

Public–Private Partnerships in Relation to Public Contracts and Procurement: Japan’s Current Issues

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Abstract

In 1999, the Act on Promotion of Private Finance Initiative (PFI Act) was enacted, and since then, the term “PFI” has been widely used in Japan as an alternative to the term “public-private partnership (PPP)” used by organizations such as the World Bank and the Organization for Economic Co-operation and Development.

However, recent international and domestic progress and environmentally related changes in the fields of public procurement and contracts have revealed the need to respond more fully from a PPP perspective in relation to significant current issues including the Sustainable Development Goals, emergent construction works related to natural disasters, protection of cultural or historical heritage sites, and public procurement in the context of the COVID-19 pandemic.

This article presents legal and practical information regarding recent developments in Japan and discusses current and future challenges in relation to various legal schemes and practices under the theme “Public-Private Partnerships in Public Contracts and Procurement” beyond the traditional framework. Thus, this article will be useful for readers wanting to deepen their understanding of Japan’s efforts in these areas, and for those interested in international comparisons.

Key words: Public-Private Partnership, Private Finance Initiative, Public Procurement, Public Contracts, Sustainable Development Goals, Competition, Emergency

I. Introduction

A firm definition of the term “public–private partnership (PPP)” has not yet been established. However, a degree of consensus has been reached among the world’s major institutions. For example, the World Bank defines a PPP as “a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.”¹ An important factor here is that it adopts the market principle that those who bear the pre-evaluated risk obtain a return, and that it is made clear by contracts and agreements. The Organization for Economic Co-operation and Development (OECD)² has adopted a similar definition.

These definitions have clearly been developed with the concept of the private finance initiative (PFI) in mind.³ The PFI, originally introduced in 1992 in the United Kingdom by the Conservative Party, which is oriented toward small government, aimed to reduce the significant initial expenditure required to develop new projects by obtaining funding from the private sector organization that was in charge of the project, which would be repaid in the form of fees for the management of the facility over the following decades. At the same time, it was expected that the efficiency of the business as a whole would be improved by allocating the risk that exists in the case of long-term contracts to the private sector. In other words, the PFI was nothing more than a strengthened commitment to the application of market forces in relation to public businesses.⁴ The Act on Promotion of Private Finance Initiative (PFI Act)⁵ was enacted several years

1 World Bank, What are Public Private Partnerships?, *available at* <https://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships> (last visited Dec. 17, 2020).

2 “Public–Private Partnerships (PPPs) are long term agreements between the government and a private partner whereby the private partner delivers and funds public services using a capital asset, sharing the associated risks...” (OECD, Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships (May 2012), *available at* <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf> (last visited Dec. 17, 2020)).

3 “Public Private Partnerships–Technical Update 2010” published by the British government in 2010 defines a PFI as “a long term contractual arrangement for the design, building, financing and operation of services and the form of PPP most often used in the UK.”(HM Treasury, Public Private Partnerships–Technical Update 2010, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/215079/ppp_technical_update.pdf (last visited Dec. 17, 2020)).

4 On the general introduction and evaluation of PFIs/PPPs (mainly in the UK), *see*, e.g., Jane Broadbent and Richard C. Laughlin, Public Private Partnerships: An Introduction, 16 (3) Account. Audit. Account. J. 332 (2003).

5 Law No. 117 of 1999 (Japan).

later in Japan, and subsequently various international organizations and foreign countries have treated PPPs and PFIs as virtually interchangeable.⁶

However, PPPs in relation to public contracts are by no means limited to the same extent as PFIs. Every public contract is, in a sense, essentially the formation of a PPP, and how to develop it for the benefit of taxpayers is not only a PFI issue. In the UK, when a deadlocked PFI project was declared closed in 2018, Finance Minister Philip Hammond said, “In financing public infrastructure [...] I remain committed to the use of a public-private partnership where it delivers value for the taxpayer [...] and genuinely transfers risk to the private sector.”⁷ Even if Japan continues with PFIs, the ideal form of PPP is an ongoing issue that should continue to be explored. It may be necessary to expand the flexibility of PPPs beyond that of PFIs.

If there is to be widespread debate about how private companies and government agencies are involved in effectively addressing public policy issues through public procurement activities or public contracts, the scope of what constitutes a PPP should also be flexible. Therefore, in this article, the scope of the PPP is broadly regarded as “a concept that captures the methods by which the private sector participates in public procurement, including public works or public service projects, over the long term or is strongly involved in them.”

6 Symbolically, this overlapping is reflected in the name of the department in charge of the cabinet office of Japan, “Public Private Partnership/Private Finance Initiative Promotion Office.” See the website of this office, <https://www8.cao.go.jp/pfi/> (last visited Dec. 17, 2020).

However, the term “public-private partnership” has a wider application in Japan. For example, in the “White Paper on Land, Infrastructure, Transport and Tourism (Fiscal Year 2013)” a “public-private partnership” is explained as follows; See Ministry of Land, Infrastructure, Transportation and Tourism, White Paper on Land, Infrastructure, Transport and Tourism (Fiscal Year 2013), available at <https://www.mlit.go.jp/common/001063075.pdf> (last visited Dec. 17, 2020).

PPP (Public Private Partnership) is a concept that captures a wide range of private sector participation in some form of public service provision. It is the method of using the private sector’s capital and know-how to improve efficiency in developing public facilities and raise the standards of public services. Some of the primary methods are, the PFI method, the designated manager system, and comprehensive work consignment to the private sector [...].

As seen in the UK, “Public Private Partnerships—Technical Update 2010” defines PPPs as “joint working between the public and private sectors, which may be by contract or through a joint-venture, to deliver infrastructure assets and services” (HM Treasury, *supra* note 3); this is a broader definition than that of PFIs, and includes long-term partnerships.

7 HM Treasury and Chancellor Philip Hammond, Budget 2018: Philip Hammond’s Speech (Oct. 29, 2018), available at <https://www.gov.uk/government/speeches/budget-2018-philip-hammonds-speech> (last visited Dec. 17, 2020). It should be noted that the need for privately funded public projects has not been totally denied in the UK.

This article presents legal and practical information regarding recent developments in Japan and discusses current and future challenges in relation to various legal schemes and practices under the theme “Public–Private Partnerships in Public Contracts and Procurement” beyond the traditional framework. Thus, this article will be useful for readers wanting to deepen their understanding of Japan’s efforts in these areas, and for those interested in international comparisons.⁸

II. A Quick Look at Japan’s History of PPPs through the PFI Act

A. The PFI Act of 1999

Japan’s PFI Act emerged as part of the range of administrative reforms aimed at improving the efficiency of administrative organizations, reducing administrative spending, and debt reduction,⁹ and was similar to the reforms introduced by the UK’s Conservative administration, which aimed to become a “small government.”¹⁰ It commenced with the Cabinet decision during the Ryutaro

8 This article neither addresses the theoretical and interpretive issues of the PFI Act of 1999 itself, nor does it address its case studies. This paper aims to understand the current and prospective problems of public procurement that Japan and the world have had or will have, from the expanded perspective of PPPs. Here, the PFI Act is given brief treatment. Therefore, this paper only provides a very rough sketch of the description of the PFI Act. It will not satisfy readers who are interested in the PFI method itself, including practical issues concerning ownership, transfer of assets to the authorities, detailed policy guidelines, or individual cases. Such readers should refer to various materials posted on the Cabinet Office website (*supra* note 6), or treatises and commentary written by lawyers in this field for detailed introductions and discussions. For example, *see* Kiyomi Kikuchi, Japan, in André Luiz Freire, Raul Dias dos Santos Neto and Thiago Luís Sombra (eds.), *The Public-Private Partnership Law Review (Edition 6) (2020)*, available at <https://thelawreviews.co.uk/title/the-public-private-partnership-law-review/japan> (last visited Mar. 20, 2021). In addition, the lawyers belonging to one of Japan’s leading law firms (<https://www.mhmjapan.com/en/> (last visited Mar. 20, 2021)) introduce and analyze trends related to the PFIs (for example, Masanori Sato and Shigeki Okatani, *Recent Developments in Public-Private Partnerships in Japan, IFLR1000 Energy and Infrastructure Guide 2016–Asia-Pacific (2016)*, available at https://www.mhmjapan.com/content/files/00022762/Recent_developments_in_public-private_partnerships_in_Japan.pdf (last visited Mar. 20, 2021)). For a survey by civil engineering experts, *see, e.g.*, Masamitsu Onishi and Kiyoshi Kobayashi, *Current Status and Perspective of Private Finance in Japan*, in Graham Winch, Masamitsu Onishi and S. E. Schmidt (eds.), *Taking Stock of PPP and PFI Around the World (Association of Chartered Certified Accountants, 2011)*, at 67-74 (Chapter 8).

