

## **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 Account Law (Law No. 35 of 1947); as governmental ordinances, the Budget Settlement and Public Accounts Ordinance (Imperial Ordinance No.165 of 1947), and the Special Exemption of Budget Settlement of Account and Accounting Regulations (Imperial Ordinance No. 558 of 1946); and as a ministerial ordinance, the Regulations for Contractual Business Transactions (Ministry of Finance Ordinance No. 52 of 1962) (reference material I - 1).

Among procurement applicable to the 1995 WTO Agreement on Government Procurement and the other international agreement (see note 1), the following legislations secure procurement procedures for the central government in line with the Agreement: Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services (Government Ordinance 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:

In addition to these procedures based on the Account laws and ordinances, the Committee for Drawing Up and Promoting the Action Program (hereafter referred to as the Action Program Committee) (reference material I - 2), drafted, as voluntary measures (reference material I-3), non-discriminatory, fair and transparent procedures which surpass those with the WTO Agreement on Government Procurement (see note 2), and has been steadily implementing follow-ups.

(Note 1)

Entities covered by the WTO Agreement on Government Procurement 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) stipulate to the Agreement in government ordinances based on the Local Autonomy Law, or internal regulations determined in order to maintain implementation of the Agreement.

(Note 2)

For example, procurement contracts of products and services by the central government entities and all other entities (such as public corporations and independent administrative institutions) are placed above SDR 130,000 in the WTO Agreement on Government Procurement. Meanwhile, in the voluntary measures, procurement contracts above SDR 100,000 and below SDR 130,000 are also handled in line with the WTO Agreement on Government Procurement. Furthermore, the period of the receipt of tenders in the Agreement shall be over 40 days, but in the voluntary measures it shall be over 50 days.

## **2. Voluntary Measures on Government Procurement**

The Action Program Committee has drafted the following voluntary measures on government procurement.

### **(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(reference material I - 2)**

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 Agreement on Government Procurement 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 Agreement to the basic 50-day period) and expansion of the Understanding to cover more procurement 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. Voluntary Measures by Individual Sectors

In order to further promote procurement based on procedures to ensure non-discriminatory, transparent, fair and open competition, the Action Program Committee has established voluntary measures and such in individual areas, in addition to the voluntary measures for government procurement on products in general.

#### List of Voluntary Measures in Individual Sectors

Revision to Procedures to Introduce Supercomputers (Decision made by AP Committee, 19 April 1990)

Procedures for the Procurement of Non-R&D Satellites (Decision made by AP Committee, 14 June 1990)

Measures related to Japanese Public Sector Procurements of Computer Products and Services (Decision made by AP Committee, 20 January 1992)

Measures on Japanese Public Sector Procurement of Telecommunications Products and Services (Decision made by AP Committee, 28 March 1994)

Measures related to Japanese Public Sector Procurement of Medical Technology Products and Services (Decision made by AP Committee, 28 March 1994)

#### (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 Procedures govern the introduction of supercomputers by 143 entities (as of 1 February 2010) cited in Attachment I, Table 1 and Table 3 of the WTO Agreement on Government Procurement (Treaty No. 23, 1995). Each ministry and agency is to give guidance to quasi-governmental agencies within its jurisdiction to procure in line with the Procedures. Furthermore, the revised procedures have been in effect since 1 May 1990.

##### b. Major points of the revised procedures

The revised 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, and 1.5 TFLOPS and over as from 1 May 2005.

## **(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 14<sup>th</sup> 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 149 entities (as of 1 February 2010 (in addition to all of the 148 entities listed in Attachment I, Table 1 and Table 3 of the WTO Agreement on Government Procurement, Japan Aerospace Exploration Agency, The Shoko Chukin Bank, Ltd., Kansai International Airport Corporation Limited, the Japan Shipbuilding Industry 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 entities listed in Attachment II-B and II-C of the Measures, 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 24<sup>th</sup> 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 no less than SDRs 100,000 by the 140 procuring entities (as of 1 February 2010) (all of the entities listed in Attachment I, Table 1 and Table 3 of the WTO Agreement on Government Procurement except Nippon Telegraph and Telephone Corporation, Nippon Telegraph and Telephone East Corporation, and Nippon Telegraph and Telephone West Corporation) of telecommunications products and services.

The Measures in the area of medical technology govern special contracts for procurement of no less than 100,000 SDRs by the 96 procuring entities (as of 1 February 2010) of medical technology products and services.

(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 20: Challenge Procedures, was newly added.

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.

#### c. Record of recent filings of complaints

Case No. 7

1. Date of filing of the complaint: October 3, 2008
2. Name of complainant: IBM Japan, Ltd.
3. Name of the procuring entity concerning the complaint: Road Transport Bureau, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT)
4. Name of procured goods/services concerning the complaint: Design and development of next Motorcar Total Information Advanced System
5. Outline of complaint:

The bidding procedure made by the procuring entity set forth in 3 and 4 above, violates the set of regulations listed below. It is requested that proposals are made to the procuring entity that principally, the complainant in question be nominated as the successful bidder; and as a preliminary, that the bidding in question be reevaluated. The set of regulations, referred to above as being violated, are as follows: the Agreement on Government Procurement; Measures Related to Japanese Public Sector Procurements of Computer Products and Services (determined by the Committee for Drawing Up and Promoting the Action Program on January 20, 1992; hereinafter referred to as the

"Procurement Measures"); the Standard Guide for the Overall-Greatest-Value Evaluation Methodology Concerning Procurement of Computer Products and Services (consented among relevant procurement ministries and agencies on March 28, 1995; hereinafter referred to as the "Computer Standard Guide"); and the Standard Guide for the Overall-Greatest-Value Evaluation Method in the Japanese Public Sector Procurement of Information Systems (consented among relevant procurement ministries and agencies on July 12, 2002; hereinafter referred to as the "Information System Standard Guide").

- (1) The evaluation was made based on standards which are not listed in the evaluation criteria;
- (2) The information required to make proposals as the object of the evaluation fails to be provided in a fair manner;
- (3) The evaluation fails to be based on a fair and impartial examination;
- (4) The evaluation committee itself fails to be of fair and impartial structure; and
- (5) The evaluation was made in particular favor of an existing vendor.

#### 6. Outline of the status of complaint review

The Government Procurement Review Board reviewed the complaint pursuant to the Review Procedures for Complaints Regarding Government Procurement and compiled a report and a proposal document on December 25, 2008. The report was delivered to 1) IBM Japan, Ltd., the complainant, 2) MLIT, the procuring entity concerned, and 3) NTT Data Corporation, a participant of the bidding, and was released to the public. In its report and proposal document, the Government Procurement Review Board ruled that the technical examination conducted by the procuring entity concerned was in violation of the Computer Standard Guide and the Information System Standard Guide, and thereby found to be conflicting with the principles of non-discrimination, transparency, and fair and open competition, called for in the provisions of the Procurement Measures. The Board thus proposed that MLIT "reexamines the bidding procedure," based on Attachment III 4.4 of the Measures on Japanese Public Sector Procurement of Computer Products and Services, and that preliminarily, MLIT "holds the bidding again without altering the bidding conditions."

#### **(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.