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Committee on Government Procurement

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NOTIFICATION OF NATIONAL IMPLEMENTING LEGISLATION

Communication from the Republic of Korea

Revision

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

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## **I. SUMMARY OF DOMESTIC REGULATIONS**

### **1. Summary of the Act Relating to Contracts to which the State is a Party**

#### **1.1 *Basic Law for Government Procurement***

The Act Relating to Contracts to which the State is a Party (ARCSP) is the basic regulation for government procurement. Unless otherwise provided for in other laws, government procurement is conducted under this Act.

#### **1.2 *The Scope of the Government Procurement Contract***

The scope of government procurement contracts for international tendering is:

- contracts for goods, construction work and services concluded by governmental agencies (according to the GPA and the international norm based upon the GPA) which exceed the amount determined and publicly announced by the Minister of Finance and Economy.

Exceptions to international tendering allowed by the GPA:

- procurement of goods and services for resale or use in the production of goods for sale or in the provision of services for sale;
- single tendering procurement including set-asides for small and medium enterprises pursuant to the provisions of the Small and Medium Enterprise Products Promotion Act;
- procurement of agricultural, marine or livestock products pursuant to the Foodgrain Management Law, the Law on Marketing and Price Stabilization of Agricultural and Fishery Products and the Livestock Law.

When necessary, the head of each central agency may procure goods and services through international tendering even though the procurement need not undergo international tendering under the GPA.

The threshold values for international tendering are:

- 151 million won ex VAT for central government entities' supplies and services procurement;
- 5,830 million won ex VAT for central government entities' construction works;
- 233 million won ex VAT for local government entities' supplies and services procurement;
- 17,490 million won ex VAT for local government entities' construction works;
- 524 million won ex VAT for other entities' supplies procurement;
- 17,490 million won ex VAT for other entities' construction works.

### 1.3 *The Principle of Contract: Bona Fides*

- Contracts shall be concluded through the agreement of contracting parties on equal standing and shall be implemented on a bona fide basis.
- All international tendering shall be conducted under 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.

### 1.4 *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 nature and scale of contracts.

### 1.5 *Principles of General Competition in Government Procurement*

- The contract official shall conduct a public procurement according to the competition principle. However, if necessary, taking into consideration the purpose, nature, scale, etc. of the contract, he may nominate participants or restrict the qualification of the participants.

### 1.6 *Restrictions on Tendering Participation Eligibility for an Improper Business Person*

A person who prevents fair competition or proper fulfilment of the contract, or a person who is deemed unqualified to participate in the tendering may be denied participation for a specified period.

Procedure for this restriction:

- The head of a central agency shall provide the person with an opportunity to state his opinion in advance and, if necessary, shall hear the opinions of other persons concerned.

### 1.7 *The International Contract Dispute Mediation Committee*

Challenge procedure

- Those who claim to have been disadvantaged in the implementation of the provisions on the scope of the government procurement contract, eligibility for participation, public notice or the decision on the successful tenderer may make an objection to the central agency concerned.
- Anyone dissatisfied with the ensuing measures by the agency may request a review from the International Contract Dispute Mediation Committee established in the Ministry of Finance and Economy.

Effect of the mediation

- The Committee shall undertake an investigation and provide mediation. If no objection is raised within fifteen days regarding the result of the mediation, it shall have the same effect as a judicial conciliation.

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

2.1 *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, as prescribed by the related provisions.

2.2 *Estimated Value of a Contract and Standard Price*

- The estimated value of a contract is a criterion 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. It shall be disclosed in a public notice.
- The Standard Price (presumed price) is a means to determine the best bidding price. It is determined by the illustrative transaction price, the cost price or the appraised price. It shall not be disclosed in advance.

2.3 *Method of Competition & Qualification of Tendering*

- Competition is conducted through competitive tendering in which there are more than two effective bidders.
- The bidder should own or be leasing the facilities required for manufacturing or supplying the contract object.
- When any approval or licence is required pursuant to the provisions of other laws, it should be obtained.

2.4 *Public Notice & Site Presentation*

- A public notice on a domestic tendering will be given ten days before the tendering date. (The related provisions for an international tendering are prescribed by the Special Enforcement Decree.)
  - In the case of a construction work tendering, the public notice will be given seven days before the site presentation date.
  - The minimum time periods between the site presentation date and the tendering date are:
    - When the estimated price is less than 1 billion won
      - 10 days

- When the estimated price is 1 billion won or more, and less than the notified amount
  - 20 days
- When the estimated price is the notified amount or more
  - 33 days
  - (\* 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.

