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## Anti-bribery and Relevant Regulations in Public Procurement in Thailand

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### 1. Introduction

Bribery commonly occurs in Thailand procurement projects. Institutional norms and the high potential for under-reporting or mixing of expenses, given the large amounts of money involved, contribute to this propensity. As bribery in such projects not only offends the notion of justice, but the notions of property and economy as well, it is considered a serious criminal offence in both the private and public sectors.

This article explains Thailand's current anti-bribery and relevant regulations with regard to public procurement.

### 2. Bribery and Relevant Regulations in respect of Public Procurement

#### (1) Bribery

A bribe is offered or given to a government project official in exchange for certain action. There are two broad categories of bribery under Thailand's criminal law:

- i. "active bribery" constitutes the offering, giving or promising of anything of value to any government official for him/her to act or refrain from acting in discharge of his/her duties; and

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- ii. “passive bribery” constitutes the request for or the receipt of anything of value by any government official or his/her agent, or the acceptance of a promise or an offer of such thing, to act or refrain from acting in discharge of his/her duties.

Both active and passive bribery are criminalised in Thailand’s Penal Code of 1956, the Offences Relating to the Submission of Bid to Government Agency Act of 1999, the Organic Law Relating to the Prevention and Suppression of Corruption Act of 2018, and other relevant laws. A criminal sentence for commission of bribery can be imposed upon private and public sector actors, both Thais and foreign nationals alike. With regard to a government official who is a bribe-taker, such individual may also be prosecuted under the Anti-Money Laundering Act of 1999.

## **(2) Bid Rigging**

Bid rigging in Thailand’s public procurement sector is likely to happen during the bid solicitation and/or bidder selection processes. It is considered to be a complex, organized crime, due to the extensive division of labor among participants (i.e., company employees, local agents, and government officials) and the variety and elaborateness of the schemes (i.e., solicitation, coercion, or deception). There are five common forms of bid-rigging;

- *Variation order abuse*: occurs when a bidder, conspiring with government project officials, submits an abnormally low bid in order to win a contract, then agrees to accept a higher priced and/or higher number of variation orders from officials.
- *Bid suppression*: occurs when two or more bidders agree in advance to refrain from submitting a bid or withdraw their submitted bids, so that one of the conspirator-bidders wins a contract.
- *Complementary bidding*: occurs when two or more bidders agree in advance to submit a bid that is understood to be too high to get accepted, much higher than the bids of other bidders, or that knowingly includes special terms or conditions that will see it rejected by the government agency.
- *Bid rotation*: occurs when two or more bidders agree in advance to take turns being the winning bidder of what are often repeating projects or purchase efforts.
- *Market allocation*: occurs when vendors agree in advance to carve up the market by allocating certain geographical areas or certain classes of purchasers to different vendors, so that they do not compete against one another.

These bid-rigging strategies are not mutually exclusive and may be used in conjunction with one another.

In response, one major piece of anti-bid-rigging legislation has been the Offences Relating to the Submission of Bids to Government Agencies Act 1999 (the “1999 Act”). The 1999 Act makes it an offence for vendors to enter into certain anti-competitive agreements and divides the class of offenders into three categories, one of which is vendors who participate in public procurement. The 1999 Act also makes bid rigging punishable with a prison sentence ranging from 1 to 20 years. With regard to the involvement of a private sector participant, there are five acts of corruption punishable under the 1999 Act:

- Formation of bidding cartels to affect public procurement;
- Solicitation to commit bid rigging in public procurement;
- Coercion of others to engage in anti-competitive practices;
- Adoption of deceptive conduct to affect public procurement; and
- Adoption of lowball or highball techniques to defraud the public through procurement proceedings.

The 1999 Act covers criminal liability in public procurement processes from tender invitation to payment. The term “government agency” under the 1999 Act includes a wide range of entities exercising legal authorities or functions of the state and receiving contributions or investment property from the state. Vendors or bidders may not view some of these entities as a ‘government agency’. For example, the Criminal Court for Corruption and Misconduct Cases ruled in two separate cases in 2019 that

the National Sport Shooting Association and the Central Laboratory (Thailand) Co., Ltd., a sports organization and food standards and product analysis company, respectively, are “government agencies” for the purpose of the 1999 Act. Any form of collusion or anti-competitive agreement among potential bidders to win a contract with one of these ‘government agencies’ is at risk of violating the 1999 Act.

Ultimately, it is very important that vendors interested in public sector procurement in Thailand pay attention to, and undertake the appropriate due diligence research concerning, the status of target entities. In addition to a prison sentence, the 1999 Act introduces a heavy financial penalty of 50% of either the amount of the highest bid made among members of a cartel or the contract price at the time of contract formation. Furthermore, it pierces the corporate veil by making a managing partner, a managing director, an executive or any person responsible for running a company that submits a bid to a government agency liable for an offence under the 1999 Act.

### **3. Thailand’s Campaigns Against Bribery Since 2017**

To reduce the risk of bribery and to promote competition and transparency, the National Assembly of Thailand enacted the Government Procurement and Supplies Management Act 2017 (the “2017 Act”) which came into force on 24 August 2017. The 2017 Act creates a unified regulatory framework for public procurement which applies to most government agencies. It creates three distinct selection processes and at least six awarding criteria, other than price (i.e., product lifetime, post-sale services, etc.), which government agencies have a statutory duty to take into account when considering a bidder’s proposal. A failure to discharge this statutory duty as a result of omission or misconduct is a violation of the 2017 Act and may result in a jail term and a fine, not only for the government official in charge of the procurement process, but also for any vendor who instigates (i.e., offers a bribe) or aids and abets that official in commission of the offence under the 2017 Act.

Subject to certain exceptions, the 2017 Act also provides recourse to administrative appeal for a non-winning bidder who can demonstrate that they would have won the right to enter into a contract, but for the government agency’s failure to follow the rules or procedures as prescribed by the 2017 Act or secondary legislation enacted thereunder. If the appellant is not satisfied with the decision of the Appeal Committee and suffers damages as a result of not winning the bid, they are entitled to file a lawsuit against the government agency in question for damages at the court of competent jurisdiction.

One of the courts of competent jurisdiction in Thailand is the Criminal Court for Corruption and Misconduct Cases established in October 2016. This specialist court of first instance has an exclusive jurisdiction over criminal cases concerning offences relating to money laundering, corruption, inchoate offences and other misconduct in public office. It has the authority to try not only government officials, but also individuals and/or a legal entities that instigate or aid and abet any official in the commission of crime, including a vendor who offers a bribe to an official in exchange for certain action or misconduct.

### **4. Conclusion**

Thailand’s anti-bribery regime is increasingly strengthened in line with its international obligations under the United Nations Convention Against Corruption. It remains to be seen what impact these recently enacted regulations will have on public procurement in Thailand. Accordingly, Japanese companies interested in participating in public procurement will have to continue paying attention to the development of these regulations, so that they will not find themselves inadvertently on the wrong side of the law.



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