

# OPEN-COMPETITIVE BIDDING IN JAPAN'S PUBLIC WORKS SECTOR AND FOREIGN CONTRACTOR ACCESS: RECENT REFORMS ARE UNLIKELY TO MEET EXPECTATIONS

JON R. GRAY\*

## I. INTRODUCTION

In January 1994, responding to U.S. pressure and a spate of construction-related scandals, the Government of Japan adopted an "Action Plan on Reform of the Bidding and Contracting Procedures for Public Works" (hereinafter "Action Plan").<sup>1</sup> The Action Plan, which was subsequently incorporated into the 1994 U.S.-Japan Public Works Agreement,<sup>2</sup> contained comprehensive measures to improve foreign contractor access to Japan's public sector construction market by making public bidding procedures fair, open and transparent. While complaints about access to Japan's construction market often take a back seat to disputes surrounding the automobile and semiconductor industries, the sheer size of Japan's public works sector has stirred the interest of U.S. construction firms and has prompted repeated attempts to establish a foothold in the Japanese market.<sup>3</sup> These attempts in the past, however, have been thwarted by opaque licensing and bidding procedures that effectively precluded foreign contractors and design firms from meaningful access to the market. Prior to the Action Plan, Japan's "designated competitive bidding procedures" for public works projects had the effect of permitting only government designated contractors to bid on public

---

\* Expected J.D., Columbia Law School, May 1997.

1. Action Plan on the Reform of Bidding and Contracting Procedures for Public Works, (Jan. 18, 1994) [hereinafter "Action Plan"].

2. Letter from Takakazu Kuriyama, Ambassador of Japan, to Ronald Brown, United States Commerce Secretary (Jan. 19, 1994); letter from Ronald Brown to Takakazu Kuriyama (Jan. 19, 1994) (hereinafter the "Exchange of Letters") (on file with the United States Department of Commerce).

3. Japanese government projects currently represent approximately 40% of total construction orders received in Japan. In the fiscal year ending March 1996, total domestic construction orders totaled 18.977 trillion yen, of which 7.831 trillion yen represented public works projects. *Lack of Market Access in Japan for Foreign Firms*, Dow Jones News Service, Jun. 20, 1996, available in Westlaw, JAPANNEWS database.

works projects and excluded most foreign participants.<sup>4</sup> The United States attempted to address these procedural impediments to market access through bilateral agreements, the most significant being the Major Projects Arrangements in 1988. As discussed herein, these pre-1994 bilateral public works agreements were limited in scope and it is questionable whether meaningful systemic changes were effected. The 1994 Action Plan was structured to address the deficiencies in these prior agreements and to expand the range of projects subject to the reforms.

The 1994 Action Plan and guidelines aim to open bidding on central and quasi-government public works projects<sup>5</sup> to all qualified firms, including foreign companies.<sup>6</sup> The new program will invite proposals from bidders for government construction projects valued at or above preestablished thresholds.<sup>7</sup> Initially, U.S. government officials hailed the new program as a "historical step forward" that would pave the way for U.S. contractors to bid on close to \$17.4 billion each year in contracts.<sup>8</sup> In June 1996, however, the chief negotiator of the 1994 Public Works Agreement, the Commerce Department's Deputy Assistant Secretary for Japan, Majory Searing remarked that "without greater foreign participation, we can only view the Action Plan as a failure."<sup>9</sup> Although

---

4. Office of the United States Trade Representative, National Trade Estimate Report on Foreign Trade Barriers, (1996) [hereinafter the "NTE Report"], available in USTR home page, <[www.ustr.gov/reports/nte/1996/japan.html](http://www.ustr.gov/reports/nte/1996/japan.html)>.

5. The Action Plan covers public works procurement by the following central government entities: Ministry of Justice, Ministry of Foreign Affairs, Ministry of Finance, Ministry of Education, Ministry of Health and Welfare, Ministry of Agriculture, Forestry, and Fisheries, Ministry of International Trade and Industry, Ministry of Transport, Ministry of Posts and Telecommunications, Ministry of Labor, Ministry of Construction, and the Ministry of Home Affairs. In addition to these national ministries, 18 government agencies and 84 other entities including public corporations will adhere to the Action Plan. Action Plan, *supra* note 1, Annex I and III; Taizo Ohmura and Stephen Kaminski, *The Construction Market Opportunities from MPA and Action Plan Projects in Japan*, Nat'l Trade Data Bank, Item Id: IT Market 111090557, ¶ A, (Dec. 5, 1995).

6. Masato Ishizawa, *Bidding Opened but Old Ties Remain Hurdle to Foreign Firms: Construction Industry Officials See Few Opportunities for Newcomers*, NIKKEI WEEKLY, Jan. 24, 1994, at 1, 19 [hereinafter "Ishizawa, Bidding Opened"].

7. The Japanese government revised upward its threshold values for construction projects subject to the Action Plan on January 19, 1996. The revised thresholds will be effective until April 1, 1998. The threshold for central government construction work is \$6.5 million. The threshold for construction work sponsored by local governments and quasi-governmental entities is \$21.6 million. These figures are based on a conversion rate of ¥100 to the U.S. dollar. *New Thresholds for Japan's Public Works Projects*, Nat'l Trade Data Bank, Item Id: IT Market IM960127, (Int'l Trade Admin., Apr. 9, 1996). See Also U.S., *Japan Evaluate Progress in Opening Construction Market*, CAPITAL MARKETS REPORT, July 26, 1995, available in Westlaw, CMREPLUS database.

8. Ishizawa, *Bidding Opened*, *supra* note 6.

9. Jon Choy, *U.S. Says Japan's Construction Market Still Walled Off*, JEI REPORT, July 5, 1996, 1996 WL 8316044.

Japan's present commitment to reform the public works sector, when compared to prior bilateral agreements, hardly warrants the conclusion that the Action Plan has been a complete "failure," U.S. trade negotiators are understandably frustrated by the slow progress in achieving quantitative results.

Without additional efforts and structural changes in Japan's "construction state,"<sup>10</sup> the Action Plan framework for improving market transparency and dismantling the ingrained practices of bid-rigging is unlikely to produce its intended results. As part of an ongoing effort to improve the bidding system, however, the United States and Japan have agreed to periodically review the Action Plan results. This bilateral commitment combined with Japan's multilateral commitment to liberalize local government procurement procedures under the World Trade Organization's new government procurement agreement (hereinafter "WTO GPA")<sup>11</sup> will hopefully promote effective enforcement of domestic competition laws and an across-the-board improvement in market access for foreign contractors. Nonetheless, in order for these bilateral and multilateral accords to have any substantial effect, the Japanese parties implementing the new bidding procedures must be lured away from the mutual capture in which government agencies and private contractors find themselves. To accomplish this may require more than just legal and procedural reforms prompted by outsiders such as the United States. The most promising way to promote such change is by convincing Japan of its own self-interest in having free and open competitive bidding. As the higher project costs attributed to designated bidding and corruption consume a larger portion of Japan's wealth, Japanese voters may

---

10. *Dokken Kokka* ["construction state"] is a term which is often used to refer to the size of Japan's construction market and the close relationships which have evolved between government commissioning agencies and private contractors. Andrew Pollack, *Japan's Road to Deep Deficit is Paved with Public Works*, N.Y. TIMES, March 1, 1997 at 1, 5.

11. The World Trade Organization's new Government Procurement Agreement [hereinafter "WTO GPA"] became effective on January 1, 1996 and greatly expands the scope of international competition for government procurement contracts. For the first time, the new WTO GPA covers construction-related services. Upon becoming signatories to the agreement, Japan and the United States also agreed to apply the WTO GPA's terms to commissioning entities at the state and prefectural levels. The main thrust of the new agreement is to require national treatment for projects exceeding certain threshold values. See Agreement on Government Procurement, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, Apr. 15, 1994), reprinted in 1 LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION (TREATIES), Booklet 10A, (Joseph Dennin, ed., 1995); see also, *January 1 Procurement Pact Widens Access to Government Purchases*, 13 INT'L TRADE REP. (BNA) 1, d15, (Jan. 3, 1996).

eventually issue a mandate to politicians for reforms that go beyond that which agreements or "action plans" can accomplish.

This Note provides an overview of the open-bidding procedures instituted pursuant to the 1994 Action Plan and the prospects for meaningful participation by U.S. contractors in the Japanese market. First, to understand the significance of the 1994 Action Plan, it is important to understand the context in which these reforms were instituted; this Note provides an overview of the Japanese construction industry's alleged entry barriers and why foreign access to the public construction sector is such a hotly contested issue. Next, the Note will brief the reader on trade initiatives and problems that precipitated the 1994 bidding reforms. Two problems which in particular led to increased pressure for reform are the Japanese practices of *dango* and designated bidding. These practices will be described in order to illuminate the Action Plan's goals and provisions. Finally, this Note will conclude with an analysis of the practical problems inherent in the 1994 Action Plan, actual results to-date and suggestions for a more substantive dialogue between U.S.-Japanese trade negotiators on this issue.

## II. THE JAPANESE PUBLIC WORKS SECTOR AND ITS IMPORTANCE TO THE UNITED STATES

The U.S. trade deficit with Japan, which until last year was the highest U.S. trade deficit with any country, resulted in a shortfall of \$47.68 billion in 1996.<sup>12</sup> While Japanese construction firms have developed a significant presence in the United States by performing services for subsidiaries of Japanese corporations, U.S. firms have obtained only a small portion of the Japanese construction sector.<sup>13</sup> As of April 1994, only twelve U.S. contractors and fourteen architectural firms had obtained

---

12. *Dollar Exceeds Most Major Currencies Despite a Widening U.S. Trade Deficit*, WALL ST. J., Feb. 20, 1997, at C24.

