

Bid Rigging Initiated by Government Officials:

The Conjecture of Collusion and Corruption in Japan

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1 Introduction

For a long time, ‘dango’, or bid rigging in public tendering, has been the main focus of competition law enforcement in Japan. The relevant authority in Japan, the Fair Trade Commission (FTC), took legal measures in a total of 134 cases in the fiscal years 2006–2012 (seven years) and almost half of the cases (59) were related to bid rigging in public procurement.¹

Promoting competition in public tendering has been on the national agenda and pursued by the FTC; the Ministry of Land, Infrastructure, Transport and Tourism (“MLIT”); the Ministry of Internal Affairs and Communications (“MIC”) and the Ministry of Finance at the central government level. Local governments, too, have been undertaking reform of the public procurement system under the leadership of the MIC and the National Governors’ Association.

Bid rigging among companies is sometimes aided by government officials when the officials provide information concerning the yearly schedule for public tendering or when they reveal the maximum and minimum contract prices set in advance by the procuring office. Officials sometimes suggest that the bidders should agree upon the winner in advance. They can be further involved in collusion by suggesting bidders that a particular company should win a contract and require bidders to coordinate their bids accordingly.

Bid rigging activities in public procurement result in inefficient use and unfair allocation of tax revenues and thus attract special attention from the public. When bid rigging is initiated or aided by the procuring office, this further implies that the civil servant, who is supposed to conduct the

¹ For a historical overview, see Stefan E. Weishaar, *Cartels, Competition and Procurement: Law and Economics Approaches to Bid Rigging* (Edward Elgar 2013)17-69

procurement procedure fairly and efficiently on behalf of the citizenry and the government to a higher ethical standard, has violated the public procurement law and acted unfairly in pursuit of self-interests.

To counter the problem, legislation specifically addressing government officials' involvement in bid rigging was enacted in 2002 and has been enforced by the FTC for about a decade.² Under this law, conduct which promotes and aides bid rigging is specified as unlawful, including nominating the winning bidder in advance and disclosing confidential information to bidders. When the FTC discovers such activities, it will demand that the procuring department investigate the issue and implement measures to eliminate the problem. The investigation is obligatory for the procuring department. It is also obliged to publish the outcome of the investigation, take action against procurement officials to recover damages and issue disciplinary action against them.

Through the investigations performed by the procuring office, the practices by which procurement officials rig bids have been uncovered. The cases also demonstrate under what circumstances collusion and corruption is likely and what motivates a procurement official to get involved in collusion.

The law has established a unique system under which the government procuring offices introduce measures to make their public tendering system more competitive under the scrutiny of the FTC. The FTC is an independent administrative agency entrusted with the promotion of competition and enforcement of the general competition law applicable to businesses. The law adopted in 2002 is applicable to government departments and their officials and has created for the FTC an additional task of ensuring that public tendering proceeds free from collusion and corruption.

In this chapter, I will: present the lessons learned from enforcement cases regarding how procurement officials start acting anti-competitively; review the function of the law and observe the interaction between the FTC and the procuring department; and consider remaining issues in resolving the confluence of collusion and corruption in Japan.

² For the FTC enforcement record in English up to 2009, see OECD Global Forum on Competition, 'Roundtable on Collusion and Corruption in Public Procurement' (2010) DAF/COMP/GF(2010)6 Japan.

2 Involvement Prevention Act: The Need for Legislation and its Application

2.1 The Antimonopoly Act and Relevant Criminal Law Provisions

Japanese competition law, or the *Antimonopoly Act* (AMA), prohibits bid rigging under the latter part of Art 3. Conduct prohibited under this part is called an ‘unreasonable restraint of trade’ and is defined in Art 2(6), which is essentially a horizontal agreement and includes horizontal price fixing and bid rigging.

Art 2(6) is applicable to entrepreneurs who operate commercial activities and, in practice, it is understood that the entrepreneurs have to be in competitive relationships with each other. The procuring department is understood as not operating commercial activities and not sharing competitive relationships with bidders; hence, Art 2(6) is not applied to the procuring government departments. The same applies to the provisions which set out the administrative sanctions, such as the elimination order and the surcharge payment order (AMA Articles 7 and 7-2), and these orders are addressed only to the entrepreneur-bidders.

Occasionally when the criminal provision of the AMA is applied, the criminal penalty is imposed not only on the entrepreneurs but also on the person who engaged in an illegal conduct by virtue of Arts 89(1) and 95(1). Under these provisions, the person may include both the employee of entrepreneur and a government official and, thus government officials may be prosecuted on the grounds of breach of the AMA. The criminal provisions are rarely used, however. There have been only three instances in which government officials were prosecuted under Arts 89(1) and 95(1) since the enactment of the AMA in 1947.

Apart from the AMA, the general criminal law in Japan prohibits the obstruction of public auctions and public tendering. Anyone (including public officials) who has committed that offence may be imprisoned for up to three years or fined up to ¥2,500,000 (Penal Code Art 96-3). Offering bribes is a criminal offence that may result in the same penalties (Art 198). Acceptance of bribes is also a criminal offence, and the penalty for that crime is up to five years’ imprisonment (Art 197(1)). If the acceptance is accompanied by a promise to perform a certain act for the person offering the bribe, a more serious penalty, such as imprisonment of up to seven years (*ibid.*), may be imposed.

These criminal law provisions are applicable to public officials who engage in anticompetitive activities in public procurement. However, because criminal laws are associated with severe penalties and social stigma, they tend to be applied with caution and are only used in serious cases in which a stricter legal standard, such as beyond a reasonable doubt, applies. Under these provisions, the wilfulness of the action and clear causation must be demonstrated. the standards of proof are significantly more stringent than the ones under the AMA.

This means that a government official's involvement in bid rigging is often left unchallenged, even when the entrepreneur is condemned under the AMA by the FTC. This is despite the fact that the bidder's wrongdoing was promoted and facilitated by the government official.

The FTC's lack of power was exemplified in 2000, when it investigated bid rigging cases in the Hokkaido area and took measures against 297 bidders in total on the grounds of AMA violation (*Hokkaido Kamikawa*, FTC Decision of 16 June 2000). The bid rigging was related to construction work procured by the Hokkaido prefecture government. During the course of investigation by the FTC, government officials' systematic involvement became apparent. They set the annual winning contract target for each bidder, nominated a particular bidder as the winning bidder ahead of the public tendering process, and instructed the local industry association to coordinate the bidders' bids accordingly. The bidders followed the instruction and rigged their bids so that the nominated bidder would be selected as the winner. Although the FTC issued the elimination orders and the surcharge payment orders to the bidders under the AMA Arts 7 and 7-2, it did not take any formal action against the government officials due to the lack of competence.

The scale of bid rigging activities in *Hokkaido Kamikawa* shocked the public and prompted public discussion over whether the FTC should have the power to pursue government officials involved in bid rigging. The FTC's ability to pursue public officials is constrained by the AMA. Either new legislation or amendment to the AMA would be necessary to solve the problem.

A gap in the law exists as well with regards to the recovery of damages. A public official's involvement in collusion may be cause for claiming civil damages under the general civil law and the laws that regulate public officials; thus, the official concerned may be liable for repayment of

damages to the government. However, governments tended to be reluctant to pursue their own officials, and hence damage claims against governmental officials were rare. There were criticisms of this reluctance from the public. But these criticisms alone were not sufficient to motivate the relevant government body to take action against their civil servants. This is because these criticisms tended to be patchy and local. Residents were only temporarily concerned with the issue after a bid rigging case was uncovered within the local government where they reside. After a while, the public focus moved to different issues.