9 For trends in administrative and fiscal reforms before and after the enactment of the PFI Act, *see, e.g.*, Kenji Hirashima, *Regime Shift in Japan? Two Decades of Neoliberal Reforms*, 10 (3) *Swiss Polit. Sci. Rev.* 31 (2004).

10 The trend in administrative reform (called “new public management”) that was first introduced in the United Kingdom and the United States was then introduced to Japan. At that time, Japan was under Ryutaro Hashimoto’s administration, and the concept of the PFI Act was formed during this administration. For an overall commentary, *see* Hiromi Yamamoto, *New Public Management – Japan’s Practice*, in Institute for

Hashimoto administration (1996–1998) to introduce “an emergency package of economic policies to conduct reforms in preparation for the 21st century.”¹¹ Here, the Japanese version of a PFI was mentioned for the first time in the context of government policy. Following investigation and research within relevant ministries and agencies such as the Ministry of Construction (now the Ministry of Land, Infrastructure, Transport and Tourism) and the Ministry of International Trade and Industry (now the Ministry of Economy, Trade and Industry), the PFI Act was introduced in 1999.

B. Issues Regarding Public Facility Management

Under Article 5 of the National Government Asset Act,¹² the heads of each ministry and agency are said to manage the government’s administrative properties.

The same applies to public property owned by local public bodies. Article 238-2 of the Local Autonomy Act¹³ stipulates that the head of a local public body has the authority and responsibility to manage public property. Individual items of legislation such as the Road Act,¹⁴ the Urban Park Act,¹⁵ or the River Act¹⁶ provide specific provisions regarding the management of public facilities. Under these laws and regulations, the ultimate management responsibility lies with public entities such as the national and local governments. However, it is possible to delegate the management role to the private sector. Therefore, legislation was sought to allow the private sector to manage public facilities on the condition that certain procedures were followed, with the aim of ensuring that the public facilities were managed efficiently. As a result, the PFI Act was introduced.¹⁷

International Policy Studies (ed.), IIPS Policy Paper (293E) (Jan. 2003), *available at* <http://www.iips.org/en/research/data/bp293e.pdf> (last visited Dec. 17, 2020).

11 Cabinet decision adopted on Nov. 18, 1997, *available at* <https://www.mlit.go.jp/crd/city/mint/library/1997ta-1.htm> (last visited Dec. 17, 2020).

12 Law No. 73 of 1948 (Japan).

13 Law No. 67 of 1947 (Japan).

14 Law No. 180 of 1952 (Japan).

15 Law No. 79 of 1956 (Japan).

16 Law No. 167 of 1964 (Japan).

17 Article 8 (2) of the current PFI Act provides as follows (this English translation is based on that of the website managed by the Ministry of Justice, “Japanese Law Translation Database System”, <http://www.japaneselawtranslation.go.jp/> (last visited Dec. 17, 2020)):

[T]he private business selected ... may implement the provision ... of a public facility ... which has been determined to be implemented by the private business in the project contracts (if the right

The management of public facilities within local government areas, which is often discussed in combination with facility management in relation to PFIs, was also reviewed in parallel.

The extent of persons other than the relevant administrative agency that may manage “public facilities,” which are set up by local public bodies to promote the welfare of residents, was previously limited to entities including “government-sponsored judicial persons” and “public organizations.” However, it was later expanded to include “judicial persons and other organizations” by the 2003 amendment of the Local Autonomy Law (these entities are called “Designated Administrators”).¹⁸ In other words, it has become possible to entrust the management of facilities owned by local governments to private companies. It is necessary to define the scope of “the business” (e.g., maintenance of facilities/equipment, type of use) in the ordinance.¹⁹ Under the scope of the legislation, an organization appointed a designated administrator by an administrative disposition of a local government can generate income through fees charged for using the facility.²⁰

Regarding the PFI Act, there was no system at the time of its enactment corresponding to the designated manager system enabling the collection of fees related to the use of facilities. However, there are many cases where the management of a public facility is a profitable business.

to operate the public facility ... has been established pursuant to the provisions of Article 16, operation ... of the public facility ... pertaining to the right to operate the public facility ...).

Based on this provision, the administrative procedures for specific exchanges with the government to permit occupancy and approval of specific construction have been eliminated within the scope of agreements, and thus it has facilitated project execution.

18 Local Autonomy Act, art. 244-2 § 3. Under the Local Autonomy Act, it is possible to entrust the management of public facilities that are used by the residents to designated managers, including private companies. For example, city parks, libraries, museums, and welfare facilities are well known as objects of designated management. This system should be understood in parallel with the PFI Act in terms of management of public facilities. The procedure of the designated manager is somewhat complicated (Art. 244-2 et seq. of the Local Autonomy Act), such as the setting of ordinance and the approval of the local assembly in individual cases, but management authority is entrusted to the designated manager, and it has a degree of discretion in relation to the execution of its business. It is reasonable to expect a degree of improvement in management efficiency through the use of a private company as the designated manager.

19 Local Autonomy Act, art. 244-2 § 4.

20 The contract under the PFI Act and the designated manager method prescribed in the Local Autonomy Act are separate and independent systems, and one procedure cannot be automatically combined with the other procedure, although they are not prevented from being combined.

Therefore, there was growing recognition that it was necessary to introduce a method of entrusting such profitable businesses to the private sector to improve the efficiency of their administration by utilizing the vitality of the private sector in managing these facilities. In response to this recognition, the so-called “concession” (operating rights in relation to public facilities) system was incorporated into the PFI Act in a 2011 revision of the law.²¹

In addition, the introduction of the concession method in relation to the PFI Act meant that the duplication of procedures related to the granting of concessions under this Act and to designating managers under the Local Autonomy Act remained unresolved for facility management that involved toll collection. A revision of the PFI Act in 2018 simplified the designated manager procedure by eliminating the need for a vote of the local assembly in relation to matters of designation, and since then an environment conducive to efficient operation has existed.²²

C. Negative in Europe, Positive in Japan

The aim of a PFI is a long-term contract that integrates the construction of the facility with its subsequent maintenance and management. Indeed, it is possible to reduce both the initial cost and the financial burden in the short term by continuing to pay facility usage fees to the contractor for a long period of time rather than paying them separately for construction of the facility and subsequent maintenance. However, in the UK, the home of PFIs, it is time to review the PFI project that started a quarter of a century ago, because although PFIs were expected to reduce costs as a result of their commitment to market principles, they have resulted in increased costs. Negative evaluations are becoming widespread, and there are few new PFI projects in the UK today.²³

In the UK, a modified version of the PFI scheme called PF2 appeared around 2010 that did not provide the private sector with excessive profits, nor did it require the private sector to assume the level of risk that the early PFI projects did, but the results were not as good as expected. Furthermore, the tendency to

21 The granting of concession rights is legally regarded as an administrative disposition of the “setting of property rights” rather than a contract.

