

A Comparison of Tendering and Contracting Systems for Public Works between Japan, the United States and EU Countries ¹⁾

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1. Introduction

Recently in Japan, the tendering and contracting systems for public works have undergone reforms. For example, the open and competitive bidding system is being promoted for cost reduction and higher transparency in the order placing and receiving process. Also, a new system has been introduced to evaluate not only the bid price but also technical advantages of the proposal. In April 2001, the Act for Promoting Proper Tendering and Contracting for Public Works (hereinafter referred to as the "Proper Tendering and Contracting Act") was placed in force. The Guiding Principle based on this Act demands the introduction of various tendering and contracting systems to make better use of technical capabilities owned by bidders.

In Europe, the EU has been formulating common market rules and each member state has been promoting national legislation to comply with these common rules since the establishment of the EU (as the successor to the EC). In the area of public procurement, they established an EU directive concerning public works in 1993 (93/37/EEC), together with those concerning public supply and public service²⁾. Also, in the United States, the Clinton Administration conducted a series of administrative reforms against the strong demand for higher governmental performance. As a result, the Federal Acquisition Regulation (FAR) was substantially revised in 1997. Both Europe and the United States were thus ahead of Japan in terms of public procurement-related legislation and reforms.

Each country developed its own tendering and contracting systems for public works according to the characteristics of its domestic construction market as well as its economic system and practices. Their tendering and contracting systems seem to have been therefore reasonably established. Countries, however, subsequently faced problems such as a rise in price after the conclusion of a contract and

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1) This paper is based on data as of December 2004. Following the revision of EU directives on public procurement in the end of April 2004, the EU member states are required to harmonize their national laws with the revision. Accordingly, they will make changes to their rules on public procurement.

2) These three directives were integrated as 2004/18/EC in April 2004.

quality control issues due to defects in their tendering and contracting systems and had to implement measures to solve these problems. Also, they were requested to meet the requirements of the WTO Agreement on Government Procurement (GPA) amid market globalization. It was thus necessary for countries to change their tendering and contracting systems for public works to respond to the internationalization of markets.

Under these circumstances, the Board of Audit of Japan conducted surveys to study the actual situations of tendering and contracting systems for public works in the United States, the United Kingdom, France, Germany and Sweden during the period from fiscal 2001 to fiscal 2003. The Board selected these countries as survey targets for the following reasons. For the United States, Japanese tendering and contracting systems for public works have been recently reformed, modeled after the U.S. systems. In the United States, mechanisms to combine tendering and contracting systems in various manners have been aggressively introduced to give incentives to bidders and contractors. The United Kingdom, France, and Germany were selected because these EU member states play central roles in the EU and because (1) the United Kingdom has been pursuing Value for Money (VFM) to maximize public values obtained through public works, instead of directly lowering construction prices, and has been implementing measures to utilize the abilities of the private sector in public procurement, including Public Private Partnership (PPP), which has also been promoted in Japan recently; (2) France has technical staff within the government and is oriented towards public procurement systems that differ from those implemented in the United Kingdom and the United States: it has long been adopting the concession system, which will have implications for Japan in accepting the critical challenge of maintaining its social capital; (3) Germany shares a strong similarity with Japan in that the government has traditionally accumulated technical capabilities as an orderer, which is also the case with France, and unlike the United Kingdom and the United States, is promoting reforms by managing its existing public procurement systems more strictly; and (4) Sweden is a North European country that is leading the world in terms of administrative decentralization and is facing the challenge of standardizing the management of public procurement systems on the national level.

This paper aims to compare the tendering and contracting systems for public works between Japan, the United States, and Europe based on surveys conducted targeting the countries listed above, and to summarize the characteristics of the systems, thereby showing what Japan can learn from these countries.

This paper is structured as follows. In Section 2, characteristics of the construction markets in the targeted countries and the proportion that public works account for in their economic activities will be described and then the characteristics of their public procurement systems as well as the background and direction of their reforms will be outlined. In Section 3, the basic tendering and contracting systems for public works implemented in relevant countries will be summarized. In Section 4, various tendering and contracting systems being promoted in the countries based on the background and direction of the reforms described in Section 2 will be briefly introduced. In Section 5, lessons that Japan can learn from the countries and the desirable direction of reforms on tendering and contracting systems for public works to be promoted in Japan will be summarized.

Chart 1 Key Factors in Selecting Countries to Compare with Japan

	United States	United Kingdom	France	Germany	Sweden
Reasons for selection	In both countries, the construction cost often increased due to changes made to contractual terms after the conclusion of contracts with the successful bidders who proposed the lowest bid price. Under these circumstances, they implemented the following measures to reform their tendering and contracting systems.		Both countries share a similarity with Japan in that the government has accumulated technical capabilities as an orderer and has the following characteristics.		Local governments were traditionally given strong authority, which has resulted in varied local public procurement systems. The country is facing the challenge of standardizing the management of these systems on the national level.
	1) Recently Japanese tendering and contracting systems have been reformed, modeled after those of the United States.	1) VFM has been pursued instead of directly lowering construction prices.	The private sector has long been engaged in the maintenance and management of public facilities, mainly through the concession system, which has implications for Japan in accepting the critical challenge of maintaining its social capital.	The country is trying to improve the cost performance of public works by managing the existing public procurement systems more strictly.	
	2) Mechanisms to give incentives to contractors have been aggressively introduced through various combinations of tendering and contracting systems.	2) In particular, public procurement systems focusing on the use of the private sector's abilities have been promoted, including PPP.			

2. Characteristics of the Construction Markets in the Targeted Countries and the Proportion That Public Works Account for in Their Economic Activities

(1) Sizes of the Construction Industry and Public Works

In the size of the construction industry and the proportion that public works account for in the economic activity, Japan is ranked as No. 1 among the targeted countries. The same tendency is observed for the number of people working in the construction industry. From these data, although they should be examined in relation to the level of social capital established in the countries, it can be said that Japanese economic structure is more dependent on the construction industry and public works than those of the United States and European countries.

However, for labor productivity (per capita GDP) of people working in the construction industry, Japan is superior to Sweden, but slightly inferior to the EU member states (the United Kingdom, France, and Germany) and far inferior to the United States. For public works, it is therefore necessary for Japan to improve competitiveness through proper management of its tendering and contracting systems.

Chart 2 Sizes of the Construction Industry and Public Works in the Targeted Countries
(Fiscal 2002: Nominal Values)

	United States		United Kingdom		France		Germany		Sweden		Japan	
Population (Unit: thousands of people)	288,240		59,207		61,237		82,482		8,925		127,435	
GDP(a) (Unit: 1 billion yen)	1,307,692	Rate to GDP	196,073	Rate to GDP	180,169	Rate to GDP	249,034	Rate to GDP	30,229	Rate to GDP	498,102	Rate to GDP
Construction industry(b)	121,867	9.3%	15,366	7.8%	15,615	8.7%	25,432	10.2%	2,069	6.8%	65,095	13.1%
Public works(c)	32,927	2.5%	2,520	1.3%	5,556	3.1%	4,049	1.6%	986	3.3%	23,374	4.7%
Number of workers(d) (Unit: thousands of people)	147,721	Ratio to the number of workers	29,526	Ratio to the number of workers	24,887	Ratio to the number of workers	38,671	Ratio to the number of workers	4,353	Ratio to the number of workers	65,299	Ratio to the number of workers
Construction industry(e) (Unit: thousands of people)	8,594	5.8%	1,290	4.4%	1,493	6.0%	2,427	6.3%	242	5.5%	6,460	9.9%
Construction industry's labor productivity(b/e) (1million yen/person)	14.2		11.9		10.5		10.5		8.6		10.1	
Exchange rates: 1 US dollar=125.4 yen, 1 British pound= 187.9 yen, 1 Euro= 118.0 yen, 1 Krona= 12.9 yen (Source) OECD, National Accounts of OECD Countries, Volume IIa / IIb, 2004												

(2) Characteristics of Public Procurement and Background for Reforms in the Targeted Countries

