

CHAPTER 14

GOVERNMENT PROCUREMENT

OVERVIEW OF RULES

1. ECONOMIC ASPECTS AND SIGNIFICANCE

Government or public procurement is the purchase, lease or rental of products and services by government entities. The size of the government procurement market and its share of the economy differs from country-to-country, but estimates generally place it between 10 percent and 15 percent of GDP. Therefore, procurement laws that discriminate against foreign suppliers distort the international flow of products and services, which worsens as the economic importance of services and soft industries increases.

National security is one reason offered for policies that favor domestic products in government procurement. However, these policies are also commonly enacted to promote industrial policy, *i.e.*, to protect specific industries. Discrimination between domestic and foreign suppliers in government procurement will, in the short run, help countries achieve their industrial policy objectives, but ultimately create an arbitrary barrier to fostering a fully competitive environment. For entities procuring goods, restrictive policies will prevent them from buying the best possible goods and services at the lowest possible price and will, therefore, prevent the government budget from achieving maximum utility. For suppliers, procurement restrictions mean that domestic industries are given excessive protection, creating disincentives for the protected industries to improve the ways in which they conduct business or develop new products. Such policies, therefore, weaken suppliers. Given that the size of the government procurement market is quite large, when procurement protection is linked to policies that protect domestic industry, disciplines on subsidies become meaningless; such protection ultimately causes palpable distortions to the free-trading system.

2. HISTORY AND BACKGROUND OF THE AGREEMENT ON GOVERNMENT PROCUREMENT AND ITS REVISION

Following widespread awareness among the major GATT Members of the impact of government procurement on international trade, the Agreement on Government Procurement (GPA) was adopted at the Tokyo Round in April 1979 as a plurilateral agreement to ensure national treatment, non-discrimination, and fair and transparent procurement procedures. The GPA came into force in January 1981.

Negotiations for the amendment of the GPA aiming at the revision of the text and the expansion of the scope started in parallel with the Uruguay Round. The new GPA was signed in April 1994 and came into effect on January 1, 1996.

Subsequently, negotiations on the amendment of the GPA of 1994 were carried out, which converged in December 2011. In March 2012, the Protocol Amending the Agreement on Government Procurement was adopted. In Japan, the revised GPA came into force in April 2014.

3. *LEGAL FRAMEWORK*

The GPA is a plurilateral agreement in which WTO Members voluntarily participate. The rules under the GPA apply only to participating countries. The GPA consists of two parts: the text of the Agreement and parties' schedules defining the scope of government procurement to which the Agreement applies.

The current GPA includes the principles of national treatment and non-discrimination and reinforces and improves fair and transparent procurement procedures in the following respects:

(1) SCOPE AND COVERAGE

In the Appendix to the Agreement, each party specifies goods, services and entities subject to the application of the rules under the Agreement, thresholds, and subject institutions (see Figure II-14).

Figure II-14 Outline of Commitments by Major Countries under the revised GPA

[Entities]

	Central government entities	Sub-central government entities	Government-related entities
Japan	All central government entities (including legislative and judiciary entities)	47 prefectures and 19 designated cities	About 130 special corporations and independent administrative institutions
US	Federal government entities	37 states	TVA, 5 power marketing administrations of the Department of Energy and the St. Lawrence Seaway Development Corporation (10 entities total)
EU	The Council of the European Union, the European Commission and central government entities of 27 EU member countries	Sub-central government entities of 28 EU member countries (including municipal-level entities)	Entities in the water, electricity, transport, port and airport sectors
Canada	Central government entities (including some judiciary entities but excluding legislative entities)	10 provinces and 3 territories	10 Crown Corporations
Rep. of Korea	Almost all central government entities	16 cities including Seoul Metropolitan Government and local governments of 3 Metropolitan cities	25 entities including Republic of Korea Development Bank

[Threshold values]

(Unit: SDR 10,000 except as otherwise indicated)

		Japan	US	EU	Canada	Rep. of Korea
Products	Central government entities	10	13	13	13	13
	Sub-central government entities	20	35.5	20	35.5	20(40)
	Government-related entities	13	250,000 USD* (40)	40	35.5	40
Services (excluding construction services and architectural, engineering and other technical services)	Central government entities	10	13	13	13	13
	Sub-central government entities	20	35.5	20	35.5	20(40)
	Government-related entities	13	250,000 USD * (40)	40	35.5	40
Construction services	Central government entities	450	500	500	500	500
	Sub-central government entities	1500	500	500	500	1500
	Government-related entities	1500 (450)	500	500	500	1500
Architectural, engineering and other technical services	Central government entities	45	13	13	13	13
	Sub-central government entities	150	35.5	20	35.5	20(40)
	Government-related entities	45	250,000 USD * (40)	40	35.5	40

* The US notifies the WTO of the threshold values based on US dollars. 1 SDR = approx. 1.4 USD (calculated using the conversion factor applied to 2016-2017 figures notified by the US to the WTO)

(2) USE OF ELECTRONIC TOOLS

Obligations of procurement agencies when using electronic tools have been newly included in the general principles (Article 4 Clause 3). Furthermore, provisions were made for the promotion of electronic tools in the official notice of intended procurement, reducing the time-period for tendering when using electronic tools, as well as procedures when using electronic auction systems (Article 7 Clause 1, Article 11 Clause 5 and Article 14).

