

1. Stipulations on Japanese Government Procurement

The following stipulations have been made concerning the procedures for the Japanese government procurement of the central government entities: as a law, the Accounts Law (Law No. 35 of 1947); as governmental ordinances, the Cabinet Order Concerning the Budget, Auditing and Accounting (Imperial Ordinance No.165 of 1947), and the Special Provisions for the Cabinet Order Concerning the Budget, Auditing and Accounting (Imperial Ordinance No. 558 of 1946); and as a ministerial ordinance, the Regulations on the Management of Contract Administration (Ministry of Finance Ordinance No. 52 of 1962) (Reference material I - 1).

Among procurement applicable to the Agreement on Government Procurement (Treaty No.23 of 1995) (hereinafter referred to as the "1994 Agreement"), the Agreement amended by the Protocol Amending the Agreement on Government Procurement (Treaty No.4 of 2014) (hereinafter referred to as the "revised Agreement") and other international agreements (see note 1), the following legislations secure procurement procedures for the central government in line with the agreements: the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services (Cabinet Order No.300 of 1980), and the Ministerial Ordinance Stipulating Special Procedures for Government Procurement of Products or Specified Services (Ministry of Finance Ordinance No.45 of 1980).

Each ministry and agency stipulates detailed rules of contract regulations, qualifications, etc., based on the above regulations:

(Note 1)

Entities covered by the 1994 Agreement and the revised Agreement are central government entities, sub-central government entities (local public entities), and all other entities (such as public corporations and independent administrative institutions). Of these, sub-central government entities (local public entities) and all other entities (such as public corporations and independent administrative institutions) make provisions in government ordinances based on the Local Autonomy Law, or internal regulations which are consistent with these agreements in order to ensure the implementation of these agreements.

In addition to these procedures based on the Account laws and ordinances, the government has drafted, as voluntary measures, non-discriminatory, fair and transparent procedures which surpass those with the 1994 Agreement, the revised Agreement and other international agreements (see note 2), and has been steadily implementing follow-ups. (Reference material I-2)

(Note 2)

For example, procurement contracts of products and services by all other entities (such as public corporations and independent administrative institutions) are placed above SDR 130,000 in the 1994 Agreement and the revised Agreement. Meanwhile, in the voluntary measures, procurement contracts valued no less than 100,000 SDR are also handled in line with the 1994 Agreement, the revised Agreement and other international agreements. Furthermore, the period of the receipt of tenders in the 1994 Agreement and the revised Agreement shall be over 40 days, but in the voluntary measures it shall be over 50 days.

2. Voluntary Measures on Government Procurement

The government has drafted the following voluntary measures on government procurement. (Reference material I-3)

(1) The Action Program for Improved Market Access (Outline)

a. Adoption of External Economic Measures

On 9 April 1985, the Ministerial Conference for Economic Measures, taking into account policy suggestions by the Advisory Committee for External Economic Issues, adopted the External Economic Measures, decided to draft and implement an Action Program designed to improve market access and set the basic policies of stipulating a provisional program time frame of within three years and the drafting of a program framework by the end of July 1985.

b. Establishment of the Government-Ruling Parties Joint Headquarters for the Promotion of External Economic Measures

In order to pursue the External Economic Measures, draft and implement the Action Program, and promote other important items related to external economic issues, the Government-Ruling Parties Joint Headquarters for the Promotion of External Economic Measures (Chairperson: Prime Minister; membership: all Cabinet members and ruling party executives) was established on 19 April 1985, by an Understanding at a high-level meeting of the government and the ruling party.

c. Adoption on the Outline of the Action Program for Improved Market Access

The Joint Headquarters adopted the Outline of the Action Program for Improved Market Access on 30 July 1985.

Specifying the program's objective to open the Japanese market to a degree surpassing international standards, the introduction to this Outline states that the Joint Headquarters shall closely review new developments in the implementation of this program and ensure the program's practical effectiveness.