Since the 1990s, there have been attempts to change the public procurement process so that it is more bid-rigging proof.³ Overall, there has been a transition in the public procurement process from single tendering (or single source procurement) to a selective competitive bidding system and then to an open tendering system (also termed a 'general competitive tendering system' in Japan). More resistant to bid rigging activities, the open tendering system has begun to be widely introduced by government procuring departments. When the selective competitive bidding system is used, the locality rule is relaxed and the number of participants in each bidding procedure is increased. Also, the rules relating to confidentiality are strengthened. These ex-ante measures alone, however, have proved to be insufficient to eradicate bid rigging by public officials.

There was also scepticism concerning the procuring departments as to how seriously and consistently they would enact measures to eliminate bid rigging and involvement by government officials. The government is made up of politicians and bureaucrats. In order to secure votes, the politicians need the support of the bidders, who are in many cases influential local contractors. The bureaucrats are thus reluctant to denounce the procuring officers.

These circumstances demonstrated the necessity of substantial legislation to set out coherent legal measures to address government officials' involvement and entrust the anti-bid rigging initiative to an independent administrative organisation, the FTC.

³ See Ministry of Internal Affairs and Communications, Ministry of Finance and Ministry of Land, Infrastructure, Transport and Tourism, 'The Results of the Implementation Status Survey under the Act for Promoting Proper Tendering and Contracting for Public Works' of 2002-2012 (http://www.mlit.go.jp/totikensangyo/const/1_6_bt_000154.html) (Japanese).

2.2 Involvement Prevention Act

In 2002, the missing element in the AMA was remedied by the enactment of the Act on Elimination and Prevention of Involvement in Bid Rigging, etc., and the Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (hereinafter referred to as the *Involvement Prevention Act*).⁴

The *Involvement Prevention Act* covers bid rigging activities at public auctions or in other competitive venues by which the national government, local governments, and governmental corporations, to which the government provides more than half of their funds, choose the contracting party for the sale and purchase or lease and contract of goods and services.

The *Involvement Prevention Act* prohibits government employees (hereinafter referred to as ‘procurement officials’) from being involved in bid rigging activities through any of the following avenues:

- Having an entrepreneur or trade association engage in bid rigging (Art 2(5)1);
- Nomination, indication or suggestion of the winner in advance (Art 2(5)2);
- Indication or suggestion of confidential information that concerns bidding or the contract subject to public tender, access to which would facilitate bid rigging (Art 2(5)3); and
- Any act taken for the purpose of facilitating such bid rigging, which would aid bid rigging and violate the employee's duties (Art 2(5)4).

In the *Involvement Prevention Act*, ‘bid rigging activities’ are understood to be practice through which entrepreneurs participating in the bidding decide upon the successful bidder or the successful bid price in violation of the provision of Art 3 of the AMA (prohibition of the unreasonable restraint of trade).

Under the *Involvement Prevention Act*, the FTC may demand that the head of the relevant government, ministry and agency (hereinafter referred to as ‘the head of the procuring office’) implement the necessary measures, or ‘improvement measures’, to eliminate and prevent the specified bid-rigging activities (Art 3(1) and 3(2)). Once the head of the procuring office receives the

⁴ For the legislation process, see Yoshiro Hayashi and others, *Shokai Nyusatsu Dango tou Kanyo Kouji Boushi-ho [Commentary on the Involvement Prevention Act]* (Gyosei, 2002) 41-42.

demand, he or she must perform an investigation. If the existence of official involvement in bid rigging becomes evident, the head of the procuring office must implement improvement measures (Art 3(4)). The results of the investigation and the contents of the improvement measures, where such a measure is taken, are to be published and notified to the FTC (Art 3(6)). The investigation, and the delineation and implementation of the improvement measures are performed independent of the FTC. On receipt of the notification, the FTC may express its opinion to the head of the procuring office when the FTC finds it necessary to do so (Art 3(7)).

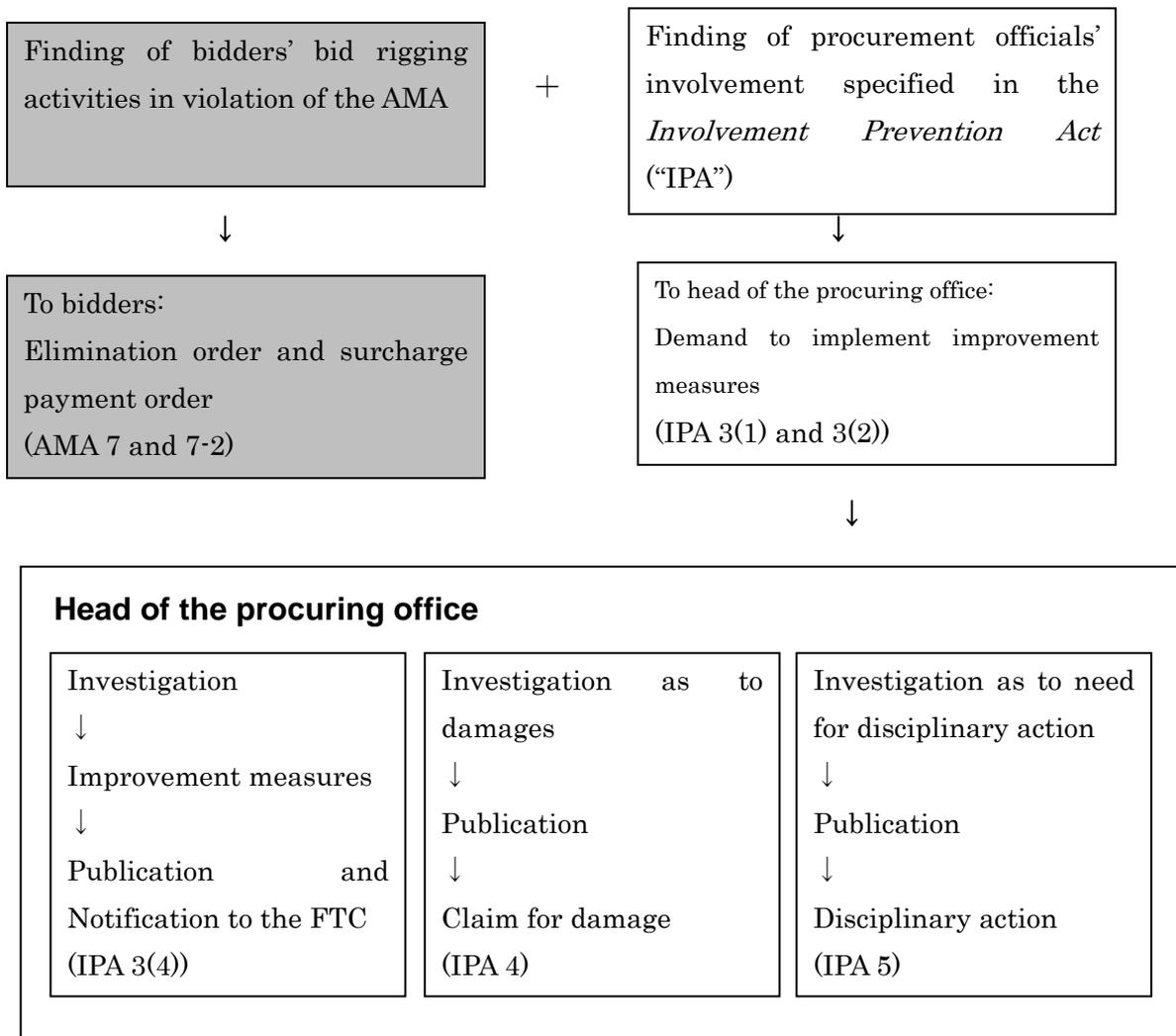
The head of the procuring office who has received the demand from the FTC is also obliged to conduct the investigation as to: i) the existence of any damage to the government caused by the official involvement in bid rigging ; ii) whether or not the offending procurement official is liable for the damages to the government; and iii) the amount of damages caused by the official (Arts 4(1) and 4(2)). The result of the investigation is subject to mandatory publication by the head of the procuring office (Art 4(4)). When it is found that the procurement official has caused damage wilfully or by gross negligence, the head of the procuring office must demand that the employee provide compensation (Art 4(5)).

