

Reduction of Compensation for Freelancers, etc.

Is it acceptable for our company to reduce the compensation to be paid to independent contractors and freelancers in order to prevent the spread of disease, as well as because of a decrease in demand, caused by the Novel Coronavirus?

Under Japanese law, if the hiring party having a position of relative superiority unilaterally demands that sole proprietors or freelancers with whom it has a business relationship reduce commissions for outsourced business operations and forces them to accept such demand, it is highly likely that the hiring party would be considered as abusing its dominant position, which is prohibited by Japan's Antimonopoly Act (Article 2, Paragraph 9, Item(v)(c)).

However, if a request to reduce compensation is made as part of negotiations concerning the compensation and the amount is considered to reflect the supply-demand relationship, it is deemed not to constitute such an abuse of dominant position ("Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act" Part 4, 3 (4) (a)). Therefore, if there is a change in circumstances for which neither the hiring party nor the sole proprietor or freelancer is responsible which occurs after contracting the work, as may be the case with the current pandemic, a reduction in compensation to reflect the decrease in demand due to the effects of the Novel Coronavirus may be permitted after negotiations with the other party and obtaining the other party's genuine consent. In addition, we recommend that new terms and conditions, such as the negotiation process, compensation amount, payment date, etc., should be clarified in writing.

There is a question of whether transactions subject to Japan's Subcontract Act violate the prohibition against reduction of proceeds (Article 4, Paragraph 1, Item 3 of the same Act). It should be noted that, under the Subcontract Act, reduction of proceeds after placing an order is illegal unless there is a "reason attributable to the subcontractor", even if it is approved or agreed by the subcontractor. Therefore, a price reduction cannot be made due to a decrease in demand or for similar reasons.

In light of the spread of the Novel Coronavirus and its impact on the supply chain, the Japan Fair Trade Commission (JFTC) requests that, when changing terms of trade with sole proprietors and freelancers, consideration be given to, including, but not limited to, the following:

"When changing contracts with sole proprietors or freelancers due to the prevention of the spread of the Novel Coronavirus or a decrease in demand caused by the spread of Novel Coronavirus infections, taking appropriate measures based on the aims of the Act on Promotion of Subcontracting, the Antimonopoly Act and the Subcontracting Act, etc., such as clarifying new terms and conditions, such as the compensation amount and payment date, in writing, etc., after sufficient consultation with the sole proprietors and freelancers who are counter-parties to the transactions."

Thus, as described above, by taking appropriate measures, the JFTC operates on the assumption that there may be times when changes to the agreement may be permitted, including reductions in compensation.

Whether a reduction in compensation is actually permitted depends on the specific case, so if you are concerned about how to handle such situation, please feel free to contact us.

[Reference]

"Ordering Companies to Take Appropriate Care in Trading with Individual Business Operators and Freelancers Affected by Novel Coronavirus Disease" by Japan Fair Trade Commission

https://www.meti.go.jp/english/press/2020/0310_003.html

"Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act" by Japan Fair Trade Commission

https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf (Tentative Translation)

Instructing Retailers to Sell Below Fixed Price

Our company is a manufacturer of masks and disinfectants, and it seems that our masks and disinfectants are being sold at high prices at pharmacies and drug stores. We would like to request pharmacies to sell our products at a fixed price or less. Will this be a problem under Japan's Antimonopoly Act?

Any act by a manufacturer, etc. to set the selling price of a retail store constitutes a restriction of resale price, and if there is no justifiable reason, it becomes an issue under Japan's Antimonopoly Act (Article 2, Paragraph 9, Item (iv)).

The restriction of resale price is defined as, "determining and instructing to maintain the selling price of the products," and such provision does not limit the restriction of resale prices to cases where instructions are given regarding the lowest price of the products, but rather, it is also considered illegal to set a maximum resale price for products unless there is a justifiable reason (If a maximum price is set, consumers may be able to purchase products at a lower price than usual; however, if a maximum price is set and a retailer only sells products at the maximum price (or a price close to that), the price of products will eventually be higher than a case where there is no restriction on the resale price, which may be disadvantageous to consumers.).