Government procurement represents one of the six areas included in this Outline. (The Outline covers: (1) tariffs; (2) import quota; (3) Standards and Certifications, and Import Procedures; (4) government procurement; (5) financial and capital markets; (6) services and imports promotion measures, etc.).

d. Establishment of the Action Program Committee

The Committee for Drawing up and Promoting the Action Program was also established on 30 July, by a decision of the Joint Headquarters.

e. Decision on continuation of follow-ups

The Action Program Committee confirmed at its 12th Meeting on 4 August 1988 that the measures drafted for each sector in the Action Program had been almost fully implemented and agreed to continue its review of new developments in the standards and approval to imports process as well as in the government procurement sector. Accordingly, it was agreed that the Committee should temporarily continue to remain active.

Various voluntary measures designed to ensure non-discriminatory, transparent, fair and open competition in the government procurement process have subsequently been taken.

f. Adoption of the Understanding on Government Procurement

At its 16th Meeting held on 19 November 1991, the Action Program Committee adopted the Understanding on Government Procurement which established voluntary implementation of measures from 1 April 1992, as part of the government's open-market policy. These measures included the lowering of the total specified procurement standard (from 130,000 SDR prescribed by the GATT Agreement on Government Procurement, which came into effect in 1981, to 100,000 SDR), official announcement of major scheduled government procurement items in the Government Procurement Kanpo publication at the beginning of the fiscal year, extension of the period between the public announcement (official notice) of a bid and awarding of the tender (from a 40-day period prescribed by the 1994 Agreement and the revised Agreement to the basic 50-day period) and expansion of the Understanding to cover more procuring entities.

g. Establishment of the Action Program Committee in the Cabinet

After the change of ruling parties in August 1993, the Cabinet passed a decision on 13 August 1993, to transfer the jurisdiction of the Committee from the Joint Headquarters to the Cabinet. The Committee retained the same function and its original name (Committee for Drawing up and Promoting the Action Program).

(2) The Action Program on Government Procurement

a. Adoption of the Action Program on Government Procurement

The Action Program on Government Procurement was adopted by the Action Program Committee at its 20th Meeting on 3 February 1994. This program, in response to domestic and foreign demands for more transparency, more fairness and more competitiveness in government procurement procedures, included radical reforms of government procurement procedures, improved methods for official announcement of government procurement information, an improved mechanism to provide government procurement information, the establishment of a system for filing grievances related to government procurement and complaint review procedures for government procurement.

b. Adoption of the Procedures for Government Procurement on Products
(Operational Guidelines)

The Action Program Committee adopted the Procedures for Government Procurement on Products (Operational Guidelines) as a set of guidelines offering more convenience to suppliers, improving market access for competitive domestic and foreign suppliers and establishing thoroughly explicit government procurement procedures, based on the Action Program on Government Procurement at its 21st Meeting held on 28 March 1994.

c. The Understanding on Government Procurement in the Service Sector

The Understanding on Government Procurement in the Service Sector was adopted at the 25th Meeting of the Action Program Committee held on 11 December 1995. This led to the expansion of the Operational Guidelines to include services offered by Japan, since the WTO Agreement on Government Procurement incorporating the service sector, which had not been applicable to the old Agreement (the GATT Agreement on Government Procurement), was to take effect on 1 January 1996.

(3) Operational Guideline on Procedures for Government Procurement etc.

a. Operational Guideline on Procedures for Government Procurement etc.
(Understanding)

Although the various decisions of the Action Program Committee were treated as remaining in effect, even after the committee's abolition by a Cabinet decision of 7 December 2012, following the amendment of the WTO Agreement on Government Procurement the necessity arose to amend the voluntary measures on government procurement. Accordingly, on 31 March 2014 an understanding among related ministries and agencies concerned in procurement was adopted entitled the Operational Guideline on Procedures for Government Procurement etc., as a mechanism that would carry forward the various decisions made by the former Action Program Committee.

Furthermore, on the same day an understanding was reached to convene the Meeting of Related Ministries and Agencies Concerning Voluntary Measures on Government Procurement, in order to conduct review and follow-up relating to these understandings among related ministries and agencies. (Reference material I-4)

3. Voluntary Measures by Individual Sectors

In order to further promote procurement based on procedures to ensure non-discriminatory, transparent, fair and open competition, the government has established voluntary measures and such in individual areas, in addition to the voluntary measures for government procurement on products in general. These voluntary measures in individual areas are stipulated in the Operational Guideline on Procedures for Government Procurement etc. (Understanding among related ministries and agencies concerned in procurement, 31 March 2014). (For details of the organizations to which voluntary measures apply, see Reference material I-5.)

