

Anti-corruption policies in Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement Self-assessment report Japan

Identifying reform needs, assessing progress and evaluating the effectiveness of anti-corruption policies and practices are central principles enshrined in the ADB/OECD Initiative and its Action Plan. In this context, the present self-assessment report from Japan was prepared as background to the Initiative's thematic review exercise on measures to curb corruption in public procurement in the Asia-Pacific region.

This thematic review on public procurement was initiated in reaction to the findings of the Initiative's 2003-2004 in-depth analysis of the legal and institutional anti-corruption frameworks of the Action Plan's then 21 endorsing countries against the standards of this Plan ("Anti-Corruption Policies in Asia and the Pacific – the legal and institutional frameworks", November 2004). In this study, public procurement was identified as one of the areas requiring particular attention in the Asia and Pacific region and where consequently the Initiative's Steering Group had a vital interest to promote reform.

With this aim, the group agreed to pursue analytical work on corruption in public procurement through a thorough review of relevant existing policies, practices and rules so as to assist participating governments in better understanding the corruption risks inherent in their countries' institutional settings and procurement practices. This thematic review further seeks to assess how countries translate into practice their commitment made under the Action Plan to curb corruption in public procurement. Eventually, the review's findings will provide governments with an analytical framework to design policies and procedures that ensure greater transparency and integrity in public procurement and to identify priorities for reform in this respect.

In line with the Action Plan's principle of self-assessment, the review is conducted on the basis of information provided by participating countries in reply to a questionnaire specifically prepared for this purpose by the ADB/OECD Initiative. The present document represents the replies submitted by Japan in this framework.

Further information on the exercise, on other participating countries and on the analysis' outcome is available at the Initiative's website at <http://www1.oecd.org/daf/asiacom/stocktaking.htm#trpp>.



A. General framework

Legal and organizational framework:

1. Please list and briefly describe laws and regulations related to government procurement, including those that give exemption to the standard government procurement rules. Where available, please attach a copy or indicate an internet-site for download of these regulations, if possible in English language. Ensure to include secondary legislation, rules and procedures. Also, please indicate relevant international or regional agreements¹ that your country is committed under, including its level of involvement (e.g. signature, ratification, implementation).

With respect to Japan's government procurement procedures, numerous domestic laws and ordinances have been promulgated. These include the Accounts Law (Law No. 35 of 1947), Cabinet Order concerning the Budget, Settlement of Account and Accounting (Imperial Ordinance No. 165 of 1947), and the Local Autonomy Law (Law No. 67 of 1947), among other laws and regulations. Here mentioned laws and regulations are accessible at <http://kensaku.kudan.hq.admix.go.jp/SOUMU/cgi-bin/idxsearch.cgi>

The Accounts Law (Law No. 35 of March 31, 1947) specifies that competition shall be administered by open tendering procedures which comprise the basic bidding procedures and in some reasonable cases there could be permitted to use selective or limited tendering procedures. The Accounts Law, furthermore, refers to exceptional cases submitted to an auction sale for any special reason.

As an international rule on procurement procedures, the Agreement on Government Procurement was concluded (effective January 1, 1996). The Agreement is managed under the framework of the World Trade Organization (WTO), with 28 countries and customs territories, including Japan, becoming signatory parties as of the end of 2001.

Procurement procedures under the Agreement on Government Procurement are also secured under domestic law by the Cabinet Order Stipulating Special Procedures for Government Procurement of Products or Specified Services (Government Ordinance No.300 of 1980), the Cabinet Order Stipulating Special Procedures for Government Procurement of Products and Specified Services in Local Government Entities (Government Ordinance No.372 of 1995) and relative ministerial ordinance.

2. Please explain the repartition of tasks and responsibilities in the procurement process among centralized, decentralized and specialized authorities (in particular: design of policies and standards; capacity building; definition of needs and terms of individual tenders; execution of different procurement stages from advertising to contract awarding; dispute resolution; control of the fulfillment of the terms and conditions by the contractor).

Japan neither have the repartition system, nor specialized authorities. Each authority executes or promotes its own procurement process.

3. Is procurement of goods governed by the same procedures as procurement of services?

Yes, it is governed by same procedure based on the regulations of the Accounts Law, Cabinet Order concerning the Budget, Auditing and Accounting and so on.

¹ e.g. APEC Non-Binding Principles on Government Procurement; WTO Agreement on Government Procurement; etc.

4. Does the procurement law establish a Public Procurement Office (PPO)? Is the PPO appropriately staffed against its mandate? In this context, please state the total number of staff involved in public procurement country-wide. Are the procurement entities/PPO provided with adequate financial resources for the execution of their tasks?

No, Japan does not have PPO.