In the following, insight will be given into the characteristics and problems of the traditional tendering and contracting systems for public works that are implemented in the targeted countries, as well as the background for and the direction of reforms on these systems.

i) United States

Traditionally in the United States, a bidder who proposed the lowest bid price had been awarded a contract under the sealed bidding system. This tendering system was highly transparent, fair, and suitable for the principle of competition. Under this system, however, the bid price alone was used as criterion for awarding a contract, and changes were often made to the contractual terms after the conclusion of a contract. In particular for large construction works, the works had seldom been conducted at the original contract price, as the price was often raised as a result of many changes being made to the contractual terms. This brought about huge profits to contractors, while the government had to eventually pay far in excess of initial budget amount. In addition, the construction was often not completed by the due date. It is said that some bidders proposed an extremely low bid price with the intention of raising the price after they successfully concluded a contract. Under these circumstances, the federal government came to recognize that the traditional system was no longer suitable for the principle of competition and it invented the concept of "best value." This means that past performance, technical capabilities and financial abilities of bidders will be considered in addition to their bid prices and that a successful bidder for public procurement may not always be the one that proposed the lowest bid price. It is said that this "best value" concept made it possible for the federal government to reduce its procurement cost over the long term as compared to the traditional procurement system with selection criterion based only on the bid price.

In the U.S. construction industry, there are many small and medium sized companies specializing in electrical works and mechanical works, and there are very few general construction companies as equipped with a full set of construction machinery as the Japanese major general construction companies are.

ii) United Kingdom

Traditionally in the United Kingdom, minimization of construction prices was strongly pursued for both public and private works. The orderer and applicants/bidders often had hostile relations with each other, and applicants/bidders were also mutually hostile. As a result, bidders began to propose extremely low bid prices to win severe competition among construction companies and, after they were awarded contracts, then complained about design defects at the construction stage to effect changes to the contractual terms, thereby raising the contract prices (called “claim culture”). Because of hostile relations between the orderer and the contractors, the construction was not conducted in response to the needs of the orderer. Some completed structures did not fully provide the required functions, and the construction cost often exceeded the initial budget amount or the time of completion was extended due to changes made to the original contractual terms.

In order to solve these problems, the British government implemented public procurement reforms basically by promoting the conclusion of contracts through PPP. This partnership system makes it possible for the orderer and the contractors to form longer relationships and gives an incentive to the latter by making the two parties share risks and profits, as well as the problems and countermeasures, for the maximization of VFM.

The United States and the United Kingdom thus had the same problem. Contract prices were raised after the conclusion of contracts due to subsequent changes made to the contractual terms. In order to solve this problem, the two countries implemented similar reforms, although by different means, in the pursuit of “best value” and VFM.

iii) France

France discontinued its traditional competitive bidding system for public works in March 2001. At present, replacing this former system based on the bid price, a bidder submitting the most economically advantageous tender shall be awarded a contract. Although the EU rules allow its member states to regard the bid price as the only criterion for choosing a successful bidder, contractors are not presently chosen in this manner in France.

In France, the government traditionally had officials who had highly technical capabilities as an orderer and the private sector was often engaged in construction works under the leadership of the government. In recent years, however, reforms have been conducted to improve the construction quality by the aggressive utilization of technical capabilities owned by the private sector as follows: the design-build system has recently been increasingly adopted in the country; the price-based competitive bidding system was abolished; and it was determined to introduce the competitive dialogue procedure before revision of the EU directive.

iv) Germany

In Germany, even before the enactment of the EU directive, a bidder submitting the most economically advantageous tender was awarded a contract. It can be said that German public procurement systems are functioning relatively well, but it is also pointed out that those in charge of placing orders for public works are not familiar with the EU directive in Germany because the state governments have high levels of independence and public works are conducted mostly by states and smaller municipalities in the country. Builders are mainly small and medium sized local companies engaged in business on the state level, and there are few that have abilities to conduct business on the national or EU level. In the country, public procurement was traditionally carried out based on the regulations on public contracts. According to the president of the Federal Court of Audit, the regulations are not defective. The problem is that those in charge of placing orders for public works are not managing the public procurement system properly based on these regulations.

In line with measures to respond to the EU directive, Germany attributes importance to the strict management of the existing regulations on public contracts for the reform on public procurement

systems.

v) Sweden

In Sweden, local governments traditionally have strong authority, so they can be said to be independent entities. In the country, all public procurement should be conducted according to the public procurement act (Lagen om offentlig upphandling: LOU) in principle. Even when a very small municipality repairs a road, it must comply with the LOU as long as it uses public subsidies for the repair work. Actually, however, smaller municipalities do not strongly recognize that they have to carry out public procurement pursuant to the LOU.

The National Board for Public Procurement (NOU) recommends that local municipalities manage their procurement systems in such a manner as meets the requirements of the EU directive, but the municipalities, which have been conducting public procurement according to their own rules, are reacting sharply against the recommendation that requires them to change their procurement methods. The national government's ministries and agencies seem to comply with the LOU in general, but the Swedish National Audit Office points out that some governmental bureaus do not fully understand the details of the LOU.

vi) Japan

Japanese tendering and contracting systems have remained almost unchanged since the Meiji period (1868-1912) for any procurement items. The Public Accounting Law regulates the systems on the national level, while the Local Autonomy Law regulates them on the local level. The Public Accounting Law permits no tendering and contracting systems other than open and competitive bidding; designated competitive bidding; and discretionary contract. Although the orderer has large discretion in the actual tendering and contracting process, the legal system does not allow the orderer to choose a tendering and contracting system according to the characteristics of the items to be procured.

For tendering and contracting systems for public works, improvements were made following a series of bribery and collusive bidding cases. Since fiscal 1994, reforms have been promoted to improve the competitiveness, transparency and fairness of the systems for public works at or above the thresholds by such measures as the full-scale adoption of the open and competitive bidding system and improvement of the designated competitive bidding system. Also, in terms of promoting cost reduction as well as ensuring both functions and quality of structures in public works, the introduction of the technical proposal integrated evaluation system, the design-build system and the value engineering (VE) system has been proposed as tendering and contracting systems that make better use of technical capabilities owned by the private sector, depending upon the details and difficulty of the work. In 2001, the Proper Tendering and Contracting Act was placed in force. Subsequently, in 2005, the Act for Promoting Quality Assurance in Public Works was also placed in force. The laws require the government to evaluate the technical proposals of the private sector in a more proactive manner.

3. Patterns of Tendering and Contracting Systems for Public Works Implemented in the Targeted Countries

(1) United States

In the United States, the federal government and local governments conduct public procurement based on different laws, regulations and rules. For tendering and contracting procedures, the federal government complies with the FAR and the procurement regulations formulated by each governmental department to supplement the FAR. The Office of Federal Procurement Policy (OFPP) of the Office of Management and Budget (OMB) is responsible for building the federal government's procurement systems.

i) Tendering systems

Except for the Simplified Acquisition Procedures used for small procurement, the federal government shall principally choose contractors under “full and open competition.”

a. Simplified acquisition procedures

As provided for in Part 13 of the FAR, the simplified acquisition procedures are used for procuring construction works, R&D, goods and services provided at prices not exceeding the simplified acquisition threshold. These procedures are also used for providing minority groups, small and medium sized companies located in disadvantageous areas, and smaller companies owned by women with more opportunities to receive orders from the government. According to the procedures, the orderer should award contracts to qualified companies as fairly as possible. For goods and services to be repeatedly procured for use, the government can conclude blanket purchase agreements.

b. Sealed bidding

Sealed bidding is a traditional bidding system provided for in Part 14 of the FAR. Under the system, the government invites companies to submit bids. After bids are publicly opened, a contract will be awarded to a bidder who proposed the lowest bid price. This bidding process is the promptest, fairest and most transparent, but as mentioned before, it is defective in that the orderer may have to pay far in excess of initial budget amount or the completion of construction may be delayed due to changes made to contractual terms after the conclusion of a contract.