22 PFI Act, art. 26 § 5.

23 National Audit Office, PFI and PF2 (National Audit Office Report) (2018), available at <https://www.nao.org.uk/wp-content/uploads/2018/01/PFI-and-PF2.pdf> (last visited Dec. 17, 2020).

criticize PFIs is now spreading throughout Europe.²⁴

Meanwhile, in Japan, PFI-type PPPs have continued to thrive. Although the UK's Chancellor of the Exchequer Philip Hammond announced in 2018 that new PFI projects (already upgraded to PF2) would be suspended,²⁵ in 2018 Japan amended the Water Supply Act²⁶ to facilitate the application of the concession method used under the PFI Act to water supply systems.²⁷ In 2019, the Tokyo Metropolitan Government awarded the rights for the management of public facilities related to the 2020 Tokyo Olympic Games,²⁸ which were subsequently postponed until 2021 in response to the COVID-19 pandemic.²⁹

24 European Court of Auditors, Special Report: Public–Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits (2018), available at https://www.eca.europa.eu/Lists/ECADocuments/SR18_09/SR_PPP_EN.pdf (last visited Dec. 17, 2020) (this report gives a negative rating to the PFI).

In the UK, a PFI-developed country, negative evaluations of PFI projects are now widespread. What was most alarming was that the UK's National Audit Office pointed out inefficiencies in the sense that PFIs would be more expensive (see National Audit Office, *supra* note 23). First, PFIs were meant to reduce the government's financial burden by utilizing the efficiency of the market, but it has been pointed out by the fiscal monitoring agency that this has not happened. In fact, public contracts under PFIs have declined significantly over the past 10 years, and are not currently in use (see HM Treasury and Infrastructure and Projects Authority, Private Finance Initiative and Private Finance 2 Projects: 2018 Summary Data (May 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805117/PFI_and_PF2_FINAL_PDF1.pdf (last visited Dec. 17, 2020)).

25 See Philip Hammond's speech, *supra* note 7.

26 Law No. 177 of 1957 (Japan).

27 Tomohiro Osaki, With Water Privatization, Japan Faces Crossroads in Battling Its Aging Pipes, Japan Times [online], Dec. 17, 2018, available at <https://www.japantimes.co.jp/news/2018/12/17/reference/water-privatization-japan-crossroads-battling-aging-pipes/> (last visited Dec. 17, 2020).

28 Regarding the case of the Tokyo Metropolitan Government, see the press release of the Tokyo Metropolitan Government, available at <https://www.metro.tokyo.lg.jp/tosei/hodohappyo/press/2019/03/29/30.html> (last visited Dec. 17, 2020).

29 The Cabinet Office announced on its website: "The number of PFI projects for which the implementation policy was announced in Fiscal Year 2019 was 77, which was the highest since Fiscal Year 1999 when the PFI Law was enacted" (Cabinet Office of Japan, Summary of the implementation status of PFI projects (Sep. 23, 2020), available at https://www8.cao.go.jp/pfi/whatsnew/kiji/pdf/jigyousensuu_kr1.pdf (last visited Mar. 20, 2021)).

III. The Current Status of PPPs in Relation to Public Contracts and Procurement

A. Concessions as a Trump Card in Japan's PFI Act

The Japanese government is keen to promote the concession system as part of the PFI Act. Currently, the government has set the scale of PFI projects for the 10-year period from 2013 to 2022 at 21 trillion yen, of which concessions account for 7 trillion yen.³⁰

Large-scale projects such as airports, roads, water and sewage systems, and educational facilities are the main targets. For example, regarding the concessions related to Kansai International Airport and Osaka International Airport, the Consortium of ORIX and VINCI Airports acquired the operating rights for 45 years in 2015 at a price of about 2.2 trillion yen.³¹ The government's Action Plan for PPP/PFI Promotion of 2020 states that:

To expand new business opportunities, reduce public burdens, and promote integrated economic and financial reforms, it is necessary to utilize PPPs/PFIs for the maintenance and operation of public facilities in various fields. In particular, it is important to utilize concession projects that introduce private management principles. To that end, by significantly expanding the use of concession businesses in growth areas such as airports, it will serve as a trigger for growth through the realization of a tourism-oriented nation, and it is necessary to try to overcome the problems by utilizing the concession business in life-related fields such as water supply and sewerage.³²

However, problems in various countries such as a deterioration in water quality and soaring water prices have resulted in water supply businesses

30 See Cabinet Office of Japan, The Action Plans for Promotion of PPPs/PFIs (Fiscal Year 2020 Version) (Decision of Public Private Partnership/ Private Finance Initiative Promotion Office on Jul. 17, 2020), available at <https://www8.cao.go.jp/pfi/actionplan/pdf/actionplan2.pdf> (last visited Dec. 17, 2020).

31 Japan Times, Details of Kansai Airport Concession Sale Revealed, Japan Times [online], Jul. 26, 2014 (shared with Kyodo News), available at <https://www.japantimes.co.jp/news/2014/07/26/national/owner-of-kansai-airports-unveils-plan-for-selling-management-rights/> (last visited Dec. 17, 2020).

32 *Supra* note 30.

returning to public management, for example, in Paris,³³ and many Japanese are now worried about the future repercussions of private sector entry into the water supply business.³⁴

In December 2019, the Miyagi Prefectural Assembly passed an amendment introducing a concession method to enable it to entrust the operation of the three businesses of water supply, sewerage, and industrial water, while the prefecture owns the equipment.³⁵ Since then, the City of Osaka has also announced the introduction of a concession method in relation to the water supply business.³⁶ Conversely, Although Hamamatsu City signed a concession-type PFI contract for their sewerage business in April 2018, the introduction of a concession in relation to the water supply business was blocked by dissenting opinions, and thus in November 2018, it was announced that the implementation would be postponed.³⁷

The classic criticism of PFIs is related to the risk of relying on the market, although the flipside is the perceived efficiency of the market, which is seen as the merit of PFIs. The abovementioned action plan states that:

Depending on the nature of a business that involves toll collection, it is possible to set up a business system that includes an appropriate mix of public burden and private sector concessions. Therefore, even if it is difficult for private sector operators to make a profit, and even if only a part of the costs can be recovered, a mixed system should be considered.³⁸

33 For information on the global trend of remunicipalization following the privatization of infrastructure projects, see, e.g., Satoko Kishimoto, Olivier Petitjean and Lavinia Steinfort (eds.), *Reclaiming Public Services* (Transnational Institute, 2017).

34 Even in the latest Diet session (201st Diet Session in 2020), the opposition parties have expressed doubts about the introduction of concessions into the water supply business.

35 See Nikkei Shinbun, Miyagi Prefecture, Enactment of Ordinance for Sale of Operating Rights, Water Supply etc., Private Sector Utilization Model, Touchstone such as Quality Assurance, Nikkei Shinbun (Tohoku Keizai), Dec. 18, 2019, at 2. Regarding this project, on March 12, 2021, the review committee, which examined the applicants, selected a group consisting of METAWATER Co., Ltd., a major water treatment company, as the best proposer and reported the results to the governor (see Nikkei Shinbun, Consignment of Water Supply etc., Group Selection, Examination Committee of Miyagi Prefecture, Metawater, etc., Nikkei Shinbun (Tohoku Keizai), Mar. 13, 2021, at 2).

36 See Mainichi Shinbun, Osaka City Announces Draft Water Privatization: Introducing the Concession Method “Cost Reduction of 40 Billion Yen in 15 Years,” Mainichi Shinbun [online], Feb. 22, 2019, available at <https://mainichi.jp/articles/20190222/k00/00m/040/316000c> (last visited Dec. 17, 2020).

37 Asahi Shinbun [online], Hamamatsu City Postpones Privatization of Water Supply: “Citizens’ and People’s Understanding Does Not Advance,” Asahi Shinbun [online], Feb. 1, 2019, available at <https://digital.asahi.com/articles/DA3S13873949.html> (last visited Dec. 17, 2020).

38 *Supra* note 30.

For example, in the abovementioned sewerage concession in Hamamatsu City, the governments are supposed to bear 90% of the costs of repairs and renovations.³⁹

Japan is lagging behind Europe, but has the advantage of being able to learn from other countries' experience. The question is, has Japan showed or will Japan show a successful model of PFIs?⁴⁰ To answer this question fully, we may need to analyze each case in depth, which is beyond the scope of this article.