List of Voluntary Measures in Individual Sectors

Operational Guideline on Procedures for Government Procurement etc. (Understanding among related ministries and agencies concerned in procurement, 31 March 2014)

- Attachment 2 Procedures to Introduce Supercomputers
- Attachment 3 Procedures for the Procurement of Non-R&D Satellites
- Attachment 4 Measures related to Japanese Public Sector Procurements of Computer Products and Services
- Attachment 5 Measures on Japanese Public Sector Procurement of Telecommunications Products and Services
- Attachment 6 Measures related to Japanese Public Sector Procurement of Medical Technology Products and Services

(1) Supercomputers

a. Adoption and Revision of Procedures

Procurement of supercomputers has been governed by the “Procedures to Introduce Supercomputers” adopted at the July 1987 Meeting of the Action Program Committee. However, the Committee revised the Procedures on 19 April 1990, in response to the claim raised by the Government of the United States that, even after the implementation of the Procedures, the Japanese Government and government-related entities procured no American supercomputers, and the Procedures needed to be revised, especially with regard to the formulation of specifications and business practices of large discounts. The revised Procedures have been in effect since 1 May 1990.

The Procedures govern the introduction of supercomputers by 140 entities (as of 1 March 2019) cited in Japan’s Annex 1 and 3, Appendix I to the revised Agreement. Each ministry and agency is to give guidance to quasi-governmental agencies within its jurisdiction to procure in line with the Procedures.

b. Major points of the procedures

The procedures are adopted to provide transparent, open, and non-discriminatory competitive procedures for the introduction of supercomputers and to ensure that a procuring entity procures the supercomputer that best enables it to perform its mission. Furthermore, the Procedures stipulate that to procure supercomputers based on bids that contravene the prohibition in the Anti-Monopoly Act against unjust low-priced sales is contrary to the policy of the Government.

NOTES: Range of Supercomputers

The Procedures of April 1990 stipulated that it would apply to the supercomputers with theoretical peak ratings of 300 MFLOPS and over. The threshold has been raised thereafter: 5 GFLOPS and over as from 1 April 1995, 50 GFLOPS and over as from 1 May 1999, 100 GFLOPS and over as from 1 May 2000, 1.5 TFLOPS and over as from 1 May 2005, and 50 TFLOPS and over as from 16 April 2014.

(2) Non R&D Satellites

The Committee adopted, to ensure openness, transparency and non-discrimination in procurement of non R&D satellites, the “Measures Relating to Procedures for the Procurement of Non-R&D Satellites,” at its 14th Meeting on 14 June 1990, based upon the preceding consultations with the Government of the United States concerning the research and development, and procurement of satellites.

The final documents concluded under the above-mentioned consultations with the US Government comprise the following: (a) the letters exchanged between Ambassador to the United States Ryohei Murata and US Trade Representative Carla Hills; (b) Attachment I (Policies and Procedures Regarding Satellite R&D/Procurement); (c) Attachment II (Procedures for the Procurement of Non-R&D Satellites); (d) Attachment III (Typical Examples of Japanese Research & Development Satellites); (e) Attachment IV (Typical Examples of United States Research & Development Satellites). Any potential supplier may file a complaint with the Government Procurement Review Board when it believes the procurement has been carried out in a manner inconsistent with the intent of the procedure or any provision of the procedures laid out in Attachment II.

One of the distinctive features of the final documents on the non-R&D satellites procurement is the provision relating to the consultations between the Government of Japan and the Government of the United States to resolve disputes over the classification of satellites (Attachment II, Section III. 1. 2.). Such provisions on the consultative mechanism, however, are not intended to restrict the scope of judgment by the Procurement Review Board. Rather, any complaint over the classification of satellites is also to be under the review by the board.

