

South Korea

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1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes. There are laws governing general public procurement procedures. There also exist separate laws and regulations governing international bidding for public procurement.

The international bidding means a bidding open to only foreigners or both foreigners and Koreans. Public procurement contracts that may be awarded by the international bidding are limited to the contracts whose value meet or exceed certain threshold amount designated by the Ministry of Strategy and Finance in accordance with the relevant international treaties on public procurement or other international rules. Such threshold amount varies depending on the relevant treaties and type of the contract. (For example, the threshold amount promulgated in accordance with the WTO's Agreement on Government Procurement is KRW 200 million for contracts for goods/services and KRW 7.6 billion for construction contracts.) However, certain types of public procurement contracts such as contracts for the procurement of defense goods cannot be awarded by the international bidding.

While the public procurement laws provide broad, general standards for the award of a public procurement contract, details of a specific bidding including eligibility and requirements for the submission of a bid are usually specified in the public notice for the bidding.

2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?

In principle, public procurement contracts should be awarded based on general competition of the bidders, regardless of the kind of good, services, etc. which are to be procured. However, when deemed necessary in light of the purpose, nature and size of a contract, the contract may be awarded by other methods such as a competition among bidders designated by the contracting authorities or the execution of the contract with a person designated by the contracting authorities without competition procedures. For example, when the goods to be procured are military goods manufactured or sold by a defense contractor, the relevant procurement contract may be awarded without going through the general competition procedures. Again, detailed procedures for a specific bidding/procurement contract are specified in the public notice for the bidding/procurement contract.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?

As described in (2), while public procurement contracts should, in general, be awarded based on general competition of the bidders, other methods may be used depending on the value and kind of the contracts. For example, a construction contract under the Basic Act on the Construction Industry may be awarded to a person designated by the contracting authorities without general competition procedures if the estimated value of the contract is KRW 200 million or less. On the other hand, for a construction contract with an estimated value of KRW 30 billion or more, bidders eligible to participate in bidding for such contract are determined by the contracting authorities before the formal bidding process begins.

In sum, the procedures for the award of public procurement contracts may vary depending on both the value and kind of the contracts.

4. In what way does the contracting authority have to inform the market about the intended procurement?

When the intended procurement is to be awarded based on competition through bidding procedures, a public notice on the intended procurement should, in principle, be made using Korea ON-line E-Procurement System (<http://www.g2b.go.kr/>) (the "KOEPS"). If necessary, public notices on newspapers, etc. may be used together with notices on the KOEPS.

5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

There is no legal requirement that a potential bidder should have a specific legal form. The bidder, however, should have a business registration certificate for the relevant business in order to participate in the bidding. The business registration certificate or an equivalent thereof is also required for registration with the KOEPS.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

There is no legal restriction on this. Usually, whether to allow joint offers or not is specified in the public notice for the bidding.

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

For the international bidding, a registered office or branch office in Korea is not required, and submission of a tender directly from abroad is allowed.

8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

In an international bidding, the governmental officials must be fair in making a decision on the award of contracts, and information should be provided on a non-discriminatory basis. While there is no legal requirement that foreign bidders should submit more supporting documents than Korean bidders, the contracting authorities may, by the relevant public notice, require foreign bidders to submit additional documents.

9. Is a multinational bidding consortium allowed to submit a bid?

There is no significant legal restriction on the multinational bidding consortium. Whether a multinational bidding consortium is allowed or not is usually specified in the public notice for the bidding.

10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?

In principle, the Korean language should be used for the international bidding. However, when it is found that the use of a foreign language is unavoidable due to certain circumstances (for example, when the suppliers of the goods to be procured are located in a limited geographical area), English, French, Spanish or the language of the country of the suppliers may be used instead.

In principle, tenders should be submitted in person at the time and location designated in the public notice for the bidding. However, tenders for an international bidding may be submitted by mail or fax, if necessary. Submission of a tender using the KOEPS is common in practice.

11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

Usually, the deadline for the submission of a bid is specified in the public notice.

12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?

In principle, bidders may not claim their costs for preparing the bid. However, the deposit for the submission of the bid and deposit for the execution of the contract may be returned as described below.

Under Korean laws, a person who wishes to participate in a bid must pay 5/100 or more of the value of the relevant contract as a deposit for the submission of the bid. Such deposit is returned to the bidder if the bidder (i) fails to win the bid or (ii) wins the bid and enters into the contract with the contracting authority. However, such deposit is forfeited if the

bidder wins the bid but fails to enter into the relevant contract.

In addition, the winning bidder who wishes to enter into the contract must pay 10/100 or more of the value of the relevant contract as the deposit for the performance of the contract. Such deposit is forfeited if the winning bidder fails to perform its obligation under the contract. Such deposit may be returned upon request immediately after the purpose of the contract has been satisfied.

13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

The relevant laws of Korea provide that, in order to receive the award of a contract, the bidder should satisfy one of the following criteria:

(i) the bidder has sufficient ability to perform its obligations under the contract and has offered the lowest price among bidders;

(ii) the bidder's tender is found to be most favorable to the contracting authority based on selection criteria specified in the public notice for the bidding; or

(iii) the bidder is selected by the contracting authority based on the review of bidders' ability to perform its obligations under the contract in the order of prices offered by bidders (from low price to high price) among those bidders who submitted prices lower than the estimated price.

The contracting authorities may establish additional selection criteria, which are typically specified in the public notice for the bidding.

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

A person who suffered disadvantage in an international bidding process (the "Disadvantaged") may file an objection demanding that the relevant act should be cancelled or corrected. Such objection may be made within (i) 15 days from the date the relevant act occurred or (ii) 10 days from the date the Disadvantaged became aware of the relevant act. The objection should be submitted to the head of the contracting authority (the "Head").

If the Disadvantaged disagrees with the decision of the Head, a request for the review of the decision of the Head may be filed with the Committee for the Resolution of Disputes Related to International Contracts (the "Committee") established under the Ministry of Finance and Strategy. Such request should be filed within 15 days from the date the Disadvantaged received the notice of the decision of the Head. The Committee has the power to order the bidding procedures to be postponed or suspend the execution of the contract.

Alternatively, the Disadvantaged may file a lawsuit with the court to seek preliminary injunction to prevent the execution of the contract.

15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

The legal protection described above is generally applicable to all kinds of public procurement contracts.

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

In addition to the primary legal protection described in (14), civil remedies may be available even after the contract has been awarded. Significant factors in determining whether to award damages include the following:

- (i) a showing that the claimant had reasonable expectation/reliance that the claimant would receive the award of the contract;
- (ii) a showing that the claimant incurred monetary expenditures/losses or lost other opportunities for profit based on the expectation/reliance described above; and
- (iii) a showing that the other party refused to enter into the contract without a justifiable cause.

17. Can your office

(i) give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

(ii) represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

(iii) Please name a contact person within your office for questions of public procurement law!

Yes, we can

- (i) advise foreign clients on all aspects of public procurement laws and procedures of Korea and assist foreign clients at all stages of public procurement projects from bid preparation to the execution and closing of the contract; and
- (ii) represent foreign clients seeking any legal remedy available under the laws of Korea.

For any question relating to public procurement laws and procedures, please contact:

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