Additionally, the head of the procuring office has to determine whether the official should be subject to disciplinary action based on the *National Public Service Act* or the *Local Public Service Act* (Art 5(1)). The result of the investigation must be published (Art 5(4)).

The investigations referred to in the previous paragraphs are performed by employees designated by the head of the procuring office (Art 6(1)). Under the *Involvement Prevention Act*, the head of the procuring office is obliged to ensure that the investigation is performed effectively (Art 6(1)). Officials in the procuring office have to cooperate with the said investigation (Art 6(3)).⁵

⁵ The Act also added criminal sanctions specifically applicable to governmental employees. Under the Act, the employee who harmed the fairness of bidding may be punished by a fine of up to ¥2,500,000 (Art 8). The public prosecutor conducts the prosecutions and the FTC is not involved in the process. The article does not discuss the criminal provision as its nature and enforcing procedure of the criminal provision differs from the rest of the Act.

FTC



Source: FTC, *Towards the Prevention of Bid Rigging – The Antimonopoly Act and Involvement Prevention Act* (<http://www.jftc.go.jp/dk/kansei/text.html>) (Japanese) (modification and translation by the author).

2.3 Application of the Involvement Prevention Act

Since the *Involvement Prevention Act* was implemented in 2003, the FTC has discovered twelve cases of bid rigging activities initiated and facilitated by government officials, in violation of the *Involvement Prevention Act*, which amounts to about 13% of the bid-rigging cases against which the FTC took legal measures.⁶ In 10 of those cases, the FTC has issued a demand to the heads of the relevant ministries, local governments and agencies to implement the necessary improvement measures. In two cases, the relevant governmental institutions had already conducted the investigation and were going to be abolished at the time of the FTC decision. Thus the FTC did not issue the relevant demand to those bodies.

In all of these 12 cases, the demand and notices were made in connection with the bidders' collusion in the provision of particular services which violated Art 3 of the AMA.⁷ In some cases, the FTC also suspected that there might have been procurement officials' involvement in relation to other services and expressed this concern through an informal request to the procuring office to inspect the issue.

The *Prevention Involvement Act* only applies to current public officials and not to ex-officials. However, the FTC has requested that the procuring offices take measures to prevent their ex-officials from engaging in bid rigging in the future.

In several cases, the FTC's investigation was helped by bidders who applied for leniency under Arts 7-2(10) and (11) of the AMA.⁸ Under the leniency programme, the applicant must explain to the FTC in detail how the bid rigging activities were organised and practiced. This implies that the applicant needs to describe the procuring official's role and activities which promoted the bid rigging activities. One would suspect that the bidder would hesitate to report the government official's involvement as such reporting would destroy a good relationship with a big customer. Nonetheless, bidders are reporting official involvement in bid rigging to the FTC, which might

⁶ A total of 93 bid-rigging cases were found in contravention of the AMA from 2003 according to the Federal Trade Commission Annual Report of 2002-2012.

⁷ The involvement activities were defined as involvement in bid rigging activities which are contrary to the AMA and, by definition, there is no illegal official's involvement conduct under the *Involvement Prevention Act* where there is no AML violation on the contractor's side.

⁸ Fair Trade Commission, 'List of Entrepreneurs Given Immunity and Reduction of Surcharges' (<http://www.jftc.go.jp/dk/seido/genmen/kouhyou/>).

suggest that the long-term stable relationships between bidders and procuring officials are somehow shaken by the FTC's enforcement activities and the leniency programme.

In all 12 cases, the procuring office conducted the investigation and published the report, which explained the official involvement bid rigging and their background in detail.

3 Procurement Officials' Involvement: How and Why Did it Commence?

The cases largely accord with the conventional view that collusion and corruption are more likely to occur in the construction and engineering industry⁹ and where bidders and procurement officials are in regular contact. The cases, however, also show more subtle features such that change and instability in a collusive relationship can trigger a procurement official's involvement. The cases reveal the significance of the ex-official working for the bidder as a facilitator of collusion and corruption. Private financial interest has not been a major reason for officials' involvement, as they tended to pursue the interest of the whole department and sometimes that of the community.¹⁰

3.1 Where Involvement Activities Took Place

A. Industries

The majority of the bid rigging cases (10) involved construction and engineering services.¹¹ The two other cases involved a vehicle management service and office furniture (See Appendix Case List).

B. Procuring Ministries and Local Governments

The governmental agencies and departments addressed in the FTC's requests and notifications include the following: three departments of government – MLIT, the Defence Facilities Administration Agency and the Ministry of Defence Japan Air Self-Defence Force (ASDF); local government – four municipal and one prefectural; and two semi-governmental agencies – Japan Highway Public Corporation (JH) and Green Resources Agency (GRA) (See Appendix Case List).

⁹ OECD (n 2) 10.

¹⁰ The following chapters are also based on the FTC's press release, publication date of which are listed in the case list at the end of the chapter.

¹¹ The state of the industries is depicted in Weishaar (n 1) ch 10 sec 3.

Three cases were part of the public procurement process conducted by MLIT. MLIT is in charge of regional development and construction of infrastructure, and it often procures construction and related services. By its nature, MLIT and, in particular, its regional development bureaus regularly handle a number of public tendering processes and are in close contact with businesses.

Five cases involve local government. In Japan, local governments are organised into 47 prefectures and 1,742 cities, towns and villages. Under the principle of local autonomy, these municipalities have their own councils and elected governors. They levy taxes and provide their citizens with basic services. Public services and the related construction and building industries are often major employers, especially in rural areas.

JH and GRA were quasi-governmental corporations. JH built and operated the national highways and GRA was in charge of silviculture and forest protection. After the bid-rigging scandals, JH was privatised and split into three companies. GRA was abolished and the Forestry and Forest Products Research Institute, an independent administrative body, took over its functions.

C. Type of Bidding

The selective bidding system, under which the procuring office nominates qualified companies and limits the number of bidders in advance, has been known to be vulnerable to bid-rigging activities. This tendency is confirmed by the *Involvement Prevention Act* enforcement record, which demonstrates the frequent occurrence of collusion and corruption where selective bidding system is used. Yet the record also reveals that the use of an open tendering system as opposed to the selective bidding system does not necessarily eradicate bid rigging from public procurement.