(3) Computer Products and Services

a. Adoption of the Measures

In order to expand trade opportunities based on the principles of non-discrimination, transparency, and fair and open competition in the public sector procurement of computer

products and services, the Action Program Committee, on 20 January 1992, adopted the “Measures on Japanese Public Sector Procurement of Computer Products and Services.”

The Measures were formulated in response to the claim raised by the US Government in 1990, that due to the problems in Japanese government procurement procedures, the share of foreign products in public sector procurement of computers in Japan was continuously low and there was a discrepancy between the share in public sector and that in private sector. The Government of Japan was to initiate the Measures with the aim of expanding procurement of competitive foreign computer products and services.

b. Major Points of the Measures

The Measures govern procurement of no less than 100,000 SDRs by 146 entities (as of 1 March 2019 (in addition to all of the 140 entities listed in Japan’s Annex 1 and 3, Appendix I to the revised Agreement, Japan Aerospace Exploration Agency, The Shoko Chukin Bank, Ltd., New Kansai International Airport Co., Ltd, The Nippon Foundation , the Japan Broadcasting Corporation [NHK] and the Japan Workers’ Housing Association), with the exception of procurement covered by “Procedures to Introduce Supercomputers.” The Measures became effective on 1 April 1992 with respect to procurement of computer products, and on 1 October 1992 for procurement of computer services, with the exception of procurement of computer services by some entities, which were covered by the Measures by 1 April 1993.

It is stipulated in the Measures that the particular tendering procedures are to be chosen by each procuring entity. However, the “Outline of External Economic Reform Measures,” adopted on 29 March 1994, stipulates that for certain procurement of computers, evaluation criteria for use of the overall-greatest-value evaluation methodology will be developed toward the end of FY1994, and procurement based on the overall-greatest-value evaluation methodology will be introduced. As a result, preparations were advanced to introduce the use of the overall-greatest-value evaluation methodology.

At the 24th Action Program Committee Meeting, held on 27 March 1995, it was decided that as from 1 July 1995, the overall-greatest-value evaluation methodology would be used for procurement valued no less than SDRs 800,000. On 28 March 1995, the relevant ministries and agencies formulated and made public the Understanding of a standard guideline on the overall-greatest-value evaluation methodology, which is designed for the administrative efficiency of procuring entities, and includes points to be evaluated.

(4) Telecommunications and Medical Technology Sectors

a. Adoption of the Measures

With regard to government procurement of telecommunications equipment and services and medical technology products and services, the Government of Japan and the US Government conducted consultations, as priority areas of the Japan-US Framework Talks. In consideration of the discussions under the Japan-US Framework Talks, the Government of Japan adopted voluntary measures related to government procurement in telecommunications and medical

technology sectors (28 March 1994 decision of the Action Program Committee), which was included in the “Outline of External Economic Reform Measures,” adopted by the Cabinet on 29 March 1994.

The Japan-US Framework Talks were concluded in 1994 in the sectors of government procurement of telecommunications and medical technology along with other sectors. In light of the results of the consultations, the Government of Japan decided upon Operational Guidelines, for the purpose of clarifying the “Measures” described above, at the 22nd Meeting of the Action Program Committee on 7 October 1994.

b. Major Points of the Measures in the Sectors of Telecommunications and Medical Technology

(a) “Measures on Japanese Public Sector Procurement of Telecommunications Products and Services” and “Measures related to Japanese Public Sector Procurement of Medical Technology Products and Services.”

The 21st Meeting of the Action Program Committee, held on 28 March 1994, in order to ensure non-discriminatory, transparent, fair, competitive and open public sector procurement procedures and with the aim of significantly increasing access and sales of competitive foreign telecommunications products and services and medical technology products and services in Japanese public sector procurement, adopted the “Measures on Japanese Public Sector Procurement of Telecommunications Products and Services” and the “Measures Related to Japanese Public Sector Procurement of Medical Technology Products and Services.” These measures were, in principle, introduced for procurement under the initial budget of FY1994.

