

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 are more exacting than those under the 1994 Agreement, the revised Agreement and other international agreements (see note 2). The government has also been implementing follow-ups on regular basis. (Reference material I-2)

(Note 2)

For example, the 1994 Agreement and the revised Agreement apply to procurement contracts of

products and services worth SDR 130,000 or above by all other entities (such as public corporations and independent administrative institutions). Meanwhile, in the voluntary measures, procurement contracts valued no less than 100,000 SDR are also in process in line with the 1994 Agreement, the revised Agreement and other international agreements. Furthermore, time-periods for tendering shall be over 40 days according to the 1994 Agreement and the revised Agreement, while 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. In the External Economic Measure, the Ministerial Conference decided to draft and implement an Action Program designed to improve market access and set the basic outline 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 set other important policies 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 of 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 make the Japanese market more open than required by 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 follow-ups continuation

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 the progress in the area of standards and certifications, import procedures as well as government procurement. Accordingly, it was agreed that the Committee continue to remain active for the time being.

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

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 in government procurement from 1 April 1992, as part of the government's open-market policy. These measures included adoption of the government procurement procedure consistent with the 1994 Agreement for contracts valued at 100,000 SDR or above (from 130,000 SDR prescribed by the GATT Agreement on Government Procurement, which came into effect in 1981), 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 50-day period in principle) and expansion of the Understanding to cover more procuring entities.

g. Establishment of the Action Program Committee in the Cabinet

Subsequent to 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 role 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, establishment of consultation and dispute settlement procedures.

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 ensuring full transparency in government procurement procedures at its 21st Meeting held on 28 March 1994, based on the Action Program on Government Procurement.

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, as the 1994 Agreement incorporating the service sector, which had not been applicable to the first agreement on government procurement (the so-called “Tokyo Round Code on Government Procurement” entered into force in 1981), 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)

The Decisions and the Understandings of the Action Program Committee remained to be effective even after the committee’s abolition by a Cabinet decision of 7 December 2012. The revised lead to the necessity to amend the voluntary measures on government procurement. Accordingly, on 31 March 2014 the Operational Guideline on Procedures for Government Procurement etc., was agreed on among related ministries and agencies concerned in procurement, which would carry forward the decisions and

the understandings made by the former Action Program Committee.

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 of the Operational Guideline on Procedures for Government Procurement etc.. (Reference material I-4)

3. Voluntary Measures by Individual Sectors

In order to achieve further non-discrimination, transparency, fairness and openness in competition, the government has established additional voluntary measures specific to some areas besides 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 on the scope of voluntary measures, 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 141 entities (as of 1 March 2020) cited in Japan’s Annexes 1 and 3, Appendix I to the revised Agreement. Each ministry and agency is to give guidance for quasi-governmental agencies within its jurisdiction to procure in line with the Procedures.

b. Major points of the procedures

The procedures describe process of transparent, open, and non-discriminatory competitive procurement to ensure that governments and government-related entities procure the supercomputer the best matching its missions. Furthermore, the Procedures stipulate that to procure supercomputers based on bids that contravene the prohibition against unjust low-priced sales in the Anti-Monopoly Act is contrary to the policy of the Government.

NOTES: Scope of the Procedure

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, 50 TFLOPS and over as from 16 April 2014, 2 PFLOPS and over as from 23 December 2019, 2.4 PFLOPS and over as from 23 December 2020, and 2.88 PFLOPS and over as from 23 December 2021.

(2) Non R&D Satellites

The Committee adopted, to ensure openness, transparency and non-discrimination in procurement of non R&D satellites, the “Procedures for the Procurement of Non-R&D Satellites,” at its 14th Meeting on 14 June 1990, factoring in the preceding consultations with the Government of the United States on 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 is the provision on the consultations process between the Government of Japan and the Government of the United States to resolve disputes over the classification of satellites (Attachment II, Section III. 12.). Such provisions on the consultation process,

however, do not limit the scope of the Procurement Review Board's dispute resolution process. 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 adopted in response to the claim by the US Government in 1990, that the share of foreign products in public sector computer procurement in Japan was low and such a low share in public sector was in contrast to that in private sector, which were attributed to problems in Japan's procurement procedure. 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 valued no less than 100,000 SDR by 147 entities (as of 1 March 2020 (in addition to all of the 141 entities listed in Japan's Annexes 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 evaluation method is 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 would be developed toward the end of FY1994, and procurement based on the overall-greatest-value evaluation methodology would 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 800,000 SDR. 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

Government procurement of telecommunications equipment and services and medical technology products and services was one of the priority topics in 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 with respect to the Measures on Japanese Public Sector Procurement of Telecommunications Products and Services and Operational Guideline with respect to the Measures related to Japanese Public Sector Procurement of Medical Technology Products and Services, on the purpose of clarifying the operation of the Measures, 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, 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,” in order to ensure non-discriminatory, transparent, fair, competitive and open public sector procurement procedures and significantly increase access and sales of competitive foreign telecommunications products and services and medical technology products and services in Japanese public sector procurement, 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 100,000 SDR by the 138 procuring entities (as of 1 March 2020) (all of the entities listed in Japan's Annexes 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 SDR by the 95 procuring entities (as of 1 March 2020) of the entities listed in Japan's Annexes 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 with the United States since March 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." at the 22nd Meeting of the Action Program Committee on 7 October 1994, so as to complement and elaborate on the Measures adopted in March 1994,

4. Others

(1) Challenge System of Government Procurement Grievances

a. Under the First Agreement on Government Procurement

Various regulations were stipulated under non-discrimination and national treatment policies, etc., in the first agreement on government procurement which came into effect in 1981. However, there were no provisions in regard to challenge procedures.