B. PPPs outside the Framework of the PFI Act

The terms PPP and PFI are often used interchangeably, but a PPP is not merely a substitute for a PFI. There can be various forms of public-private collaboration beyond the legal framework related to the PFI Act. In Japan, the PFI Act provides procedures governing contracts with private companies for the maintenance and operation of public facilities, and thus procedures for entrusting the provision of public services to the private sector that do not involve the management of public facilities are beyond the framework of the PFI Act. There is a wide variety of methods by which the government can engage with the private sector in anticipation of achieving market-related efficiencies. For example, the private consignment of household waste collection services, which has been actively promoted in Japan recently, is a general business consignment contract based on the normal procedures under the Local Autonomy Act. Since this business, which has previously been managed by government agencies, is now open to the private sector, these contracts fall within the scope of public-private collaboration. If the operation and maintenance of waste treatment facilities were to be entrusted to the private sector, it would be within the scope of the PFI Act because it involves the

39 Akira Yamazaki, On the Introduction of the Concession Method to Sewage Works in Hamamatsu City, Presentation sheets for the project promotion seminar jointly held by the Cabinet Office and the Ministry of Land, Infrastructure and Transportation on Feb. 16, 2019, available at <https://www.mlit.go.jp/common/001224595.pdf> (last visited Dec. 17, 2020).

40 From a neutral standpoint, it can only be said that verification by professional researchers of the PFI system is necessary. If Japan's PFIs have become an evolved version that overcomes problems internationally experienced, these lessons should be shared worldwide. However, this is not the scope of this paper. It goes without saying that Japan's PFI system is not in all respects the same as that of other countries and the range of projects called "PFIs" may not always match in each country (as a reference for conducting surveys on PFI methods around the world and making comparisons among systems in each country, see Graham Winch, Masamitsu Onishi and S. E. Schmidt (eds.), *Taking Stock of PPP and PFI around the World* (Association of Chartered Certified Accountants, 2011). What causes favorable or unfavorable results cannot be explained only by pointing out superficial differences among countries, but it is left to empirical analysis based on statistical data. There is no choice but to leave it to future research.

management of public facilities. However, it should be pointed out that many of the issues regarding the opening up of infrastructure projects to the private sector are not related to the operation of the PFI Act, but instead are related to political decisions based on the classical public contracting method.

C. PPPs and Public Procurement/Contracts from the Viewpoint of the SDGs

The Sustainable Development Goals (SDGs) that were adopted by the United Nations in 2015 “a call for action by all countries – poor, rich and middle-income – to promote prosperity while protecting the environment” and they “recognize that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, equality and job opportunities while tackling climate change and working to preserve our ocean and forests.”⁴¹ Development is certainly important, but it must be sustainable, not only from an economic perspective, but also from a social and environmental perspective, including human rights, discrimination, poverty, reduction of greenhouse gas emissions, and protection of heritage sites. In summary, the SDGs must be approached from the perspective of future generations.⁴²

To that end, the role of PPPs is important. The 17th SDG, “Revitalize the global partnership for sustainable development” calls for strong global partnerships and cooperation. The 16th target of this goal is to enhance “the global partnership for sustainable development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the sustainable development goals in all countries.”⁴³

41 See the website of the United Nations, available at <https://unric.org/en/united-nations-sustainable-development-goals/> (last visited Mar. 20, 2021).

42 It should be noted that regarding the UN’s Sustainable Development Goals, “the people-first approach to PPPs” has been widely recognized around the globe, which “is derived from the SDGs and is a new generation of infrastructure, utility and social service projects done through PPP, putting people’s interest at their core, generating both ‘value for people’ and ‘value for the planet’” (underlines omitted) (George Katapodis, Infrastructure Planning: New Era, New Partnerships and a People-First Approach in the Post COVID-19 Period, Slides for OECD Webinar held on Jun. 20, 2020 (“Strategic Planning of Infrastructure for the Recovery Phase”), available at <https://www.oecd.org/gov/public-procurement/Greece-OECD-Infra-Webinar-slides.pdf> (last visited Mar. 20, 2021).

43 See the website of the United Nations, available at <https://unric.org/en/sdg-17/> (last visited Mar. 20, 2021).

The SDGs are related to public contracts. The 12th SDG is to “[e]nsure sustainable consumption and production patterns” and sub-goal 12-7 is to “promote public procurement practices that are sustainable in accordance with national policies and priorities.”⁴⁴ In the case of Japan, the government has made a commitment to undertake “green procurement” in relation to sub-goal 12-7, but has not expressed a commitment to public procurement that takes into consideration internationally important labor issues.⁴⁵

The current global trend is not merely to seek efficiency in relation to public contracts, but to demand that both the government and private sector parties to public contracts make a positive commitment to solving social problems. To that end, the government agencies that set the rules regarding public contracts are required to include incentives designed to secure a commitment by the private sector to solving social problems.⁴⁶

Ideas from the perspective of the SDGs are also required in relation to private sector participation in the infrastructure field, and there is considerable transformational pressure on PFIs/PPPs, which continue to focus on economic efficiency.⁴⁷

The range of the SDGs also extends to the cultural area. The protection of cultural assets is related to the very identity of a country and region, and is essential for their sustainable development. As Jyoti Hosagrahar states, “[c]ultural heritage — both tangible and intangible — and creativity are resources that need to be protected and carefully managed. They can serve both as drivers for achieving the SDGs as well as enablers, when culture-forward solutions can

44 See the website of the United Nations, available at <https://unric.org/en/sdg-12/> (last visited Mar. 20, 2021).

45 See the SDGs Promotion Headquarters (Ministry of Foreign Affairs), Japan: The SDGs Implementation Guiding Principles (Dec. 22, 2016), available at <https://www.mofa.go.jp/mofaj/gaiko/oda/sdgs/pdf/000252819.pdf> (last visited Dec. 17, 2020). This is due to the fact that Japan has not ratified the Labor Clauses (Public Contracts) contained in the 1949 Report (Convention No. 94) of International Labor Organizations, which aimed at ensuring respect for minimum labor standards in the execution of public contracts.

46 See Sue Arrowsmith and Peter Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge Univ. Press, 2009). As an early stage approach from PPP to the EU's public procurement sector, see Christopher Bovis, *Public Service Partnerships as Instruments of Public Sector Management in the EU*, 6(4) *Eur. Procurement & Pub. Private Partnership L. Rev.* 201 (2012). Regarding the general legal rules of public procurement in the EU, see Christopher Bovis, *The Law of EU Public Procurement* (2nd ed.) (Oxford Univ. Press, 2015).

47 For a general explanation of the transformational pressure, see Martin Dietrich Brauch, *Contracts for Sustainable Infrastructure: Ensuring the Economic, Social and Environmental Co-Benefits of Infrastructure Investment Projects* (IISD, 2017).

ensure the success of interventions to achieve the SDGs.”⁴⁸

Here, I introduce an example of a significant achievement by a local government. The following section describes the initiative introduced by Nichinan City in Miyazaki Prefecture.⁴⁹

Nichinan City includes one of the most historic castle towns in Kyushu, Obi. Numerous historic buildings are owned by the city in Obi, and are nationally registered as tangible cultural properties or city-designated cultural properties. Thus, the city is responsible for their repair and maintenance, which costs a lot of money and is a considerable burden for a city with a population of only 50,000. These buildings are aging, and many are in poor condition. Therefore, the mayor of Nichinan, who was less than 40 years old at the time, decided to rent these buildings out for any purpose, so long as their historic nature was respected, with the maintenance costs to be met by the lessee. In response to the call for participants, the largest railway company in the Kyushu area and a consortium including Japan’s leading airline have submitted plans to use several buildings as accommodation facilities, and have entered into contracts. All of these private companies have sufficient know-how in relation to customer transportation, abundant financial resources, and strengths in tourism marketing. Since there is a commitment to preserve the buildings as cultural heritage properties, the city, which is the owner of the properties, can fulfill its responsibility while at the same time reducing its financial burden. Moreover, because the buildings are leased, the city is making a profit.