13. In 1994, U.S. officials reported that while Japanese firms had a \$13 billion stake in the U.S. construction market, U.S. firms had contracts totaling just \$189 million for work in Japan. John McDonald, *In a Strange Twist, the Prime Contractor Building the Ronald Reagan Federal Courthouse is Japanese-owned*, ORANGE COUNTY REGISTER, Sept. 3, 1996, at B1. As of 1993, it was estimated that Japanese contractors earned approximately \$1 billion a year from United States federal projects. *Walled-up: Japanese Construction*, ECONOMIST, Oct. 30, 1994, at 76. Japan has frequently defended its entry into the U.S. construction market claiming that it has made "[a] large contribution to the American economy and hardly contributed to America's trade deficit with Japan." *Japanese Government Launches Public Relations Offensive on Construction Market*, KYODO NEWS, March 8, 1991.

licenses to perform construction-related work in Japan.<sup>14</sup> In the same year, construction contracts won by U.S. firms represented only 0.017 percent of Japan's total construction market.<sup>15</sup>

The Japanese construction market is reputed to be the largest in the world with over \$865.7 billion in contracts tendered each year.<sup>16</sup> Although the post-1990 drop in land prices has tempered the frenzy of speculative real-estate buying and private construction orders, in 1994 the government announced a new public works investment program totaling \$6.4 trillion that will run from 1995 to 2004.<sup>17</sup> This most recent public works program is a ripe opportunity for foreign contractors to get a bite of the public works apple. If U.S. contractors and design firms can successfully bid on even a small portion of these new public works, further reductions in the U.S.-Japan trade deficit may be possible. Moreover, construction contract awards to U.S. contractors may open new export channels to U.S. suppliers of construction materials, thereby further eroding the balance of payments deficit.

### III. THE JAPANESE CONSTRUCTION SECTOR AND ITS DIFFERENCES AS COMPARED TO THE UNITED STATES CONSTRUCTION SECTOR

#### A. Macroeconomic Sectoral Differences

The construction industry occupies a unique place in Japan's society and economy as compared to the United States. Historically, Japanese construction activity has had a close link to the government.<sup>18</sup> This link became particularly pronounced after World War II as contractors worked with the government to rebuild Japan and other parts of Asia as part of its government reparations program.<sup>19</sup> To cope with the enormity of this task, the government created the Ministry of Construction ("MOC") to oversee reconstruction.<sup>20</sup> The MOC not only oversees construction activity, but also

---

14. Ohmura and Kaminsky, *supra* note 5, ¶ A, E(4)(2)(a).

15. Estimate based on FY 1993 figures. *Id.*

16. Steve Glain, *Japan, U.S. Shifts Trade Focus to Construction*, *ASIAN WALL ST. J.*, July 2, 1996, at 1.

17. *New 10-year, 630 Trillion Yen Public Works Program Approved*, *JAPAN WEEKLY MONITOR*, Oct. 10, 1994, 1994 WL 2097347.

18. See generally David L. Richter, *Legal Barriers to U.S. Firm Participation in the Japanese Construction Industry*, 12 U. PA. J. INT'L BUS. L. 755, 757 (1991).

19. *Id.*

20. S. LEVY, *JAPANESE CONSTRUCTION: AN AMERICAN PERSPECTIVE* 37 (1990) [hereinafter "LEVY, JAPANESE CONSTRUCTION"].

actively promotes new projects and business tie-ups.<sup>21</sup> In order to manage the licensing, construction standards and bidding for major public works, the MOC maintains a staff of over 26,000 employees.<sup>22</sup>

The link between government and the construction sector has strengthened as industrialization and urbanization has necessitated large civil engineering projects. Particularly, over the last twenty years, Japan has been staunchly committed to improving its infrastructure through airport, highway, tunnel and energy projects. Despite two decades of efforts to improve infrastructure, however, government officials contend and the public generally agrees that more work is needed.<sup>23</sup> As an example, even now half of the Japanese people live in homes without sewage connections.<sup>24</sup> These conditions have prompted MOC officials to make comments to the effect that with regard to infrastructure, "Japan is still a developing country compared to Western Europe and the United States."<sup>25</sup>

As mentioned previously, public construction projects account for close to 40 percent of the Japanese construction market, making Japanese contractors far more dependent on the government than U.S. contractors.<sup>26</sup> This interlocking relationship between private firms and government agencies is further evidenced by the fact that at Japan's top one-hundred construction firms, one in six executives is a former bureaucrat.<sup>27</sup> This interlocking system, common in other sectors of the Japanese economy, is known as *amakudari*. In *amakudari*, retiring bureaucrats are offered stable and lucrative employment by private companies which in turn use these former bureaucrats to build lobbying channels between themselves and the

---

21. LEVY, JAPANESE CONSTRUCTION *supra* note 20, at 37.

22. See generally Kaoru Kashiwagi, Robert A. Rubin & Marcy Ressler Harris, *Construction Law and Practice in Japan*, 9 CONSTRUCTION LAW 1, 39 (1989); Richter, *supra* note 18, at 759.

23. Pollack, *supra* note 10.

24. *Id.*

25. *Id.*

26. It has been estimated that government projects account for approximately 20 percent of total construction work in the U.S. See LEVY, JAPANESE CONSTRUCTION, *supra* note 20, at 40. The Organization for Economic Cooperation and Development estimates that public works spending is approximately 6.6 percent of Japan's GDP as compared to 1.6 percent in the United States and 2-3 percent in Western European countries. Pollack, *supra* note 10.

27. 1 in 6 Contractor Execs are "Amakudari", JAPAN ECONOMIC NEWSWIRE, Dec. 13, 1996, available in Westlaw, JWIREPLUS database. According to Teikoku Databank, as of March 1996, almost half of the executives hired from outside were from construction-related areas in national and local government organizations. The surveys indicate that although many of the former bureaucrats had been employed in the engineering side of the business at the government agencies, at the private firm they often worked in the sales departments to apparently strengthen the private firm's link to the public sector work.

public commissioning entities. For many observers in the United States, this system is thought to breed corruption and impinge on the independent decision-making authority of the government agencies. Among many Japanese construction executives, however, *amakudari* is viewed as a way of forging beneficial relationships between government agencies and the private sector.

The net result of this public agency and private sector linkage is arguably a situation of mutual capture where both the private firm's and public ministry's interests and agents have become commingled. This commingling erodes the system of administrative checks and balances designed to ensure that public contracting is efficient and in the public's best interest. While the firm/ministry alignment of interests may work to decrease informational asymmetries, so also rises the specter of firms exercising improper political influence to obtain contracts.<sup>28</sup> Foreign firms, without the close political connections developed from years of working with the MOC, have little hope of penetrating this closed system in order to win public contracts. This situation is further exacerbated for U.S. firms which are significantly limited in their use of former government officials as paid consultants under the Foreign Corrupt Practices Act.<sup>29</sup>

#### B. "General Contractors" in Japan as Compared to their U.S. Counterparts

To understand U.S.-Japan trade tension on the construction issue, it is important to note that the idea of a "construction company" in Japan has different connotations than in the United States. General contractors in Japan are extremely diversified entities offering a range of services. The

---

28. In 1993, just prior to the formal announcement of the bidding reforms, top Japanese contractors were shaken by a series of scandals involving company executives who were arrested on charges of bribing public officials. Several public officials were also arrested. See Masato Ishizawa, *Born-Again Contractors Out to Win Public Trust*, NIKKEI WEEKLY, Feb. 14, 1994, at 1. One construction company executive in a press conference frankly admitted that money was given to the Sendai public authorities "to improve [their relationship] . . . because [they] had not been granted any major public-works projects from Sendai." See Ishizawa, *Bidding Opened*, *supra* note 6, at 1. Furthermore, the construction industry has been a major source for the Liberal Democratic Party's political donations. See Ellis S. Krauss & Isobel Coles, *Built-in Impediments: The Political Economy of the U.S.-Japan Construction Dispute*, in JAPAN'S ECONOMIC STRUCTURE, SHOULD IT CHANGE? 338 (K. YAMAMURA ED. 1990).

29. The Foreign Corrupt Practices Act, which is unique to the United States, prohibits U.S. persons from offering direct or indirect payments of money or "anything of value" to a foreign official who assists in obtaining business, preferential legislation or regulations in a corrupt fashion. 15 U.S.C. § 78dd-2 (1994).

“Big Six” Japanese general contractors in aggregate employ over 85,000 engineers, architects and construction specialists who can offer start-to-finish construction services.<sup>30</sup> While construction is their main business, they are also actively engaged in real-estate development, hotel management and even cookie manufacturing.

On the technical front, the civil engineering capabilities of Japanese construction firms have advanced to cope with limited land areas and enabled construction of offshore and underground areas.<sup>31</sup> When comparing U.S. and Japanese contractors, it is useful to consider that large Japanese contractors maintain extensive research and development facilities and spend significantly more on research and development than their U.S. counterparts.<sup>32</sup> Japanese contractors are currently engaged in advanced research regarding earthquake-proof structures, space construction techniques and robotics. U.S. contractors, in contrast to the foregoing, tend to have smaller organizations, are less diversified and employ forty percent fewer employees.<sup>33</sup>

Even though there are no quantitative studies that establish which country’s contractors are the more competitive, such factors can be evaluated qualitatively. First of all, large Japanese contractors’ diversification permits them to cast a broad relationship network. This network can be easily tapped in order to obtain pricing information for construction materials and subcontractors. U.S. contractors, especially new entrants to the Japanese market which lack these preexisting supplier and subcontractor relationships, must necessarily spend more time and money to establish local relationships prior to making a bid proposal. With improved access to the public works market, it is hoped that U.S. firms will be able to develop informational networks comparable to those of their Japanese counterparts.