Meanwhile, the voluntary measures adopted by the Action Program Committee prescribed challenge procedures, and the Committee implemented the procedures in line with the voluntary measures.

b. After the Uruguay Round

(Reference material I-6)

In the revised Agreement which came into force in 1996 as the result of parallel negotiations with the Uruguay Round, provision on “Challenge Procedures” (Article XX) was introduced in addition to provisions on non-discrimination and national treatment policies that had been already stipulated in the first agreement in relation with challenges.

Accordingly, the Office for Government Procurement Challenge System was established following a Cabinet decision on 1 December 1995. The Office was intended to review complaints. The role of the Action Program Committee on challenge procedures based on the voluntary measures was taken over by the Office. Following the Central Government Reform on 6 January 2001, the Office was affiliated to the Cabinet Office. Today, the office has the Council on the Government Procurement Review and the Government Procurement Review Board.

On 7 March 2014, the chair of the Council on the Government Procurement Review designated international agreements that apply to government procurement, such as economic partnership agreements (EPAs). Since then, the Office has dealt with not only complaints pursuant to the 1994 Agreement and the revised Agreement but also complaints pursuant to these designated international agreements. International agreements designated by the Council are as follows (as of 1 March 2020).

- (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 Challenge System of Government Procurement (Reference material I-7)

Challenges are processed in accordance with the Review Procedures for Complaints Regarding Government Procurement (adopted on 14 December 1995 by the Council on the Government Procurement Review) and the Detailed Regulations on Review Procedures for Complaints Regarding Government Procurement (adopted on 11 January 1999 by the Council on the Government Procurement Review).

When a supplier challenges arising in the context of a covered procurement, the Government Procurement Review Board, which is comprised of academic experts, will review the complaint from a fair and independent standpoint, based on the procurement procedures stipulated by the revised Agreement and the voluntary measures established by the Japanese Government. In case that the Board determines that there was a breach of the Agreement, it recommends correction of the breach such as redoing the procurement process, with or without the criteria or requirements of the procurement changed.

d. Record of Recent Filings of Complaints

Case No. 16

1. Date of filing of the complaint: December 13, 2019
2. Name of the claimant: IBM Japan, Ltd.
3. Name of the related procuring entity: National Center for Child Health and Development
4. Name of procured goods/services concerning the complaint: Hospital Information System
5. Outline of the complaint:

In the procurement,

- ① the related procuring entity cancelled the contract without any basis on tendering notice, specification or the National Center's detailed regulations on contract, which is inconsistent with Article 12 Paragraph 2 (a) and Article 15 Paragraph 5 (a) of the revised Agreement.
- ② the related procuring entity didn't award the contract to the claimant despite the fact that the claimant ranked first in the overall-greatest-value evaluation and attained a right of first negotiation in bid opening. This is inconsistent with Article 15 Paragraph 5 (a) of the revised Agreement, since the treatment based on reason of technical specifications and performance etc.

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, and then drafted a report and proposal on March 12, 2020 issued to 1) the claimant and 2) the related procuring entity, National Center for Child Health and Development.

In the report and proposal, the Board unanimously approved the complaint that the cancellation of the contract is inconsistent with the Article 15 Paragraph 5 (a) of the revised Agreement, and proposed, based on 6.(2) in Review Procedure for Complaints Concerning Government Procurement, that the related procuring entity treat the claimant as contractor and correct its procurement procedure by revision of the detailed regulations on contract and its operations.

(2) Construction Sector

While the bidding and contracting procedures for public works are not followed up 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 improve foreign companies’ 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 ensure procurement process consistent with 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. (Understanding at 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 2019.

(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 (see note 1) 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. Additional points are credited to those corporations certified under the Act on Promotion of Female Participation (Eruboshi and Platinum Eruboshi certification(see note 2)), 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 small- and medium-sized companies that have formulated action plans for business owners based on the Act on Promotion of Female Participation.

In FY2018, implementation of the initiative by central government entities amounted to about 1,210 billion yen (32.2% of overall procurement subject to the initiative) and about 9,500 contracts (27.4% of overall procurement subject to the initiative). For independent administrative institutions, it amounted to about 670 billion yen (41.9%) and about 6,400 contracts (54.7%).

The Cabinet Office has commenced administrative work in October 2016 to certify these foreign companies satisfying the requirements under the Act on Promotion of Female Participation as work-life balance promoting corporations, when foreign companies participate in procurement subject to the revised Agreement.

(Note 1)

After the revised Act is to be effective on 1 June 2020, the article number will be 24.

(Note 2)

Platinum Eruboshi is added among the certification list after the revised Act is to be effective on 1 June 2020.