This is a case involving utilization of public facilities, but it is not a PFI project that requires complicated procedures. Unlike airports and waterworks, there are no specific restrictions in terms of public facilities (only a request for protection of the cultural property), and it is not a facility that charges a fee for public use. Therefore, there was no need to outsource this function to the private sector as a PFI project, nor was there any need to establish a concession.⁵⁰

This project also has the character of a PPP, which has a flexible definition, as noted earlier, in that it utilizes the benefits of the free market to fulfill the

48 Jyoti Hosagrahar, Culture at the Heart of the SDGs, *The UNESCO Courier*, April–June 2017 edition (2017).

49 Shigeki Kusunoki, A New Style of Public–Private Partnership through Public Contracts, *Agora* [online], Sep. 14, 2020, available at <http://agora-web.jp/archives/2048085.html> (last visited Dec. 17, 2020).

50 The reason for this approach was the fact that these were general properties rather than administrative properties with strictly limited application.

government's responsibilities. It is also based on an approach identified in relation to the SDGs involving the fulfillment of social demands such as maintenance of historical landscapes and protection of cultural heritage properties through public contracts. It is interesting that it also has a PFI-like feature that is not based on the PFI Act in the form of leasing, which is a classic feature of contracts prior to the PFI Act.

A key policy of Japan's conservative government under Prime Ministers Shinzo Abe and Yoshihide Suga is regional revitalization. Thus, there is a need for a strategy to creatively and sustainably maintain local prosperity, and public contracts that stimulate incentives for private companies are one of the most effective means of achieving this aim. The case of Nichinan is also noteworthy as a Japanese example of pursuing the SDGs related to the preservation of cultural heritage and historical cityscapes, and is expected to provide an advanced example of an SDGs-type PPP aimed at regional revitalization. One issue that needs to be resolved is how to understand the social, economic, and historical values of the facilities, and how to match them with the needs of the private sector.

D. PPPs as Measures against Natural Disasters

Japan is highly vulnerable to natural disasters such as earthquakes and typhoons. Vivid memories remain of the 2011 Great East Japan Earthquake and associated tsunami, which caused severe damage, and major typhoons strike Japan almost every year, causing significant damage.

Responding to natural disasters is, of course, the responsibility of the government (both national and local), and restoration works are undertaken by contracting out public works, which can be said to be the central focus of public procurement. However, the more urgent the work is, the more difficult public procurement becomes.

This is because public works contracts, whether competitive or not, are carried out under the mechanism of "freedom of contract," similar to private procurement. Private companies (in this case construction companies) have the freedom not to respond to contract solicitations, and under the Japanese legal system, they cannot be forced to participate under threat of administrative sanctions.⁵¹

51 In § IV, I introduce the legal scheme regarding compulsory procurement in relation to pandemics.

In the United States, the United States Army Corps of Engineers (USACE)⁵² is responsible for large-scale disaster recovery, but in Japan, the Self-Defense Forces are focused on saving lives, and the civil engineering work in disaster-affected areas is done by local construction companies.⁵³ The Ministry of Land, Infrastructure, Transport and Tourism and local governments do not have the ability to carry out civil engineering works, and thus for cases where procurement is urgent, the Accounting Act⁵⁴ that regulates national contracts allows for a discretionary contract (direct award) that does not rely on competitive bidding.⁵⁵ The same applies to the Local Autonomy Law that regulates local governments.⁵⁶ However, this process is still based on the principle of “freedom of contract” and there is no institutional guarantee in relation to urgent reconstruction works.

Japan is trying to overcome this situation through the use of PPPs. The Japanese national government and local governments often conclude an agreement (termed a “disaster agreement”) with a construction company wherein the company promises to undertake emergency works in the event of a disaster at the request of the government. Contracts based on negotiations with individual companies rather than competitive bidding are justified on the grounds that a disaster-response agreement is necessary.⁵⁷ Companies who enter into these agreements are rewarded by the procurement agency in the form of incentives in relation to competitive bidding procedures regarding other areas of public procurement (for example, favorable evaluations of cooperative companies in the application of the comprehensive evaluation method).⁵⁸

52 Available at <https://www.usace.army.mil/> (last visited Dec. 17, 2020).

53 See, e.g., Masaru Nakajima, Local Construction Companies are Essential for Disaster Recovery, *Toyo Keizai* [online], Feb. 2, 2018, available at <https://toyokeizai.net/articles/-/206827> (last visited Dec. 17, 2020).

54 Law No. 35 of 1947 (Japan).

55 Accounting Act, art. 29-3 § 4 provides that (the following translation is from the website mentioned at *supra* note 17):

A contract whose nature or purpose does not permit tender, a contract that cannot be put out to tender due to urgent circumstances, or a contract that it is determined would be disadvantageous to put out to tender, must take the form of a discretionary contract, pursuant to the provisions of the Cabinet Order.

56 Local Autonomy Act, art. 234 § 2.

57 Ministry of Land, Infrastructure, Transportation and Tourism, Application Guidelines for Public Contracts Methods in Disaster Recovery (last modified in 2017), available at <https://www.mlit.go.jp/common/001192319.pdf> (last visited Dec. 17, 2020).

58 Ministry of Land, Infrastructure, Transportation and Tourism, Application Guidebook for Public Contracts and Overall Evaluation Methods in Public Works (last modified in 2020), available at https://www.ktr.mlit.go.jp/ktr_content/content/000782392.pdf (last visited Dec. 17, 2020).

This allows national and local governments to request private companies to provide emergency services under the agreement. Meanwhile, the private companies can obtain additional profits through other public contracts.

In general, emergency response to disasters is unprofitable for private companies. Construction equipment is unable to be rented at short notice, and so construction companies are required to own and maintain the necessary equipment. Furthermore, cancellation of other jobs is often necessary. Meanwhile, the government cannot provide flexibility in relation to the value of the contract just because the work is urgent. This situation has led to the proposal that construction companies that commit to providing services in the event of an emergency are offered incentives to enable them to win other contracts during normal periods.

Disaster response is the very premise of the formation of a sustainable society, and thus it can be said that disaster-response agreements are a form of PPP in relation to public contracts that are required to meet the SDGs. Here, the term PPP should be considered in broader terms than the definition of “a long-term contract ... in which the private party bears significant risk and management responsibility, and remuneration is linked to performance” mentioned earlier.⁵⁹ It is important that a suitable balance is achieved between the incentive structure provided to private companies and the solution of public problems.⁶⁰

IV. COVID-19 and Public Procurement in Japan

A. Difficulties Related to Public Procurement in an Emergency

If neither the use of national coercion nor direct management by the government as a last resort can be expected in an emergency, the only remaining option for public procurement is PPPs. Thus, establishing a prior agreement in preparation for disaster response is an effective solution.

The 2020 COVID-19 pandemic reminded us of the importance of public procurement in an emergency, and also made us keenly aware of the difficulty of

59 See § I.

60 Many resources and discussions can be found on the International Sustainable Resilience Center's website (<https://isrc-ppp.org>) on how PPP should be used in emergencies such as natural disasters and the COVID-19 pandemic.

managing this process. The disaster countermeasures mentioned in the previous section can be prepared in advance, under the expectation that the emergency situation is likely to occur at some point in the future. Regardless of whether it is an earthquake or a typhoon, the types of damage can be predicted, and when the disaster strikes, the location and extent of the damage is evident. Thus, if a network of disaster agreements is spread all over the country, a large area can be secured.

However, this was not the case in relation to public procurement during the COVID-19 pandemic. It was not possible to predict in advance what needed to be procured urgently, and it took time for the government to make decisions regarding business plans.

Here, I introduce two cases that symbolize the confusion that occurred during the COVID-19 pandemic. Both explain the importance of PPPs and the need for ingenuity in relation to their establishment.