Although Japan’s top contractors have certain unquestionable technical strengths, Japanese contractors lag behind U.S. and European contractors in the international contracting market.<sup>34</sup> Many top Japanese firms have a broad international presence which, on average, generates a

---

30. “The Big Six” are Japan’s largest contractors — Kajima, Kumagai Gumi, Obayashi, Shimizu, Taisei and Takenaka. In 1991, their total net sales volume and orders backlog exceeded \$190 billion. SIDNEY M. LEVY, JAPAN’S BIG SIX, INSIDE JAPAN’S CONSTRUCTION INDUSTRY 1 (1993) [hereinafter “LEVY, JAPAN’S BIG SIX”].

31. Ohmura and Kaminsky, *supra* note 5, at ¶4(1)(a)(b).

32. *Id.*

33. LEVY, JAPAN’S BIG SIX, *supra* note 30, at 60.

34. Taizo Ohmura, *Local Government Major Projects*, Nat’l Trade Databank, Doc. Id: 2478, (Int’l Trade Admin., Aug. 1, 1996).

lower percentage of overseas revenues than the international operations of U.S. and European firms.<sup>35</sup> One might argue that the lower profitability of Japanese firms internationally is evidence that the difficulty foreign contractors face in Japan is less a question of competitive strength and more a question of Japanese protective trade practices. Some commentators have also noted that U.S. firms have had more experience in building construction and design, especially for large-scale projects with grand and conceptual design schemes.<sup>36</sup> As a result of this experience, U.S. firms have developed highly advanced systems for managing construction costs and quality. It is expected that this management "know-how" will give U.S. firms an edge in coping with labor shortages and rising construction costs in Japan.<sup>37</sup>

#### IV. THE DESIGNATED COMPETITIVE BIDDING SYSTEM AND *DANGO*: TWO SPECIFIC RESTRAINTS ON TRADE AFFECTING U.S. GENERAL CONTRACTORS VYING FOR PUBLIC WORKS CONTRACTS

U.S. trade negotiators have a lengthy laundry list of direct and indirect trade restraints which affect U.S. construction firms. This list encompasses specific complaints with respect to licensing procedures and the above-mentioned governmental collusion with industry.<sup>38</sup> For purposes of understanding the 1994 Action Plan and related U.S.-Japan agreements, it is necessary to focus on two unique aspects of Japan's construction sector: 1) the designated competitive bidding system and 2) *dango*, otherwise known as collusive bidding or price-fixing.

##### A. *Designated Competitive Bidding*

Public works contracts in Japan, at least according to the law, are required to be procured through a process of competitive bidding.<sup>39</sup> Nevertheless, even when competitive bidding is employed, each bidder must pass a qualification process which takes into consideration the

---

35. *Id.*

36. *Japan's Construction Market*, CONSTRUCTION REVIEW, Sept. 22, 1992, 1992 WL 3121347.

37. *Id.*

38. *See generally* Richter, *supra* note 18, at 759.

39. Z. KITAGAWA, DOING BUSINESS IN JAPAN PART II §6.04[1] (1990).

bidder's past financial and construction performance.<sup>40</sup> For large and complex projects requiring a certain level of technical expertise and where few bidders are expected to participate, designated competitive bidding may be authorized by a Cabinet order.<sup>41</sup> Despite the legal requirement that open-competitive bidding must be used for most government procurement under Article 29-3(1) of the Accounts Law and Article 234 of the Local Autonomy Law, in practice most public works contracts have been awarded through designated bidding procedures.<sup>42</sup>

In designated competitive bidding, bidders are selected before the tender process by the government agency soliciting the bids.<sup>43</sup> In order to be chosen as a designated bidder, a firm must first obtain a contractor's license from the MOC and then register with the government.<sup>44</sup> The government commissioning agency then ranks the contractors based on criteria weighted heavily toward the contractor's qualifications and track record in Japan.<sup>45</sup> Based on this ranking, ten contractors are usually invited to bid on the project.<sup>46</sup> A contractor which is not designated may not participate in the bidding regardless of its qualifications.<sup>47</sup> For U.S. firms, this is tantamount to a "Catch 22": no experience, no access; no access, no experience.<sup>48</sup>

The designated bidding system is often defended as a means of ensuring quality control and preventing low bids by firms which are unqualified and too unsophisticated to perform the desired work. Japanese construction firms complain that an American-style open and competitive bidding system "wastes time" by attracting countless bids from inexperienced firms.<sup>49</sup> Furthermore, critics of competitive bidding claim that although competition may ensure lower prices, there is no guarantee that the job will be done well.<sup>50</sup>

---

40. Jean Heilman Grier, *U.S.-Japan Government Procurement Agreements*, 14 WIS. INT'L L. J. 1, 7 (1995).

41. *Id.*

42. Kaoru Kashiwagi, *Opening of Japan's Public Works Construction Market*, 11 INT'L CONSTRUCTION L. R. 253, 254 (1995).

43. *U.S. Said Seeking Access to Japanese Municipal Public Works*, INTERNATIONAL BUSINESS AND FINANCE DAILY (BNA), Sept. 20, 1995.

44. Grier, *supra* note 40, at 32-33.

45. See Richter, *supra* note 18, at 4.

46. Grier, *supra* note 40, at 32-33.

47. *Id.*

48. *Id.*

49. *Walled-up: Japanese Construction*, *supra* note 13.

50. *Id.*

Kunio Maeda of the Tobishima Corporation expressed an alternative view that elimination of the designated bidding system would destroy the fabric of Japanese society by allowing cheap imported labor into Japan.<sup>51</sup> According to Mr. Maeda, the subsequent influx of foreign labor from nearby Asian countries would cause great dislocation in the domestic labor market resulting in unemployment, urban slum areas and upsetting the "unique" Japanese harmony.<sup>52</sup> An incidental, albeit important, side effect would be the bankruptcy of thousands of "mom & pop" contractors who might be squeezed-out of the market by a surge of outside competition.<sup>53</sup> No longer would smaller contractors and subcontractors be "guaranteed" a piece of the pie. For Japanese politicians to even consider a move that would jeopardize smaller as well as larger contractors' market shares would be equivalent to political suicide.<sup>54</sup> In short, Mr. Maeda's comment gives us a strong hint that pork-barrel politics, rather than "quality control," might be driving some of the resistance to bidding reform.

While superficially it might be argued that designated bidding procedures serve the same role as construction bonding in the United States,<sup>55</sup> the coziness of contractor-government relations combined with licensing procedures that require construction experience in Japan prompted the United States to levy complaints that the procedures are a structural impediment to foreign access.<sup>56</sup> In response to this U.S. criticism, the MOC issued guidelines in 1988 for obtaining a contractor's license and a place on the designated bidders list.<sup>57</sup> The government bulletin plainly acknowledged and justified the designated bidding system as follows:

---

51. LEVY, JAPANESE CONSTRUCTION, *supra* note 20, at 149.

52. *Id.*

53. Yoshio Takeuchi, the president of the special purpose company established to construct the Kansai Airport, described the public works sector as an "unemployment countermeasure." Krauss and Coles, *supra* note 28, at 346.

54. The politically sensitive nature of Japan's construction industry is better understood in light of the fact that the construction industry employs over 6.2 million people (representing approximately 10% of the national work force) and accounts for 20% of GNP. *Id.* at 336; Louise de Rosario, *Backs to the Wall: Japan's Public Works Bid-Rigging Draws Increasing Fire*, FAR EASTERN ECONOMIC REVIEW, June 24, 1993, at 59.

55. Construction bonding is a contractual device which protects project owners from incompletion or default by building contractors. In the United States, insurance underwriters are the main suppliers of construction bonds which are frequently required by project owners of contractors. See generally LEVY, JAPANESE CONSTRUCTION, *supra* note 20, at 20.

56. It should be noted that the Japanese claimed that the designated bidding system was no different from procedures in European countries, such as the United Kingdom, which use a "selective tender" system. See Krauss & Coles, *supra* note 28, at 341.

57. LEVY, JAPANESE CONSTRUCTION, *supra* note 20, at 150.

In designated competitive bidding, the commissioning entity selects those firms that are thought to be suitable as contractors with regard to funding, credit, operational capacity, and other factors . . . the winning contractor will then be chosen through competitive bidding. Since the designated competitive bidding has the advantage of being able to exclude those firms whose operational capacities are insufficient, or who might provide inferior work, or who might commit other breaches of contract, most contracts for public works under the jurisdiction of the Ministry of Construction are awarded through the designated competitive bidding system.<sup>58</sup>

As the government's statement illustrates, the designated bidding system offers no bright line safeguards against government officials and closely linked construction company executives deciding which firms possess "the operational capacities" to do the work.

### B. *Dango*

The designated bidding procedures feed the flames of yet another serious impediment to the prospects of U.S. contractor access: *dango*. *Dango* refers to a wide range of bid-rigging activities which according to Article 2.6 of Japan's Anti-Monopoly Act of 1947 ( hereinafter "AMA"), and the Japanese Criminal Code are illegal.<sup>59</sup> Article 2.6 of the AMA defines bid-rigging as "the restriction of business activities through mutual cooperation between companies and the substantial restraint of competition in certain business areas against the public interest."<sup>60</sup> The Japan Fair Trade Commission ("JFTC") can impose administrative sanctions<sup>61</sup> or criminal sanctions<sup>62</sup> on persons who violate the AMA.<sup>63</sup> While the AMA has been on the books since the end of World War II, it was rarely enforced

---

58. *Id.*

59. See generally *Shiteki dokusen no kinshi oyobi kosei torihiki no kakuhō ni kansure hōritsu* [Law Concerning the Prohibition of Private Monopoly and the Maintenance of Fair Trade], Law No. 54 of 1947 [hereinafter "Anti-Monopoly Act"].