The Measures in the area of telecommunications govern special contracts for procurement of telecommunications products and services valued no less than SDRs 100,000 by the 137 procuring entities (as of 1 March 2019) (all of the entities listed in Japan’s Annex 1 and 3, Appendix I to the revised Agreement except Nippon Telegraph and Telephone Corporation, Nippon Telegraph and Telephone East Corporation, and Nippon Telegraph and Telephone West Corporation).

The Measures in the area of medical technology govern special contracts for procurement of medical technology products and services valued no less than 100,000 SDRs by the 94 procuring entities (as of 1 March 2019) of the entities listed in Japan’s Annex 1 and 3, Appendix I to the revised Agreement.

(b) “Operational Guidelines with respect to the Measures on Japanese Public Sector Procurement of Telecommunications Products and Services” and “Operational Guidelines with respect to the Measures related to Japanese Public Sector Procurement of Medical Technology Products and Services”

In consideration of the consultations held with the United States since March 1994, with a view to complementing and clarifying the measures adopted in March 1994, at the 22nd Meeting of the Action Program Committee on 7 October 1994, the Government of Japan adopted the “Operational Guidelines With Respect to the Measures on Japanese Public Sector Procurement of Telecommunications Products and Services” and “Operational Guidelines

with respect to the Measures related to Japanese Public Sector Procurement of Medical Technology Products and Services.”

4. Others

(1) System of Complaint Review Procedures for Government Procurement Grievances

a. The System under the Former Agreement on Government Procurement

Various regulations were stipulated under non-discrimination and national treatment policies, etc., in the GATT Agreement on Government Procurement which came into effect in 1981. However no regulations were stipulated in regard to complaint review procedures.

On the other hand, regulations relating to a system of complaint review procedures have been established in each voluntary measure adopted by the Action Program Committee, and a complaint review procedure is implemented based on these regulations.

b. The System under the WTO Agreement on Government Procurement (Reference material I-6)

The WTO Agreement on Government Procurement came into effect in 1996 as the result of the Uruguay Round of GATT. Besides the regulations regarding non-discrimination and national treatment policies already existent in the former Agreement, the article addressing complaints review procedures, namely, Article XX: Challenge Procedures, was newly added to the 1994 Agreement.

Accordingly, the Office of Government Procurement Review was established following a Cabinet decision on 1 December 1995. The Government Procurement Review Board was established to review complaints. The responsibility for the complaint review procedure based on the voluntary measures decided by the Action Program Committee was transferred to the new organization. By the Central Government Reform on 6 January 2001, the office was affiliated to the Cabinet Office.

The head of the Office of Government Procurement Review also designates international agreements such as economic partnership agreements (EPAs) and receives not only complaints based on the WTO Agreement on Government Procurement but also complaints based on these designated international agreements. International agreements designated by the Office of Government Procurement Review are as follows (as of 1 March 2019).

- (a) Japan-Singapore Economic Agreement for a New Age Partnership
- (b) Japan-Mexico Economic Partnership Agreement
- (c) Japan-Chile Economic Partnership Agreement
- (d) Japan-Switzerland Economic Partnership Agreement
- (e) Japan-Peru Economic Partnership Agreement
- (f) Japan-Australia Economic Partnership Agreement
- (g) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- (h) Japan-EU Economic Partnership Agreement

c. Outline of the System of Complaint Review Procedures for Government Procurement Grievances (Reference material I-7)

Grievances are processed based on the Review Procedures for Complaints Regarding Government Procurement (adopted 14 December 1995 by the Office of Government Procurement Review) and the Detailed Regulations on Review Procedures for Complaints Regarding Government Procurement (adopted 11 January 1999 by the Office of Government Procurement Review).

When a specific grievance is filed, the Government Procurement Review Board comprised of academic experts will consider the case, from an impartial and independent standpoint, based on the procurement procedures stipulated by the Agreement on Government Procurement and the voluntary measures established by the Japanese Government.

d. Record of Recent Filings of Complaints (2019)

Case No. 15

1. Date of filing of the complaint: March 27, 2018

2. Name of complainant: anonymity

3. Name of the procuring entity related to the complaint: National University Corporation Akita University

4. Name of procured goods/services concerning the complaint: Janitorial services for Akita University Graduate School of Medicine and Faculty of Medicine, Akita University Hospital and others Cleaning Service 1Set

5. Outline of complaint:

Despite the fact that the lowest-price-award method is applied in the tendering processes for the procured services, due to ambiguity of the awarding criteria, the tendering process is inconsistent with Article 15 Paragraph 5 (b) of the revised Agreement.