B. “Abenomask”

On 1 April 2020, when speculation was widespread that the COVID-19 situation would worsen, Prime Minister Shinzo Abe declared a state of emergency and announced that Tokyo would be locked down. It was the government’s policy to “distribute two cloth masks to all 50 million households in Japan.”⁶¹ Certainly, considering that masks had become difficult to obtain all over Japan and public dissatisfaction was growing, this was a worthwhile policy initiative. However, the Japanese people also expected the government to make bold decisions such as blockading the city as a measure against the spread of the coronavirus, and providing large-scale economic support for businesses and individuals. As a result, many Japanese people were disappointed, and criticized the government.⁶² Since the Abe administration’s economic growth strategy was widely referred to as “Abenomics,” people started to refer to the mask distribution policy as “Abenomask.”⁶³

61 Prime Minister Shinzo Abe’s announcement at the 25th Meeting of the Novel Coronavirus Response Headquarters (Apr. 1, 2020), available at https://japan.kantei.go.jp/98_abe/actions/202004/_00001.html (last visited Dec. 17, 2020).

62 Gearoid Reidy, From Abenomics to Abenomask: Japan Mask Plan Meets With Derision, Bloomberg [online], Apr. 2, 2020, available at <https://www.bloomberg.com/news/articles/2020-04-02/from-abenomics-to-abenomask-japan-mask-plan-meets-with-derision> (last visited Dec. 17, 2020).

63 *Id.*

Given that people were panicking as a result of the serious shortage of masks, it cannot be denied that this measure had some impact. However, the problem lay in the process leading up to the awarding of the contract. This can be understood as an example of the issues involved in relation to PPPs. The following is an extract from Prime Minister Abe's announcement on 1 April 2020:

[...] with the sudden surge in demand due to the novel coronavirus disease, there have been shortages of masks in stores, causing great inconvenience for the public. Last month, we distributed 15 million surgical masks to medical institutions across the country. Next week, we plan to provide an additional 15 million.

Furthermore, we will secure cloth face masks and steadily provide the necessary amounts to care facilities for the elderly, care centers for people with disabilities, and elementary and junior high schools nationwide.

These cloth masks, like the one I am wearing today, are not disposable, and can be washed in detergent and reused, making them extremely effective for meeting the sudden surge in demand for masks. By the end of next month, we expect to secure a further 100 million masks. We therefore intend to include the purchase of these cloth masks in the emergency economic measures to be decided next week. We will distribute them to all of the over 50 million households across the country, sending two per address, using Japan Post's all-address delivery system. Even if it is before the supplementary budget is passed, we will use contingency funds and other means and begin distributing these masks from the week after next, starting with those prefectures with the highest number of patients.⁶⁴

The first mask shortage that came to the attention of the Abe administration was in relation to long-term care facilities and pregnant women. In mid-March 2020, the government signed a discretionary contract following negotiations with several vendors.⁶⁵

64 *Supra* note 61.

65 See the Ministry of Health, Labour and Welfare's disclosed information regarding negotiated contracts (for fiscal year 2019), available at https://www.mhlw.go.jp/sinsei/chotatu/zuii/dl/19honsyo_ippan_04.pdf (last visited Dec. 17, 2020). The discovery of defective products in many instances has led to questions about quality control. See Nikkei Asia, Itochu and Kowa to recall masks after defects in Japan handout: The two companies said they procured the products from overseas, Nikkei Asia [online], Apr. 24, 2020, available

The cloth masks were to be made to order, rather than purchasing masks that were already in stock, and so the first priority was to secure production facilities before signing a contract. It was later revealed that at least one vendor had been in contact with the government by the end of February 2020.⁶⁶

Thus, it can be seen that the government had already negotiated with prospective vendors to secure the necessary production volume prior to announcing the distribution of cloth masks for all households on 1 April 2020.

In other words, they signed contracts to manufacture and supply the required number of cloth masks with multiple vendors following negotiations that did not include public notification or competition. These contracts were signed in early April 2020.⁶⁷

In cases requiring urgent procurement, there is not enough time to carry out competitive tendering procedures. Therefore, the Accounting Act and the Local Autonomy Act allow for non-competitive negotiation contracts in an emergency. Competitive procedures are too risky in relation to procurement that requires a production system. The loss to the contractor is significant when they fail to win the contract, and so is the damage to the government when the contract cannot be fulfilled. Non-competitive negotiation contracts are beneficial to both the private sector supplier and the government in the sense that they increase certainty. The government loses the advantage of achieving economic efficiency through competitive bidding, but gains the advantage of obtaining an immediate response in an emergency.

However, even if there is no competition, it is uncertain whether any private sector company will respond in an emergency as long as the underlying premise is “freedom of contract.” Thus, even the non-competitive approach involves risk. It is the public sector that is under pressure, and so to elicit the cooperation of the private sector, planning must be emphasized rather than competition.

at <https://asia.nikkei.com/Business/Health-Care/Itochu-and-Kowa-to-recall-masks-after-defects-in-Japan-handout> (last visited Dec. 17, 2020).

66 See the interview with the CEO of Kowa Company Ltd. (Asahi Shinbun [online], Jun. 1, 2020, available at <https://www.asahi.com/articles/ASN5071YLN5FUTFK00F.html> (last visited Dec. 17, 2020)).

67 See the Ministry of Health, Labour and Welfare’s disclosed information regarding negotiated contracts (for fiscal year 2020), available at https://www.mhlw.go.jp/sinsei/chotatu/zuii/dl/20honsyo_ippan_04.pdf (last visited Dec. 17, 2020).

The extreme form of a non-competitive approach is “production compulsion.” It was reported that the President of the United States enforced the Defense Production Act⁶⁸ in March 2020, ordering General Motors (GM) to produce ventilators.⁶⁹

There are no laws in Japan that support such compulsory production orders. However, the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response⁷⁰ was enacted in 2012, and COVID-19 was included as a designated infectious disease under an amendment to the Act in 2020. Under this Act, when the prime minister declares a state of emergency, prefectural governors are authorized to request private companies to sell specified goods designated in the cabinet order,⁷¹ and where the goods are urgently required, they are authorized to seize those goods.⁷² However, such requests and seizures are only possible in situations where companies are holding stocks of the designated goods.⁷³ This means that the manufacturing process itself cannot be coerced.

Therefore, emergency response is possible within the framework of cooperation from the private sector. As long as there is no advance preparation for emergency response such as disaster agreements in relation to public works, the government negotiates informally with a specific contractor behind the scenes, and most of the order planning and budget acquisition is undertaken simultaneously because it is necessary to persuade the cooperating vendors to secure their production preparations.

In this case, information disclosure is crucial. Collusion and fraud might be suspected if the contract was concluded following private negotiations with no public notification and no competition. It can be said that justification can be provided by clarifying the process of communication with the contractor and the details of the contract to the public, but the Japanese government did not fully respond to requests for transparency in relation to the abovementioned process.

68 Defense Production Act of 1950, 50 U.S.C. §§ 4501 et seq.

69 David Shepardson, Trump's Attack on GM over Ventilators Quickly Turns to Praise, Reuters News [online], Mar. 30, 2020, available at <https://www.reuters.com/article/us-health-coronavirus-trump-ventilators-idUSKBN21H098> (last visited Dec. 17, 2020).

70 Law No. 31 of 2006 (Japan).

71 Art. 55 § 1.

72 *Id.* at § 2.

73 *See id.* at § 1-2.

Regarding cloth masks in response to the COVID-19 pandemic, contracts for aged-care facilities and pregnant women were signed in mid-March, and mask orders for all households were signed in early April. Nevertheless, when the name of the provider was sought in the Diet in late April, the names of some vendors were not disclosed.⁷⁴ In addition, the unit price per mask paid to each company was not revealed, allegedly because it would hinder future operations.⁷⁵ As emphasized in the guidelines issued by the OECD in response to COVID-19, “direct awards” are permitted for special reasons, but at the same time prompt information disclosure is also required.⁷⁶ Justification is impossible if governments are reluctant to disclose information.⁷⁷

A more fundamental problem lies in finding ways to make contracts more secure. The term PPP sounds good, but a solution that relies on the cooperation of the private sector.

74 Mainichi Shinbun, Ministry Refuses to Name 4th Supplier in Troubled Japan Mask Handout Scheme, Mainichi Shinbun [online], Apr. 25, 2020, available at <https://mainichi.jp/english/articles/20200425/p2a/00m/0na/012000c> (last visited Dec. 17, 2020).