### 2.5 *Decision Method for the Successful Tenderer*

- Performance ability test method

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

- Decision method in a domestic tendering

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

In the tender for purchasing goods, the successful tenderer is the lowest price bidder regardless of the proviso above.

### 2.6 *Single Tendering*

Following are the cases in which a single tendering can be applied:

- in the case of a situation where an Act of God or national security is concerned;
- in the case of a contract with the current construction company to ensure future identification of the construction contractor responsible for any possible defects;
- in the case of a contract to procure goods related to patents or in the case where the supplier is only one person;
- in the case of a work whose estimated price is under 50 million won, or goods and services whose estimated prices are under 20 million won;
- in the case of goods that are set aside for small business;
- in the case of goods that are related to provisions of the Social Welfare Business Act;
- in the case of no bidder, even after a tendering renotification, etc.

### 2.7 *Restrictions on Tendering Participation for an Improper Business Person*

Restrictions may be imposed for a specific period on:

- a person who has constructed structures defectively or designed them inadequately;

- a person who has caused danger or damage to the public due to the lack of safety measures; or
- a person who has given a bribe in a tendering procedure, etc.

### 3. Summary of the Special Regulation of the Enforcement Decree of the ARCSP for a Specific Government Procurement (Special Enforcement Decree)

#### 3.1 *Scope of the Special Enforcement Decree*

The Special Enforcement Decree will be applied to all international tendering prescribed by the GPA and other provisions.

For an international tendering which is not covered by the GPA, there is no obligation for observing the provisions of the GPA. However, provisions of the Special Enforcement Decree shall be applied correspondingly.

#### 3.2 *Principles of Contracts for a Specific Procurement*

- Fair competition and non-discrimination principles shall be observed in all international tendering.
- Any procurement requirement shall not be divided with the intention of avoiding the application of GPA.
- Entities shall not impose offsets on suppliers from other GPA members in an international tendering.

#### 3.3 *Tendering Procedure*

There are three types of tendering in the international tendering procedure: open tendering, selective tendering and limited tendering (single tendering).

#### 3.4 *Language in an International Tendering*

- The basic language is Korean. When necessary, however, 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.

#### 3.5 *Qualification of Suppliers in Open Tendering and a Supplier's List*

- Qualifications for a bidder, such as contract performance record, technical performance ability, financial capacity, etc., can be provided to confirm a supplier's ability to fulfil a contract.
- To simplify the qualification procedures, entities can avail themselves of a permanent supplier's list.

### 3.6 *Public Notice on Intended Procurement and Decision on the 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 the GPA.
- Information on the contract award shall be published no later than 72 days after the award of each contract.

### 3.7 *Challenge Procedures & the International Contract Dispute Mediation Committee*

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

### 3.8 *Implementing International Business Practices*

When necessary, in light of the nature of international trade, international business practices can be used for currency, deposits of contract payments, inspection, adjustment for inflation, etc.

## 4. Summary of Other Regulations Related to Government Procurement

### 4.1 *The Act on Government Procurement Business (AGPB)*

#### Character of the AGPB

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

#### Coverage of the AGPB

- The procurement by State and local government entities of goods worth more than 50 million won and construction works worth more than 2 billion won shall be conducted through OSROK.
- Government invested institutions, if necessary, can commit the procurement business to the OSROK.



#### Centralization of government procurement

- Basically, each government authority is responsible for procuring goods, services and construction services for its own use. However, goods and works of which the estimated value exceeds a given threshold value should be procured and supplied through the Office of Supply of the Republic of Korea on behalf of the other end-user institution (end-user).
- 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 OSROK. The latter consists of government-funded or government-sponsored agencies, which have the option to procure goods, services and works on their own or through OSROK.
- Even 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.

#### OSROK procurement procedures

- Each central and local government agency will forecast its needs for supplies and construction services during the course of a year, determine the purchase request plan with the preparation of budgeted funds, and submit it to OSROK before the beginning of the next fiscal year.
- Upon receipt of the purchase request plans from the end-users, 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. OSROK will then procure and supply in a cost-effective and timely manner.

#### 4.2 *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 local government procurement. However, the main contents of these provisions are quoted from the ARCSP. Therefore, local government entities operate under the same basic procurement system as the central government.

##### Main differences in provisions from the ARCSP

- In case of local government procurement for a construction work less than 500 million won, a regional restriction can be imposed as a precondition for the bid. For example, according to the provisions of the Local Finance Act or its Enforcement Decree, entities can restrict participants' eligibility to persons 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 only on those construction works worth less than 3 billion won.