However, as the spread of the Novel Coronavirus has progressed, the Japan Fair Trade Commission (JFTC) has stated its position that instructing retailers to sell products such as masks below a certain price for a limited period of time in order to prevent retailers from setting unreasonably high prices generally benefits consumers with respect to the purchase of the products, there are justifiable grounds for doing so, and that there would be no problem under the Antimonopoly Act (Reference below).

Please note that, according to the above concept, if instructing retailers to sell products at a certain price or less actually results in raising the retail price of the products, then there is no justifiable reason to do so. Therefore, for example, in cases where there is no retailer who has unjustifiably set a high price, and if the manufacturer instructs the retailer to set the highest price of a particular product, it is expected that the retailer will sell products at the highest price (or a price close to that). In such case, it would be considered illegal.

In addition, even when there is no longer a need to prevent unreasonably high prices, continuing to set a maximum price effectively serves as an indication of the selling price and

causes the price to remain high, which may become an issue under the Antimonopoly Act.

[Reference]

"Q&A on the Antimonopoly Law in Response to Novel Coronavirus Disease" by Japan Fair Trade Commission
<https://www.jftc.go.jp/oshirase/coronaqa.html> (Japanese)

Non-acceptance or Returns by Main Subcontracting Entrepreneur Based on Rumors

Our company (a main subcontracting entrepreneur under Japan's Subcontract Act) is an electronics manufacturer, but we heard a rumor that a person at the factory of the subcontractor (under the Japan's Subcontract Act) that manufactures components for electronic equipment has been infected with the Novel Coronavirus. We are thus hesitant to accept the parts manufactured at this factory. Will this be a problem under the Subcontract Act?

In the absence of reasons attributable to the subcontractor, the fact that a main subcontracting entrepreneur refuses to receive the goods ordered by it or causes a subcontractor to take back the goods after receiving them violates the prohibition of non-acceptance provisions of the Subcontract Act (Article 4, Paragraph 1, Item (1)), and/or the prohibition of return of the goods provisions of such Act (Item (4) of the same Paragraph).

The Japan Fair Trade Commission's (JFTC) interpretation of the existence of the "reasons attributable to the subcontractor" is very limited. In the case in question, acceptance of the goods may not be refused, nor may the goods be returned, unless the subcontractor's delivery is found to be defective, etc. (HP of the JFTC "Implementing Order of the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors" https://www.jftc.go.jp/en/legislation_gls/index_files/implementing_order.pdf)

Therefore, if an infected person working with the subcontractor is not investigated to determine whether he/she was involved in the production of the parts delivered, or whether the infection could spread via the parts delivered because he/she was involved, non-acceptance or return of the parts across the board would not constitute proper non-acceptance or return of defective parts, and would be highly likely to become an issue under the Subcontract Act.

Whether your case actually falls under the prohibition of non-acceptance or return of goods under the Subcontract Act depends on the specific circumstances. If you are concerned, please feel free to contact us.

[Reference]

“Q&A related to the Great East Japan Earthquake” by Japan Fair Trade Commission, Question 6
<https://www.jftc.go.jp/soudan/shinsaikanren/23jishinqa.html>
(Japanese)

Cancellation of Orders to Subcontractors, etc.

Our company (a main subcontracting entrepreneur under Japan’s Subcontract Act) has been manufacturing a Product C incorporating Component A and Component B, but due to the Novel Coronavirus pandemic, Component B could not be obtained. Although the Component A can be supplied by a subcontractor under the Subcontract Act, it would not be possible to manufacture Product C based only on the delivery of Component A. For this reason, we would like to cancel the order to the subcontractor manufacturing Component A. Will this be a problem under the Subcontract Act?