5. Please name the sectors, areas or conditions subject to particular procurement rules (if applicable, e.g. military; local governments; state owned enterprises; urgency).

There are no particular procurement rules in Japan.

Procurement policies and practices:

6. Do model tender documents exist (e.g. handbooks, model forms, model contracts, etc)? If yes, is their use mandatory, and do they contain a specific anti-corruption clause?

No, model tender documents or model contracts, which provide common and standard forms to all suppliers in Japan, do not exist. However, each ministry has regulated standard forms for contracts in certain extent, for instance, Ministry of Land, Infrastructure and Transport has set up standard forms of contracts for public construction works. Even if, there are some standard forms, it is not so sure that their use is mandatory, because each ministry keeps its own custom and manners. Standard forms for contracts usually do not contain a specific anti-corruption clause.

7. Please provide the latest available economy-wide annual total numbers and values of purchases, with breakdown a) by sector and b) by type of procurement. In this context, please describe the procurement types foreseen by law (e.g. sealed tender, direct purchase; limited tendering) and the policy of your Government towards these types.

We have no statistics by sector (public corporation or local government).

The following survey covers in principle procurement contracts made by central government entities and public corporations and products and services (except construction works) of which value were above the threshold of 100.000SDR.

Table: Breakdown of procurements by types of goods and services, and by contract type (2002) (Upper col.: Number of contracts, Lower col.: Value (100 million Yen))

	Total	Open tendering	Selective tendering	Single tendering
Goods	12,408	10,883 (87.7)	59(0.5)	1,466 (11.8)
	6,874	5,250 (76.4)	145 (2.1)	1,479 (21.5)
Services	3,331	1,821 (54.7)	1 (0.0)	1,509 (45.3)
	2,816	862 (30.6)	1 (0.0)	1,953 (69.4)
Total	15,739	12,704 (80.7)	60(0.4)	2,975 (18.9)
	9,690	6,112 (63.1)	146 (1.5)	3,431 (35.4)

(Note) Figures in parentheses: Ratio(%)

Source: Japan's Government Procurement: Policy and Achievements Annual Report (FY 2003 version) (<http://www.kantei.go.jp/foreign/procurement/2003/>)

8. Please explain under which conditions pre-selection procedures are conducted.

In general, in order to participate in open and selective tendering procedures, suppliers need to be qualified by entities concerned and listed as qualified suppliers. All of the applicants should be basically qualified, except such cases suppliers fall under some disqualified conditions, like a bankruptcy or other incapability for conducting legal actions.

Application for qualification can be made without any restrictions by suppliers' nationalities. A Japanese subsidiary of a foreign firm may apply for qualification on behalf of the parent firm by presenting a letter of attorney.

9. If your country is currently engaged in or planning a major reform of its procurement system, please briefly state the scope and objectives of this reform.

Japan is not engaged in or planning a major reform. But in recent time, the conditions of limited or single tendering contracts are reviewed in order to improve the accountability, effectiveness and checking function.

B. Transparency and Fairness

Transparency of general procurement policies and regulations:

10. Are the existing laws, regulations and policy guidelines on public procurement publicly available and, if yes, where/how?

Yes, most of laws and regulations on public procurement, such as the Accounts Law, the Cabinet Order concerning the Budget, Settlement of Account and Accounting and the Local Autonomy Law, are publicly available with the compendium of laws or internet-site at <http://kensaku.kudan.hq.admix.go.jp/SOUMU/cgi-bin/idxsearch>.

In addition, "Questioned and Answers on Government Procurement Contracts" has been prepared by Ministry of Foreign Affairs to Japanese and foreign suppliers as Guidance of the Government Procurement Market of Japan, which provides basic information concerning policy guidelines based on the international agreement under the framework of WTO. It is accessible at http://www.mofa.go.jp/mofaj/annai/shocho/chotatsu/q_a/index.html

The Committee for Drawing Up and Promoting the Action Program drafted, as voluntary measures, non-discriminatory, fair and transparent procedures which surpass those with the WTO Agreement on Government Procurement, and has been steadily implementing follow-ups. You can find the detail information about the voluntary measures at the Annual Report of "Japan's Government Procurement: Policy and Achievements-Annual Report." The latest version of this report is at <http://www.kantei.go.jp/foreign/procurement/2003/>.

11. In your country, do certain territorial entities or institutions establish lists of eligible contractors (sometimes called “white-lists”)? If yes, please explain the criteria for a company to be included in or excluded from this list, and what use is made of such lists.

No, certain territorial entities or institutions do not exist in Japan.

12. Is a bid security and/or a performance guarantee required from the bidder? What are the procedures for advertisement of procurement opportunities?

