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Committee on Government Procurement

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NOTIFICATION OF NATIONAL IMPLEMENTING LEGISLATION

Communication from the Republic of Korea

The attached communication has been received from the Republic of Korea in accordance with the Committee Decision of 4 June 1996 relating to the procedures for the Notification of National Implementing Legislation (GPA/1/Add.1).

THE NOTIFICATION OF NATIONAL IMPLEMENTING LEGISLATION

BASIC REGULATIONS¹

1. The Act Relating to Contracts to which the State is a Party (ARCSP)
2. The Enforcement Decree of the ARCSP
3. The Special Enforcement Decree of the ARCWSP for a Specific Government Procurement

¹Copies (in Korean) are available for consultation in the Intellectual Property and Investment Division (office 3057).

1. SUMMARY OF DOMESTIC REGULATIONS

Summary of Act Relating to Contracts to which the State is a Party

1. *Basic Law for the Government Procurement*

The Act Relating to Contracts to which the State is a Party (ARCSP) is the basic regulation for the government procurement. Except special provisions provided by other laws, the government procurement is governed by this Act.

2. *The Scope of Government Procurement Contract*

The scope of government procurement contracts for an international tendering is:

- the contracts for goods, construction works and services concluded by governmental agencies according to the international norm and the Government Procurement Agreement which exceed the amount determined and publicly announced by the Minister of Finance and Economy.

The exception of an international tendering allowed by the GPA:

- the contracts for goods and services procured with a view to resale or to use in the production of goods or provision of services for sale from small and medium enterprises pursuant to the provisions of the Small and Medium Enterprise Products Promotion Act, and purchasing any agricultural, marine or livestock products pursuant to the Grains Control Act, the Act relating to Distribution and Stability of Agricultural and Marine Products, or the Livestock Industry Act.

The head of each central agency may procure goods and services through an international tendering when necessary.

3. *The Principle of Contract: Bona Fide*

- Contracts shall be concluded according to the principle of bona fide.
- An international tendering shall be implemented according to the principles of reciprocity. The contract officials shall not impose any special terms or conditions upon the citizens of a member country of the Government Procurement Agreement or upon the products or services produced from those countries.

4. *Decision on the Selected Tenderer*

In a competitive tendering, the successful tenderer shall be:

- a person who is deemed fully capable of fulfilling the terms of the contract and offers the lowest bid;
- a person who offers the most favourable bid for the State in conformity with the evaluation criteria specified in the public notice or the tender documentation;

- a person whose bid conforms closest to the criteria if the evaluation criteria are determined by the Presidential Decree considering the contract's nature and scale.

5. *Principles of General Competition in Government Procurement*

- The public officer in charge of contract shall conclude a contract by the means of general competition. Except, if deemed necessary, taking into consideration the contract's purpose, nature, scale, etc., he may nominate participants or restrict the qualification of the participants.

6. *Restriction on Tendering Participation Eligibility for Improper Business Person*

Restriction on tendering participation to an improper business person may be imposed for a specified period:

- a person who might be detrimental to a fair execution of the competition or a proper fulfilment of the contract; or
- a person who is deemed unqualified to participate in the tendering.

Procedure for this restriction:

- The head of a central agency shall give the other party an opportunity to state his opinion in advance and, if necessary, hear the opinion of the interested person.

7. *The International Contract Dispute Mediation Committee*

Challenge procedure

- Those who have got a disadvantage by the matter of the scope of the government procurement contract, eligibility for participation, public notice, and decision on successful tenderer may make an objection.
- Anyone who is dissatisfied with the measures by the demanded institution may request a review for a mediation to the International Contract Dispute Mediation Committee established in the Ministry of Finance and Economy.

Effect of the mediation

- The Committee shall make the investigation and mediation. If not any objection is raised within fifteen days after an agreement, it shall have the same effect as a judicial conciliation.

Summary of Enforcement Decree of the Act Relating to
Contracts to which the State is a Party

1. *Principles of Contracts*

- In the conclusion of contracts, a contract official shall not impose any special condition which unreasonably restricts the contractual benefit of the other party, which is prescribed by the related provisions.

2. *Estimated Value of Contract and Standard Price*

- Estimated value of contract is a criterion opened in a public notice. It is a basic tool for determining the value of contracts for purposes of implementing the GPA. It is based upon the budget amount for a procurement and calculated according to the provisions of the GPA.
- Standard Price is a means to determine a best bidding price. It is determined by the illustrative transactional price, the cost price or the appraised price. It shall not be informed.

