

- what can meet various conditions, such as operational concepts, performance, acquisition cost, life cycle cost, schedule and others, with Japanese technologies;
- what is indispensable in light of maintaining war sustainability in the event of a contingency as well as of ensuring the ability to improve operations and maintenance in peacetime (eg, ammunition and ships);
- what are the items that should not be dependent on foreign countries from the perspective of confidentiality (eg, communications and encryption technology);
- what is indispensable for realising operational concepts based on Japan's geographical and policy peculiarities; and
- what are the latest technologies from foreign countries that are hard to obtain.

When it is necessary to select either domestic or foreign products that satisfy the conditions, the Ministry of Defense will make a decision after evaluating the industrial participation by Japanese companies in each stage of the life cycle of defence equipment to be selected (research, development, production, maintenance, supply, decommissioning, etc) and the range and the extent of transferring technologies to Japan.

Law stated - 1 5 2024

Favourable treatment

Are certain treaty partners treated more favourably?

There are no treaty partners that are treated more favourably.

Law stated - 1 5 2024

Sanctions

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

The Foreign Exchange and Foreign Trade Act governs the import and export control system in Japan.

Export

Based on the Foreign Exchange and Foreign Trade Act, the Export Trade Control Order regulates certain export of articles, and the Foreign Exchange Order regulates providing technologies to companies and countries located outside Japan. These export controls require the permission or filing of the METI.

Regarding the concept of the export control in Japan, both the List Regulations and Catch-all Regulations govern articles and technologies that are highly likely to be used for the development of weapons and related items.

Under the List Regulations, permission from the METI is required in the following cases:

- if the articles to be exported fall under items 1 to 15 of Appended Table 1 of the Export Trade Control Order; or
- the technologies to be provided fall under items 1 to 15 of Appended Table 1 of the Foreign Exchange Order and such technologies have specifications that fall under the Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Control Order and the Appended Table of the Foreign Exchange Order.

This regulation applies to exports to all regions and countries. Therefore, Japanese-affiliated companies are also required to obtain permission for exports to their overseas factories. The lists are revised every year in light of recent international situations.

Under the Catch-all Regulations, even items other than those regulated in the List Regulations above, whose destinations are in certain regions or countries other than those specified in Appended Table 3 of the Export Trade Control Order (countries that participate in each international export control regime and strictly enforce export controls), require permission from the METI if they are likely to be used for the development of weapons.

Import

The Foreign Exchange and Foreign Trade Act prohibits import or requires permission of the METI if the certain items are imported. 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.

The economic sanctions have been implemented against countries including Russia, North Korea and Iran, and import and export regulations have been imposed on certain articles to ensure effectiveness of such sanctions.

Trade offsets

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 Defense is considering their introduction.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

When and how may former government employees take up appointments in the private sector and vice versa?

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

However, to ensure transparency, public officers or former public officers must file notices with certain prescribed governmental authorities if:

- they promise, while in office, to assume a position in a profit company or non-profit company after retirement; and
- after having held a managerial position in public office, they assume a position in either a profit company or non-profit company within two years after retirement (except where a notice in relation to above has already been filed).

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

In addition, the Self-Defense Forces Act regulates reemployment of members of the Self-Defense Forces as follows:

- the members of the Self-Defense Forces may not carry out the following (article 65(2) of the Self-Defense Forces Act):
 - provide information on the other members or former members of the Self-Defense Forces with a company for the purpose of reemployment of them;
 - request the company to provide information on the position to be reemployed for the same purpose above; and
 - request the company to reemploy other members or former members of the Self-Defense Forces;
- the members may not provide the following to the 'interested company' (article 65(3) of the Self-Defense Forces Act):
 - provide their own information for the purpose of reemployment with the interested company or its subsidiary after retirement;

- request the interested company to provide information on the position to be reemployed for the same purpose above; and
- request or promise to the interested company that they will be employed;
- the interested company means the company to which a member of the Self-Defense Forces is engaged in the affairs in the course of their business, which fall under any of following:
 - the company which operates or plans to operate a business subject to a permission or licence;
 - the company which has received subsidies, and operates or plans to operate a business covered by such subsidies;
 - the company which is recipient of adverse dispositions;
 - the company which has concluded, or is going to conclude or apply for, a certain contract with the Ministry of Defense; and
 - the company which is under criminal investigation; and
- The former members of the Ministry of Defense who are working at the company are prohibited from requesting members belonging to bureaus and other organisations in which they were employed during five years prior to their retirement, to perform or not to perform acts in the course of their duties, about affairs related to contracts or dispositions involving the company and belonging to the duties for five years prior to their retirement and for two years after their retirement (article 65(4) of the Self-Defense Forces Act).