c. Competitive negotiated proposals

This is a system provided for in Part 15 of the FAR that is intended to compensate for the defects of sealed bidding in the pursuit of best value. The federal government is increasingly using this system. This system is used when i) time does not permit the solicitation, submission, and evaluation of sealed bids ; ii) it is necessary to choose a contractor based on factors other than price; and iii) it may become necessary to discuss with bidders. Under the system, the government presents a written “Request for Proposal” to bidders, and the bidders submit proposals to meet the needs of the government. The government then examines and evaluates the proposals to choose a contractor from among them. In this process, the government is allowed to discuss with bidders regarding the defects of their specifications, and the bidders are given opportunities to revise their proposals before the selection of a successful bidder. Competitive negotiated proposals are often used in the design-build system.

ii) Criteria for awarding a contract

In sealed bidding, a bidder who proposed the lowest price will be a successful bidder, while in competitive negotiated proposals, the government needs to predefine factors to be evaluated to ensure best value for the government. The government should always consider the following three factors: price, quality (technical advantages, etc.), and past performance³⁾. In evaluating these factors, it is required to attribute more importance to narrative description than to quantitative evaluation and rating by scores, and the evaluation results should be explained by narrative descriptions. The Government Accountability Office (GAO) also recommends that the government narratively describe the reasons why a bidder was awarded a contract.

iii) Negotiability

In competitive negotiated proposals, a two-stage selection method is often adopted for efficient negotiations with a limited number of applicants.

A method called a “bake-off” may also be used. In the “bake-off” process, the government provides

3) Other evaluation factors include qualification of employees and business management.

part of the information about the completed design of a structure to bidders, and the bidders in turn provide the government for value with opinions and improvement proposals regarding the feasibility of construction and design-related problems. In the process, the government can communicate the evaluation factors that it thinks important to the bidders. Also in the negotiation process, the government will not disclose the names of other bidders, the number of these competitors, and the proposals made by other bidders, and each bidder will make efforts to make the best proposal to win a contract, which will promote competitive pricing.

(2) Common Rules Adopted by EU Member States

EU member states have to place more priority on compliance with the EU directive set out among them than on compliance with their national laws. They are obliged to harmonize their domestic laws with the EU directive. It is therefore necessary to describe the EU's common rules before examining the tendering and contracting systems for public works adopted in the United Kingdom, France, Germany and Sweden.

For tendering and contracting systems for public works, DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁴⁾ regulates public works, together with public supply and public service. The directive targets each public work and the concession of each public work equal to or greater than 6,242,000 euros without including value added tax. For works below this threshold, each member state is allowed to carry out procurement according to their own national laws.

i) Tendering systems

The following four systems are provided for by the EU directive⁵⁾.

- Open procedure
- Restricted procedure
- Negotiated procedure
- Competitive dialogue procedure

Comparing these systems with systems adopted in Japan, the open procedure is similar to the open and competitive bidding system; and the restricted procedure is similar to the public invitation designated competitive bidding system⁶⁾. Any companies can file an application for the restricted procedure, but only those chosen from the applicants as meeting the requirements in terms of managerial and financial situations and technical capabilities can actually participate in bidding. For this tendering system, the participants should number at least five and 20 at most.

The EU directive provides that the open procedure or the restricted procedure be adopted in principle and that the negotiated procedure be applied only for exceptional cases as listed in the directive (when it is difficult to estimate costs in advance, when the bidding process was unsuccessful, when technical or artistic requirements inevitably specify qualified companies, and when a new contract is added to an existing one). The government has to have at least three companies participate in the negotiated procedure. Details of negotiations shall be disclosed to the public and the government shall negotiate with all the bidders. The government is prohibited from negotiating only with a specific company. In the newly approved competitive dialogue procedure, the orderer, when it cannot clearly set out the technical, legal and financial requirements, is allowed to negotiate concurrently with

4) 93/36/EEC, 92/50/EEC, and 93/37/EEC regulated public supply, public service, and public works, respectively before they were revised to be integrated into 2004/18/EC. Member states are required to harmonize their national legislation with the revised directive by January 2006.

5) As a result of revision in April 2004, introduction of framework agreements is approved.

6) Under this system, unlike the designated competitive bidding in which the orderer designates bidders at its sole discretion, a certain number of applicants are chosen as bidders from those who filed applications.

multiple bidders during the period from when proposals are submitted to when a contract is awarded so that the government can adopt the most excellent proposal.

The EU's tendering procedures focus on the promotion of indiscriminate competition within the EU and prohibit the orderer from treating companies of other EU member states discriminatively compared with domestic companies. The tendering information and the results shall be announced in the Official Journal of the EU. Also, upon request from a bidder who could not win a contract, the orderer must answer why the bidder was not awarded a contract in comparison with the successful bidder.

ii) Criteria for awarding a contract

As criteria for awarding a contract, the following two are approved:

- The lowest bid price
- The most economically advantageous tender

Which criterion to use is up to the orderer, but the criterion should be publicly announced in advance. For the most economically advantageous tender, it is also necessary to announce the evaluation factors and their weights.

Evaluation factors for the most economically advantageous tender include the price, time of completion, maintenance cost, profitability, and technical merits. The lifecycle cost of the work can also be considered.

iii) Negotiability

The EU directive originally defined the negotiated procedure as an exceptional procedure. At the end of April 2004, however, the directive was revised to approve the competitive dialogue procedure as a new independent tendering system which allows the orderer to negotiate with bidders before awarding a contract when the orderer cannot clearly set out the specifications.

(3) United Kingdom

i) Tendering systems

Tendering systems adopted in the United Kingdom are the same as those provided for by the EU directive: they are the open procedure, restricted procedure, and (competitive and uncompetitive) negotiated procedure. The U.K. government recommends the restricted procedure and the competitive negotiated procedure rather than the open procedure for construction works and consulting services so far as they are allowed under the EU directive. This is because the open procedure will invite too many bidders, which will in turn cause much work loads to the orderer, and because bidders will make more sincere efforts when the number of those participating in bidding is limited.

Under these tendering systems, orders were traditionally placed under the design-bid-build system. Recently, however, private finance initiative (PFI), prime contracting, and the design-build system are recommended as PPP contracts to maximize VFM. The traditional design-bid-build system can also be applied so far as it provides VFM, but in applying this system, the orderer is required to make explanations to justify the application. The three new systems, however, require considerable labor for both the government and the private sector, and the number of cases in which the traditional contracting system is used is still larger.

ii) Criteria for awarding a contract

A bidder who will produce the largest VFM throughout the project's lifecycle shall be awarded a contract. This corresponds to "the most economically advantageous tender" as provided for by the EU directive. It is said that bidders cannot be awarded a contract by only proposing the lowest bid price, except for contracts on simple construction works.

Ideas about how to evaluate quality and cost in measuring VFM and their weights differ by

contract, but these criteria should be announced in advance. In general, quality carries more weight for contracts that are more complicated and innovative in terms of technology, and cost carries more weight for simpler and routine construction works.

iii) Negotiability

In the competitive negotiated procedure, the government negotiates with multiple bidders. Bids may be submitted before negotiations are started. The open and restricted procedures also allow room for negotiations. When the construction work is complicated or when the market is immature, the government may negotiate with bidders, even after bids are submitted, regarding the specifications and risk sharing to ensure opportunities to improve VFM.

As the background for this situation, public procurement reforms were started in the United Kingdom to eliminate the “claim culture” (in which extremely low bid prices are proposed due to fierce competition for receiving orders and the prices are subsequently raised because of complaints made by successful bidders).

(4) France

The French code of public contracts (Code des Marchés Publics: CMP) was revised once in March 2001 and again in January 2004, and the government introduced the competitive dialogue procedure in anticipation of revision of the EU directive on public procurement. At the same time, the national and local governments unified their rules.

i) Tendering systems

For contracts amounting from 230,000 euros to 5.9 million euros, either of the bidding procedure, the negotiated procedure, or the competitive dialogue procedure is applied⁷⁾.