3. *Method of Competition & Qualification of Tendering*

- The competition is conducted by means of a competitive tendering in which more than two effective bidders participate.
- The bidder should be owning or leasing the facilities required for manufacturing or supplying of the contract object.
- When any approval or licence is required pursuant to the provisions of the laws, it should be qualified.

4. *Public Notice & Site Presentation*

- A public notice on domestic tendering will be given ten days before the tendering date (international tendering is prescribed by the Special Enforcement Decree).
 - In the case of construction work tendering, it will be given seven days before the site presentation date.
 - Site presentation will be carried out before following period:
 - When the estimated price is less than 1 billion won
☐ 10 days or more
 - When the estimated price is 1 billion or more and less than notified amount
☐ 20 days or more
 - When the estimated price is the notified amount or more
☐ 33 days or more
(* The notified amount is determined by the GPA.)

- Details of the public notice:
 - Matters assigned for the tendering
 - Place, date and time for the tendering and its opening
 - Qualification of a bidder
 - Decision method for the successful tenderer, etc.

5. *Decision Method for the Successful Tenderer*

- Performance ability test method

In a contract above notified amount, a successful tenderer shall be examined with respect to the performance ability of the concerned contract in the order of the lowest tenderer under the standard price.

- Decision method operated only in a domestic tendering

A successful tenderer is a bidder with the lowest price, provided that the bidding price is not less than the amount of 90/100 of the standard price and under the standard price.

In the tender for purchasing goods, the successful tenderer is the lowest price bidder.

6. *Single Tendering*

Following are the cases to which single tendering can be applied:

- in case of an Act of God or national security,
- in case of a contract with the current construction company due to difficulties of assigning liabilities for defects that might happen in relation to future construction works,
- in case of purchasing goods granted patent or in case where the supplier is only one person,
- in case of a work whose estimated price is under 50 million won, or goods and services whose estimated price is under 20 million won,
- goods set-aside for a small business,
- goods related provisions of the Social Welfare Business Act,
- in case of no bidder even in the renotification tendering etc.

7. *Restriction on Tendering Participation for an Improper Business Person*

Restriction may be imposed for a specific period to:

- a person who has constructed structures defectively or designed them inadequately,
- a person who has not been careful in taking safety measures, thereby causing danger or damage to the public, or
- a person who gives a bribe in a tendering procedure etc.

Summary of Special Enforcement Decree of the ARCWSP for a
Specific Government Procurement (Special Enforcement Decree)

1. *Scope of Special Enforcement Decree*

The Special Enforcement Decree will be applied to:

- an international tendering prescribed by the GPA and other provisions.

For an international tendering which is not covered by the GPA, there are no obligations for observing the provisions of the GPA. However, provisions of Special Enforcement Decree shall be applied correspondingly to even the cases for the standardization of the procurement system.

2. *Principles of Contracts for a Specific Procurement*

- Fair selection for a successful tenderer and non-discrimination to any tenderer shall be done in an international tendering.
- With the intention of avoiding the application of GPA, any procurement requirement shall not be divided.
- Entities shall not impose any offsets in tendering procedures.

3. *Tendering Procedure*

Following are tendering procedures for an international tendering: open tendering, selective tendering and limited tendering (single tendering).

4. *Language in an International Tendering*

- A basic language is Korean. However, when necessary, foreign languages including WTO official languages can be used.
- In a public notice, main items for a tendering shall be written in one of the WTO official languages.

5. *Qualification of Suppliers in Open Tendering and a Supplier's List*

- Main conditions for suppliers are limited to those which are essential to ensure the supplier's capacity to fulfil the contract in question such as contract performance record, technical performance ability and financial capacity etc.
- To simplify the qualification procedures, entities can operate a permanent supplier's list.

6. *Public Notice on Intended Procurement and Decision of Successful Tenderer*

- Time limits for a tendering shall not be less than 40 days from the date of the public notice.

- The public notice shall contain details related to the tendering according to the provisions of GPA.
- Information on the contract award shall be published not later than 72 days after the award of each contract.

