



Current Development in South Korean Procurement Law



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I. Current State of Public Procurement

1. General Procurement in S. Korea

- National Procurement Market 2014: ca. \$11 billion

*National total budget 2014: ca. \$356 bn.

2. Defense Procurement in S. Korea

- Procurement Market 2014: ca. \$1.2 bn.

*Defense total budget 2014: ca. \$3.4 bn.

II. Structure of Procurement Law

1. Basic Law

- Act on Contracts to Which the State is a Party
 - Enforcement Decree(Presidential Decree), Enforcement Rule(Ministerial Rule of Strategy and Finance)
- Act on Contracts to Which a Local Government is a Party
 - Enforcement Decree(Presidential Decree), Enforcement Rule(Ministerial Rule of Security and Public Administration)

2. Specific Law

- Framework Act on the Construction Industry
 - Enforcement Decree(Presidential Decree), Enforcement Rule(Ministerial Rule of Land, Infrastructure and Transport)
- Government Procurement Act
 - Enforcement Decree(Presidential Decree), Enforcement Rule(Ministerial Rule of Strategy and Finance)
- Fair Transactions in Subcontracting Act
 - Enforcement Decree(Presidential Decree). *No Enforcement Rule of Fair Trade Commission
- Defense Acquisition Program Act
 - Enforcement Decree(Presidential Decree), Enforcement Rule(Ministerial Rule of National Defense)
- Others: Private Finance Initiative Act etc.

III. Contents of Procurement Law

1. Act on Contracts to Which the State is a Party
(= State Contracts Act)*FAR in USA, GWB in Germany
 - Purpose: To promote smooth administration of contracts by providing for basic matters regarding contracts to which the State is a party
 - Scope of Application
 - Contracts to which the State is a party, including government procurement contracts entered into through international tendering procedures
 - Contracts entered into between the State as a party and a national of the S. Korea as the counter-party

III. Contents of Procurement Law

1. State Contracts Act

- Main contents

- Contract Principles (§ 5, 6): Principle of equality, principle of good faith, principle of reciprocity, principle of transparency and fairness
- Contract Conclusion Means (§ 7, 22, 23, 24, 25): Open tenders (*principle*), limited competition, appointed competitive tender, negotiated procedure (§ 7), others (contract by unit cost (§ 22), contract by rough estimate (§ 23), consolidated contract (§ 24), joint contract (§ 25))
- Determination of Successful Tenderer (§ 10)
 - The highest price: In a competitive tendering procedure that becomes a source of revenue
 - In a competitive tendering procedure that imposes a burden on the National Treasury: The lowest price (No. 1), The most favorable to the State (No. 2)
- Procurement by Negotiation (Decree 43)
- Means of Acquisition for Transparency and Fairness: Restriction on Qualification for Participation of Inappropriate Business Entities in Tendering Procedures (§ 27), Penalty Surcharge (§ 27-2) etc.

III. Contents of Procurement Law

2. Act on Contracts to Which a Local Government is a Party
(= Local Government Contracts Act)
 - Scope of Application: Apply to contracts, etc., which are a source of revenues and expenditures, concluded between local governments and parties to contracts.
 - Main contents(*Similar to State Contracts Act)
 - Contract Conclusion Means: Open tenders(*principle*. § 9), appointing tender, negotiated procedure, others(long-term continuous contracts and ongoing expenditure contracts(§ 24), contract by unit cost(§ 25), unit price contracts for third parties(§ 26), contract by rough estimate(§ 27), consolidated contract(§ 28), joint contract(§ 29))

III. Contents of Procurement Law

- Main contents(*Similar to State Contracts Act)
 - Determination of Successful Tenderer(§ 13)
 - The highest price
 - The lowest price(No. 1), The most favorable to the state(No. 2), contracts by design competition(when design service requiring symbolism, monumentality, artistry, etc., No 3), value for money(Decree 42)
 - Procurement by negotiation(Decree 43)
 - Means of Acquisition for Transparency and Fairness: Restriction on qualification for participation of inappropriate business entities in tendering procedures(§ 31), penalty surcharge by committees(§ 31-2) etc.

III. Contents of Procurement Law

3. Framework Act on the Construction Industry

- Scope of Application: Construction works, its procurement contracting and subcontracting etc.

- Construction Works: Engineering works, building works, industrial equipment works, landscaping works, environmental installation works, and other works to install, maintain and repair facilities(including site preparation works for installing such facilities)

- Main Contents: Connected with Public Procurement(Chapter III: Contract or Subcontract Agreements)

- Principles of contract agreements of construction Works(§ 22): Principle of equality, fairness and the contract in good faith

- Direct Performance of Construction Works(§ 28-2): Less than ten billion won9(*1 mi. dollar) per case of works

- Restrictions on Subcontract of Construction Works(§ 29): All of the construction works or most of the major portions

- Direct Payment of Subcontract Prices(§ 35)

- Assistance to Small or Medium Constructors(§ 46)

- Dispute Conciliation by Central Construction Dispute Conciliation Committee(§ 69)

*Under the jurisdiction of the Minister of Land and Transport Affairs

- Sanctions to Constructor: Correction Orders, etc.(§ 81), Suspension, etc. of Business(§ 82), Cancellation, etc. of Registration of Construction Business(§ 83) etc.

III. Contents of Procurement Law

4. Government Procurement Act

- Scope of Application: Purchase, distribution management, and supply of procurement commodities and any business ancillary thereto etc.