For the bidding procedure, the orderer can freely choose either the open procedure in which anyone can participate as bidders or the restricted procedure in which only those meeting certain requirements can participate as bidders. In general, the restricted procedure is often applied for the procurement of public works and public services, while the open procedure is often applied for the procurement of goods. The government will not negotiate with bidders and will award a contract to a bidder based on objective criteria. For performance-based bidding, the restricted procedure is always adopted.

For the competitive dialogue procedure that was introduced in January 2004, the government will apply this when it cannot present technical specifications or when the government intends to procure a legally and financially complicated structure. The government negotiates these problems with bidders, eventually to lower the contract price through technical improvements⁸⁾ after the solicitation for bids is announced in the same manner as for ordinary competitive bidding.

ii) Criteria for awarding a contract

A bidder who submitted the most economically advantageous tender shall be awarded a contract. The evaluation factors include management cost, technical value, time required for procurement, quality (aesthetic and functional), profitability, after-sale service, technical assistance, due date, and the price. Which factors are more important than others will be announced, but the factors are not weighed and numerically rated in scores.

The EU rules allow its member states to award a contract based only on the direct procurement price, but the French government does not choose its contractors in such a manner in principle.

7) For contracts not exceeding 230,000 euros, an appropriate system can be adopted depending upon the purpose. Until January 2004, however, tendering systems were designated by construction price.

8) Negotiations shall not be made only for the purpose of lowering the bid prices.

iii) Negotiability

In the process of choosing a successful bidder, the government can demand that bidders clarify or modify the elements of documents submitted by them, but cannot negotiate with them on the details.

In some exceptional cases, however, the government may award a contract under the negotiated procedure, but these cases are limited when the bidding process was unsuccessful, when a new contract is added to an existing one, when the contract needs to be urgently or confidentially awarded, or when the technical or artistic requirements inevitably specify the qualified companies. In the competitive dialogue procedure newly approved in January 2004, the government can negotiate with bidders after a solicitation for bids is announced.

(5) Germany

In Germany, the federal and local governments comply with different rules on public contracts depending upon the details of the goods, services, or public works to be procured. For construction and public engineering works, the regulation created by the committee on placing order and contracting of construction works (DVA) established jointly by the government and the private sector are applied. The regulation is called *Verdingungsordnung für Bauleistungen* (VOB) in German.

i) Tendering systems

For contracts at or above the threshold set out by the EU, the open, non-open, or negotiated procedure is applied, while for contracts below the threshold, the general competitive bidding, restricted competitive bidding, or free-hand procurement system is applied. The open procedure for contracts at or above the threshold corresponds to the general competitive bidding system to be implemented for contracts below the threshold, and these two are equivalent to the open and competitive bidding system adopted in Japan. Similarly, the non-open procedure for contracts at or above the threshold corresponds to the restricted competitive bidding system for contracts below the threshold, and these two are equivalent to the public invitation designated competitive bidding system implemented in Japan. The negotiated procedure for contracts at or above the threshold corresponds to the free-hand procurement system for contracts below the threshold, and these two are similar to the discretionary contract system in Japan. In Germany, however, the government is not allowed to negotiate with only one bidder and has to negotiate with multiple bidders.

Based on data for fiscal 2002 regarding the management of tendering systems through VOB provided by the Federal Ministry of Transport, Building and Housing, the Federal Ministry of Defense and the Federal Agency for Labor, the general competitive bidding system is dominant for contracts below the threshold in terms of monetary value but the restricted competitive bidding system is slightly dominant in terms of the number of cases, while the open procedure is overwhelmingly dominant for contracts at or above the threshold in terms of both monetary value and the number of cases.

As provided for in Article 4 of VOB/A, the German government should divide each public work project into technical areas in order to place separate orders to the companies specializing in each of these areas. For large public works, the government must also split the project into multiple work divisions and place orders for each of these divisions. As the background for this, the Germans seem to expect that these ordering methods will encourage many small and medium sized companies specializing in specific technical areas to participate in bidding, thereby promoting competition⁹⁾.

ii) Criteria for awarding a contract

Article 25 of VOB/A requires that the most economically advantageous tender in terms of various factors including design and function be awarded a contract. For the evaluation factors and their

⁹⁾ Based on experience in Japan, there are worries that separate orders will raise the total construction cost. German governmental agencies that were interviewed, however, didn't worry about this.

weights, the orderer has to announce them in advance. Basically, the orderer evaluates bids by itself, and it rarely employs external experts for evaluation. According to the results of an interview survey targeting orderers, their experience shows that the most economically advantageous tender is often the one that proposes the lowest bid price¹⁰⁾.

iii) Negotiability

For the open procedure (for contracts at or above the threshold) and the general competitive bidding system (for contracts below the threshold) as well as for the non-open procedure (for contracts at or above the threshold) and the restricted competitive bidding system (for contracts below the threshold), the government can only negotiate with (or make an inquiry in a more strict meaning to) bidders for the purpose of confirming the reasonability of the price and the work. These negotiations, however, are deemed exceptional. The government is not allowed to negotiate with (or make an inquiry to) bidders for purposes other than the above. They cannot negotiate with bidders to make them change the details of their bids, except for erroneous estimates and other clear mistakes.

For the negotiated procedure and the free-hand procurement system, the government can negotiate with bidders on all the aspects, including the price and the work. The government may make bidders change the details of their bids. In particular, when there are too many subcontractors, the government may negotiate with the bidder to reduce the number of their subcontractors. (In Germany, the orderer tends to frown on the use of subcontractors, perhaps because the orderer cannot directly communicate what they want to subcontractors¹¹⁾.) Even for the negotiated procedure and the free-hand procurement system, however, the government is prohibited from negotiating with only one bidder. In principle, it has to negotiate with all the bidders to give them equal opportunities¹²⁾. Also, the negotiation details shall be disclosed to the public.

(6) Sweden

In Sweden, the public procurement act called the LOU¹³⁾ regulates public procurement. All the organizations that use public funds to procure goods, services and public works have to comply with this law, including public corporations, foundations and associations in addition to the national and local administrative organs.

As in other EU member states, the LOU complies with the EU directive for procurement at or above the threshold. For procurement below the threshold, the LOU has set out its own rules, to which the EU directive is not applied.

i) Tendering systems

In principle, the open procedure and restricted procedure are used for the procurement of public works at or above the threshold, and the simplified procedure and selective procedure are adopted for those below the threshold. When procurement should be carried out urgently or some special techniques are required, however, the government may use the negotiated procedure (for contracts at or above the threshold) and the direct procurement system (for contracts below the threshold).

10) Regarding this issue, builders submitted a petition to the Federal Parliament, insisting that the orderer almost always award a contract to a bidder who proposed the lowest bid price and not to a bidder who submitted the most economically advantageous tender as provided for in VOB. The Federal Court of Audit conducted a survey in response. As a result, the Court concluded that it cannot be said that any of the bids not awarded a contract is more economically advantageous than that awarded a contract. At the same time, it recommended that the orderer managed the VOB more strictly, insisting that compliance with the VOB and the VOB handbook will ensure that the most economically advantageous tender will be awarded a contract.

11) When a bidder uses a subcontractor, it has to consult with the orderer about the qualification of the subcontractor. The orderer can negotiate with a bidder to replace a subcontractor with another company.

12) According to an interview with the Federal Office for Building and Regional Planning (BBR), Article 55 of the federal finance law (BHO) provides for competition by multiple companies as a rule. When there is an urgent need, however, the government may negotiate with a single company.