Although it is stipulated that tenderers are required to pay 5% or more of their estimated contract prices as guarantee fees, payment of the fees is usually exempted, since those participating in competitive tendering procedures are, in most cases, qualified suppliers.

The information, such as notices of intended procurements, which are published in the official gazette, is also available on the website of each government entity.

Transparency of procurement opportunities:

13. Describe where and how tender opportunities are published, including if their publication is mandatory or depends on certain criteria (if so, please list)? Please state if a fee has to be paid to receive tendering documents and – if yes – how this fee is fixed and whether other processing fees apply. Please briefly explain whether your country allows adequate and reasonable time for interested suppliers to prepare and submit responsive bids.

A procuring entity publishes a notice in the official gazette, “Kanpo” or its equivalents at the local level, for the invitation to tender at least 40 days in advance of the closing date of receipt for tenders. As voluntary measures, established as a part of the effort to increase access opportunities for foreign suppliers to the Japanese market, the Government of Japan extends the period for the receipt of tenders for procurement of products and services valued at above 100,000 SDR (which are to be handled in accordance with the Agreement) to 50 days from the date of public notice for the invitation to tender, barring unusual circumstances.

Furthermore, with a view to facilitating access to information on government procurement, an electronic data base containing the information published in the official gazette, “Kanpo”, is available, either at such places as local branch offices and Business Support Centers of Japan External Trade Organization (JETRO (Information Service Division, Tel: 03(3582)5549, Fax: 03(3589)4179)) or through on-line information and data base retrieval services (<http://www.jetro.go.jp/>).

The central government entities have decided to provide on their respective websites procurement information on Notices of Invitation to Tender, etc., published in the official gazette, “Kanpo”. They have also decided to establish exclusive websites that provide integrated procurement information (except for public works). Websites will be established and go online in April 2001.

14. Are selection and award criteria prescribed by law? If yes, are they prescribed in an exclusive manner? Please name these criteria a) for procurement of goods, and b) for procurement of services (e.g. technical requirements, qualification of the bidder, evaluated price, expertise/experience, etc.) and those that are explicitly excluded (e.g. nationality of the bidder or other affinity, etc.). Is the description of these criteria in the tender documentation mandatory?

Yes, selection and award criteria are prescribed by such as the Accounts Law and the Cabinet Order concerning the Budget, Settlement of Account and Accounting.

“The lowest tendered prices” is the general rule. A contract is awarded to the tenderer who has submitted a tender of the lowest price, provided that the price does not exceed the ceiling price evaluated in advance by the procuring entity taking into account such criteria as actual prices of similar transaction, supply-demand balance, complexity of the procurement, quantity to be procured and time allowance of the delivery. Nevertheless, contracts may be awarded on the basis of various criteria in addition to, the lowest tendered prices (over all greatest value method), while ensuring transparency of procedures, fairness, and budgetary efficiency, should nature of procurements so require. Japan’s government procurement regime is consistent with these elements of value for money. It has been and will be our practice to procure products, services, etc. based on so called “the principle of the best value for money”.

Yes, the description of these criteria in the tender documentation is mandatory.

Transparency of contract evaluation and award procedures:

15. What is the procedure if none of the bids or too few – relative to a prescribed limit – fulfill the technical requirements as defined in the call for tender (e.g. reopening of the bid, negotiations, etc.)? Do you keep a register of all bids received?

If no tenders are lower than the ceiling price after several submissions, the tendering procedures are ceased. In this case, the procuring entity follows either of the following procedures: (1) to negotiate with the tenderers concerned individually without modifying the tender conditions and award the contract to a tenderer offering a price lower than the ceiling price; or (2) to repeat the whole tendering procedures, including reissuance of a public notice on tender, with the tender conditions modified.

Yes, we keep a register of all bids received.

16. Where and how are actions and decisions in the procurement process recorded? How long and where are these records preserved, and who can access this information?

After closing its procurement process, actions and decisions are recorded at the relevant department of each procurement authorities, according to the Cabinet Order concerning the Budget, Settlement of Account and Accounting.

These records are preserved for designated terms, at least 5 years, based on the criteria for minimum preservation terms, which is instructed by guidelines to some kind of the official accounting documents. It is principally accessible for all persons, who make requirement to disclose these documents.

17. How and to whom is the final decision on awarding the tender disclosed? Do reasons for the selection of the winning bidder have to be stated? Are post-awarding negotiations allowed and, if yes, under what conditions?

Tenders are opened at the time and place specified by a notice in the official gazette, “Kanpo” or its equivalents at the local level, in the presence of tenders or their proxies. Should no tenderers or their proxies be present, staff of the procuring entity who are not involved in the tendering procedures are required to witness.