*Procurement commodities: Demand commodities and stockpile commodities

**Demand commodities: Commodities stipulated by Presidential Decree, which are required by an end-user institution

***Stockpile commodities: Daily necessities, raw materials and facility materials which are stipulated by Presidential Decree

- Main contents:

- Special Cases for Contracts(§ 5): Contracting methods prescribed by Presidential Decree- Contract with Multiple Suppliers(§ 7-2 Decree)

- Procurement Procedures, etc.(§ 9)

- Determination of Sale Price of Stockpile Commodities(§ 11)

- Private-Public Joint Stockpiling Projects(§ 12)

- Fines for Negligence(§ 14) etc.

III. Contents of Procurement Law

5. Fair Transaction in Subcontracting Act *Fair Trade Commission

- Purpose: Contributing fair order in subcontract transactions
- Scope of Application: All subcontracts in form of construction works, commodities, service etc.

- Main contents

- Prohibition of unfair conduct: Prohibition of unfair special contracts (§ 3-4), Prohibition of fixing unreasonable subcontract consideration (§ 4), Prohibition of unreasonable cancellation of entrustment (§ 8), Prohibition of unreasonable return of goods (§ 10), Prohibition of reduction (§ 11), Prohibition, etc. of request to provide technical data (§ 12-3), Prohibition of unreasonable payment in kind (§ 17), Prohibition of unreasonable intervention in management (§ 18), Prohibition of retaliatory measures (§ 19), Prohibition of evasion of this act (§ 20) etc.

- Connecting with Payment, etc. of Subcontract Consideration: Payment the subcontract consideration by not later (§ 13), Direct payment of subcontract consideration (§ 14), Adjustment of subcontract consideration due to change in design, etc. (§ 16)

- Dispute Mediation: Mediation of Dispute by Subcontract Dispute Mediation Council (§ 24, 24-4)

- Sanctions: Corrective measures (§ 25), Penalty surcharges (§ 25-3), Publication of lists of habitual violators (§ 25-4), Penal provisions (§ 30.* not exceeding the amount equivalent to double the subcontract consideration), Fines for negligence (§ 30-2. *not exceeding \$10,000)

III. Contents of Procurement Law

6. Defense Acquisition Program Act

- Scope of Application: Execution of defense acquisition programs, Procurement of munitions etc.
- Main contents:
 - Securement of transparency, professionalism and effectiveness
 - Defense Acquisition Program Promotion Committee(DAPPC: § 9) *Deliberating upon and coordinating, matters regarding the conclusion of types of weapons systems, equipment, etc., and matters regarding offset trade etc.
 - Determination of Successful Tenderer: Offset Trade by DAPPC *Purchasing of munitions from abroad(§ 20)

IV. Executive Organization of Procurement

1. Public Procurement Service(PPS)

*GSA in USA, Bundeskartellamt in Germany

- Function: Domestic and foreign procurement, construction contracts, stockpile management and property management for state and local government(<http://www.pps.go.kr/eng/index.do>)

- Procurement method: Digital procurement through KONEPS(Korea Online E-Procurement System)

2. Defense Acquisition Program Administration: DAPA(www.dapa.go.kr)

V. Legal Protection

1. Petition for Objection(Protest)
 - State contracts: Central government agency(§ 28 SCA)
 - Local contracts: Local government(§ 34 LGCA)
 - Where contracts occur
2. Administrative Committee
 - State contracts: State Contract Disputes Conciliation Committee (§ 29) *Boards of Contract Appeal/USA, Bundeskartellamt/Germ.
 - *The committee may suspend or stop the procedure if it is necessary(§ 30)
 - Local contracts: Contract Dispute Mediation Committee(§ 35)
 - *Cf. Vergabekammer/Germany
 - *The committee may suspend or stop the procedure if it is necessary(§ 36)
3. Taking legal action at Administrative Court
 - *US Claims Court/US Court Federal Claims, German Verwaltungsgericht
4. As circumstances require: Concrete (judicial)review through Korean constitutional court(§ 111 Const.)

VI. FTA and Public Procurement

1. Common Enforcement Act for FTA(Free Trade Agreement)
 - State Contract Act, Local Government Contract Act and, Special Regulation for State Contract Act and its Enforcement Decree
2. Korea-USA FTA(§ 17.2 & 17-a Annex)
 - Scope of Application:
 - Application: Only Central Administrative Agency
 - Threshold
 - Commodities, Service: US- 100.000\$(*WTO GPA 200.000\$), Korea- 100 million won(ca. 100.000\$)
 - Construction works: 5 million SDR
 - Main Contents:
 - Contracting method: Including BOTC(build-operate-transfer contract), Public Works Concession Contract etc.
 - Not apply to procurement in furtherance of Human Feeding Programmes
 - Analogue adaption of WTO GPA: Computation of contract price, contract procedure and Qualification evaluation of supplier etc.

VI. FTA and Public Procurement

3. EU-Korea FTA

- Scope of Application
 - Threshold
 - General Procurement Market: Same level to WTO GPA
 - Private Investment Procurement Market: above 15 million SDR
 - Application:
 - EU: Central/Federal Administrative Agencies and all large and primary local government
 - Korea: Central Administrative Agencies, Metropolitan Local Government, and some primary local government.



**Thank you
for your Cooperation!**