4.3 *The Government-Invested Enterprise Management Law (GIEML)*

- Procurement business by government-invested institutions is prescribed by the Government-Invested Enterprise Management Law and Administrative Regulations by the Ministry of Finance & Economy.
- The difference between GIEML and ARCSP is that the scope of entities covered by each law is different and GIEML has a special provision regarding single tendering. However, the main contents of these provisions are quoted from the Act Relating to Contracts to which the State is a Party. Therefore, government-invested entities operate under the same basic procurement system as the central government.

**II. CONTACT POINTS FOR AN INQUIRY ON GOVERNMENT PROCUREMENT**

*The Act Relating to 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 Government Procurement Business*

Office of Supply  
Administration and Management Division

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

### III. ANSWERS TO THE CHECKLISTS

#### I. GENERAL ELEMENTS

##### 1. *Has the agreement been transposed into national law and/or does it apply directly?*

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 procurement by central government institutions. It prescribes details concerning contracts to which the state is a party, including procurement proceedings and contract administration. It contains details related to government procurement contracts through 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 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 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 the Local Financing Act. However, this Act generally follows the provisions of the 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?*

Procurement by other entities such as government-invested enterprises is controlled by the Government-Invested Enterprise Management Law. This Law also generally follows the provisions of the 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 but there are some exceptions such as regional restrictions and conditions for single tendering. Local governments can restrict participants' eligibility to persons doing business within their jurisdictions, when the estimated price of the work is less than 5 billion won. The restriction can be imposed on construction works worth less than 3 billion won by the central government.

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

We are running a database system offering information on 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 of 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.***

The provisions for a public notice reflect the provisions of the GPA. These are almost the same as the provisions of the GPA. Basically public notice for open or selective tenderings should be given no less than 40 days before the tender date. In some cases, for a selective tendering, the time-limit for a tender is extended to more than 65 days.

A public notice shall contain every item prescribed by the GPA such as the place, date and time for tendering and its opening, qualification of the bidder, 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 a notice regarding a qualification system as an invitation to participate. If your implementing legislation provides for this opportunity, give details.***

A notice of planned procurement can be used by any entity according to Article IX:3 of the GPA (SED Art. 13). The entities may notify in the gazette the plan for procurement of goods, construction works and services to be supplied under specific procurement contracts during each fiscal year. The notice on procurement plans shall contain the statements set forth in the related provision of the GPA.

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 the permanent lists of suppliers. Qualification of suppliers can be determined by entities, taking into consideration construction capacity, skills or management status (SED Art. 10).

It is not necessary for a contract official to change the requirements for the supplier's list on a contract-by-contract basis. It is the 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?***

Negotiations are allowed during the tendering procedure. If necessary, taking into consideration the nature of the contract, urgency and national security, the head of each central agency or its public officials may enter into a contract after receiving proposals from bidders and negotiating technical specifications, quality, 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. According to the provisions of the GPA, some exceptions are prescribed as below.

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

In the 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 procedures. When necessary, however, foreign languages, 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 make them generally available. Please provide this information.***

Anyone who claims to have been disadvantaged due to breaches of the GPA by an entity's measures in the course of international tendering may make an objection and seek revocation or correction of such acts from the International Contract Dispute Mediation Committee.

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

The head of the relevant procuring entity shall, within 10 days from 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 the Vice Minister of Finance and Economy. The Committee has 15 members who are professors and barristers designated by the Minister of Finance and Economy and 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 no objection is raised. 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 make the provisions for the various challenge procedures reflect the provisions of the GPA, such as holding hearings before a decision, conducting an open mediation process, providing decisions in writing, etc.

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

The ARCSP contains general provisions on the challenge procedures. The case can be sent to the related institutions for a special consultation. In the process of the Committee's mediation, procedures such as delivery, 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 cancellation and correction of breaches and compensation for losses or damages. There are limits to the compensation. It is limited to costs for tender preparation or protest.

(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.***

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

Interim measures by the Committee shall be taken within seven days from the date of 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 from the date of its receipt.

The mediation shall be final unless both parties (the applicant and the head of a central agency concerned) have an objection to it within 15 days from completion of the mediation. It shall have the same effect as an out-of-court settlement.

Legal channels for complaints or appeals are open to any supplier. Appeals can be raised in 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 is determined by the arrangement. Therefore, there can be no cost in some cases.