13) For the outline of the LOU, refer to a brief description of LOU provided by the NOU on the following website: <http://www.nou.se/pdf/english.pdf>

There are no national data available for the tendering systems for public works, but according to the National Property Board (SFV), the open or restricted procedure is often used for contracts at or above the threshold and the selective procedure is often used for contracts below the threshold.

ii) Criteria for awarding a contract

Article 22 of the LOU stipulates that a bidder who proposed the lowest bid price or submitted the most economically advantageous tender be awarded a contract. The evaluation factors and their weights must be announced in advance. The orderer evaluates bids by itself and it rarely employs external experts for evaluation.

iii) Negotiability

In Sweden, except for the negotiated procedure (for contracts at or above the threshold) and the direct procurement system (for contracts below the threshold), the government negotiates with bidders only to clarify their questions concerning bids and not to make bidders change the quantities or prices proposed in the bids. For the simplified and selective procedures, the government can negotiate with bidders to standardize specifications among bidders, but must not negotiate with only one bidder. Also, the negotiation details must be disclosed to the public.

(7) Japan

i) Tendering systems

In Japan, the open and competitive bidding system is conducted for large public works that are covered by the WTO Agreement on Government Procurement, and the designated competitive bidding system is widely conducted for other public works. The Public Accounting Law stipulates that the national government adopt either of the open and competitive bidding system, the designated competitive bidding system, or the discretionary contract system for public works and does not allow it to choose a tendering system according to the characteristics of items to be procured. The designated competitive bidding system includes a public invitation typed one adopted in the EU and other countries, but this procedure is used for relatively large public works. For smaller works, the designated competitive bidding system, which gives large discretion to the orderer, is often used, especially by local governments. Discretionary contracts are concluded with specific companies when the work in question requires special techniques or when the work should be urgently conducted and there is no time to solicit bids.

ii) Criteria for awarding a contract

The bid that proposes the lowest bid price, from among bids that do not exceed the price predetermined by the orderer, is awarded a contract. In fiscal 1999, however, competitive bidding in which not only the bid price but also technical advantages and quality are evaluated (called “technical proposal integrated evaluation system”) was also approved based on comprehensive agreement with the Minister of Finance.

iii) Negotiability

The Public Accounting Law does not permit any negotiations in placing orders for public works, and the national government does not negotiate with bidders. However, incorporated administrative agencies such as the Japan Water Agency and the Urban Renaissance Agency have experimentally conducted negotiations with bidders, and Central Japan International Airport Co., Ltd. has actually used this negotiated tendering method. Also, for local municipalities, Soka City and Kyoto Prefecture have used the method. In these cases, negotiations were conducted on various issues, including technical aspects at the time of bidding and bid prices after bidding.

Chart 3. Tendering and Contracting Systems for Public Works Implemented in Japan, the United States, and Europe

	Japan	United States	EU	United Kingdom	France	Germany	Sweden
1. Basic law and regulation	Public Accounting Law	Federal Acquisition Regulation (FAR)	EU directive (2004/18/EC) (Targeting each public work with a total construction cost amounting to 6,242,000 euros or more)	Public Works Contract Regulations (PWCR)	Code of public contracts (CMP)	Procurement regulations for public works (VOB)	Public procurement act (LOU)
2. Characteristics and problems of the traditionally implemented tendering and contracting systems	Lack of competition due to designated competitive bidding and collusive bidding	After a contract is awarded to a bidder who proposed the lowest bid price, changes are often made to the contractual terms, which eventually raises the construction cost.		After a contract is awarded to a bidder who proposed the lowest bid price, the contractual terms are often changed at the construction period, which eventually raises the construction cost ('claim culture').	There have been no serious problems. Efforts are being made to promote the use of technical capabilities owned by the private sector by discontinuing price-based bidding.	There have been no serious problems. Because the state government is quite independent from the federal government, their staff members are not always familiar with the EU directive. The VOB should be more strictly complied with.	Local governments have strong authority, and it is necessary to make them comply with the LOU in a unified manner.
3. Current tendering and contracting systems							
Basic system	① Open and competitive bidding ② Designated competitive bidding ③ Discretionary contract	① Simplified acquisition procedures ② Sealed bidding ③ Competitive negotiated proposals	① Open procedure ② Restricted procedure ③ Negotiated procedure ④ Competitive dialogue procedure	(1) For contracts at or above the threshold ① Open procedure ② Restricted procedure ③ Negotiated procedure (2) For contracts below the threshold ① Open procedure ② Restricted procedure ③ Negotiated procedure	The following procedures are used for contracts amounting to 230,000 to 5.9 million euros ① Bidding procedure (exceptional) ② Negotiated procedure ③ Competitive dialogue procedure Procedures can be chosen freely for contracts amounting to less than 230,000 euros	(1) For contracts at or above the threshold ① Open procedure ② Non-open procedure ③ Negotiated procedure (2) For contracts below the threshold ① General competitive bidding ② Restricted competitive bidding ③ Free-hand procurement	(1) For contracts at or above the threshold ① Open procedure ② Restricted procedure ③ Negotiated procedure (2) For contracts below the threshold ① Simplified procedure ② Selective procedure ③ Direct procurement
	(Remarks)	The basic rule is "full and open competition" regardless of the tendering systems. Traditionally, system ② was more often utilized, but in recent years system ③ is mainly applied. For ②, a two-stage selection method is often adopted; at the first stage, technical proposals submitted by applicants are evaluated and only those meeting the predefined requirements can proceed to the second stage of sealed bidding. Tendering and contracting systems are used in various combinations.	Basically, systems ① and ② are used, and the use of ③ is exceptional. (This system is used only when it is difficult to estimate the costs in advance; the bidding process was unsuccessful, there is an urgent need, or when qualified companies are specified due to technical or artistic requirements.) System ④ was newly established.	The following contracting systems have been recently recommended (in principle). The relations between the orderer and the contractors are shifting from hostile ones to cooperative ones. ① PFI (or PPP) ② Design-build system ③ Private contracting ④ Framework agreement	Exceptionally negotiable for ①, however only when it is difficult to estimate the costs in advance; the bidding process was unsuccessful, there is an urgent need, or when qualified companies are specified due to technical or artistic requirements.)	The systems described in ① and ② are basically adopted and the system described in ③ is exceptional. (This system is adopted only when it is difficult to estimate the costs in advance; the bidding process was unsuccessful, there is an urgent need, or when qualified companies are specified due to technical or artistic requirements.)	The systems described in ① and ② are basically adopted and the system described in ③ is exceptional. (This system is adopted only when it is difficult to estimate the costs in advance; the bidding process was unsuccessful, there is an urgent need, or when qualified companies are specified due to technical or artistic requirements.)
Negotiability	Not negotiable	Negotiable for ③	Negotiable for ③ and ④	Negotiable (even after bids are submitted)	For ①, inquiries can be made regarding the reasonability of the price and the work. Except for clearly erroneous estimates, the details of bids cannot be changed.	For ① and ②, inquiries can be made only for the reasonability of the price and the work. Except for clearly erroneous estimates, the details of bids cannot be changed.	For ① and ②, negotiations can be conducted for standardizing the specifications among bidders.
	Some incorporated administrative agencies and local governments experimentally conducted negotiations.	The "bake-off" process and incentive contracts are often utilized.			Any negotiations can be conducted for procedures ② and ③. • Companies to which a concession is granted are selected through the negotiated procedure.	For ③, the details of bids can be changed through negotiation. Negotiation with only one bidder is not permitted.	For ③, the details of bids can be changed through negotiation. Negotiation with only one bidder is not permitted.