The selective bidding system was used solely in two out of twelve enforcement cases. In seven cases, bid-rigging activities aided by government officials occurred where both the selective bidding system and open tendering system were used. In two cases, only the open tendering system was employed (See Case List)

D. Character of Bidders

Overall, the cases illustrate that official involvement took place where government procuring processes are characterised by frequent and repeated interactions amongst bidders and close contact between procuring offices and bidders.¹²

Locality

Many cases took place locally where the procuring offices were closely linked with nearby businesses.

In *Kochi (MLIT)*, *Aomori* and *Ibaragi*, and for some types of public procurement in the *Iwamizawa* and *Niigata*, all of the bid riggers were based in the prefecture or in the city where the procuring offices are located.¹³

Local leaders and trade associations took the essential role in these cases. For instance, a local trade association was a core coordinator in *Iwamizawa*,¹⁴ and three leading companies, called the ‘Niigata Top Three’, coordinated bid rigging in *Niigata*.¹⁵

Ex-officials’ presence

In five cases, ex-officials, who were then working for the bid-rigging companies, played an essential role by coordinating the bid-rigging activities and providing the companies with competition-sensitive information, which they had gained from their former colleagues in the

¹² About the importance of repetitive interactions and organisational link, see Johann Graf Lambsdorff, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy* (Cambridge University Press 2007) 150–55.

¹³ *Re Oyokawa and others*, FTC Decision 11 of March 2003 [*Iwamizawa General Construction*]; *Re Douou Kosan and others*, FTC Decision of 11 March 2003 [*Iwamizawa Pipe*]; *Re Chiba Denki Koji*, FTC Decision of 11 March 2003 [*Iwamizawa Electric Work*]; *Re Hokuritsu Hodo and others*, FTC Decision of 11 March 2003 [*Iwamizawa Road*]; *Re Katsui and others*, FTC Decision of 11 March 2003 [*Iwamizawa Building*]; *Re Kinoshitauchigumi and others*, FTC Decision of 17 September 2004 [*Niigata Open-Cut*]; *Re Maruto Watanabe and others*, FTC Decision of 17 September 2004 [*Niigata Building*]; *Re Yoshida Kensetsu*, FTC Decision of 19 May 2009 [*Niigata Jacking*]; *Re Construction Service Procured by City of Aomori*, FTC Order of 22 April 2010; *Re Construction Service Procured by Ibaragi Prefecture Land Reform Office*, FTC Order of 4 August 2011 [*Ibaragi Land Reform*]; *Re Construction Service Procured by Ibaragi Prefecture Sakai Construction Office*, FTC Order of 4 August 2011 [*Ibaragi Sakai*]; *Re General Construction Works (Road) Procured by MLIT Shikoku Regional Development Bureau*, FTC Order of 17 October 2012 [*Kochi River*].

¹⁴ City of Iwamizawa, *Report on Bid Rigging*, 2003.

¹⁵ *Niigata Open Cut* (n 13); *Niigata Building* (n 13); *Niigata Jacking* (n 13); *Re A*, Tokyo High Court Judgement of 22 December 2005; City of Niigata, *Report on Bid Rigging*, December 2004.

government.¹⁶ In particular, in *ASDF*, 56 bid-rigging companies out of 60 had ex-officials as their employees.¹⁷

3.2 How Involvement Activities were Conducted

Government officials were typically involved in bid-rigging activities by nominating the winner in advance. The nomination was then communicated to bidders, who coordinated their bids so that the bidder selected by the officials would win the contract. In order to disguise the collusive bidding activities, a cover bidding strategy is often used where the unsuccessful bidders submit bids i) with a higher price than the one submitted by the chosen bidder; or ii) that are known to be unacceptable to the procuring office, e.g. bids outside of the price range pre-set by the procurer.¹⁸

Another way for officials to aid bid rigging is to provide the bidders with competition-sensitive confidential information. Information relating to the scheduled maximum and minimum prices is especially competition-sensitive. These prices are usually set by the procuring office in advance. If the lowest bidding price exceeds the scheduled maximum price, the government re-initiates the public tendering procedure. If the highest bidding price is below the scheduled minimum price, again, the government re-initiates the process. The rationale behind setting these scheduled prices is to ensure that the work is done properly without any suppression of the interests of employees and subcontractors that are hired by the contracting party, while also guaranteeing that taxpayer's money is not be wasted by an unreasonably excessive procurement price. The scheduled prices are kept confidential by most central government ministries and many parts of local governments before the bidding procedure is completed. However, officials sometimes unlawfully disclose this information and help the bidders submit a bid within the range of the scheduled contract cost—normally towards the maximum end of the range.

Under the *Involvement Prevention Act*, three types of conduct are specified as officials'

¹⁶ In Niigata case, the investigation by the city government revealed that there have been instances in where local politicians were also involved. City of Niigata, *ibid.* About the politicians' involvement in the procuring process in general, see Weishaar (n.1) 181–82; Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973–1995* (Routledge 2002) 158–65.

¹⁷ Ministry of Defence, *Report on Bid Riggings in Relation to Procurement of Office Furniture at Air Self-Defence Force*, 14 December 2010.

¹⁸ See OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* DAF/COMP(2009)1/Final 2.

involvement activities (see 2.2 above). Another type of involvement activity includes endorsement of the outcome of bidders' coordination and selection. The procuring officials sometimes hold a strong bargaining position over the bidders as the purchaser, and his/her voice is called 'ten no koe' (literal translation: 'the voice from Heaven' or the 'voice of God'); he/she is regarded as decisive in the collusive allocation process. In such a situation, endorsement by the procurement official cements the collusion among bidders.

Investigations carried out by the procuring offices and the reports published by them have been revealing just how these enabling practices took place.

A. Nomination of the Winner

In seven cases, the procurement officials unlawfully nominated the winner ahead of the public tendering process (Ibaragi, ASDF, Sapporo, GRA, DFAA, Floodgate (MLIT) and Iwamizawa).

In *Iwamizawa* and *Ibaragi*, the winner was chosen in advance of the public tendering process by officials who then informed the directors of the local industry associations. The directors related this information to the bidders, who then collaborated to ensure that the preferred contractor would win the contract.¹⁹

In *Floodgate (MLIT)*, procurement officials chose the winner in advance for some type of services, and the bidders chose the winner for other types of service.²⁰ The officials selected the winner so that contracts were allocated evenly. In the selection process, officials also took account of the participant's willingness to win the contract, their capability and past experiences.²¹

In *GRA*, officials allocated the public contract among the bidders according to the number of ex-officials working for each bidder, with the aim of securing a post-employment job at the bidders.

¹⁹ *Iwamizawa General Construction* (n 13); *Iwamizawa Pipe* (n 13); *Iwamizawa Electric Work* (n 13); *Iwamizawa Road* (n 13); *Iwamizawa Building* (n 13), *Ibaragi Land Reform* (n 13); *Ibaragi Sakai* (n 13); Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee, *Report on Bid Riggings*, 9 February 2012; City of Iwamizawa (n 14).

²⁰ *Re Kurimoto and others*, FTC Order of 8 March 2007 [*Floodgate River*]; *Re Ishikawazima Harimazima and others*, FTC Order of 8 March 2007 [*Floodgate Dam*].

²¹ Ministry of Land, Infrastructure, Transport and Tourism, *Report on Bid Riggings in Relation to Floodgate Facilities*, 18 June 2007.