60. *Id.* art 2.6

61. *Id.* art. 25.

62. *Id.* arts. 89-100.

63. Administrative sanctions may be carried out under Articles 7 and 7.2 of the Anti-Monopoly Act. Criminal sanctions are authorized under Article 89 of the Anti-Monopoly Act.

prior to 1991.<sup>64</sup> Additionally, criminal prosecution of AMA cases in the last five years has been sporadic and no one has been imprisoned as a result of a violation.<sup>65</sup> In 1984, after several AMA violations by construction companies, the JFTC issued industry-specific guidelines targeting *dango* activities by construction trade associations.<sup>66</sup> Nevertheless, *dango* continued, apparently unaffected by the new JFTC guidelines.<sup>67</sup>

*Dango* in public works bidding frequently occurs between designated bidders who collude and select which contractors should win the contract and set the expected contract price.<sup>68</sup> The designated bidders then bid in the prescribed manner so that the selected contract winners win at the decided contract price.<sup>69</sup> Over a period of time, construction firms engaging in *dango* alternate among themselves as to which firms will place the winning bids for different projects. Until recently, *dango* was viewed as a practice only occurring at the contractor level to assure that each party received its fair share of the public works budget and in response to *dango*, it was commonly believed the government merely looked the other way. Transactions have been uncovered, however, that indicate the government may actually encourage *dango*.<sup>70</sup>

Construction industry executives and the MOC often consider *dango* a necessary evil, and until recently, "in the minds of most construction industry people . . . roughly on par with committing a parking offence."<sup>71</sup>

64. In 1991, the Japanese Fair Trade Commission levied criminal charges against industrial wrapping material manufacturers for price fixing. Naoaki Okatani, *Regulations on Bid Rigging in Japan, the United States, and Europe*. 4 PAC. RIM. L. & POL'Y J. 249, 254, (1995).

65. NTE Report, *supra* note 4.

66. Yoichiro Hamabe, *Changing Antimonopoly Policy in the Japanese Legal System — An International Perspective*, 28 Int'l Law 903, at 920 (1994) citing Shohei Shibata, et. al., *Dokusenkinshiho no Kaisetsu* ("Commentary on the Anti-Monopoly Act") (Taisei ed., 1993) at 205, 219.

67. It has been suggested that despite the JFTC's 1984 measures, Shin Kanemaru, the leader of the LDP, undertook behind-the-scenes measures to strengthen *dango* against the JFTC guidelines. See Krauss & Coles, *supra* note 28, at 340.

68. Okatani, *supra* note 64, at 250.

69. *Id.*

70. In March 1995, the Japan Sewage Works Agency, an agency under the MOC, was accused of actively proposing that a cartel be formed by select sewage contractors in advance of a bid for a sewage treatment facility. Japan's Fair Trade Commission ("FTC") filed a complaint against the companies involved, but said it lacked the authority to file a complaint against the agency or officials there. According to sources at the contractors charged by the FTC, *ten no koe* — voices from heaven — came from the Sewage Agency directing the contractors on how to divide the work for the project and what bids to submit for the contracts. See Masato Ishizawa, *Bid-Rigging by Electric Firms, Government Alleged - FTC Files Complaint*, NIKKEI WEEKLY, March 13, 1995, at 2.

71. Charles Smith, *Bid Rigours*, FAR EASTERN ECONOMIC REVIEW, Mar. 23, 1995, at 57.

Given the large number of contractors in Japan,<sup>72</sup> *dango* is seen as way of equalizing opportunities and protecting the smaller contractors that provide subcontracting services to the larger general contractors.<sup>73</sup> It can be argued that without *dango* larger contractors could easily tap into their economies of scale and vast informational networks and crowd-out smaller competitors. Through the distribution of contracting opportunities, *dango* prevents destructive competition that might otherwise undermine long-term general contractor/subcontractor relationships. Again, the net result of the *dango* system is a controlled competitive system which seeks to keep all contractors, both large and small, at full employment. Foreign contractors threaten this even-handed distribution of public works contracts among the construction cartels.

Aside from pork-barrel justifications for *dango*, bid-rigging clearly leads to inefficiencies and misallocated resources. In bid-rigging, contract prices are kept artificially high and the realization of a lower price which might have resulted in a freely competitive regime is undermined.<sup>74</sup> Consequently, inefficient contractors who lack a competitive advantage are sustained at the expense of project owners and taxpayers. Some commentators have noted that because of factors such as bribery and closed bidding, construction costs in Japan are at least 30-40 percent higher than in the United States.<sup>75</sup> From the U.S. perspective, the inefficiencies and higher costs associated with a closed public works market drains monies from the Japanese treasury that might otherwise be used to stimulate Japanese demand for American imports.<sup>76</sup>

## V. RECENT HISTORY OF CONSTRUCTION SECTOR TRADE TALKS

The designated bidding system and related *dango* activities were not a hot-point of contention between U.S.-Japan negotiators until bidding for the Kansai Airport in 1987 illustrated how formidable the barriers to U.S.

---

72. *Japan's Edge on U.S. Widens*, ENGINEERING NEWS RECORD, Sept. 20, 1990, at 16. It is estimated there are over 500,000 small contractors in Japan.

73. Takunosuku Hasegawa, an executive director of the Research Institute of Construction and the Economy, defended *dango* as a practice that helps defuse destructive competition. Krauss & Coles, *supra* note 28, at 340.

74. See Okatani, *supra* note 64, at 264.

75. Pollack, *supra* note 10.

76. See generally Krauss & Coles, *supra* note 28, at 345.

involvement in large civil engineering projects actually were.<sup>77</sup> The Kansai Airport project was a massive one trillion yen project near Osaka which entailed the construction of a man-made island three miles offshore.<sup>78</sup> When foreign firms were not selected as qualified bidders because they could not list previous experience in building similar projects in Japan, Congress began to rattle its sword. Finally, after the Senate Foreign Relations Committee cited the public works market as yet another area where the Japanese were stonewalling U.S. firms,<sup>79</sup> the Japanese Government opened the Kansai Airport project to bidding by U.S. firms on a nondiscriminatory basis.<sup>80</sup> In the resulting Kansai Airport Agreement and subsequent bidding, the experience of overseas contractors outside Japan was deemed equivalent to construction experience within Japan.<sup>81</sup>

After this initial taste of the lucrative public works market, the U.S. requested access to other public works projects on the same basis as provided in the Kansai Airport Agreement.<sup>82</sup> When Japan rejected this request, Congress passed the Brooks-Murkowski Amendment to an appropriations bill in late 1987 which precluded Japanese construction firms from participating in all U.S. public works projects for one year.<sup>83</sup> In addition to the Brooks-Murkowski Amendment, the United States Trade Representative, invoking the authority of Section 301 of the 1974 Trade Act,<sup>84</sup> began to investigate and consider possible retaliation against trade practices of the Japanese government that constituted barriers to U.S. access to the public works sector.<sup>85</sup>

These drastic measures prompted a series of discussions between the Japanese Ambassador to the United States, Nobuo Matsunaga, and then U.S. Secretary of Commerce, C. William Verity, culminating in the Major

---

77. *It will be Difficult to Award Contracts for Phase 2 of the JPY 1 Trillion new Kansai International Airport to Foreign Firms because Japanese Construction Workers will be Involved*, NIKKEI WEEKLY, May 16, 1987, at 1, col. 4.

78. Krauss & Coles, *supra* note 28, at 345.

79. *Id.* at 346.

80. Grier, *supra* note 40, at 34.

81. *Id.*

82. *Id.*

83. *Id.* at 36.

84. Trade Act of 1974, 19 U.S.C. §§ 2411-2420 (1994). Section 301 authorizes the U.S. Trade Representative (hereinafter "USTR") to take action against trade practices of foreign countries that are inconsistent with or deprive benefits to the United States under international trade agreements. Section 301 also permits the USTR to take action when a foreign country's trade policies either "unjustifiably" or "unreasonably" restrict or burden U.S. commerce.

85. Grier, *supra* note 40, at 16.

Projects Arrangements.<sup>86</sup> The 1988 Major Projects Arrangements (hereinafter "MPA") and their subsequent expansion in 1991 formed the basis of limited U.S. involvement in large public works contracts prior to the 1994 Action Plan and allowed and encouraged bidding on specified Japanese public projects over a fifteen year period.<sup>87</sup> "Special measures" agreed upon between the U.S. and Japanese trade negotiators aimed to enhance U.S. firms' participation in the designated projects. The measures included: 1) expedited licensing procedures for foreign firms, 2) public tender notices for MPA projects to be published in major construction newspapers, 3) longer tender schedules, and 4) the establishment of an "Access Promotion Office" where U.S. firms could gather information regarding Japan's public construction market.<sup>88</sup> In addition to the MPA, the MOC, through the mechanism of administrative guidance,<sup>89</sup> asked Japanese contractors to form partnerships and jointly participate in bidding with foreign contractors.<sup>90</sup> In short, the new procedures helped simplify the steps necessary for foreign contractors to become designated bidders for a narrow range of big projects. Firms which were not designated, although still out of the loop, were entitled to a reason for why they were not selected.<sup>91</sup>

The projects designated by the MPA were significant in that they represented some of the largest developments slated in Japan. Projects included the Kansai Airport Terminal, Haneda Airport and Minato Mirai, a huge urban redevelopment project near Tokyo. U.S. and European firms quickly rushed to form joint ventures to obtain portions of these lucrative contracts. One firm, Overseas Bechtel, Inc., a subsidiary of the U.S. Bechtel Group, was granted 10 percent of the Haneda Airport project to the dismay and resentment of other Japanese contractors.<sup>92</sup>

---

86. See Richter, *supra* note 18, at 6.

87. See generally Dryden, Usui & Setzer, *Accord Reached on U.S. Access to 14 Major Projects in Japan*, ENGINEERING NEWS RECORD, Apr. 7, 1988, at 12.