Law stated - 1 5 2024

Addressing corruption

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 the public officer's official duties;
- any bribe, upon request, to a potential public officer in relation to the performance of official duties for which the public officer is expected to be responsible;
- any bribe, upon request from a public officer in relation to the performance of the public officer's 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 the public officer's duties upon request.

The Criminal Code prohibits bribery towards Japanese public officials, while bribery towards foreign public officials (such as those who engage in public service for a national or local foreign government) is prohibited under the Unfair Competition Prevention Act, even if carried out overseas. Previously, only Japanese employees could be prosecuted for bribery towards foreign public officials committed abroad. With the amendment of the Unfair Competition Prevention Act, effective from 1 April 2024, employees of corporations with main offices in Japan, regardless of nationality, are prohibited from engaging in bribery towards foreign public officials.

In the procurement of defence and security articles, the conditions are generally very specific and there is no market price. In many cases, contracts are executed upon calculating a target 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.

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 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 denominated from procurements for defence and security items and services for a certain period (up to 36 months depending on the degree of seriousness of the violation, and in the case of refusal to comply with system research, until the same resumes). In addition, enterprises that have capital ties or personal relationships with an enterprise that was denominated may be barred from participation in open and selective tendering procedures for agreements for similar types of defence and security items and services.

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

- the following acts with interested parties, as 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 mah-jong) together (including in the case of splitting the bill); and
- 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.

Law stated - 1 5 2024

Lobbyists

What are the registration requirements for lobbyists or commercial agents?

There are none.

Law stated - 1 5 2024

Limitations on agents

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

No.

Law stated - 1 5 2024

AVIATION

Conversion of aircraft

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

In August 2010, the Ministry of Defense 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 ShinMaywa US-2 rescue flying-boats and Kawasaki P-1 fixed-wing patrol aircraft have been disclosed and published upon request from commercial enterprises. In December 2016, the 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 to sell them to the Japan Aerospace Exploration Agency. The Ministry of Defense 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.

Law stated - 1 5 2024

Drones

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 METI is required for each plant;
- the manufacturing or repair must be conducted by permitted business operators in a manner approved by the METI, 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.

Under the Civil Aeronautics Act, to fly an unmanned aircraft, the owner must apply for registration of the unmanned aircraft. Registration is not required, however, if the owner has notified the METI in advance of the test flight.

Law stated - 1 5 2024

MISCELLANEOUS

Employment law

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

Labour and employment rules are domestic laws and do not apply unless a contractor employs employees in Japan. If a company 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.

Law stated - 1 5 2024

Defence contract rules

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

No.

Law stated - 1 5 2024

Defence contract rules

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

Not applicable.

Law stated - 1 5 2024

Personal information

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'. As a result, company 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.

Law stated - 1 5 2024

Licensing requirements

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

There are no registrations or licensing requirements.

Law stated - 1 5 2024

Environmental legislation

What environmental statutes or regulations must contractors comply with?

Green Purchasing Act

The Act on Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities (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 Defense has also set its own corresponding procurement goals for 2016.

In response, the cabinet has established a basic policy that covers 22 types of articles in December 2023: paper, stationery, office furniture, imaging equipment, computers, office equipment, mobile phones, home appliances, air conditioners, hot water heaters, lighting equipment, automobiles, fire extinguishers, uniforms and work clothes, interior and bedding, work gloves, other textile products, equipment, disaster reserve supplies, public works (materials, construction machinery, methods and objects), services and garbage bags.

Green Contract Act

Going further than the Green Purchasing Act, the Act on Promotion of Contracts of the State and Other Entities, Which Show Consideration for Reduction of Emissions of Greenhouse Gases, etc. (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. The cabinet has also 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.

Law stated - 15 2024

Environmental legislation

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

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, companies must submit bids that meet such requirements. Evaluation will be conducted by the ATLA, which is the agency managing procurement.

Law stated - 1 5 2024

Environmental legislation

Do 'green' solutions have an advantage in procurements?

Nothing other than that which is specified in above.

Law stated - 1 5 2024

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

After several decades of a pacifist approach to regional security issues, Japanese national security policy has been undergoing sweeping changes due to the rapid shift in the security environment in the Asia Pacific region. There have been multiple attempts to transform the legal framework for defence and security procurement into one that is more user-friendly. Examples of such attempts are the Act on the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures (commonly referred to as the Economic Security Promotion Act), enacted in May 2022 and effective as of April 2023, and the Three Security Documents (the National Security Strategy of Japan, the National Defense Strategy and the Defense Buildup Program (published in December 2024)), in addition to the accompanying introduction or discussion of secret patents and security clearance system. For historical reasons, the Japanese legal system has kept the military component of the legislative framework to a minimum for a long time. However, regional geopolitics have made it imperative to upgrade the Japanese defence legal framework. Those considering entry into the market are strongly encouraged to keep a close eye on such developments.

Law stated - 1 5 2024