(3) PROMOTION OF ACCESSION OF DEVELOPING COUNTRIES

Currently, most of the parties to the revised GPA are developed countries. Therefore, promoting the accession of developing countries, which possess potentially large government procurement markets, is one of the major tasks for the future. Due to this, provisions to promote the accession of developing countries were included in the revised Agreement -- specifically: (1) the provision of S&D (special and differential treatment) of developing countries during the process of accession negotiations and implementation of the revised Agreement; (2) the provision of the most favorable coverage of the Agreement by the existing parties when developing countries accede and special treatment after accession during the transition period for applying the Agreement (*i.e.*, a price preference for developing country products, offsets, the gradual addition of entities or sectors to which the Agreement applies, and a threshold higher than the permanent threshold); and (3) the provision of technical cooperation and capacity-building related to accession and implementation.

(4) CHALLENGE PROCEDURES

It became mandatory for parties to implement systems in which suppliers who believed there was a breach of the Agreement in the procurement procedure of a government entity could file a complaint. A court or an impartial and independent institution that has no relation to the results of procurement must review complaints submitted. If a violation is found, correction of the breach of the Agreement, compensation for damages and other remedial measures shall be provided.

Japan formed a Government Procurement Review Board consisting of experts in the field to serve as the complaint resolution body under the Cabinet Office. Since 1996, 14 complaints have been processed.¹

(5) FILING OBJECTIONS CONCERNING THE MODIFICATION OF APPLICATION COVERAGE

Concerning the procurement entities that are subject to the Agreement by a party, when it wishes to revise the content of its annexes to change the name of entity (or something else) or to withdraw an entity from the annexes due to reasons such as privatization, it must submit a notification to the Committee on Government Procurement. It is possible for other parties to file an objection against this notification. If no objection has been filed by any other parties or when a resolution has been reached with respect to an objection, the modifications will be approved. Before the GPA is revised, as long as other parties do not retract their objection, privatized entities could not be excluded from the annexes. For example, three Japanese companies -- East Japan Railway Company (JR EAST), Central Japan Railway Company (JR CENTRAL) and West Japan Railway Company (JR WEST) -- had all of their state-owned shares sold, and thus the companies' capital became owned by the private sector. However, since the EU did not retract its objection concerning the withdrawal of these companies from the annex of the Agreement, the three companies remained to be covered by the Agreement. The EU then retracted the objection against three companies on October 28, 2014, and they were no longer covered by the Agreement under Japan's Note 5 to Annex 3 of the revised Agreement. Specific dispute settlement procedures (*i.e.*, consultation by involved countries and the arbitration procedure adopted by the Committee on Government Procurement) were established in order to secure a measure for a third party to objectively judge and resolve such conflicts between parties. Furthermore, the adoption of indicative criteria (for removing a privatized organization from the annex) became a mandatory responsibility of the Committee on Government Procurement. Discussions on the specific substances continue in the Committee on Government Procurement.

¹ <http://www5.cao.go.jp/access/japan/short-j.html>

(6) DISPUTE SETTLEMENT PROCEDURES

The Agreement requires that in principle, disputes be settled in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). There are, however, several departures from normal DSU procedures. First, given the time-sensitive nature of government procurement tenders, the Agreement requires that an effort be made to shorten the panel review period that is set out in normal DSU procedures as much as possible. Second, the Agreement does not allow cross retaliation under any circumstances (imposition of countermeasures that suspend concessions or obligations under the agreements in other fields (such as services and TRIPS) is not allowed. Conversely, for disputes arising in connection with the agreements in other fields, imposition of countermeasures that suspend concessions or obligations under the GPA is not allowed).

(7) REDUCED OBLIGATIONS FOR SUB-CENTRAL AND GOVERNMENT-RELATED ENTITIES

The Agreement allows sub-central and government-related entities to use simplified procedures in requests for tenders and to maintain lower statistical reporting obligations than central-government entities. This has the effect of reducing the burden on sub-central and government-related entities to which coverage has been newly extended.

(8) FUTURE TASKS

After the revised Agreement came into effect, conducting further negotiations were planned with the objective of further improvements to the Agreement and reducing and abolishing discriminatory measures. As part of this, a specific work plan was formulated concerning the five areas -- SMEs, statistical data, sustainable procurement, exclusion and restriction in parties' annexes and safety standards in international procurement.

4. RESPONSES IN JAPAN CONCERNING THE REVISED GPA

General regulations in Japan concerning government procurement relating to central government entities include the Public Accounting Act, the Cabinet Order concerning the Budget, Auditing and Accounting, and the Special Ad Hoc Cabinet Order concerning the Budget, Auditing and Accounting. These regulations include the principles of fairness, equal opportunity and economy. They share the same basic principles of non-discrimination and transparency contained in the GPA. Additionally, the consistency of the procurement procedures subject to the revised GPA is ensured by domestic regulations such as the Cabinet Order Providing for the Special Cases of Procurement Procedure of Domestic Products or Specified Services and the Ministerial Ordinance Specifying the Special Cases of Procurement Procedure of Domestic Products or Specified Services. Furthermore, regional government entities and government-related entities each put in place special ordinances based on the Local Autonomy Act and internal rules conforming to the revised GPA, ensuring the implementation of procurement procedures of the revised GPA within Japan.

In addition, voluntary measures that exceed the standards in the revised GPA designated, such as having the bidding period stipulated to be forty days or more, while it is fifty days or more in the revised GPA.

RECENT DEVELOPMENTS

As of the end of February 2018, the GPA is participated in by 19 countries/regions. Furtherance of accession negotiation with new parties is an important issue for the coming years. Ten countries are currently involved in accession negotiations -- Albania, Australia, China, the Republic of Georgia, Jordan, Kyrgyz Republic, Oman, Russia, Tajikistan, and Macedonia. China, in particular, has a large government procurement market, and its accession will have a large impact on promoting the accession of non-parties. Therefore, early accession of China at a high commitment level is desired.