88. Ohmura and Kaminski, *supra* note 5.

89. Administrative guidance [*gyosei shido*] has been described as "a common Japanese regulatory technique that, although generally non-binding, seeks to conform the behavior of regulated parties to broad administrative goals." Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 926-32 (1984).

90. Naoaki Usui, *Slowly but Measurably, the Japanese Door Opens*, ENGINEERING NEWS RECORD, Apr. 13, 1989, at 12.

91. Grier, *supra* note 40, at 37.

92. Takumi Anzai, *European and U.S. Firms Lining Up to Join Airport Project*, NIKKEI WEEKLY, Mar. 17, 1990, at 1.

Although the MPA gave U.S. contractors a foothold and access to several lucrative projects, the MPA had several fundamental flaws. Within Japan, the opening of public works bidding was viewed as merely a token donation to alleviate foreign pressure.<sup>93</sup> As it has been said with respect to minority affirmative action contracting in the United States, what essentially amounted to tokenism reinforced the perception that foreign contractors were inferior and not entitled to the share of contracts they had been allocated.<sup>94</sup> Based upon visits to joint venture construction sites, it was clear that foreign contractor personnel were segregated from the main operations and were only called upon to consult on minor issues or to appear during visits by U.S. and Japanese government officials. One Japanese construction worker at the Kansai Airport project described the role of two U.S. general contractors in the project as "rather unimportant."<sup>95</sup> A Japanese executive at one of the general contractors involved in the airport joint venture went on to further say that, "not one of the jobs [the U.S. contractors] are doing is something that only they could do."<sup>96</sup> Naturally, the large U.S. contractors which had been granted such concessions were content to continue receiving the preferred treatment and were reluctant to pressure Japan into a defensive position. Smaller U.S. firms lacking clout or name recognition, however, were as effectively precluded from the market as they had been before.<sup>97</sup>

Most important, the "special measures" only applied to MPA designated projects. The Japanese government refused to apply the MPA procedures to other work and asserted that the MPA was only a temporary measure to give foreign firms exposure to the bidding system so that in the future they could compete without special treatment.<sup>98</sup> As a result, the Japanese government still retained power over foreign contractor access by controlling which projects were designated as MPA work. For all other public works projects, designated bidding continued to be the norm.

It is important to note that the MPA set into motion reforms which were subsequently built-upon in the 1994 Action Plan. First, Japan agreed

---

93. *Token Work or Token Projects — U.S. Builders Shut Out of Big Bucks*, TOKYO BUSINESS TODAY, Feb. 1994, at 44.

94. See generally *University of California Regents v. Bakke*, 438 U.S. 265, 298, 98 S.Ct. 2733, 2752 (1978), (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection.").

95. *Token Work*, *supra* note 93.

96. *Id.*

97. Steven W. Setzer and William Krizan, *U.S. getting tough with Japanese*, ENGINEERING NEWS RECORD, May 17, 1993, at 6.

98. Grier, *supra* note 40, at 39.

to acknowledge construction experience outside Japan as equivalent to experience obtained in Japan for the designated MPA works.<sup>99</sup> The MPA also led to the establishment of a Procurement Review Board to hear complaints of potential suppliers.<sup>100</sup> This Procurement Review Board was subsequently incorporated into the 1994 Action Plan and elements of it were borrowed and used as a basis for Japan's dispute resolution mechanism under the WTO GPA.

Despite the progress embodied in the MPA provisions, and only four years after the initial MPA agreement, the Commerce Department figures pointed to a 30 percent decrease in contract awards to U.S. firms.<sup>101</sup> Some insiders believed that Japanese officials had been breaking large contracts into smaller ones to fall under the threshold amount for projects to be considered subject to the MPA, thereby avoiding application of the MPA completely.<sup>102</sup> The MPA had also kept the designated bidding system largely intact — still vesting commissioning entities with authority to exclude foreign firms. Without addressing designated bidding procedures and bid-rigging *per se*, the MPA reforms were unlikely to benefit foreign contractors other than those contractors fortunate enough to get a piece of the highly visible projects. Since only select foreign firms were chosen to be a part of the MPA joint ventures, it might be argued that the joint ventures spawned by the MPA were the same type of closed arrangements about which outside U.S. companies had previously complained.<sup>103</sup>

## VI. THE 1994 ACTION PLAN

### A. *Course of Events Leading to the Action Plan*

The U.S.-Japan construction dialogue again reached an impasse in 1993 as the limited results of the MPA became more apparent and as a series of bribery scandals involving top government and construction industry officials received extensive press attention. In 1993, Japan was cited by the United States for discriminating against U.S. products and services in the public works sector under Title VII.<sup>104</sup> Along with the

---

99. *Id.* at 40.

100. *Id.*

101. Setzer and Krizan, *supra* note 97.

102. *Id.*

103. See generally *Collusion Rampant in Japan*, ENGINEERING NEWS-RECORD, Jan. 12, 1989, at 17.

104. Grier, *supra* note 40, at 41 citing USTR, Title VII Report 2, at 1 (April 30, 1993).

citation, the U.S. set a deadline by which Washington intended to impose sanctions against Japanese construction firms operating in the United States unless the Japanese government took steps to reform the public works sector.<sup>105</sup> These actions by the United States, combined with a dire need to regain domestic public trust lost due to the bid-rigging and bribery scandals,<sup>106</sup> prompted the Japanese cabinet to adopt the Action Plan on January 18, 1994. The next day, on January 19, 1994, the United States and Japan also announced the establishment of a new U.S.-Japan Public Works Agreement which incorporated the Action Plan and made it binding between the United States and Japan.<sup>107</sup>

While the U.S. Trade Representative's pressure and deteriorating public confidence in the public works system clearly prompted some of the reforms, it is also likely the reforms were driven by the need to restart public works projects that had been postponed because government authorities had canceled contracts with the network of companies involved in the scandals.<sup>108</sup> These projects were viewed as a key input in Japan's economic stimulus program designed to help pull the country out of its recession. Without meaningful change in the public works system, some politicians may have feared the economic stimulus program would never get off the ground.

### *B. Substantive Provisions of the Action Plan — An Overview*

The goals of the Action Plan are ambitious as the January 18, 1994, government release stated:

Paying due attention to the importance of ensuring high quality in public works, the Action Plan aims to drastically enhance transparency, objectivity and competitiveness in bidding and contracting procedures for public works in Japan, as well as to make these procedures more approachable from an international perspective, and to further strengthen the principle of non-discrimination. To this end, the Government of Japan will undertake the concrete measures, as described below, which

---

105. David Holley, *Japan OKs Plan to Open Public Works Projects to Outside Firms*, LOS ANGELES TIMES, Jan. 19, 1994, at 1.

106. Action Plan, "Background and Objectives of Action Plan."

107. Grier, *supra* note 40, at 41.

108. Masato Ishizawa, *Radical Revision urged for construction bids: Restoration of public trust sought following rash of rigging and bribery scandals*, NIKKEI WEEKLY, Dec. 27, 1993, at 2.

include the adoption of transparent, objective and open competitive procurement procedures, appropriate evaluation of foreign firms, establishment of a complaint mechanism, and preventative measures against such unfair practices as "*Dango*."<sup>109</sup>

So what exactly are these "concrete measures" and do they represent meaningful progress for foreign firms?

### 1. Construction Services

The Action Plan promises "open and competitive bidding" in construction services for central government construction work valued at \$6.5 million or more and quasi-governmental construction work valued at \$21.6 million or more.<sup>110</sup> Contractors participating in the new procurement procedures must first obtain a construction license.<sup>111</sup> To obtain a construction license, a company must 1) employ qualified managers and engineers and 2) demonstrate credibility in executing contracts as well as financial reliability.<sup>112</sup> The foreign experience of managers and engineers will be evaluated by the MOC to determine whether such personnel is qualified for licensing purposes.<sup>113</sup>

Once a construction license is obtained, the contractor must then "qualify" to be able to participate in the "Open and Competitive Bidding Procedures." Qualification requires the potential contractor to 1) register with the commissioning authority, 2) obtain a minimum score on a business evaluation conducted by the commissioning entity, and 3) meet certain "definitive criteria" which take into consideration the contractor's ability to fulfill the contract.<sup>114</sup>

---

109. Action Plan, "Background and Objectives of the Action Plan."

110. See generally *New Thresholds for Japan's Public Works Projects*, *supra* note 7.

111. Action Plan, ch. II(1)(1).

112. *Japan's Construction Market*, *supra* note 36.

113. *Id.*

114. Action Plan, at ch. II(2)(d)(i)-(iii).

## 2. Notice Procedures and Publication of Qualification Requirements

To enable contractors to obtain information necessary to put together a successful bid, commissioning entities must publish a notice stating that procurement procedures will be initiated.<sup>115</sup> This notice must include information regarding the type of project, qualification requirements, tendering procedures and relevant contact persons.<sup>116</sup> Only general information regarding the project and contact points will be published in English.<sup>117</sup> The notification provisions are particularly important for contractors requiring access to information regarding the below-mentioned qualification requirements.