Afterward, the officials continued their involvement and chose the winner so that each bidder could have the same share of public contracts as in the previous year.²²

In *DFAA*, officials allocated the contracts to the bidders, taking account of the number of ex-officials working for each bidder as well as the contractor's past involvement in related projects. Sometimes ex-officials working for the bidders were consulted by current officials in the allocation process. The result of the allocation was communicated to the bidders through the ex-officials employed by them. This type of involvement is motivated by the desire to secure employment after leaving the DFAA. Because of the DFAA's human resource management policy, its younger officials cannot be promoted until the senior officials leave. It is thus essential for DFAA to secure sufficient jobs for departing officials for smooth human resource management. This was the background to the officials' involvement in collusion.²³

In *ASDF*, the officials set the annual target for each bidder and chose the winner so that the target would be achieved. For this purpose, the public tender order specifications were drafted in such a way that only the product of the chosen company would be accepted as compliant with the specifications at each public tendering. The officials requested that the chosen bidders write the specifications themselves, and the bidders did so. The annual target was set so as to give the most advantageous allocation of public contracts to (a) bidders employing large number of ex-officials and (b) bidders who accepted ASDF cutting corners when it was trying to spend its yearly budget in a short time at the end of the fiscal year.²⁴

B. Disclosure of Information

In *Niigata*, the bidders chose the winner and the officials informed the chosen bidders of the estimated cost. With this information, the bidders could determine the scheduled maximum price and rig the bids accordingly.²⁵

²² *Re Shinrin Gizyutu Association et al*, FTC Order of 25 December 20007; *Re A*, Tokyo District Court Judgement of 1 November 2007, 54 FTC Shinketsu-shu 799; Green Resource Agency, *Report on Measures to Prevent Reoccurrence of Bid Rigging Activities*, 25 December 2007.

²³ *Re Goyo Kensetsu et al*, FTC Order of 20 September 2007; Defence Facilities Administrative Agency Bid Rigging Investigation Committee, *Report on DFAA Bid Rigging Activities*, 15 June 2006.

²⁴ *Re Office Furniture Procured by Ministry of Defence Air Self-Defence Force*, FTC Order of 30 March 2010; Ministry of Defence (n 17).

²⁵ *Niigata Open Cut* (n 13); *Niigata General Construction* (n 13); *Niigata Jacking* (n 13); City of

In *Public Vehicle (MLIT)*, information about the bidders and where the public tendering process would be introduced was disclosed to one of the bidders, Kitakyo (vehicle management) K.K. At that time, the agency was going through a reform of the public procurement system, and the competitive tendering system was replacing single tendering. Kitakyo was employing many ex-officials of the procuring office. Using this information, Kitakyo colluded in the bid with the other two bidders.²⁶

In *Kochi (MLIT)*, confidential information relating to the total value evaluation system was disclosed to the bidders. Under that system, the winner is chosen by the procuring office, taking into account not only the bidding prices but also several other factors, such as technical excellence and innovative planning. The bidders need the information in relation to allocation of points to non-price factors (e.g. technical excellence) in order to coordinate their bids. Mitani-KK K.K., the leading local company in Kochi area and the ring- leader, requested that the officials disclose the information and the officials complied.²⁷

C. Designing the Tender Process

In *Aomori*, officials always nominated the same set of companies for the selective bidding process. The bidders were separated into three groups, and it was known to government officials that the companies in the same group would collude better. On the other hand, companies belonging to different groups tended to dispute the results of the public tendering and often reported and complained that there was unlawful low-price bidding occurring. When the procurement officials were considering measures to counter the low-price bidding problem, bidders suggested the above grouping strategy. The officials, who were then annoyed by the frequent bidder complaints, decided to adopt that strategy.²⁸

In *Ibaragi* and *JH*, contractors chose the winner for some types of contract and officials aided

Niigata (n 15).

²⁶ *Re Public Vehicle Management Service Procured by MLIT*, FTC Order of 23 June 2009; Ministry of Land, Infrastructure, Transport and Tourism, *Report on Bid Riggings in Relation to Public Vehicle Management Services*, 18 February 2010.

²⁷ *Kochi Road* (n 13); *Kochi River* (n 13); Ministry of Land, Infrastructure, Transport and Tourism, *Report on Bid Riggings in Kochi Prefecture*, 14 March 2013.

²⁸ *Aomori* (n 13); City of Aomori, *Report on Bid Riggings*, 17 December 2010.

the collusion by changing preconditions for participation in public tender and enabling the chosen winners to participate in the public tendering and allowing them to make a bid according to the agreement amongst bidders.²⁹

D. Endorsement of Contract Allocation

In *JH* and *Floodgate (MLIT)*, certain bidders' employees acted as coordinators and allocated contracts among the bidders. The procurement officials aided the coordinators by endorsing the allocation. With the endorsement, the coordinators easily obtained acceptance of their allocation from other bidders.³⁰

E. Obstruction of Investigation

Obstruction of an investigation is not expressly listed as a prohibited act under the *Involvement Prevention Act*. Some instances have been recorded in the published reports.

In *ASDF* and *JH*, procuring officials required the bid-rigging companies not to report the facts relating to the obstruction of the public tendering system. In *JH*, evidence was destroyed by officials after the FTC had commenced inspection.³¹ In *ADSF*, after an internal audit was carried out on suspicion of bid rigging at the procuring office, procuring officials informed the bid-rigging companies of the existence of the internal audit, which was likely to lead the bidder to hide or destroy relevant evidence.³²

3.3 How Involvement Practices Commenced

²⁹ *Ibaragi Land Reform* (n 13); *Ibaragi Sakai* (n 13); *Re JFE Engineering and others*, FTC Decision of 18 November 2005 [*JH JFE*]; *Re Mitsubishi Ju Kogyo and others*, FTC Decision of 16 September 2009 [*JH Mitsubishi*]; Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19); Higashinohon Kosoku Doro, Naka Nihon Kosoku Doro and Nishi Nihon Kosoku Doro, *Report on Bid Riggings*, 16 February 2004.

³⁰ *JH JFE*, *ibid*; *JH Mitsubishi*, *ibid*; *Re Miyaji Tekko and others*, Tokyo High Court Judgement of 21 September 2007, 54 FTC Shinketsu-shu 773; *Floodgate River* (n 20); *Floodgate Dam* (n 20); Higashinohon Kosoku Doro and others, *ibid*; MLTI, *Floodgate* (n 21).

³¹ Higashinohon Kosoku Doro and others (n 29).

³² Ministry of Defence (n 17).

A stable and lasting relationship among individuals is regarded as a key element for successful collusion.³³ At the beginning, however, instability and change emerging in the procuring system can trigger the officials' involvement.

In *GRA*, *Public Vehicle (MLIT)* and *ASDF*, the introduction of the competitive bidding system was the trigger for official involvement. Before that, procuring offices chose the contractor through a single tendering system, taking into account the number of ex-officials working for the contractor. It was expected that, after the introduction of the competitive bidding system, such allocation of the contracts would become impossible and officials, therefore, started aiding collusion among bidders.³⁴

In *Kochi (MLIT)*, the total value evaluation system was introduced, and the ringleader, Mitani, then requested officials to disclose the information which the bidders need to continue their collusive action. It is generally understood that the total value evaluation system is collusion-proof because this selection process makes it difficult for bidders to coordinate their bidding strategy and to monitor the manipulations of other colluders. Mitani's request and the government officials' acquiescence nullified the benefit of the newly introduced public tendering system.³⁵

In *JH* and *Floodgate (MLIT)*, the ring leaders and coordinators were losing influence over other bidders; they decided, therefore, to get officials involved in order to maintain this influence and continue collusion.³⁶

3.4 Motivations

The interest of the procuring departments as a whole and, in particular, securing post-retirement jobs serves as a major reason for officials to facilitate collusion. In some cases, considerations of the public interest, however misconceived, also played a part in their involvement.