6. Outline of the status of complaint review

The Government Procurement Review Board conducted a review based on the Review Procedure for Complaints Concerning Government Procurement, drafted a report and proposal on June 8, 2018, and issued these to 1) the complainant and 2) the related procuring entity, National University Corporation Akita University.

In the report and proposal, the Board proposed that the abovementioned related procuring entity “cancel the contract” and “implement the procurement process again from the start” for this project on the grounds that the insufficient confirmation of performance ability of complainant in the investigation based on the National University Corporation Akita University Administrative Regulations for Accounting Article 70 (hereinafter referred to as the “investigation on the procurement”) was inconsistent with the main clause of Paragraph 5 and 5 (b) of Article 15 of the revised Agreement, and on the grounds that lacking clear statement in the tendering briefing on the important awarding criteria for the investigation on the procurement was inconsistent with Article 10, Paragraph 7 (c) and Article 15, Paragraph 5 of the revised Agreement.

(2) Construction Sector

While the bidding and contracting procedures for public works are not covered by the Action Program Committee, the “Major Projects Arrangements” and the “Additional Measures of the Government of Japan on Major Projects Arrangements” were adopted by the Cabinet, in May 1987 and in July 1991, respectively, both of which were intended to increase access to large scale public works projects. Furthermore, in January 1994, the “Action Plan on Reform of the

Bidding and Contracting Procedures for Public Works,” which included adoption of open and competitive tendering procedures for procurement with a value above a certain threshold, was adopted by the Cabinet. In order to improve the actual operation of the Action Plan, Operational Guidelines with Respect to the Action Plan on Reform of the Bidding and Contracting Procedures for Public Works were drafted in June 1996. (Administrative Vice Ministers’ Conference).

In November 2000, in the context of these measures, “Act for Promoting Tendering and Contracting for Public Works” was enacted to promote transparency and fair competition in tendering and contracting procedures for public works. Also, in March 2005, “Act for Promoting Quality Assurance in Public Works” was enacted to assure quality in public works. Both Acts have been revised in 2014.

(3) Guidelines in public procurement for broadly evaluating corporations that promote measures such as work-life balance to encourage the advancement of women

Based on Article 20 of the Act on Promotion of Female Participation and Career Advancement in the Workplace (Act No. 64 of 2015, hereinafter referred to as the Act on Promotion of Female Participation) and Guidelines for Utilization of Public Procurement and Subsidies Toward the Promotion of Women’s Advancement (decided by the Headquarters for Creating a Society in which All Women Shine on March 22, 2016), initiatives are in place in which certain corporations receive additional evaluation points as those promoting measures such as work-life balance in the procurements by the government and others conducted under the Comprehensive Evaluation Bidding System and the Competitive Bidding System, provided that those corporations are certified under the Act on Promotion of Female Participation (Eruboshi certification), Act on Advancement of Measures to Support Raising Next-Generation Children (Act No. 120 of 2003) (Kurumin and Platinum Kurumin certification), Youth Labor Welfare Act (Law No. 98 of 1970) (Youth Yell certification), or are small- and medium-sized companies that have formulated action plans for business owners based on the Act on Promotion of Female Participation.

In FY2017, implementation of the initiative by central government entities amounted to about 940 billion yen (25.1% of overall procurement subject to the initiative) and about 8,800 contracts (25.3% of overall procurement subject to the initiative). For independent administrative institutions, it amounted to about 390 billion yen (34.3%) and about 4,800 contracts (48.3%).

Additionally, for foreign companies participating in businesses applicable to the WTO Agreement on Government Procurement that are verified as fulfilling standards equivalent to those required for certifications based on laws such as the Act on Promotion of Female Participation, the Cabinet Office has commenced administrative work in October 2016 to confirm these companies to be treated as corporations promoting measures such as work-life balance.