## 3. Qualification and Contract Awards

The qualification requirements must be set out as “objective points” taking into consideration *inter alia* the business evaluation results, past records of the firm in similar projects and the qualifications and experience of engineers expected to work on the project.<sup>118</sup> In addition to materials required to be submitted under the qualification requirements, the Action Plan also requires potential contractors to submit detailed implementation plans for “particularly difficult projects” (known as “Implementation Plan Evaluation Type Projects”). These implementation plans, which are specific to the tendered project, will be used by the commissioning entities in evaluating the contractors’ technical qualifications.

After contractors have submitted their tender application materials, the commissioning entity must notify the potential contractors whether they have passed the qualification requirements within seven days (14 days for the “Implementation Plan Evaluation Type Projects”).<sup>119</sup> Contractors that are deemed “disqualified” will be notified of the reasons for their disqualification and may request additional explanation

---

115. *Id.* at ch. II(2)(b).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at ch. II(1)(2)(e).

if they so desire.<sup>120</sup> In the end, the contract must be awarded to the bidder submitting the lowest bid below the ceiling price established by the commissioning entity.<sup>121</sup>

#### 4. Design and Consulting Services

The "Public-Invitation Proposal Procedure" for suppliers of design, engineering and consulting services operates in a similar manner to the Open and Competitive Bidding Procedures for construction services providers. Based on objective criteria, firms are invited to submit proposals from which the commissioning entity will select the "best proposal."<sup>122</sup> Again, firms not meeting the criteria set out in the procurement notice will not be able to submit proposals. Although design and consulting services, such as architecture and interior design, are usually not easily evaluated on price alone, the Action Plan does provide for a "Public-Invitation Competitive Bidding Procedure" in cases where price is the only criterion for selection among proposals.<sup>123</sup>

#### 5. Evaluation of Foreign Firms and Non-Discrimination Provisions

One of the more important provisions in the Action Plan for U.S. contractors is the "non-discrimination" provision providing that "foreign firms will not be discriminated against in any aspect of the bidding procedures for public works."<sup>124</sup> This non-discrimination provision also addresses the "Catch 22" situation in which U.S. firms are barred from the bidding process because they have no contracting experience in Japan. Qualification assessments of foreign firms will now require evaluation of construction experience outside of Japan as well as the financial resources of the parent company in the foreign contractor's home country.<sup>125</sup>

---

120. *Id.*

121. *Id.* at ch. II(1)(2)(f).

122. *Id.* at ch. II(2)(1)(g).

123. *Id.* at ch. II(2)(1)(h).

124. *Id.* at ch. III.

125. *Id.* at ch. III(2)-(3).

The Action Plan further addresses discrimination against foreign contractors by prohibiting commissioning entities from adopting technical specifications that are disadvantageous to foreign suppliers. In most circumstances, technical specifications must now be based on international or nationally recognized standards.<sup>126</sup>

## 6. Countermeasures against *dango*

Since the Action Plan was prompted in part due to the bribery and bid-rigging scandals that were exposed in 1993, the Action Plan proposes several measures to combat the practice of *dango*. First, the Action Plan requires the Ministry of Construction and prefectural governors to increase penalties imposed on persons who engage in *dango*.<sup>127</sup> Second, the Action Plan requires commissioning entities to block firms that have violated the Anti-Monopoly Act from participating in the open bidding process.<sup>128</sup> Third, the Action Plan contemplates a strengthened role for the JFTC in establishing and enforcing guidelines for the public procurement process.<sup>129</sup> The new JFTC guidelines specifying fundamental principles of applying Article 2.6 of the Anti-Monopoly Act to public works bidders were announced in July 1994 and offer concrete examples of practices that violate and do not violate the Anti-Monopoly Act.<sup>130</sup> Finally, the Action Plan authorizes commissioning entities to recover damages suffered as a result of *dango* or other illegal trade practices.<sup>131</sup>

## 7. Joint Ventures

Prior to the Action Plan, most large public works contracts were awarded to joint ventures, a practice which was often criticized as a thinly disguised means of distributing public works contracts among contractors.<sup>132</sup> Additionally, the very nature of the joint venture business

---

126. *Id.* at ch. VI(1)(2)(b).

127. *Id.* at ch. V(1).

128. *Id.* at ch. V(2).

129. *Id.* at ch. V(3).

130. *FTC Unveils Legal Norms to Deter Contractor Bid Rigging*, KYODO NEWS SERVICE, July 5, 1994, available in LEXIS, World library, JEN file.

131. Action Plan, at ch. V(6)(2).

132. *Id.* at ch. VI(2)(1).

organization was ripe for further entrenching the interlocking network that was conducive to collusion. The Action Plan seeks to reverse the past tendency of joint venture formation with a new emphasis on placing orders to single contractors except in cases where there is a "compelling necessity" to award the contract to a joint venture.<sup>133</sup>

## 8. Complaint Mechanism

Since the Action Plan reforms are only as effective as the enforcement and dispute resolution mechanisms employed to ensure compliance, the Action Plan carries over the third party complaint review board from the MPA which has been adjusted to meet the requirements set forth under the WTO GPA. The Action Plan initially provided for a temporary dispute resolution board which was replaced by the Government Procurement Review Board when the WTO GPA became effective on January 1, 1996.<sup>134</sup> The GPA Procurement Review Board reviews complaints by all suppliers in connection with Japanese government procurement and not only construction related disputes.

## 9. Sunset Provisions for the Major Projects Arrangements

The MPA will continue to be in effect until all 36 projects designated as MPA projects are completed.<sup>135</sup> Procurement for construction, design and consulting services that exceed the threshold amounts set forth in the Action Plan, however, will be governed by the terms of the Action Plan.<sup>136</sup> The gradual phasing-out of the MPA is consistent with the Japanese government's desire to move away from the MPA's preferential procedures to an open, competitive system in which foreign firms compete on a level playing field.<sup>137</sup>

---

133. *Id.* at ch. VI(2)(1).

134. See Jean Heilman Grier, *Japan's Implementation of the WTO Agreement on Government Procurement*, 17 U. PA. J. INT'L ECON. L. 605, 645 (1996) [hereinafter "Grier, WTO"].

135. Action Plan, Attachment 2(2); see also NTE Report, *supra* note 4.

136. *Id.*

137. See generally, Grier, *supra* note 40, at 39.

## 10. Municipalities and Prefectural Governments

Although the Action Plan applies only to central and quasi-governmental public projects, under the terms of the Action Plan the Japanese government promises to encourage local governments and designated cities to comply with the terms of the Action Plan as well.<sup>138</sup> The exemption of local public works from the Action Plan was significant since it is estimated that over 80 percent of all public works spending takes place at the local level.<sup>139</sup> When Japan became an implementing party to the WTO GPA on January 1, 1996, however, what might have been a gaping hole in the Action Plan was narrowed. In adopting the WTO GPA, which aims to make government procurement in most sectors "fair, open, transparent, competitive, and accessible to foreign suppliers," Japan agreed to extend its coverage to all Japanese prefectures and twelve municipalities.<sup>140</sup>

Now that all Japanese prefectures and certain designated cities are obligated under the WTO GPA to utilize open and competitive bidding procedures, select local governments must make the same reforms as the central government is required to make under the Action Plan.<sup>141</sup> Since the terms of the WTO GPA only specify broad commitments by the signatories to implement open and competitive bidding, the Commerce Department's Ms. Searing has met repeatedly with local government officials and urged them to adopt the specific measures and procedures set forth in the Action Plan. To reinforce the comprehensive application of the Action Plan to most national and sub-national public works, local governments must be persuaded to abandon explicit and disguised locality requirements<sup>142</sup> and to consider firms' foreign experience as a measure of their qualifications.<sup>143</sup>

---

138. Action Plan, ch. VII.

139. *Bid Rigging: Fall in Unexplained Spending*, Dow Jones International News, Mar. 15, 1995, available in Westlaw, DJINSPLUS database.

140. Grier, *WTO*, *supra* note 134, at 628.

141. Arlene Mayeda and Edward Dunn, *Japan's Public Works Market: New Challenges and Opportunities*, BUSINESS AMERICA, Nov. 1995, at 14.

142. Prior to the recent reforms, firms bidding on certain local public works were required to maintain a place of business in the region in order to qualify for bidding. *Id.*

143. *Id.*

## VI. PROGRESS, PROBLEMS AND ACTUAL RESULTS SINCE THE 1994 ACTION PLAN

### A. *Improvements over Prior Public Works Agreements*

The foregoing changes implemented under the Action Plan, to a certain extent, represent improvements over prior attempts to reform the public sector bidding process. Most importantly, the range of projects to which open and competitive bidding now applies has been significantly expanded as compared to the MPA which provided improved bidding procedures for only "designated" projects.<sup>144</sup> A bright line test as to whether a contract is above a threshold amount will now determine whether open-bidding will be used. This compares favorably to the MPA's opaque process through which certain projects were "designated" to allow competition by foreign bidders.

The Action Plan also makes progress in expressly prohibiting commissioning entities from dividing procurement so as to reduce the value of contracts below the thresholds triggering the open bidding procedures.<sup>145</sup> Whether this express prohibition will have any effect on actual practice, as discussed below, remains to be seen.