A. Securing jobs after retirement

³³ A similar observation applies to bid rigging activities in general. See OECD (n 18) 3 'market conditions'.

³⁴ *GRA* (n 22); *MLIT, Public Vehicle* (n 26); Ministry of Defence (n 17).

³⁵ *MLIT, Kochi* (n 27).

³⁶ *Higashinohon Kosoku Doro and others* (n 29); *MLIT, Floodgate* (n 21).

In five cases, officials were motivated by the need to secure a job after retirement, both for themselves and for their colleagues (*JH*, *GRA*, *DFAA*, *Public Vehicle (MLIT)* and *ASDF*) (see 3.2.A above).³⁷

B. Feeling in Debt to Local Companies

In *Kochi (MLIT)* and *Ibaragi*, the bidders, the majority of which were local contractors, were in a cooperative relationship with procurement officials. When natural disasters happened and local roads are damaged, government officials rely on local contractors to fix the problem and help the communities. Officials hence felt indebted to the local contractors.³⁸

C. Quality of Work

There has been the perception among procurement officials that, under the competitive tendering system, price competition is pursued at the expense of quality. This has been regarded as one of the reasons for officials' involvement in collusion.

In *Floodgate (MLIT)*, officials stated that they were involved in the collusive allocation of public contracts out of the concern that the bidders would focus only on the reduction of the bidding price, thereby reducing quality and also that the contractors' expertise would be lost in the long run.³⁹

In *GRA*, officials believed that coordination and collusion would help the contractors to maintain their special expertise as well as to secure high quality of work with less public expenditure in the long run.⁴⁰

In *Ibaragi*, coordination and collusion on the part of businesses was seen by procurement officials as an efficient and organised way to procure public work. One of the officials additionally stated that he had got involved in bid rigging on the basis of his personal belief that, in order to secure high quality work, it is necessary for bidders to coordinate their bids and to prevent excessive

³⁷ Higashinihon Kosoku Doro and others (n 29); *GRA* (n 22); Ministry of Defence (n 17); *MLIT, Public Vehicle* (n 26); Defence Facilities Administrative Agency Bid Rigging Investigation Committee (n 23).

³⁸ *MLIT, Kochi* (n27); *Ibaragi Prefecture Bid-Rigging Investigation Committee*(n23)

³⁹ *MLIT, Floodgate* (n 21).

⁴⁰ *GRA* (n 22).

price competition.⁴¹

D. Systematic and On-going involvement

Once official involvement becomes a normal part of operation, it becomes an enduring practice.

In all 12 cases, official involvement lasted longer than three years and was undertaken by procurement officials at three different ranks. In most cases, there was a replacement of procurement officials, yet the involvement continued.

In *Kochi (MLIT)*, procurement officials stated that they could not help but engage in wrongful conduct in order to maintain a good relationship with their senior officials, who had been facilitating collusion before they were promoted.⁴² In *GRA*, procurement officials similarly stated that they did not have the choice to cease their involvement where their directors and senior officials were also involved in collusion.⁴³ In the Ibaragi case, one of the officials once stopped his involvement, but his successor resumed it having heard the complaint that the industry was in turmoil since the stoppage.⁴⁴

4 Measures Taken by Procuring Ministries and Local Government

The *Involvement Prevention Act* has introduced a mandatory investigation and publication system at the procuring office. It has also imposed an obligation on the procuring office to recover damages from officials and to take disciplinary actions against them. The Act has significantly improved the quality and scope of the information available to the public, facilitated the reform of the public procurement system and changed the practice in relation to recovery of damages. Still, not all responses by the procuring offices and officials have been favourable, and further improvement and research is certainly needed.

4.1 Investigation

⁴¹ Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19).

⁴² MLIT, *Kochi* (n 27).

⁴³ GRA (n 22).

⁴⁴ Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19).

Under the *Involvement Prevention Act*, the head of the procuring office is obliged to carry out an investigation as to the existence of involvement, upon receipt of the request from the FTC, and publish the outcome of the investigation.

In all cases where the FTC issued the notice and requirement to the procuring office, the latter conducted the investigation and found involvement on the part of their officials, as previously determined by the FTC. Although the *Involvement Prevention Act* does not exclude the possibility that the procurement office could reach an outcome different from the FTC's findings, so far all investigation outcomes have been consistent with the FTC's findings.

In the FTC's press releases, only the basic outline of the officials' involvement activity is provided; and the reports published by the procuring offices, which are of some dozens of pages, add more to our knowledge, particularly in relation to the reasons for and background of the involvement activities and how these helped the bidders' collusion.⁴⁵

The information is important for public scrutiny of government activities.

In *Kochi (MLIT)*, some procurement officials considered that collusion would benefit the local industry as a whole, but the report showed that the collusion unevenly benefited the three ringleader companies.⁴⁶ That finding in the report might have corrected government officials' misconception that collusion benefitted the whole industry, as opposed to particular ringleaders, and thus deterred procurement official's involvement in bid rigging for the same reason in the future.

Some problems remain: Not all investigations have been carried out effectively. In *Sapporo*, it was pointed out in the report that the investigation team could not fact-find as officials and ex-officials did not cooperate with the investigation. Two officials who had played major roles in the

⁴⁵Other sources of information include the judgements delivered under the criminal law (either on the virtue of obstruction of public tendering or bribery). However, they also tend to be brief and the focus of the judgement is mainly on the detail of individual conduct and the intentions of the individual convicted. The historical and institutional background and minor wrongdoings of other staff are rarely detailed in a judgement. In comparison, the report issued under the *Involvement Prevention Act* tends to be more comprehensive and to explain better the institutional background and relatively minor wrongdoings engaged in by officials.

⁴⁶ MLIT, *Kochi* (n 27).

coordination had killed themselves before the government investigation began, making it more difficult for the team to investigate.⁴⁷ In *ASDF*, the ex-officials working for the bidders declined to cooperate with the investigation team, suggesting that they could not obtain consent from their current employers, who were also bidders and suspected of AMA violation.⁴⁸

The FTC may issue an opinion about the outcome of an investigation under Art 3(7) of the *Involvement Prevention Act*. There has been no reported case so far in which the FTC has exercised this authority.

4.2 Improvement Measures

When the procurement office finds the existence of involvement activities specified in the *Involvement Prevention Act*, the office has to implement improvement measures that will eliminate these unlawful activities.

A set of measures has been introduced to help make the public tendering procedure more competitive: i) Widen the range of participating companies, such as by replacing the selected bidding system with a general competitive public tender system (or open tendering system) or by increasing the number of qualified bidders; ii) Implement more rigorous information management (e.g. limiting information available to the bidder, introducing an electronic bidding system and establishing firewalls between the department that organises the project and the department that conducts the public procurement); iii) Introduce a flexible bid valuing system (such as a total value evaluation system); iv) Establish a monitoring board; v) Strengthen the internal whistle-blower system by, for example, introducing an external, independent contact person or an electronic reporting system; vi) Restrict bidder's recruitment of ex-officials; and vii) Raise awareness among the procuring officials of the rules against involvement in bid-rigging activities as well as the need to promote competition in the public procurement process.⁴⁹

⁴⁷ Sapporo City Bid-Rigging Activities Investigation Committee, *Report on Bid-Rigging Activities in Relation to Sapporo City Sewage Construction Work*, 18 March 2009.