Although individual cases are determined based on the specific circumstances, in any transactions to which the Subcontract Act applies, cancellation of an order to a subcontractor or non-acceptance of ordered goods, etc. solely for the convenience of a main subcontracting entrepreneur constitutes a potential violation of the Subcontract Act, except when the subcontractor itself is liable (Article 4, Paragraph 1, Item (1) of the Subcontract Act). It constitutes non-acceptance (Article 4, Paragraph 1, Item (1) of the Subcontract Act) for the main subcontracting entrepreneur to cancel the order after the subcontractor completes the manufacturing of Component A solely based on the reason that Component B could not be obtained, and Product C cannot be manufactured with Component A only. In addition, if the main subcontracting entrepreneur delays the delivery date and ultimately refuses to receive the goods manufactured by the subcontractor, this will constitute non-acceptance. Also, if the delivery date is delayed until only the time when the goods can actually be received, it can constitute an unreasonable change in delivery, unless the main subcontracting entrepreneur bears the storage cost during such period (One possible solution would be to defer the delivery date by bearing the storage cost.).

On the other hand, if the main subcontracting entrepreneur cancels the order due to the above reason before the completion of the manufacturing of Component A and does not compensate the subcontractor for the resulting expenses incurred, this would be considered as an unreasonable change to the content of the work (Article 4, Paragraph 2, Item (4) of the Subcontract Act). Again, if the main subcontracting entrepreneur pays all of the costs incurred by the subcontractor for the production of unfinished units of Component A, this would not constitute an unjustified change to the content of the work. Furthermore, in the case where the manufacturing will be continued but the delivery date will be changed, additional expenses need to be borne as mentioned above.

Please note that decisions as to whether the actual situation constitutes non-acceptance or unjustified change to the content of the work, as well as the details of expenses to be borne, may vary depending on the specific circumstances. If you have any concerns, please let us know.

[Reference]

“Booklet for Training Courses for Promotion of Appropriate Subcontracting Transactions” by Japan Fair Trade Commission
https://www.jftc.go.jp/houdou/panfu_files/R1textbook.pdf
(Japanese)

“Implementing Order of the Act Against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors” by Japan Fair Trade Commission
https://www.jftc.go.jp/en/legislation_gls/index_files/implementing_order.pdf

“Q&A related to the Great East Japan Earthquake” by Japan Fair Trade Commission, Question 9
<https://www.jftc.go.jp/soudan/shinsaikanren/23jishinqa.html>
(Japanese)

Refusal of Request from Subcontractors to Increase Unit Price

Due to the effects of the Novel Coronavirus, one of our subcontractors asked us (as the main subcontracting entrepreneur under the Subcontract Act) to raise unit prices because production and procurement costs have risen significantly. In response to such request, would it be a problem under the Subcontract Act for us, as the main

subcontracting entrepreneur, to continue transactions at the same unit price as in the past?

Requests to raise unit prices due to cost hikes resulting from the effects of the Novel Coronavirus pandemic, such as a significant rise in production and procurement costs, are considered to be an unfair demand for price cuts under the Subcontract Act if they are unilaterally rejected or ignored without sufficient consultation with subcontractors (Article 4, Paragraph 1, Item 5 of the Subcontract Act). In individual cases, the determination will be made based on the specific facts. For example, if a subcontractor demands a raise in unit prices on the grounds that production and procurement costs have significantly increased due to the effect of the Novel Coronavirus pandemic, the main subcontracting entrepreneur is required to hold discussions by presenting reasonable counter-proposals and other negotiations, by receiving explanations and materials from the subcontractor regarding the details of the request for a raise in unit price and the extent of the actual cost increase, and by collecting information regarding the pricing of other suppliers.

Whether your case constitutes an unfair demand for price cuts will depend upon the specific circumstances, so if you are concerned, please do not hesitate to contact us.

[Reference]

“Booklet for Training Courses for Promotion of Appropriate Subcontracting Transactions” by Japan Fair Trade Commission

https://www.jftc.go.jp/houdou/panfu_files/R1textbook.pdf
(Japanese)

“Price Negotiation Know-How and Handbook for SMEs and Small Business Operators” by Small and Medium Enterprise Agency

<https://www.chusho.meti.go.jp/keiei/torihiki/2020/200305support.pdf> (Japanese)

“Q&A related to the Great East Japan Earthquake” by Japan Fair Trade Commission, Question 11

<https://www.jftc.go.jp/soudan/shinsaikanren/23jishinqa.html>
(Japanese)

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