On its face, the Action Plan is intended to make the steps toward becoming a qualified bidder more transparent. Where possible, the language of the Action Plan requires commissioning entities to use objective standards and, most importantly, directs the commissioning entities to take into consideration overseas experience and resources of foreign contractors when making qualification determinations. Again, this reform represents a jump forward from prior arrangements in which foreign firms were excluded by the opaque ranking standards under the designated bidder system that weighed traditional business linkages, personal relationships and political factors more than technical merit or contract price.<sup>146</sup> In principle, the new objective qualification and "nondiscrimination" provisions that take into consideration international experience should contribute to the break-down of the cozy relationships between contractors and government officials.

---

144. The Office of the United States Trade Representative estimated that the Action Plan would cover over \$20 billion of procurement annually. USTR Release, Jan. 19, 1994.

145. Action Plan, ch. II(4).

146. Mayeda and Dunn, *supra* note 141.

Although the Action Plan announced on January 18, 1994 represents a voluntary statement by the Japanese government, it is important to remember that the Action Plan is also incorporated into the 1994 U.S.- Japan Public Works Agreement which requires annual meetings "to assess the implementation and utilization of the Action Plan."<sup>147</sup> This bilateral commitment to monitor foreign access until at least 1999 provides opportunities to fine tune current reforms and to implement new ones.

### *B. Problems Unsolved or Exacerbated by the Plan*

Scraping the surface of the reforms, however, reveals that the Action Plan has loose strands that appear likely to unravel the lofty goals stated in the Action Plan's preamble.

#### 1. Discretion remains in hands of commissioning entities

While the Action Plan requires entities to consider foreign contractors' overseas experience for licensing and qualification purposes, the MOC and prefectural licensing authorities still retain complete discretion in determining whether a contractor is qualified. Although the Procurement Review Board will act as a third party arbiter in disputes arising under the Action Plan,<sup>148</sup> the Action Plan does not require third party examiners to evaluate the qualifications of project bidders.<sup>149</sup> Even though qualification requirements are required to be objective, there necessarily remains a subjective element to the commissioning authorities' qualification decisions — especially for design and consulting contracts — that can be used to favor domestic construction concerns. To realize the stated goals of making public contracting procedures "more transparent and objective," some commentators propose that the MOC establish a third party panel of private experts to examine the bidders' qualifications.<sup>150</sup> This third party review board would be separate from the third party arbiter designated to review complaints.

---

147. See Exchange of Letters, *supra* note 2.

148. Action Plan, at ch. IV.

149. Kashiwagi, *supra* note 42, at 270.

150. *Id.*

## 2. Complaint Procedures

Aggrieved contractors may bring challenges to contract awards and bidding procedures before the Government Procurement Review Board ("GPRB").<sup>151</sup> Although the procedures and composition of the GPRB appear to ensure its neutrality and fairness,<sup>152</sup> it is questionable whether foreign contractors will actually use the complaint mechanism. It has been observed that contractors may hesitate to invoke the authority of the complaint mechanism against a government entity if they perceive that they will be discriminated against in future business dealings with the same entity.<sup>153</sup> This observation may explain why, even after poor results under the Action Plan reforms to date, no disputes regarding public works have been brought before the GPRB.

Experience under similar dispute resolution mechanisms in different trade sectors has also been disappointing. Cray Research, a U.S. bidder for a supercomputer procurement contract, brought a claim under a similar type of complaint mechanism against a Ministry of Education division in 1992.<sup>154</sup> The review board narrowly limited its review to the procedures used in the bidding process and paid little attention to the merits and qualitative differences among the competing bidders.<sup>155</sup> If the new GPRB similarly limits its review to only procedural compliance with the Action Plan, foreign contractors may be further discouraged from invoking the complaint mechanism. Without meaningful checks and balances by aggrieved foreign contractors, it is possible commissioning entities will be able to violate provisions of the Action Plan with impunity.

## 3. Anti-Monopoly Act Enforcement

Chapter V, Section 3 of the Action Plan authorizes the JFTC to establish fundamental principles for applying Article 2.6 of the Anti-

---

151. Grier, *WTO*, *supra* note 134, at 645

152. *See generally* *Id.* at 643-655 (discussing the GPRB procedures); *see also* Action Plan, Annex 4; The WTO GPA requires that all parties establish local bid challenge procedures that provide bidders with an impartial and independent review. The review board must have no interest in the outcome of the procurement.

153. Grier, *WTO*, *supra* note 134, at 652, FN 353.

154. *Id.* at 654.

155. *Id.*

Monopoly Act to public works bidders. Commentators have viewed the new JFTC guidelines as an improvement over the preceding 1984 guidelines which only outlined practices which were acceptable under the Anti-Monopoly Act.<sup>156</sup> The new guidelines define as illegal any designation through consultation among contractors of a specific contractor to win a government project by submitting a low bid on the basis of advanced information. While the JFTC may have refined its definition of illegal practices, the new guidelines do nothing to increase enforcement of the Anti-Monopoly Act. As previously mentioned, the long history of reluctance to invoke Article 2.6<sup>157</sup> may have the practical effect of rendering the JFTC's guidelines ineffective.

#### 4. Joint Ventures and the Sunset of the MPA "Special Measures"

Although the MPA has been faulted for its limited application to specific projects and its piecemeal tokenism for highly visible foreign firms, the MPA did encourage Japanese firms — whether voluntarily or under administrative guidance — to form joint ventures with U.S. contractors in such projects. The Action Plan signals a move away from encouraging Japanese firms to form joint ventures with U.S. contractors and explicitly sets forth a new policy of placing orders to single contractors whenever possible.<sup>158</sup> Now, in cases where joint ventures are used and open bidding is required, Japanese contractors seem to be eschewing U.S. contractors for domestic partners. This is supported by evidence that out of 164 joint ventures in the first year under the Action Plan, only one joint venture included a foreign partner.<sup>159</sup> While the new trend toward discouraging procurement through joint ventures is allegedly in response to complaints that joint ventures spawned collusion, the opportunities for U.S. firms to become familiar with Japanese market practices through mandatory joint ventures under the MPA regime may be sorely missed.

---

156. *FTC Unveils Legal Norms*, *supra* note 130.

157. When over 500 companies were found to have colluded on public works projects in Yamanashi prefecture and gave then-LDP leader Shin Kanemaru thousands of dollars in bribes, the FTC merely ordered the companies to behave. Michael P. King, *Not the Last Dango in Tokyo*, *ASIAN WALL ST. J.*, June 20, 1994, at 10.

158. Action Plan, ch. VI(2)(1).

159. *U.S. Raises Concerns with Japan over Access to Construction Market*, 12 INT'L TRADE REP. (BNA)1316, Aug. 2, 1995.

Perhaps now that Japan views itself as having conceded to U.S. demands for open bidding, it no longer feels it needs to give preferential treatment to U.S. firms. While preferential treatment under the MPA was tainted with the same negative externalities as designated bidding, U.S. firms were at least given an opportunity to obtain experience in Japanese construction technology, subcontracting and material procurement. Under a strictly competitive bidding system, however, Japanese firms with the home-court advantage are likely to beat out inexperienced foreign bidders. Again, a "Catch 22" situation may develop which parallels prior problems under the old licensing system: contractors with no Japanese experience cannot be effective players in the open-bidding game. In the future, it is possible U.S. contractors will wish they had gotten something other than for what they asked.

### C. *Actual Results under the Action Plan*

Only two years have passed since full implementation of the Action Plan in April 1995. The Commerce Department, which initially hailed the reforms as "opening the way for U.S. firms to have broader access to the Japanese public sector construction market,"<sup>160</sup> has already expressed concern that the Action Plan is not living up to expectations.<sup>161</sup> In fiscal year 1995, of 613 new public construction contracts issued in Japan, only one contract valued at \$8.8 million went to a U.S. company.<sup>162</sup> In competition for design contracts, U.S. firms won only two contracts with a total value of \$1.5 million out of twenty contracts tendered by government entities.<sup>163</sup> After a 1996 meeting between Japan and the United States to review the results of the Action Plan, Ms. Searing of the Commerce Department called the number of contracts won by U.S. companies, "still awful."<sup>164</sup> Continued dissatisfaction resulted in Japan being placed on the Title VII watch list in October 1996 because of perceived problems with Japan's

---

160. U.S. Dept. of Commerce Release, Jan. 19, 1994.

161. *Id.*

162. In 1995, Shal Bovis won a minority share in a \$155 million project to develop a convention center in Fukuoka. Steve Glain, *Japan, U.S. Shift Trade Focus to Construction*, *ASIAN WALL ST. J.*, July 2, 1996 at 1.

163. Choy, *supra* note 9.

164. Glain, *supra* note 162.

implementation of the Action Plan and failure to meet its continuing obligations under the MPA.<sup>165</sup>

In response to prodding from Washington to further improve channels for foreign access, Japanese negotiators appear to be taking the stance that there is nothing else they can do to level the playing field.<sup>166</sup> Also, Japanese trade officials point out that the "successful" bid rate for construction and design contracts is much higher than it appears because U.S. firms only bid on five construction and four design projects in 1995.<sup>167</sup> Furthermore, Japanese commentators note that many of the projects tendered in 1995 involved "labor-intensive, low value work (such as road paving) that was of little interest to U.S. firms."<sup>168</sup>

Irrespective of the calculus used to evaluate the 1995 reform results, it is hard to contest that the value of the contracts awarded to U.S. firms is insignificant in light of the fact that total construction orders covered by the new bidding procedures exceeded \$14 billion in 1995.<sup>169</sup> Design orders put out to bid in the same year exceeded \$34 million.<sup>170</sup>

In addition to the arguably dismal numerical results during 1994 and 1995, U.S. contractors have voiced complaints that the Japanese government and contractors have been uncooperative in permitting foreign participation in bidding contests.<sup>171</sup> Some of the problems have stemmed from commissioning entities narrowly defining the criteria necessary for qualification. In the case of one contract for a government office building, the commissioning entity allegedly required all bidders to have experience in a construction method that was unique to Japan.<sup>172</sup> As a result, no U.S. firms were "qualified" to bid despite the fact they possessed extensive office construction experience overseas.<sup>173</sup> In response to numerous complaints, the MOC recently agreed to publicize the outcome of qualification decisions which in the past had only been

---

165. Identification of Trade Expansion Priorities (Super 301) Pursuant to Executive Order 12901. October 1, 1996.

166. Glain, *supra* note 162.

167. Choy, *supra* note 9.

168. *Id.*

169. *Id.*

170. *Id.*

171. Office of the United States Trade Representative, Ann. Rep. On Discrimination in Foreign Gov't Procurement, IV(A), April 30, 1996.