⁴⁸ Ministry of Defence (n 17).

⁴⁹ Some of the measures are also listed in the OECD guidelines (n 18).

Regardless of the nature and effect of the involvement activities, most of the above measures have been implemented by procurement offices as improvement measures, with minor variations in scope.

Some measures were superficially tailored to particular circumstances. In *ASDF*, the department helping officials to find a post-departure job was reorganised and separated from the procurement department, and usage of its annual budget began to be closely monitored.⁵⁰ In *DSFF*, the human resource policy was changed in order to lessen the need for the department to secure employment for departing officials, for example by extending the retirement age. Also in *DSFF*, the Defence Facilities Technology Foundation, an institute which helped officials secure jobs in bidder-companies, was dissolved.⁵¹

In *Kochi (MLIT)*, where the total value evaluation system was used, it was considered that the long time that elapsed between the evaluations of non-price factors (e.g. technological excellence) and the submission of the bid facilitated the unlawful disclosure of evaluation points to bidders. Therefore, this time lag was shortened.⁵²

In *Aomori*, the senior official, who had great influence over the operation of the local government, was closely involved in the collusion. He was the chief auditor and the chief of the operations bureau. The lack of separation of these powers was viewed as a reason behind the illegal involvement activities and, as an improvement measure, reorganisation of the organisation was planned. Further, the internal reporting system was introduced at all levels of local government in reaction to the senior official's demand to act for the benefit of a particular private party.⁵³

In *Floodgate (MLIT)*, concern for quality was noted as a background factor. Adoption of the total value evaluation system and a system to monitor the quality of work were proposed as improvement measures.⁵⁴

⁵⁰ Ministry of Defence (n 17).

⁵¹ Committee on Fundamental Preventive Measure in Relation to DFAA Bid Rigging Activities, Report on Fundamental Preventive Measures, 16 June 2006.

⁵² MLIT, *Kochi* (n 27).

⁵³ City of Aomori (n 28).

⁵⁴ MLIT, *Floodgate* (n 21).

Not all concerns were addressed in the implementation measures. For example, the need to secure local contractors' cooperation in case of emergencies was not addressed in the Ibaragi case. Except for *Floodgate*, referred to above, measure to ensure quality has apparently have not been introduced – despite the concern noted in the report.

In *Public Vehicle (MLIT)*, a labour agreement might have been breached partly by the improvement measures. The public procuring office, a regional office of the MLIT, had one of the contractors re-employ its employees, 503 in total, in order to cut public expenditure. The labour unions of the procuring office and the contractor acted together and were assured by the procuring office that there would be no redundancy for the ex-off competitive tendering, the procuring office was concerned that the contractor would apply redundancies having lost business from the procuring office. It therefore, started to disclose confidential information to the contractor. After intervention by the FTC, this special arrangement between the regional procuring office and the contractor attracted public criticism, and it was decided, as an improvement measure, that the procuring office would never discuss terms and conditions of labour with a contractor.⁵⁵

The FTC may issue opinions about the measures taken by the heads of procuring offices under Art 3(7) of the *Involvement Prevention Act*. There has been no case reported so far in which the FTC has exercised this authority.

4.3 Damages

A. Investigation and Request for Compensation

The head of the procuring office is obliged to conduct the investigation in relation to any damage caused by officials and to publish the outcome of the investigation. When the head of the procuring office finds that the damage was caused wilfully or by gross negligence, he or she must request that the officials compensate those wronged by way of damages.

Damages are understood as of civil tort in nature, under which the victim can recover only what he or she has due to the wrongdoing. Also, it is accepted under tort law that the victim can

⁵⁵ MLIT, *Public Vehicle* (n 26).

request any of the wrongdoers to pay the entire damages on a joint liability basis when it is difficult to attribute the amount of liability to each wrongdoer.

In six cases, officials were requested by the procuring office to pay damages (see Appendix Case List). In all cases, officials were made liable as a joint tort-feasor along with the contractors.⁵⁶

The *Involvement Prevention Act* does not address the harm caused by ex-officials. The procuring office may still sue an ex-official by virtue of general tort law; in *Floodgate (MLIT)* and *JH*, the procuring offices indeed did so.⁵⁷

On the other hand, in *Sapporo*, the city's mayor decided not to sue for damages on the grounds that the officials did not recognise that their involvement was illegal and that the colluding companies had already compensated the government. There were thus no damages to recover.⁵⁸ In *Public Vehicle (MLIT)*, no official was requested to pay damages as the head of the procuring office found no damage had been caused by wilful misconduct or gross negligence.⁵⁹

B. State of Recovery

The procuring office is not obliged to disclose the outcome of their requests to pay damages. In some cases, the outcome happened to be known to the public.

⁵⁶ City of Niigata (n 15); Higashinohon Kosoku Doro, Naka Nihon Kosoku Doro and Nishi Nihon Kosoku Doro, *Report on Damages Cause by Bid Riggings*, 24 July 2008; Ministry of Land, Infrastructure, Transport and Tourism, *Report on Damages Caused by Involvement Activities*, 29 January 2010; Ministry of Defence, *Report on Damages Caused by Bid-Rigging Involvement Activities*, 13 December 2012; City of Aomori (n 28); Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19).

⁵⁷ Ministry of Land, Infrastructure, Transport and Tourism, *ibid*; Higashinohon Kosoku Doro and others, *ibid*.

⁵⁸ City of Sapporo, *Report on Bid-Rigging Involvement Activities in Relation to Sewage Electric Facilities and Improvement Measures*, 1 July 2009.

⁵⁹ Ministry of Land, Infrastructure, Transport and Tourism, *Report on Damages Caused by Bid Rigging Involvement Activities*, 13 April 2012.

In *ASDF*, notification was made by the FTC to the Board of Audit of Japan as well as to the procuring office.⁶⁰ That board independently investigated the issue and published a report in which it stated that the damages had not been recovered and the procuring office should ensure they are.⁶¹

In the Aomori case, officials of the Aomori Prefecture did not pay damages, and the governor proposed that the prefectural parliament take up a case against them. The parliament was divided and eventually voted against the governor's proposal. In the parliament, local politicians raised doubts about the existence of the officials' involvement and criticised the fact that the governor had blindly endorsed the findings of the FTC.⁶²

4.4 Disciplinary Action

A further obligation exists for the head of the procuring office to conduct an investigation into the grounds for disciplinary action and publish the outcome of the investigation. Various sanctions have been imposed as disciplinary action was taken against officials who were found to have engaged in the specific involvement activities set out under the *Involvement Prevention Act*.⁶³ Furthermore, the senior officials who were in a position to monitor the officials were disciplined on the grounds of lack of oversight in *Iwamizawa*, *Niigata*, *JH*, *Floodgate (MLIT)*, *Ibaragi* and *ASDF*.⁶⁴

Through the investigation performed by the procuring office, conduct violating other laws, such as the Act for Promoting Proper Tendering and Contracting for Public Works, may be identified.

⁶⁰ FTC, Press Release on *ASDF*, 30 March 2010.