7. *Challenge Procedures & International Contract Dispute Mediation Committee*

- Suppliers can challenge alleged breaches of the GPA to the procurement entities or International Contract Dispute Mediation Committee.
- The Committee is established in the Ministry of Finance and Economy to investigate and mediate the request for review by a supplier.
- The chairman of the Committee is Vice Minister of Finance and Economy. The Committee has 15 members who are professors, barristers or officials, etc.
- The Committee can order the interim measures which include suspension of tendering procedures, etc.
 - The mediation by the Committee can be provided for the correction of breaches of the GPA or compensation for the loss or damages suffered.
- The mediation has the same effect as a judicial conciliation when it has no objection.

8. *Implementing the International Business Practices*

When necessary, in light of nature of international trade, international business practices can be applied to determine currency, deposit of contract payment, inspection or adjustment of inflation, etc.

2. SUMMARY OF OTHER REGULATIONS RELATED TO THE GOVERNMENT PROCUREMENT

1. *The Act on the Government Procurement Business*

Character of the Act

- The Act contains the provisions for the central government procurement system implemented by the Office of Supply (OSROK).

Applied Institution

- The State and Local government entities shall commit the procurements for the goods more than 50 million won and the construction works more than 2 billion won to the OSROK.
- Government invested institutions, if necessary, can commit the procurement business to the OSROK.

Centralization of the government procurement

- Basically, each government authority is responsible for procuring goods, services and construction services for its own use. However, goods and works exceeding a given threshold value, which a specialized agency can procure more efficiently, should be procured and supplied through the Office of Supply of the Republic of Korea to central and local government agencies (so-called end-users).
- The OSROK's end-users are classified into two categories: obligatory and voluntary. The former consists of central and local government agencies, which are required to purchase their needed goods and works above a given threshold value through the OSROK. The latter consists of government-funded or government-sponsored agencies, which have options to procure goods, services and works for themselves or through the OSROK.
- Even the obligatory end-users, however, are allowed to purchase goods and conclude construction contracts for themselves in cases of urgent procurement needs, small purchases below a given threshold value or procurement for national defence or security.

System to draw up government procurement

- Each central and local government agency will forecast its need for supplies and construction services during the course of a year, determine the purchase request plan with the preparation of the budgeted funds, and submit it to the OSROK before the beginning of the next fiscal year.
- Upon receipt of the purchase plans from the end-users, the OSROK shall draw up a comprehensive Acquisition Program considering the end-user's procurement plan for the coming year as well as the procurement level of the previous year, which will then procure and supply in a cost-effective and timely manner.

2. *Local Financing Act*

Character

- The local government procurement system is prescribed by the Local Financing Act and its Presidential Decree, etc.
- The provisions of the Act and its Presidential Decree regulate specialties for the local government procurement. However, main contents of these provisions are quoted from the Act Relating to Contracts to which the State is a Party.
- In conclusion, local government entities operate the same procurement system as the central government.

Main different provisions from the ARCSP

- In case of local government procurement, the estimated price for the regional restriction is different from that of the state.

According to the provisions by the Local Finance Act or its Enforcement Decree, entities can restrict participants' eligibility to only the person doing business within its jurisdiction when the estimated price is less than 5 billion won.

According to the provisions by the ARCSP and its Enforcement Decree etc., the restriction can be imposed to the construction work only less than 3 billion won.

3. *The Government Invested Enterprise Management Law*

- Procurement business of the government invested institution is prescribed by the government invested Enterprise Management Law and Administrative Regulation by the Ministry of Finance & Economy.
- These regulations include some specialties for the entities applied and exception in the single tendering from the provisions of the ARCSP. However, main contents of these provisions are quoted from the Act Relating to Contracts to which the State is a Party.
- In conclusion, government invested entities operate the same procurement system as the central government.

3. **CONTACT POINTS FOR AN INQUIRY ON THE GOVERNMENT PROCUREMENT**

The Act Relating to the Contracts to which the State is a Party

Ministry of Finance and Economy
Government Accounting Policy Division

Telephone: + 82 2 500 5391
Telefax: + 82 2 503 9291

The Local Financing Act

Ministry of Home Affairs
Local Financing and Economy Division

Telephone: + 82 2 500 5391
Telefax: + 82 2 503 9291

The Government Invested Enterprise Management Law

Ministry of Finance and Economy
Government Loan and Enterprise Management Division

Telephone: + 82 2 500 5391
Telefax: + 82 2 503 9291

The Act on the Government Procurement Business

Office of Supply
Administration and Management Division

Telephone: + 82 2 533 5979
Telefax: + 82 2 596 9548

4. ANSWER TO THE CHECKLIST OF ISSUES

I. GENERAL ELEMENTS

1. *Has the agreement been transposed into national law?*

It has been transposed into domestic laws and regulations such as the Act Relating to Contracts to which the State is a Party ("ARCSP"), the Local Financing Act and the Government Invested Enterprise Management Law.