75 Kyodo News, Japan Gov’t Sued over Disclosure of ‘Abenomask’ Unit Price, Order Numbers, Kyodo News [online], Sep. 28, 2020, available at <https://english.kyodonews.net/news/2020/09/2f22e10b0943-govt-sued-over-disclosure-of-abenomask-unit-price-order-numbers.html> (last visited Dec. 17, 2020).

76 OECD, COVID-19: Competition and Emergency Procurement (2020), available at <https://www.oecd.org/competition/COVID-19-competition-and-emergency-procurement.pdf> (last visited Dec. 17, 2020).

77 The Act for Promoting Proper Tendering and Contracting for Public Works (Law No. 127 of 2000) provides the statutory requirement for ensuring transparency in public procurement, in the field of public works. There, the procuring agency is required to disclose “the name of the bidder and the bid amount,” “the name of the winning bidder and the winning bid amount,” “the qualification requirements when the qualification of the bidder is determined,” and “names of nominated persons in designated competitive bidding” (Art.5 and 8).

In August 2006, the Ministry of Finance noticed “About the Optimization of Public Procurement” to each ministry (https://www.mof.go.jp/budget/topics/public_purchase/koukyou/koukyou_02.htm (last visited Mar. 20, 2021)), which requested the procuring agencies to publish “the legal basis for choosing the direct award method.” However, it does not require a description of the negotiation process of it. Given the reluctance to disclose information, the current situation is that only the minimum amount of information required by laws, regulations, and the guidelines of the Ministry of Finance is disclosed.

For information that has not been disclosed, in the end, there is no choice but to rely on an information disclosure request under the Act Concerning Access to Information Held by Administrative Organs (Law No. 42 of 1999) and an information disclosure lawsuit if information disclosure request is rejected. For example, in February 2021, a lawsuit was filed under this Act, because it is illegal not to disclose a document describing the circumstances of the contract with the distributor for “Abenomask” mentioned in this Article. See Mainichi Shinbun, Japanese Prof Sues for Gov’t Disclosure of “Abenomask” Contract Negotiation Details, Mainichi Shinbun [online], Feb.22, 2021, available at <https://mainichi.jp/english/articles/20210222/p2a/00m/0na/015000c>. (last visited Mar. 20, 2021). According to this news, the plaintiff states that the government has a responsibility to explain the negotiation process to the public on Abenomask’s contracts, but the government replied that it could not disclose it because it did not prepare an official document. Citing the Public Records and Archives Management Act (Law No. 66 of 2009), which requires the creation of documents for the verification of decision-making processes, the plaintiff argues that such documents do exist.

C. Subsidy Program for Sustaining Businesses

The Subsidy Program for Sustaining Businesses provides subsidies that can be used by businesses to support the continuation of the business or to support recovery by businesses that are particularly affected by the spread of infectious diseases. The program is handled by the Small and Medium Enterprise Agency, which is an external agency of the Ministry of Economy, Trade and Industry. This program, which had to be outsourced because the government could not cope with the scale of work required, has a contract value of about 75 billion yen, which is a significant business consignment contract. The contract was signed at the end of April 2020, but the lack of transparency regarding the contract process was criticized in May.⁷⁸

In general, urgent public procurement is generally achieved by direct award as a discretionary contract without relying on competitive bidding. This saves the time required for processes such as public notices, applications, and bid-opening. However, despite the urgent need for public procurement, a comprehensive evaluation-type open bid was conducted, which required the submission of proposals related to the business operation. The public notice period was only five days, and there was only one day between the deadline for submitting a proposal and the decision regarding the successful contractor. Common sense suggests that this was an unreasonable time frame.⁷⁹

Certainly, such a fast-tracked process is legally permissible. If necessary, the public notice period can be shortened to five days, and there is no limit on the period from the proposal submission deadline to the decision being announced.⁸⁰ In this case, the organization may have wanted to respond only superficially to ensure competitiveness while recognizing the urgency of the situation, but the revelations after the contract was signed suggested that the competitive nature of the process was doubtful. The contractor was interviewed several times about

78 Mainichi Shinbun, Japan Gov't Accused of Overspending via Coronavirus Subsidy Subcontracting, Mainichi Shinbun [online], Jun. 2, 2020, available at <https://mainichi.jp/english/articles/20200602/p2a/00m/0na/012000c> (last visited Dec. 17, 2020).

In addition, the contractor who received the order subcontracted as much as 97% of the contract to a major advertising agency, raising doubts about the actual activity of the winning bidder (*Id.*).

79 See the interview with Shigeki Kusunoki: It is Difficult to Evaluate Two Proposals within a Day, Tokyo Shinbun [online], Jul. 12, 2020, available at <https://www.tokyo-np.co.jp/article/41926> (last visited Dec. 17, 2020).

80 See Article 74 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting (Imperial Ordinance No. 165 of 1947).

two weeks prior to the public notice. It is not clear what type of information was exchanged, but it might have been questionable behavior. Prospective bidders who have been contacted in advance can obtain an overview of the contract requirements, giving them a competitive advantage, while those who only learn of the project requirements at the public notice stage are at a disadvantage. Other potential vendors were also interviewed in advance, but to ensure the fairness of the competitive bidding process, a sufficient outline of the contract requirements should be made publicly available at the outset.⁸¹

When an advance meeting is necessary to provide an inexperienced business with the necessary information to enable it to make an informed bid, procuring agencies need to take the utmost care with regard to compliance.

If it is not possible to undertake the project smoothly without this cooperation, this is a very risky approach. In the case of a discretionary contract, it is possible for the procuring agency to either contact multiple bidders and negotiate competitively without a public notice, or to narrow the field to a specific provider and negotiate directly from the outset. Either way, information exchange is possible from the commencement of negotiations. However, as long as a competitive bidding process is used, specific public–private exchanges in relation to ordering must be deferred until the public notice and application stages, otherwise the equality and fairness required under a competitive bidding process would be impaired. Since strict conditions regarding equality and fairness have been instituted, there is justification for using a competitive bidding process. Conversely, when using the discretionary contract or direct award approach, complete transparency is required because no such justification exists.

If the vendor was considered to be the best qualified candidate, and the situation was an emergency, the direct awarding of a contract would have been a more straightforward way of obtaining cooperation from the vendor. However, failing to promote fair competition while supposedly conducting a competitive bidding process is a bad example of a PPP.

81 See Shigeki Kusunoki, *On the Subsidy Program for Sustaining Businesses: From a Legal Point of View*, Agora [online], Jun. 5, 2020, available at <http://agora-web.jp/archives/2046449.html> (last visited Dec. 17, 2020).

D. Brief Summary

If it is difficult to follow the U.S. approach, which allows for forced production and procurement under the Defense Production Act of 1950,⁸² which the Trump administration applied to GM in 2020, public procurement in an emergency must be based on PPPs. Both cases discussed in this section demonstrate the difficulty of public procurement in an emergency, and both posed significant challenges.

In relation to the procurement of cloth masks in response to the COVID-19 pandemic, it is necessary to secure the production chain, in other words, the suppliers' capability of fulfilling the contract. Thus, sufficient prior consultation is necessary. A competitive bidding process in which bidders do not know in advance whether they will be successful is risky for private companies, and awarding a contract without knowing that a company is capable of fulfilling its commitment is risky for governments.

The Japanese government continues to hesitate to disclose information, despite growing demand for transparency in relation to both the contract process and content because competitive processes were not applied. If information disclosure is delayed, the appropriateness of the contract cannot be independently evaluated, leading to a loss of trust in relation to public contracts.

Conversely, in the case of the Subsidy Program for Sustaining Businesses, open bidding was conducted under a punishing schedule. Interviews with some businesses prior to the public notice being issued raised suspicions that sensitive information was provided in advance. It goes without saying that the need for transparency does not disappear just because a competitive bidding process has been conducted. Information transmission must be fair and impartial to all potential contractors.