Similarity with Japanese systems	① Simplified acquisition procedures ≙ Discretionary contract system ② Sealed bidding ≙ Open and competitive bidding	① Open procedure ≙ Open and competitive bidding ② Restricted procedure ≙ Public invitation-designated competitive bidding	① Open procedure ≙ Open and competitive bidding ② Restricted procedure ≙ Public invitation-designated competitive bidding	Bidding procedure ≙ Open and competitive bidding or public invitation-designated competitive bidding	① Open procedure ≙ Open and competitive bidding ② Restricted procedure ≙ Public invitation-designated competitive bidding	① General competitive bidding ≙ Open and competitive bidding ② Restricted competitive bidding ≙ Public invitation-designated competitive bidding	① Open procedure ≙ Open and competitive bidding ② Restricted procedure ≙ Public invitation-designated competitive bidding	① Simplified procedure ≙ Open and competitive bidding ② Selective procedure ≙ Public invitation-designated competitive bidding
Criteria for awarding a contract	Lowest bid price for ② Best value for ③	① Lowest bid price ② Most economically advantageous tender The basic rule is "to maximize VFM."	① Lowest bid price ② Most economically advantageous tender	Most economically advantageous tender	① Lowest bid price ② Most economically advantageous tender	① Most economically advantageous tender ② Most economically advantageous tender	① Lowest bid price ② Most economically advantageous tender	① Lowest bid price ② Most economically advantageous tender
(Remarks)	② The best value analysis explains why a bidder was awarded a contract in a narrative manner. The evaluation factors and their weights should be announced in advance. The division method is often used for evaluation.	② Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.	② Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.	Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.	② Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.	② Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.	② Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.	② Most economically advantageous tender ≙ Comprehensive evaluation The evaluation factors and their weights should be announced in advance.
4. Other characteristics								
Incentive contract	Various incentive contracts are used in combination with tendering systems.	Incorporated as one of the procedures in contracting systems	As systems similar to VE, there are: ① Performance system ② Variation system	Not provided for in particular (If relevant announcement is made in advance, alternative proposals may be submitted.)	Not provided for in particular (If relevant announcement is made in advance, alternative proposals may be submitted.)	Not provided for in particular (If relevant announcement is made in advance, alternative proposals may be submitted.)	Not provided for in particular (If relevant announcement is made in advance, alternative proposals may be submitted.)	Not provided for in particular (If relevant announcement is made in advance, alternative proposals may be submitted.)
(Remarks)	VE may be conducted at the tender phase or in the post-contract phase.	There are no special provisions on incentive contracts.	There is no system equivalent to VE in the post-contract phase for the reason that such VE is not fair.	There is no system equivalent to VE in the post-contract phase for the reason that such VE is not fair.	There is no system equivalent to VE in the post-contract phase for the reason that such VE is not fair.	There is no system equivalent to VE in the post-contract phase for the reason that such VE is not fair.	There is no system equivalent to VE in the post-contract phase for the reason that such VE is not fair.	There is no system equivalent to VE in the post-contract phase for the reason that such VE is not fair.
PPP	Started PFI in 1999	Not generally used (Mainly, contracting-out is adopted)	• PFI • Prime contracting • Design-build system	Concession system Afterimage system	Concession system Afterimage system	Concession system Afterimage system	Concession system Afterimage system	Implemented only once (for the A-train to the airport)
Design and construction	Orders are separately placed in principle. The design-build system is used by some agencies.	Differs by contract. ① Design-bid-build system ② Design-build system The system described in ② is more often used for competitive negotiated proposals.	Traditionally, the design-build system was utilized. Recently, however, the design-build system has also been recommended.	Orders are separately placed in principle. Orders are separately placed for each work division in principle.	Orders are separately placed in principle. Orders are separately placed for each work division in principle.	Orders are separately placed in principle. Orders are separately placed for each work division in principle.	Orders are separately placed in principle. Orders are separately placed for each work division in principle.	Orders are separately placed in principle.
CM system	Experimentally used for public works directly supervised by the national government. Adopted by some local governments.	Has long been utilized. The CM system is divided into the following two: pure-CM and CM at risk.	Not used much	Does not exist	Does not exist	Does not exist	Does not exist	Coordinated general construction contracts (similar to pure-CM)
5. Others	Various tendering and contracting systems have been introduced in recent years.	In April 2004, a revised directive was placed in force which covers public supply, public service, and public works in an integrated manner.		If relevant announcement is made in advance, the following can be submitted: • Additional bids (voluntary proposals by companies) • Alternatives (proposals made according to the designation by the orderer)	If relevant announcement is made in advance, the following can be submitted: • Additional bids (voluntary proposals by companies) • Alternatives (proposals made according to the designation by the orderer)	If relevant announcement is made in advance, the following can be submitted: • Alternatives (proposals made according to the designation by the orderer)	If relevant announcement is made in advance, the following can be submitted: • Alternatives (proposals made according to the designation by the orderer)	If relevant announcement is made in advance, the following can be submitted: • Alternatives (proposals made according to the designation by the orderer)

4. Introduction of Various Tendering and Contracting Systems in the Targeted Countries

In this section, the characteristic tendering and contracting systems of the targeted countries will be introduced and the focus of reforms on these systems will be described.

(1) United States

i) Design-build system

In the United States, the design-bid-build system has been traditionally used. When the orderer wants to save labor and when the work in question requires special technical capabilities that the orderer does not have, however, the design-build system may be utilized. This system is advantageous in that the time of completion will be shortened, a single company will assume the entire responsibility for the work, and that changes made to the contractual terms due to complaints from the contractor will be minimized.

The design-build system, however, also has defects. The designer and the construction company work together as a team, which may hinder the check-and-balance function in comparison to the traditional design-bid-build system in which the designer supervises the construction work, and the orderer cannot strongly control the work. It is therefore necessary for the orderer to set out the performance requirements that contractors have to meet.

Depending upon states and municipalities, the use of the design-build system is restricted.

ii) Incentive contracts

In the United States, various incentives (e.g. incentive fees and award fees) are given to contractors to encourage them to meet the due date and budget. Public procurement contracts are basically divided into fixed price contracts and cost reimbursement contracts, and incentive contracts are positioned in the middle of these two contract types. Under incentive contracts, contractors can gain more profits if they put forth more effort, and it can be said that the orderer and the contractor share risks under an incentive contract.

If incentive fees are given to a contractor at the beginning of work, the contractor may devote itself to cost saving, which may in turn lead to lower quality. The orderer therefore usually gives award fees first, to improve the quality of work, and then gives incentive fees if the work proceeds successfully.

Contracts on building construction works include a provision on VE, regardless of what is constructed and how, and this provision permits the submission of VE proposals. According to the GAO, however, there have been few outstanding proposals submitted.

iii) Construction management (CM) system

The construction management system is often implemented to ensure the fulfillment of work, regardless of the tendering and contracting systems. The CM system is said to be suitable for public projects involving many prime contractors or for cases when competitive bidding procedures are required. The CM system is roughly divided into pure-CM¹⁴⁾ and CM at risk¹⁵⁾.

(2) United Kingdom

i) PFI

In the United Kingdom, PFI is promoted as a means to achieve high VFM by providing public services through the utilization of private funds. The public sector traditionally assumed almost

14) The orderer concludes a contract with a CM company and then concludes contracts with specialty contractors according to advice given by the CM company.

15) The orderer concludes a contract with a CM company as well as with a designer, but not with specialty contractors: the CM company concludes a contract with specialty contractors. For the selection of specialty contractors and the contract prices, the CM company discloses them to the orderer for approval, thereby ensuring cost transparency.

all the risks associated with the implementation and management of public projects, but in PFI it is possible for the public sector to transfer substantial risks to the private sector. For example, the period in which facilities cannot be utilized due to repair works may be excluded from the payment target, or payment amount may be reduced if a cleaning service is insufficient and does not meet the management requirements. In return for these advantages, the public sector naturally has to pay sufficient payment to companies participating in PFI. In PFI, it is important to establish the partnership by transferring risks to those who can manage them most properly, distributing risks between the public and private sectors, and making payments worth the amount of risks shared.

ii) Prime contracting

Prime contracting is a contracting system in which a single prime contractor assumes the entire responsibility for a construction project, including design, construction, delivery, maintenance and management. This system is different from PFI in that the public sector purchases services and pays for the services in PFI, while the public sector purchases facilities and pays for the facilities in prime contracting. In prime contracting, however, if the public sector concludes a contract on the purchase of facilities including associated maintenance and management services, there might be actually little difference between prime contracting and PFI. There is, however, one definitive difference between them. In prime contracting, the purchase of facilities is made by public funds, while in PFI private funds is utilized. (Accordingly, the prime contracting system is often used by the Defence Procurement Agency, which is required to own facilities.)