The Act Relating to Contracts to which the State is a Party ("ARCSP") is the basic regulation on the procurement by the central government institution. It prescribes details concerning contracts to which the state is a party, including procurement proceedings and contract administrations. It contains details related to government procurement contracts through an international competitive bidding. It prescribes provisions related to National Treatment, Non-discrimination, and the Transparency of Government Procurement.

The Enforcement Decree of the ARCSP provides details delegated by the ARCSP and those necessary for the implementation of a domestic tendering.

The Special Enforcement Decree of the ARCSP for a Specific Government Procurement provides details delegated by the ARCSP and those necessary for the implementation of an international tendering.

2. *In the case that entities below the federal or central state level are covered: are these categories of entities autonomous from federal or central state level government in the implementation of the Agreement?*

Entities below the federal or central state level have their own procurement system such as Local Financing Act. But the Act generally follows provisions of ARCSP.

3. *In the case that Annex 3 entities are covered: are these categories of entities autonomous in the implementation of the Agreement or do they apply the legislation provided by the federal/central or sub-central level?*

Other entities such as government invested enterprises are controlled by the Government Invested Enterprise Management Law. But the Law also generally follows provisions of ARCSP.

4. *Which main differences (if any) exist between the implementing laws at the federal or central level, the sub-central level and for Annex 3 entities?*

There are no significant differences except regional restriction and conditions for a single tendering. For example, a local government can restrict participants' eligibility to persons doing business

within its jurisdiction, when the estimated price of the work is less than 5 billion won. However, the restriction can be imposed by a central government only to the construction work of which the estimated price is less than 3 billion won.

5. *To what extent is information technology used in the process of government procurement?*

We are running a database system offering information of tendering opportunities.

II. SPECIFIC ELEMENTS

6. *Identify the specific provisions in your legislation which reflect the national treatment and non-discrimination commitments of Article III of the Agreement?*

ARCSP Article 5 and its Special Enforcement Decree (SED) Article 4

7. *Article IX:2 of the Agreement foresees that the invitation to participate may take the form of a notice of proposed procurement. If your implementing legislation provides for this opportunity, give details.*

Provisions for the public notice are provided reflecting the provisions of the GPA. Those are almost same provisions of the GPA. Basically public notice for open or selective tendering should be done not less than 40 days before the tender date. In some cases for a selective tendering, time limit for a tender will be extended to more than 65 days.

A public notice shall contain every item prescribed by the GPA such as place, date and time for tendering and its opening, qualification of the bidder and contact points etc. (SED Art. 11, 12).

8. *Article IX:3 of the Agreement foresees that entities at the sub-central level as well as Annex 3 entities may use a notice of planned procurement or notice regarding qualification system as an invitation to participate. If your implementing legislation provides for this opportunity, give details.*

Besides a public notice, other provisions for a notice of the planned procurement are prescribed according to the Article IX:3 of the GPA (SED Art. 13).

9. *In the case of selective tendering procedures: to what extent are entities allowed to use permanent lists of suppliers or is there a requirement for lists of suppliers to be selected on a contract-by-contract basis?*

If necessary, entities can use permanent supplier's lists. Qualifications for registration at supplier's lists can be determined by entities, considering experiences, skills or business conditions of entities (SED Art. 10).

It is not necessary for a contract official to change the requirements for supplier's list on a contract-by-contract basis. It is same as the current classification system for suppliers. The requirements for the supplier's list are fixed.

- 10. Article XIV of the Agreement allows for negotiation under certain conditions. Are entities allowed to proceed to negotiations? If so, which categories and what are the conditions imposed?**

Negotiation can be allowed during the tendering procedure. If it is deemed necessary, taking into consideration the nature of contract, the urgency, national security, the head of each central agency or the public officials may enter into the contract after receiving the proposals from bidders suppliers and negotiating technical specification or qualities, etc.

- 11. Article XI contains the time-limits for tendering and delivery. Time-limits shall normally be "not less than X days". Does the domestic legislation reflect the various minimum time-limits as set out in the Agreement? If not, give information on any longer time limits which have been established.**

The time-limits for tendering shall be more than 40 days after a public notice. In compliance with the provisions of the GPA, some exceptions are prescribed as below:

In case of an emergency notice: more than 10 days after a public notice.