172. *Id.*

173. *Id.*

released to companies that participated in the bidding.<sup>174</sup> Foreign contractors will be able use these publicized decisions to identify possible patterns of discrimination against foreign bidders.

In the ongoing battle against *dango*, there appears to be progress, or at least a stepped-up effort to pursue AMA violations. In 1995, a record number of firms were fined for AMA violations; particularly prevalent among these violations was the number of *dango* cases.<sup>175</sup> Skeptics, though, have questioned whether the increased number of cases is a sign that *dango* is just becoming more commonplace.<sup>176</sup>

The Action Plan's provisions with respect to joint ventures, as alluded to earlier, have also produced complaints from U.S. contractors that with the Action Plan in place, Japanese companies are resisting U.S. initiated proposals to form joint ventures.<sup>177</sup> When U.S. trade negotiators brought this grievance to the Japanese government's attention, the Japanese government responded that the decision to form joint ventures was a private sector decision outside of the government's control.<sup>178</sup> The Japanese government's excuse, however, that its hands are tied does not seem convincing in light of its prior efforts to encourage joint venture formation via administrative guidance under the MPA. Bidding qualification rules limiting joint venture formation to two entities and the Action Plan's own provisions restricting procurement awards to joint ventures further block foreign firms from beneficial business and technology tie-ups.<sup>179</sup>

U.S. negotiators have expressed concern that, despite explicit prohibitions in the Action Plan and WTO GPA, commissioning entities are dividing contracts into smaller ones to avoid thresholds triggering open-competitive bidding.<sup>180</sup> In addition, foreign contractors have complained that several local governments still require bidders to have a local presence in the area in order to qualify to bid.<sup>181</sup> The Japanese

---

174. *Construction Ministry to Release Evaluation Results*, JAPAN ECONOMIC NEWSWIRE, Oct. 30, 1996, available in Westlaw, JWIREPLUS database.

175. *Record Number of Firms Fined for Violating Anti-Monopoly Law*, NIKKEI ENGLISH NEWS, Dec. 17, 1996, available in 1996 WL 14951439.

176. *Down Japan's Drain/Rigging Business in Japan*, ECONOMIST, Sept. 7, 1996, available in 1996 WL 11247108.

177. Choy, *supra* note 9.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

government has promised to investigate these claims, but affirms it is in full compliance with the WTO GPA.<sup>182</sup>

The next U.S.-Japan flashpoint over the public works sector, however, appears to be brewing over whether to apply the MPA in lieu of the Action Plan to two large airport projects. The first airport dispute centers on whether the 1988 MPA applies to the second phase of the Kansai International Airport. The U.S. wants the MPA to apply because of the special advantages given to foreign bidders.<sup>183</sup> The Japanese officials, though, claim that the second phase falls under the aegis of the Action Plan and requires open-competitive bidding.<sup>184</sup>

In the second airport dispute involving the new Chubu airport slated to be built in Nagoya, Senator Murkowski has resurfaced and vowed to propose another version of the Brook-Murkowski Amendment if U.S. companies are discriminated against in the bidding process.<sup>185</sup> The Chubu airport, according to the terms of the MPA, is an "if and when" project requiring that the project be designated an MPA project only if the government decides to build the project.<sup>186</sup> U.S. officials claim that Japanese airport authorities have already awarded contracts for the Chubu airport to Japanese firms using the designated bidding system.<sup>187</sup> If MPA project designation is postponed further, the U.S. government is concerned foreign firms will not be able to play a significant role in the project.<sup>188</sup>

In sum, the ongoing debate over airport construction access is yet another indication that the public works system is far from transparent and that both Japan and the United States are unhappy with the current state of the construction accords.

## VII. CONCLUSION

The need to re-evaluate the Action Plan with respect to foreign firms is apparent as the opportunities for foreign firms in Japanese

---

182. *Id.*

183. *Id.*

184. *Id.*

185. *Senator Threatens Retaliation over Japan Airport Plan*, JAPAN ECONOMIC NEWSWIRE, Dec. 18, 1996, available in Westlaw, JWIREPLUS database.

186. NTE Report, *supra* note 4.

187. *Id.*

188. *Id.*

public works projects have not materialized or shown improvement since the Plan's implementation.

To keep public works discussions on track, U.S. trade negotiators might consider pushing for more results-oriented reforms with quantifiable targets. Majory Searing, in a 1996 interview, estimated the 1994 Action Plan should have opened another 15 percent of the public works market to foreign competition.<sup>189</sup> A results-oriented plan which suggests these numbers might encourage the Japanese government to enforce the Action Plan's provisions more stringently. Although quantitative results are often too rigid and do not take into consideration the myriad contingencies that arise in the market, an agenda where results as well as procedures are emphasized might be helpful.

Apart from the Action Plan reforms, Japan has started down a path of adopting a system of third party performance bonding for public works projects which might help stem some of the problems which surface through the qualification process. Although bonding of construction work has been used in the past, it was based on a "completion guarantor system" in which other contractors bidding for the project would guarantee that they would take over the project if the successful bidder was unable to complete the work.<sup>190</sup> The "completion guarantor system," however was criticized for encouraging *dango* because it afforded yet another opportunity for contractors to get together and exchange pricing information.<sup>191</sup> With a third party construction bonding system in place to guarantee against contractor default, the designated bidding and qualification systems in which only firms with strong track records and healthy balance sheets are selected would no longer serve a legitimate purpose. Under such a system, third party sureties would step into the position of commissioning entities in determining qualifications, presumably based on economic and competitive criteria rather than personal relationships. The United States should focus attention on encouraging Japan to adopt this type of system.

---

189. *Cracking the Japanese Market: The Continuum of Policy and Promotion*, JEI REP., No. 14, Apr. 12, 1996.

190. *System to be Studied to Ensure Public Works Completion*, JAPAN WEEKLY MONITOR, June 6, 1993, 1993 WL 2477304.

191. *Construction Ministry Ponders New Performance Bond System*, Tokyo Financial Wire, June 3, 1994, 1994 WL 10705741.

While the Action Plan may have created a system that looks transparent from the inside, critics have noted that the new bidding procedures become more opaque the farther one gets from Tokyo.<sup>192</sup> To this end, continued efforts at the sub-national level to encourage open bidding and enforce anti-competition law are warranted. Unfortunately, this will be difficult since it is at the local level where personal connections and the preservation of local interests will still take priority. Efforts should be taken not only to educate rural contractors as to the procedures of open bidding, but to also ease their transition from what in many ways has been an entitlement program guaranteeing their access to public works contracts. As foreign contractors have required induction into the ways of Japanese contracting, so too should the Japanese government take measures to advise domestic construction companies as to international standards and cost control. Hopefully, such efforts will weaken the resistance to open competition as the new bidding regulations become less "foreign."

Since a decade of bilateral public works agreements has failed to produce results for foreign contractors, the United States might consider more informal pressure on Japan to alleviate the agency capture that has calcified between the commissioning entities and private contractors. Particularly worthy of future discussions is the elimination of *amakudari* and the generous political donations which are channeled from contractors to the Liberal Democratic Party. These are subtle trade barriers which can easily elude regulation and foreign pressure. Admittedly, the employment practices of private firms and political contribution laws are matters purely within Japan's domestic authority and U.S. demands in this area might be deemed to be overreaching. A recent ground-swelling of domestic discontent with corruption within the public works sector may obviate the need for the United States to raise their voice in this area. As of March 1997, the fate of the enormous 1995-2004 public works investment package was in serious limbo. Prime Minister Ryutaro Hashimoto has suggested that the public works program be reviewed after complaints from domestic constituencies that the public works sector has played a disproportionately large role in the Japanese political and economic system.<sup>193</sup> As the Japanese public

---

192. Smith, *supra* note 71.

193. Pollack, *supra* note 10.

begins to feel the effect of wasteful public works and corruption in the public coffers, internal pressures for the construction complex to clean-up its act may proliferate. Domestic pressure to establish restrictions on *amakudari* and political contributions will likely accomplish more meaningful changes than would the intrusion of the United States in this area.

Finally, despite the heightened rhetoric and politicization of the public works sector debate, the U.S. needs to keep in mind that results will take time. The Action Plan, in many ways, is a step in the right direction and has forced Japan to reconsider its traditional contracting practices. Just recently, the *Nikkei Shinbun* reported that experimental ways of introducing fairer bidding procedures are in the works. One method has been to institute a lottery procedure for qualified bidders.<sup>194</sup> Trade negotiators, however, must remember that the procedures developed may not resemble the type of "open-bidding" prevalent in the U.S. Nevertheless, a concerted effort by U.S. firms to work within the present system will enable the U.S. to better identify the areas that can be improved and hopefully serve as a basis for continued reforms.

---

194. *Dango Booshi e Shinhoshiki* [Developing New Methods to Prevent *Dango*], NIKKEI SHINBUN, February 24, 1996.