⁶¹ Board of Audit, 2010 Audit Report (2011), Ministry of Defence, *Report on Damages Caused by Bid-Rigging Involvement Activities*, 13 December 2012.

⁶² 2012 Aomori City Parliament, 4th Regular Meeting No.9.

⁶³ City of Aomori (n 28); Ministry of Land, Infrastructure, Transport and Tourism, Press Release on Disciplinary Action, 18 February 2010; Ministry of Defence and Defence Facilities Administrative Agency, Press Release on Disciplinary Action, 15 June 2006; Ministry of Defence, Press Release on Disciplinary Action, 14 December 2010; MLIT, *Floodgate* (n 21); GRA (n 22); Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19); City of Iwamizawa (n 14); Higashinohon Kosoku Doro and others (n 29); MLIT, *Kochi* (n 27); City of Niigata (n 15); City of Sapporo (n 55).

⁶⁴ City of Iwamizawa (n 14); City of Niigata (n 15); Higashinohon Kosoku Doro and others (n 29); MLIT, *Floodgate* (n 21); Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19); Ministry of Defence and Defence Facilities Administrative Agency, *ibid.*

In *Ibaragi*, officials who did not fall foul of the *Involvement Prevention Act* were disciplined for violating the former act.⁶⁵

5 Positive Changes and Issues Remaining

The *Involvement Prevention Act* has brought positive changes overall. In particular, the scope of investigation and the quality of the information made available to the public has been significantly improved. Although what is revealed in the published reports might appear to be merely a collection of anecdotes, this knowledge will be continue to be accumulated and will help to reveal where and how collusion and corruption are likely to occur.⁶⁶

There is certainly room for further improvement. Obstruction of investigation and, particularly, destruction of evidence, is not expressly specified as involvement conduct under the Act. Considering the sequence of actions set under the Act, under which the FTC first investigates the bidder's violation of the AMA and the procuring office then carries out the investigation in its office – and the time gap between these two investigations – a strict obligation not to obstruct in any way is essential for an effective investigation.

These improvement measures have been in line with the conventional wisdom on how to make the public procuring system more competitive. It is encouraging that procuring offices seem to have tried to reform the system as a whole, roused to action by the FTC's demand issued under the *Involvement Prevention Act*.

It should be noted that it is not easy to devise improvement measures. Public procurement needs to satisfy a variety of needs, which are sometimes conflicting.⁶⁷ For instance, the transparency in relation to budget allocation and management of competitive bidding is good for prevention of corruption but is likely to facilitate collusion.⁶⁸ When establishing the policy regarding ex-officials'

⁶⁵ Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee (n 19).

⁶⁶ The endeavour to devise the tools for detecting bid rigging is conducted at international forums. See, e.g., OECD, *Detecting Bid Rigging in Public Procurement: Helping Governments to Obtain Best Value for Money*.

⁶⁷ For illustrative cases, see Frank Anechiarico and James B. Jacobs, 'Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem' (1995) 40 NYL Sch LR 143.

⁶⁸ See Robert C. Marshall and Leslie M. Marx, *The Economics of Collusion* (The MIT Press 2012) 200–02. For an empirical and theoretical study about the public procurement reform at Mie

recruitment, consideration has to be given to freedom of occupation, to legitimate business demand for ex-officials' expertise and to the impact on the recruitment system in the government.⁶⁹ Public interest consideration, which are necessarily embedded in public procurement activity, complicates the issue further.⁷⁰

Despite the provision of the Act, the procuring offices still seem to be reluctant to pursue compensation from its officials. Public attention to the issue is likely to bring improvement and, for that purpose, regular disclosure of information in relation to the state of recovery should be made mandatory for the procuring office.

prefectural government, see Hiroshi Ohashi, 'Effects of Transparency in Procurement Practices on Government Expenditure: a Case Study of Municipal Public Works' (2009) 34 Rev Ind Organ 267.

⁶⁹ For the details of the issues, see David Zaring, 'Against Being Against the Revolving Door' (2013) U Ill LR 507.

⁷⁰ Robert D. Anderson, William E. Kovacic and Anna Caroline Müller points out 'the importance to acknowledge that the promotion of competition in by no means the only value at play in effective procurement systems' at OECD (n.2) 451.

Appendix Case List

<u>Case Name</u>	Products and services [Type of procuring process] Number of bidders	Involvement conduct as specified in the Act	Claim for damage
Procuring department and local government Date of FTC demand and notice			
<u>Kochi (MLIT)</u> Ministry of Land, Infrastructure , Transport and Tourism 17 October, 2012	General engineering works in Kochi (MLIT) area [Open tendering] 58 companies (gross total)	Art 2(5)3 (Illegal information disclosure of evaluation points)	
<u>Ibaragi</u> Ibaragi Prefecture 4 August, 2011	Civil engineering works and pavement construction [Selective bidding and open tendering] 86 companies (gross total)	Art 2(5)1 and 2(5)2 (Nomination of winner and disclosure of the confidential information)	✓
<u>Aomori</u> City of Aomori 22 April, 2010	Civil engineering works [Selective bidding] 34 companies	Arts 2(5)4 (Grouping bidders to facilitate bid riggings)	✓
<u>ASDF</u> Air Self-Defence Force (ASDF) of the Ministry of Defence (MOD) 30 March, 2010	Office furniture [Open tendering] 6 companies	Arts 2(5)1 and 2(5)2 (Nomination of winner)	✓
<u>Public Vehicle (MLIT)</u> Ministry of Land, Infrastructure, Transport and Tourism 23 June, 2009	Public Vehicle (MLIT) management jobs in Hokkaido area [Selective bidding and open tendering] 4 companies	Art 2(5)3 (Disclosure of confidential information, such as schedule of competitive tendering)	
<u>Sapporo</u> City of Sapporo	Electric equipment	Arts 2(5)1 and 2(5)2	

29 October 2008	construction projects for sewage disposal facilities [Selective and restricted bidding] 10 companies	(Nomination of winner)	
<u>GRA</u> Green Resource Agency 27 December, 2007	Geological surveys for construction and improvement of forest roads [Selective bidding and competitive quotation] 21 companies	Arts 2(5)1 and 2(5)2 (Nomination of winner and endorsement of bidders' allocation of the bid)	
<u>DFAA</u> Defence Facilities Administration Agency (DFAA) 22 June, 2007	Civil engineering and construction projects [Selective bidding and open tendering] 56 companies	Arts 2(5)1 and 2(5)2 (Nomination of winner)	
<u>Floodgate (MLIT)</u> Ministry of Land, Infrastructure and Transport 8 March, 2007	Floodgate (MLIT) facility construction projects [Selective bidding and open tendering] 23 companies	Arts 2(5)2 (Nomination of winner)	✓
<u>JH</u> Japan Highway Public Corporation 29 September, 2005	Steel bridge construction projects [Selective bidding and open tendering] 45 companies	Arts 2(5)1 and 2(5)3 (Endorsement of bidder allocations and disclosure of confidential information)	✓
<u>Niigata</u> City of Niigata 28 July, 2004	Sewerage construction projects [Selective bidding and open tendering] 113 companies	Art 2(5)3 (Disclosure of confidential information, such as estimated contracting prices)	✓

<u>Iwamizawa</u> City of Iwamizawa 30 January, 2003	Construction projects [Selective bidding] 126 companies	Arts 2(5)1-3 (inclusive) (Nomination of winner and disclosure of confidential information, such as estimated contracting prices)	
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