

# COMPETITION AND RESTRICTIONS ON BUREAUCRAT-LED BID-RIGGING PRACTICES

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## **Japan Fair Trade Commission (JFTC):**

JFTC controls actions that will restrict inter-company competition.

Many cases: Administrative investigations

- Some malicious or serious cases: Compulsory investigation of criminal cases; Filing an accusation with Public Prosecutor's Office

## **Anticompetitive Acts**

Cartel: e.g. Raising the price level in unison on the industry-wide scale

Bid-rigging: The winning bidder is designated in advance. Other firms cooperate so that the winning bidder will be awarded the contract.

Private monopolization: Controlling or excluding competitors

Unfair business practices

## **Inter-company Competition**

Lowering prices

Developing technology

Innovations in corporate management styles

Fostering moral values: Company staff will not seek their personal interests in the company.

## **Edo Era: 1603–1868**

The Tokugawa shogunate served as the central government, while various clans (local governments) ruled local areas.

## **Japan's Feudal System**

The shogunate granted feudal lords their own territories, and the lords managed them. Japan had more than 200 clans at that time.

Feudal lords and their lieges needed to make their territories flourish in order for their offspring to prosper.

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“*Issho Kenmei*”...“all over creation”

Direct meaning is “working hard to protect land”.

Clans served like a corporation where staff members share the same destiny.

Large-scale flood control projects, development of new rice fields, fostering of commerce and industry sectors: Competition among local governments

- Population increased threefold during the Edo era.
- Education spread (the three R’s: Reading, wRiting and aRithmetic)
- *Samurai* moral values are similar to corporate ethics.

### **Since the Meiji era**

Accumulation during the Edo era served as a driving force for national development

Becoming a centralized nation

- Competitive local governments faded out.

However, *Samurai* moral values lingered on, serving as a mental backbone.

### **Bid-rigging**

Competitors designate a prospective winning bidder prior to the public sector’s competitive bidding.

Corporations other than the prospective winning bidder will cooperate so that the prospective winning bidder will be awarded the contract.

- It looks like a competition on the surface, but it is not a competition in real terms: The successful bidder will enjoy high profits.

### **Collusive Bidding at the Initiative of Government Officials**

The ordering party gets involved in designating prospective winning bidders.

- Staff members of the ordering party do not usually earn direct rewards for their involvement.
- Retirees of the ordering party will parachute into winning bidders or their related organizations.

### **Actions against Bid-Rigging**

JFTC: Issues cease and desist orders, surcharge payment orders, or files criminal accusations in malicious or serious cases (criminal penalties will be imposed).

Ordering party: Seeks compensation for damages, demands payment of penalty, or

suspends the bidding qualifications.

### **Act for the Prevention of Collusive Bid-Rigging at the Initiative of Government Officials**

Came into force in 2003.

This legislation prohibits the following acts:

- 1) Making bid participants engage in bid-rigging;
- 2) Expressing an intention on winning bidders;
- 3) Leaking confidential information on order placement; and
- 4) Aiding bid-rigging.

Improvement measures by ordering party:

- JFTC recognizes the ordering party's involvement
- JFTC demands the ordering party to take improvement measures
- The ordering party will conduct necessary investigations
- If the ordering party gets involved, it will take necessary improvement measures, such as improving its bidding systems.
- The ordering party will disclose to the general public investigation results as well as improvement measures and also report them to JFTC.
  
- Actions against staff members  
Seeking compensation for damages, or taking disciplinary measures (dismissal/suspension from office, salary cut, etc.)

Criminal penalties (abetting bid-rigging or leaking secrets: Imprisonment with labour for a maximum of five years, or a maximum fine of ¥2.5 million, will be imposed): Independent of JFTC's investigation.

### **Past Cases**

#### *1. The order for construction work placed by Iwamizawa City (Hokkaido) (in 2003)*

- 1) The officials of the city government selected a prospective winning bidder for each construction project and gave such information to the industry group.
  - 2) The officials of city government told the industry group about the estimated construction cost (much higher than the actual cost) for each project.
- In this way, the city hall made bid participants engage in bid-rigging.

In response to this case of bid-rigging, the city government decided to prepare instruction manuals, expand the general competitive bidding system, and voluntarily refrain from re-employment of the city government's retirees at related organizations. (The ordering parties took the same approach in subsequent cases.)

*2. The order for construction work placed by Niigata City (Niigata Prefecture) (in 2004)*

In response to a request from a prospective winning bidder (designated by bidding participants), the city government officials passed on its estimated project cost.

The Niigata District Public Prosecutor's Office prosecuted four city government officials for Obstruction of Public Auction. The Supreme Court has delivered the final and conclusive judgment, imposing imprisonment with labour for one year to one and a half years, with a suspended sentence of three years.

*3. The order for upper portion bridge work placed by Japan Highway Public Corp. (in 2005)*

1) Japan Highway Public Corp. (JHPC) received an allocation list of prospective winning bidders from JHPC retirees and approved such list.

2) In response to requests from JHPC retirees, JHPC placed multiple orders by splitting the entire project into several portions.

JHPC made bidding participants engage in bid-rigging in order to provide reemployment opportunities for JHPC retirees.

JFTC accused noncompliant enterprises as well as a vice president and an executive board member of violating the antitrust law. The Supreme Court delivered a conclusive judgment that imposed imprisonment with labour for two and half years with a suspended sentence of four years, and imprisonment with labour for two years with a suspended sentence of three years.

JHPC demanded two executive board members to pay compensation for damages of approximately ¥8.7 billion jointly and severally with the noncompliant enterprises.

*4. The order for the water gate work placed by the Ministry of Land, Infrastructure, Transport and Tourism (in 2007)*

The officials of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) informed a bid facilitator of their intended winning bidder so that bid-rigging would go smoothly.

MLIT demanded two former staff members to pay compensation for damages of approximately ¥800 million jointly and severally with the noncompliant enterprises and three MLIT retirees.

5. *The order for civil engineering/building construction work placed by Defense Facilities Administration Agency (in 2007)*

Based on the status, age, etc., of the Defense Facilities Administration Agency (DFAA) retirees at the time of their retirement, the officials of DFAA calculated the annual target of new orders acceptance for each construction firm where DFAA retirees have parachuted. Within such calculation result, DFAA selected prospective winning bidders for each construction project and provided such information to the industry stakeholders through DFAA retirees.

Then, DFAA was abolished and merged with the Ministry of Defense in September 2007.

6. *The order for forest road survey design tasks placed by the Japan Green Resources Agency (in 2007)*

The JGRA selected the prospective winning bidder on the basis of the number of former colleagues who had joined the bidding company, and the extent of the company's enthusiasm for the contract. After selecting the prospective winning bidder for each project, the JGRA informed the winning bidder that it had been chosen as such.

JFTC filed an accusation with the Prosecutor-General that the noncompliant enterprises and a former executive board member and a former manager violated the antitrust law. The Tokyo District Court delivered the conclusive judgment, imposing imprisonment with labour for two years, with a suspended sentence of four years, and imprisonment with labour for one and a half years, with a suspended sentence of three years.

7. *The order for the sewage treatment facility's electric engineering work placed by Sapporo City (in 2008).*

8. *The order for vehicle management tasks placed by the Ministry of Land, Infrastructure, Transport and Tourism (in 2009).*

9. *The order for fixtures and furniture placed by the Japan Air Self-Defense Force (in 2010).*

10. *The order for civil engineering package work placed by Aomori City (in 2010).*

11. The orders for civil engineering package work and pavement work placed by Ibaraki Prefecture (in 2011).