The urgency of the situation meant that the process of a comprehensive evaluation type competitive bidding process was completed in five days from the announcement to the deadline for submissions and the winning bid was announced one day after the deadline for submissions.

If negotiations had been conducted outside the competitive bidding framework, the process would have been more flexible. However, Japan's

82 *Supra* note 68.

Accounting Act and the Local Autonomy Act do not include provisions for negotiation during the competitive bidding process, and thus most negotiations are conducted as part of a discretionary contract process. These are typically direct negotiations with one or more specific vendors who have been targeted from the outset, which has contributed to increasing suspicion regarding the public procurement process in Japan.

Like other countries, Japan was not prepared in advance for emergency public procurement in relation to COVID-19. However, just as Japan, a disaster-prone country, has been able to insure itself to a certain extent through public-private “disaster agreements” to enable public procurement in emergencies, a more timely response to the COVID-19 pandemic might have been possible through PPPs. How to do this most effectively is a task for future research.

V. What Japan Has Learned and What Could Be Learned from Japan

PPPs in relation to public contracts are more appropriate for Japan’s regional revitalization program. The advantage of PFI-type PPPs is that they enable more efficient business operations in relation to the management of public facilities. Nichinan City’s aim was to draw on the private sector’s knowledge in relation to the management of facilities, thereby achieving more effective use of these assets. The process involved soliciting ideas that contributed to the development of the area through the utilization of a particular historic building, and the winning contractor in each case was able to lease the building in question for its own use.

The scheme of permitting the use of facilities on the basis that all construction costs are met by the contractor, and collecting rent for the use of the building, is similar to a concession that enables governments to charge private companies a fee for the operating rights. The case of Nichinan teaches that there may be a number of simpler and more agile ways to implement PPPs in public contracts. Public contracts aimed at regional revitalization and maintenance of historic cityscapes are also in line with the SDGs. The important thing is to legally solve public policy issues speedily and flexibly on a case-by-case basis.

A PPP should not be seen as “a long-term contract,” in which “the private

party bears significant risk and management responsibility,” where “remuneration is linked to performance,” but rather as an exercise in cooperation by the private sector in response to a request from the public sector. In a broad sense, Japan, a disaster-prone country, seems to have established a certain style of PPP, that is, preemptive behind-the-scenes disaster agreements accompanied by favorable treatment of the cooperating firms in future comprehensive evaluation processes.

Under the freedom of contract principle, public procurement in an emergency can be extremely risky. Thus, to avoid such risks, companies that have promised to cooperate in the event of a disaster will be given preferential treatment in relation to public works contracts during normal times.

This will stabilize the operations of local construction companies and enable the purchase and maintenance of the necessary equipment. The Act for Promoting Quality Assurance in Public Works of 2005⁸³ changed the evaluation process from accepting the lowest price under the automatic bidding method to a comprehensive evaluation method, which made such a scheme viable.

In Japan, the procuring agencies cannot undertake public works directly, and the Self-Defense Forces do not have sufficient expertise. Building an effective incentive structure in such a situation, that is, a method of securing “a long-term commitment of cooperation from the private sector” is an effective mechanism for PPPs in relation to emergencies. This is based on the characteristics of public works whereby orders are repeatedly placed and received over a long period of time between specific procuring agencies and construction companies.

In the case of public procurement in response to the COVID-19 pandemic, despite the urgency of the situation, the contract was a one-off. In each case, the procuring agencies must search for a contract partner while being exposed to the risk of the free market based on freedom of contract.

In the case of “Abenomask,” although it was a one-off contract that could not be prepared for in advance, it could be said that it was a good outcome in an emergency. However, it did not fully meet the demand for transparency, which is necessary in relation to direct award contracts.

83 Law No. 18 of 2005 (Japan). See Shigeki Kusunoki, *Japan's Government Procurement Regimes for Public Works: A Comparative Introduction*, 32 *Brook. J. Int'l L.* 523, 535–539 (2007).

When there is insufficient time to conduct an open call for bids, the administration may use its connections to informally assess bids and in some cases negotiate contracts based on personal relationships that bureaucrats are reluctant to reveal.

Japan is likely to face numerous challenges in terms of PPPs in response to emergencies while it continues to operate under the constraint of not being able to exercise compulsory acquisition powers.

Meanwhile, Japan has also experienced the risks involved in forcing firms to participate in a competitive bidding process even though the agency has a preferred vendor in mind. Instances of a supposedly competitive bidding process in which a specific contractor cooperated in advance before the public notice was issued, raising suspicions that the chosen contractor obtained an unfair advantage, will be seen as a bad example of a PPP.

To elicit cooperation from vendors, economic incentives need to be offered, and relying on voluntary cooperation is unrealistic in terms of institutional design. However, a competitive bidding process must be equally open to all vendors, and if that level of equality cannot be provided, it is better to use the direct award method in the interests of complete transparency.

Japan has become aware of the difficulty of public procurement in an emergency, specifically the challenges faced by PPPs in responding to a crisis. However, while in some cases private firms may have an advantage in negotiations over the procuring agencies, the most serious consequence is a failure to contract.

Meanwhile, intellectuals will express their opposition and the mass media can be expected to be highly critical if proposals are presented that allow the state to exercise coercive authority. Adverse reactions to the use of compulsory powers by the state are historically strong in Japan, and under the current democratic system, there is little chance of introducing U.S.-style legislation enabling compulsory procurement.⁸⁴

84 For background information, *see, e.g.*, Lawrence Repeta, The Coronavirus and Japan's Constitution: Article 41 Provides the Government with Sufficient Power to Take Aggressive Action, *Asahi Shinbun* [online], Apr. 14, 2020, available at <https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/> (last visited Dec. 17, 2020). *See also* Linda Sieg, 'Lockdown', Japan-style: Pressure to Conform, not Penalties for Non-compliance, *Reuters* [online], Apr. 14, 2020, available at <https://www.reuters.com/article/us-health-coronavirus-japan-emergency-ex-idUSKBN21O08J> (last visited Dec. 17, 2020).

The OECD states in its guidelines published in response to the COVID-19 pandemic that a point to keep in mind when direct award contracts are permissible (that is, when “they may be considered necessary in cases of emergency and force majeure”⁸⁵), is that “[t]o assess the immediacy, types and volumes of such urgent needs, procurers should be in continuous communication with the units that will use the procured material, e.g., hospitals.”⁸⁶

Certainly, the key to public procurement in an emergency is information sharing and continuous communication. The specific details related to COVID-19 could not have been anticipated, but the threat of a viral pandemic has existed for a long time, and it should have been possible, to some extent, to predict in advance what was likely to happen and what would need to be procured.

Japan has learned some important lessons about PPPs in relation to public contracts in response to an emergency, and it is expected that legislative measures for that purpose will continue to be introduced. Sharing the knowledge that has been acquired among countries will be of great benefit, because what happens in Japan also happens overseas, and vice versa.

VI. Concluding Remarks

Current issues in relation to PPPs include commitment to projects, the realization of social policies in contracts, sustainable development including regional revitalization, and emergency response, including to natural disasters. The SDGs emphasize the need for institutional design aimed at long-term commitments to solving public and private social issues through public contracts. The COVID-19 pandemic has illustrated both the difficulty and the danger of eliciting cooperation from private companies in an emergency. It can be said that the importance of maintaining long-term relationships rather than entering into long-term contracts has been recognized, especially in Japan, which does not have the authority, like the United States, to exercise compulsory procurement.

However, it seems that overall, there is an increasing trend toward tackling public contract issues from the perspective of more flexible PPPs, and thus the need for supporting legislation will undoubtedly increase. Certainly, the existing

85 OECD, *supra* note 76.

86 *Id.*

PPPs' ideas cannot be directly applied to the modern issues of public contracts. That is why it is necessary to continually evolve the idea of PPPs so that it can be applied more flexibly, more modernly, and more effectively to the solution of real problems.

If the description presented in this article of Japan's approach to public procurement and contracts inspires discussion or leads to suggestions regarding legislative or legal issues in any country other than Japan, then the article will have served its purpose.

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