In prime contracting, the contract price is not fixed. It is a targeted price and the balance between this price and the cost actually incurred is shared by the orderer and the contractor. This is intended to encourage private companies to save costs and introduce new techniques. Also, to ensure cost transparency, an open-book accounting system is adopted in which the contractor discloses the project-related accounting to the orderer (and the National Audit Office: NAO) for examination. In addition, the contractor's performance shall be continuously measured and the results shall be fed back to the contractor for improvement of the project.

Prime contracting has contributed to substantial cost reduction, perhaps because there were traditionally no exclusive and continuous relations between prime contractors and subcontractors in the United Kingdom.

iii) Design-build system

In PFI and prime contracting, blanket orders are placed for design and construction. Also, when neither of PFI or prime contracting is used, the design-build system is being promoted for higher VFM, although orders were traditionally placed separately for design and construction in the country. The design-build system is often used for relatively small projects, because the system is inferior to PFI and prime contracting in terms of project integrity.

Through this system, the government aims to eliminate the "claim culture," in which contractors make complaints about design defects at the construction stage in attempts to raise the contract price.

iv) Framework agreement

Framework agreement, unlike the three different PPP systems described above, is concluded not for a single project, but for multiple projects to be implemented within a certain period with a single company selected by bidding. In traditional public procurement, individual contracts were concluded respectively. This agreement was originally introduced for the procurement of goods and services, but has also been adopted by the Highways Agency for repair works.

Framework agreement is covered by the EU directive revised in 2004.

(3) France

i) Concession system

In France, the concession system similar to PFI has been adopted since the end of the 18th century. The concession system is used in the two different cases of construction and management of public facilities, and only management of public facilities (without construction)¹⁶⁾. The concession system is similar to PFI in that public organizations, as the orderer, grant the concession to provide public services to corporations (private or public companies), and the right-bestowed corporations (construct and) manage the public facilities. It differs from PFI, however, in that the corporations provide public services directly to users and charge them fees for the services. The concession system is used only for projects in which profitability can be ensured by collection of fees from users, and public funds will not be input for these projects. The corporations to be granted concessions are chosen not by bidding procedure, but by negotiated procedure.

ii) Performance / variation system

As systems similar to VE at the tendering phase, ① the performance-based bidding system and ② the variation system are implemented in France. The former is adopted when the orderer places an order for a project in a new technical field which the orderer does not fully understand. The orderer shows their needs and desirable performance not as specifications, but in a more general form, and requires bidders to make proposals that meet the orderer's needs.

The variation system enables bidders to make technical proposals that do not necessarily meet the specifications, and this system is also approved by the EU directive. Unlike VE, however, any profits gained from cost savings will be attributable to the orderer alone and no extra money will be distributed to the contractor. This system is thus based on the idea that to be selected as a contractor itself provides an incentive.

In regard to a system that is equivalent to VE in the post-contract phase, such system is not approved in France for the reason that it might hinder the fair treatment of candidates to be awarded a contract.

(4) Germany

i) Additional bids and alternatives

In Germany, pursuant to Article 10.5 of VOB/A, bidders can submit additional bids or alternatives when they submit their bids. An additional bid differs from an alternative in that the former is a voluntary proposal submitted by a bidder while the latter should meet the requirements designated by the orderer in the written description of work . The orderer has to announce in advance whether it will accept additional bids or alternatives.

ii) PPP

There are various PPP systems used in Germany, depending upon the size of private fund raised and the fund recovery method. For road construction, for example, there are four PPP models: the concession model, model A, model F, and the truck toll collection model.

In the concession model, the private sector raises funds for the planning, construction, and management, and the sector recovers the amount equivalent to the construction cost, fund-raising cost, and margins from the government over the 15 years following the first year after construction. In model A, the private sector takes charge of design, construction, maintenance and management

16) Cases in which only management is contracted, without construction, are called "affermage." These may be included in the concession system in a wide sense. France is not ahead of other EU member states in the introduction of ordering systems to utilize private sector's technical capabilities or in privatization. The country, however, has long been implementing the concession or affermage system to have the private sector maintain and manage public facilities by clarifying how benefits and costs are shared, which has implications for Japan, where the maintenance of social capital will be an critical challenge.

and fund-raising for increasing the number of Autobahn lanes from four to six and receives toll fees collected from trucks for the relevant section of lanes from the government during a 20-to-30-year maintenance period. In model F, the private sector collects toll fees directly from trucks and private cars for the newly established tunnels, bridges, and bypasses. Model F is similar to model A, but differs from it in that the private sector collects fees directly from travelers. In the truck toll collection model, the private sector establishes and manages a toll collection system for 12 years.

(5) Sweden

In Sweden, the design-build system is seldom adopted¹⁷⁾, and there is only one example of PPP implementation: the railroad (A-train) connecting Stockholm to Arlanda Airport was constructed through PPP. There are therefore few examples in which new tendering and contracting systems were implemented.

Some governmental agencies, however, adopt a project management system called “coordinated general construction contracts,” which is similar to the CM system popular in the United States. For blanket orders, the orderer concludes a contract with a general construction company, and then the company concludes contracts with subcontractors for the construction work. Under coordinated general construction contracts, the orderer concludes a contract with a construction company and also selects electrical engineers or mechanics and concludes contracts with them, and then transfers the contracts concluded with these subcontractors to the construction company. The orderer, the general construction company and the subcontractors are required to build consensus among themselves¹⁸⁾. There are few large general construction companies in Sweden, and the coordinated general construction contracts are preferred to blanket orders.

(6) Japan

In Japan, in reference to systems implemented in the United States and in Europe (in the United Kingdom, in particular), the following new tendering and contracting systems are being experimentally implemented.

i) Design-build system

For public works conducted in Japan, orders are placed separately for design and construction in principle. There are, however, cases in which the design-build system is adopted in order to make better use of technical capabilities owned by construction companies at the design stage. The system is often used together with the technical proposal integrated evaluation system, which provides criteria for awarding a contract.

ii) VE system

In order to improve quality and save costs for public works, bidders may be asked to make proposals at the time of bidding or after being awarded a contract. For VE in the post-contract phase, an amount equivalent to half of the cost saved will be distributed to the contractor. This system is often used by the national government, but some local governments are also experimentally implementing it.

iii) Technical proposal integrated evaluation system

Under this system, a contract is awarded based on the bid price as well as on the evaluation

17) For an outer loop line road in Stockholm, a new blanket order system was planned to be applied instead of applying a traditional system to place separate orders for the design, construction, management, and maintenance of the road. It was, however, subsequently revealed that the cost of fundraising by the private sector would be expensive due to relatively high interest rates, and the Parliament later decided to use a government subsidy for the construction of the road.

18) It can be said to be similar to the pure-CM.

of technical advantages of the proposal. Specifically, prices, quality, time of completion, design, construction safety and others are comprehensively evaluated. The Ministry of Construction (present Ministry of Land, Infrastructure and Transport) was the first to implement this system and, in 1998, the Ministry used it for a project under its direct supervision. In evaluating bids, evaluation scores are often divided by the bid price.

iv) PFI

The Law Relating to the Promotion of the Realization of Public Facilities by Using Private Funds (the PFI Law) was enacted in 1999. The PFI market size has been favorably expanding since then, as demonstrated by the fact that the number of business plans formulated and announced for PFI reached 179 at the end of December 2004.

5. Conclusion – Direction of Reforms on Tendering and Contracting Systems for Public Works –

Based on comparison of the tendering and contracting systems for public works between the United States, Europe and Japan and of the reforms on these systems implemented in the relevant countries, there is one common denominator between the countries. All of them are promoting the use of technical proposals made by the private sector. The direction of reforms on public procurement, however, seems to differ by country because the background for the establishment of the tendering and contracting systems differs by country.