In case of a planned procurement notice: more than 24 days after a public notice.

- 12. To what extent does the implementing legislation allow entities, in pursuance of Article XII:1, to permit tenders to be submitted in several languages (one of which has to be a language of the WTO)? To what extent do entities use this flexibility?**

The basic language is Korean in the tendering procedure. However, when necessary, a foreign language including WTO official languages can be used (SED Art. 8).

III. CHALLENGE PROCEDURES - ARTICLE XX

- 13. Paragraph 3 of Article XX requires each Party to provide its challenge procedures in writing and making them generally available. Please provide this information.**

Anyone who has been disadvantaged due to the breaches of the GPA occurred by an entity's measure in the course of international tendering may make an objection for revocation or correction of such acts to the International Contract Dispute Mediation Committee (SED Art. 28).

- 14. To the extent that this information does not fully respond to the following points, please provide the supplementary information necessary to do so.**

- (i) The time-limit to launch a complaint contained in the Agreement is "not less than 10 days". What are the limits in domestic legislation?**

A supplier or contractor shall submit a complaint within 15 days after the occurrence of the act which is the cause of the objection or 10 days after acquiring knowledge of such an act.

The head of the relevant procuring entity shall, within 10 days of the receipt of the complaint, examine and take necessary measures such as correction and give a prompt notice of the decision to the supplier or the contractor submitting the complaint.

- (ii) ***What body is responsible for the challenge procedures? Is this a "court" or an "impartial and independent review body"? If the latter:***

In order to examine and mediate the request for a review, a committee is established in the Ministry of Finance and Economy.

- ***How are its members selected?***

The chairman of the Committee is Vice Minister of Finance and Economy. The Committee has 15 members who are professors, barristers designated by the Minister of Finance and Economy or public officials designated by the heads of major procurement entities.

- ***Are its decisions subject to judicial review?***

The mediation has the same effect as a judicial conciliation when there is no objection. If there are any objections, the case can be sent to the court.

- ***If not, how are the requirements of paragraph 6 of Article XX taken into account?***

We have the provisions for various challenge procedures reflecting the provisions of the GPA such as hearing before a decision, open mediation process, decision by writing, etc.

- (iii) ***What is the applicable law by reference to which the challenge body will examine complaints?***

ARCSP has general provisions for the review of the challenge procedures, reviewing, examining and investigating. The case can be sent to the related institutions for a special appreciating. During the process, the provisions for the procedures such as delivery or notice etc. shall follow the provisions of the Act for the Civil Suit.

- (iv) ***Which rapid interim measures are provided to correct breaches of the Agreement and to preserve commercial opportunities?***

- ***Do these measures include the possibility to suspend the procurement process? On what conditions?***

Suspension of tendering proceedings or awarding of contracts may be granted until the arbitration (mediation) process in the Committee is completed.

- (v) ***How do challenge procedures provide for correction of the Agreement? What types of compensation for loss or damages suffered can the challenge body order?***

The Committee can make a mediation offer including cancelation and correction of the breaches and compensation for loss or damages. There are limits to the compensation. It will be limited to the expense for a preparation for the tendering and mediation.

- (vi) ***Give any available information on the time periods for the stages of the challenge process, including to obtain interim measures and a final decision.***

A supplier or contractor who has an objection to the measure by the entity concerned can request a review of the Committee for International Dispute Mediation within 15 days of the receipt of the notice of decision.

Interim measures by the Committee shall be taken within seven days of the receipt of the opinion of a procurement entity.

The Committee, unless there are any other specific reasons, shall review and arbitrate the appeal filed within 50 days of its receipt.

The mediation shall be final unless the applicant for appeal or the head of a procuring entity concerned raises any objection to it within 15 days of the completion of mediation. It shall have the same effect as an out-of-court settlement.

Legal channels for complaints or appeals are open to any suppliers. Appeals can be raised to a civil suit.

- (vii) ***What are the usual costs to conduct a challenge procedure? Are there possibilities foreseen to do so free of charge?***

Translation, stenography, appreciation or testing cost can be billed to the appellant.

If there is a prior arrangement between both parties, the cost of challenge procedures can be imposed by the arrangement. Therefore, there can be no cost in some cases.