The pursuit of accountability does not always conflict with the pursuit of VFM. When the orderer attributes importance to the utilization of private sector's technical capabilities and involves the private sector in the ordering process from an initial stage or incorporates non-price factors into evaluation criteria through negotiated procedure, the design-build system or PPP, however, it will become difficult to completely eliminate the orderer's arbitrariness, which in turn will make it difficult to ensure accountability. On the other hand, if too much importance is attributed to accountability for competitiveness, transparency and fairness, there will be little room to evaluate non-price factors or to adopt the private sector's excellent techniques, which will in turn make it difficult to pursue VFM throughout the lifecycle of a project. An ideal public procurement system, therefore, would be a system under which accountability and VFM are pursued in a well-balanced manner based on cooperation between the public and private sectors.

In this section, in terms of relatively technical capabilities between governments and private sectors and the pursuit of the accountability and VFM, present situations of tendering and contracting systems for public works implemented in the targeted countries and directions of their reforms will be typified and summarized.

(1) United States and United Kingdom

In the United States and the United Kingdom, the government is inferior as an orderer to the private sector in terms of technical capabilities and has no choice but to utilize private sector's technical capabilities. Consequently, the government involves the private sector in the ordering process from the initial stage under negotiated procedure or the design-build system. The evaluation criteria are no longer simply price-based, but to ensure accountability, the government is required to detail the reasons why it awarded a contract to a certain bidder in the United States, and the open-book accounting system is adopted in the United Kingdom. In these countries, public procurement reforms are being promoted to improve VFM without compromising accountability. In the United Kingdom, the government and the private sector generally had hostile relations and the PPP system is being promoted to move them to cooperative relations. In the United States, although competitive negotiated proposals have been increasingly utilized, the principle of "full and open competition" is strongly

maintained, and competition is accelerated through a “bake-off” process in negotiations between the government and companies.

(2) Germany, France and Sweden

In France and Germany, the government has relatively excellent technical capabilities as an orderer and has a strong power. In regard to tendering and contracting systems for public works, no serious problems have been observed in these countries as long as competitiveness, transparency and fairness are ensured in the bidding process. France adopted the competitive dialogue procedure earlier than other EU member states. It seems intended to utilize private sector’s technical capabilities, but also to allow the government the flexibility to choose a tendering and contracting system from more diversified options. In Germany, the PPP system has been introduced, not primarily to utilize private sector’s technical capabilities, but rather to use private funds, reflecting the financial situation of the government. In public procurement, both the federal and local governments are required to strictly comply with the regulations on public contracts. In both France and Germany, a bidder submitting the most economically advantageous tender shall be awarded a contract, which demonstrates that both the countries are pursuing VFM. In these countries, however, most builders are small and medium sized companies and the government is promoting reforms while maintaining a certain level of influential power.

In Sweden, where local governments have relatively strong authority, it is required to establish a public procurement system on the national level. The country is similar to Germany in terms of the direction of public procurement reforms. Both countries are aiming to manage the system more strictly. In Sweden, however, promoting the use of information disclosure and ombudsman systems which are traditionally adopted in Northern Europe seems more effective than adopting innovative procurement systems.

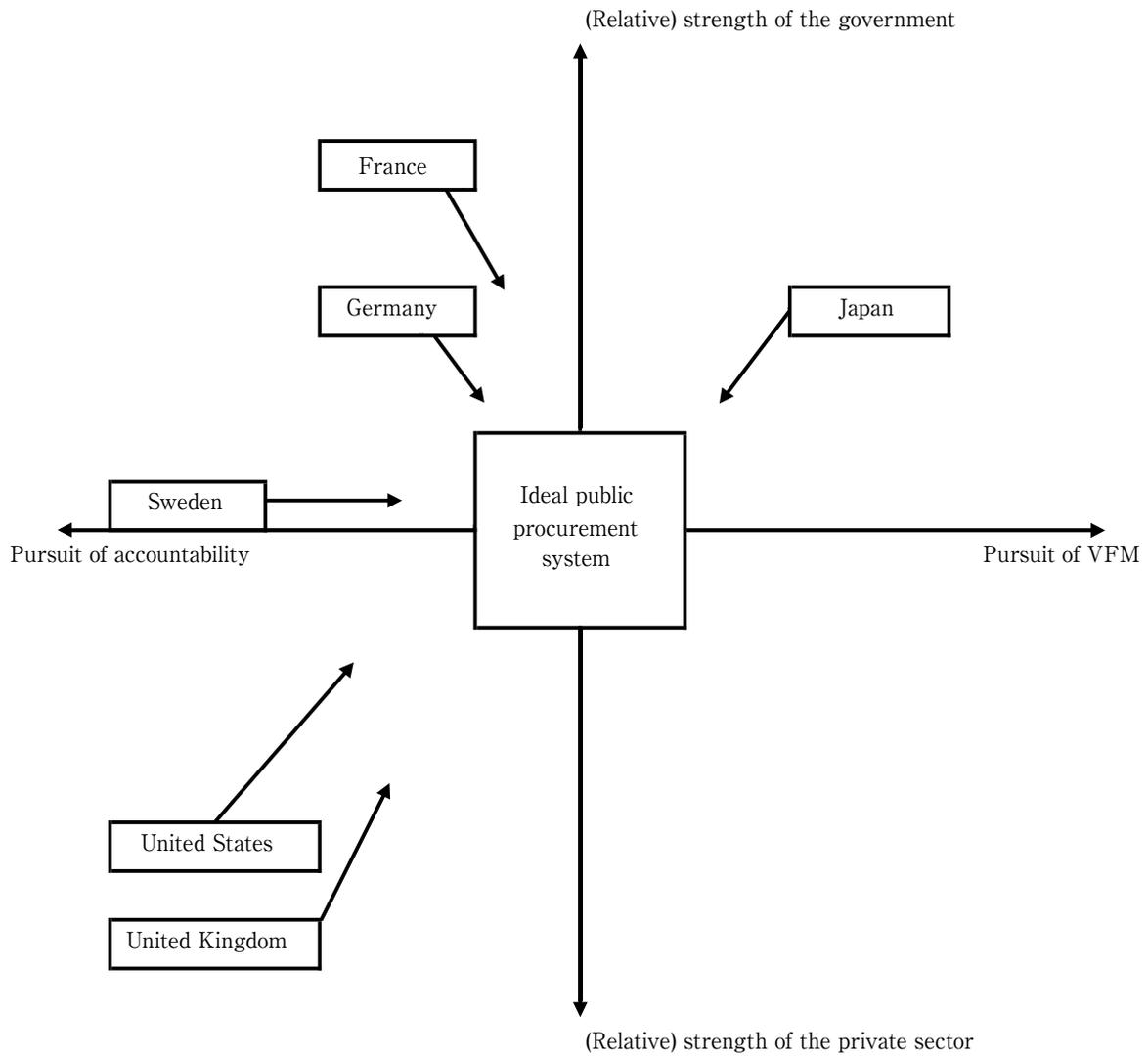
(3) Japan

Finally, what should Japan do in the reform of tendering and contracting systems for public works in the future?

The Japanese government tended to adopt systems implemented in foreign countries, in particular in the United States and the United Kingdom, regarding tendering and contracting for public works. The government, however, traditionally had highly technical capabilities as an orderer, although the level of their capabilities has been recently relatively declining compared with those owned by the private sector. Based on its still high technical capabilities, the government has maintained cooperative relations with contactors. Contractors often respond flexibly to the needs of the orderer, expecting to receive more orders in the future. There is no “claim culture,” and contract prices are seldom markedly raised due to changes made to the contractual terms after a contract is awarded. Also, the technical standards of structures constructed through public procurement are superior to those in the United States and Europe. Rather, Japan seems to be facing the problem of a lack of competitiveness, transparency and fairness in the ordering process. Based on this view, what Japan should do to reform the systems is to promote the use of tendering and contracting systems that improve competitiveness, transparency and fairness (i.e. accountability).

In order to make better use of private sector’s technical capabilities, it would be effective to use negotiated procedure, the design-build system, PPP and the technical proposal integrated evaluation system. As a prerequisite for this, however, it would be necessary to adopt tendering systems that intensify competition and to promote the open-book accounting system for higher cost transparency.

Chart 4 Direction of Reforms on Tendering and Contracting Systems for Public Works in the Targeted Countries



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