No, reasons for the selection of the winning bidder have to be stated. Because, it is not needed, as a general rule, a contract is awarded to the tenderer who has submitted a tender of the lowest price, provided that the price does not exceed the ceiling price evaluated in advance by the procuring entity taking into account such criteria as actual prices of similar transaction, supply-demand balance, complexity of the procurement, quantity to be procured and time allowance of the delivery. In spite of this general rule, for the requirements from bidders that have lost in the tender of the designated contracts concerning government procurement of goods and services, reasons should be notified to those bidders.

No, post-awarding negotiations are not allowed.

18. Are framework contracts allowed? If yes, what measures are taken to control against corrupt or unnecessary demands?

(We can not give answers, because the meaning of framework contracts are not clear.)

C. Integrity

Integrity of procurement personnel:

19. Do codes of ethics or similar instruments exist that explicitly apply to procurement personnel and entities? If yes, do they specifically address corruption risks, and do they contain conflict of interest provisions (e.g. provisions making mandatory the declaration of personal interests by agents and buyers)?

Yes, they do. The National Public Service Laws(NPSL) and the Local Public Service Laws(LPSL) define national and local public employees as servants of the whole people and obligates them to attend their duties in the interest of public. The NPSL,LPSL, the National Public Service Ethics Law (Ethics Law), Ethics Bylaw and the Ethics Regulation respectively provide disciplinary and ethical rules observed by national and local public employees. The NPSL and LPSL provides a wide range of disciplinary duties related to conflict of interest, such as restrictions on political activities, accepting positions in profit-making enterprises and engaging in outside business, etc. In addition, the Ethics Law, the Public Service Ethics Code(Ethics Code), Ethics Bylaw and Ethics Regulation prohibit further specific acts people's trust of the public service, such as receiving a gift of money, goods or real estate and accepting a hospitality, etc. from an interested party and request reports regarding the gifts, hospitalities, stock transactions and incomes. etc.

20. Does your country provide for specific training for procurement personnel that include integrity issues? Please list manuals or policy guidelines that might exist to clarify procurement procedures and principles to procurement personnel (if existing please attach a copy or internet-address for download).

No, it does not. However, Ministry of Finance used to host or organize general training courses for accounting personnel, which contains sometimes procurement as a part of its courses, in order to increase awareness, that procurement process should be faire and effective.

There are no specific manuals or policy guidelines, in addition to laws, regulations and the aforementioned international agreement on question No.1.

21. Is procurement personnel required – and if yes by what regulation and to what institution – to report attempts by suppliers to undermine the impartiality and independence of action by offering bribes, benefits or other forms of inducement?

Yes, public officials, including procurement personnel, are required to file an accusation with judicial police or a public prosecutor when they consider that there exists an offence, including offering bribes, in the course of the performance of their duties. [Article 239(2) of the *Code of Criminal Procedure*]

22. Which penal and/or administrative sanctions are applicable to procurement personnel for accepting or soliciting bribes? Are public officials liable for the economic damage that the procuring entity suffers? What is the policy that applies to procurement personnel for accepting or soliciting small facilitation payments such as gifts, benefits, hospitality (e.g. outright forbidden, accepted under certain circumstances, etc.; please explain).

Public officials, including procurement personnel, are punished by crimes of bribery of the *Penal Code*. Typically, a public official who accepts, demands or promises to accept a bribe in relation to his duty shall be punished by imprisonment for not more than five years; when a public official agrees to do an act in response to the bribe, he shall be punished by imprisonment for not more than seven years; when a public official consequently do an illegal act in response to the bribe, he shall be punished for imprisonment for a definite term of not less than one year. The bribe accepted with the knowledge of the crime shall be confiscated, or the equivalent value shall be collected. [Article 197 to 197-5 of the *Penal Code*]

Procurement personnel should be dismissed, suspended from duty, suffer reduction in pay or administration of a reprimand, when they have acted contrary to the Accounts Law and the related regulations, or neglected other official duties, according to the Article 82 of the National Public Service Law, which provides disciplinary punishment to these public officials.

Yes, they are. The Law on the Responsibility Budget Implementation Officers stipulates that those officers who incur liabilities or make payments against statutes or budget on purpose or gross negligence will have to reimburse the damage caused.

Provisions of crimes of bribery of the *Penal Code* do not mention to small facilitation payments. Crimes of bribery are determined as far as those gifts or benefits are offered “in relation to the officials’ duties.”

On the other hand, the Ethics Law and the Ethics Code prescribed prohibitions, such as receiving a gift of money, or goods from an interested party; obtaining a loan or borrowing free goods from or at the expense of an interested party; receiving free provision of service from or at the expense of an interested party; playing golf or travelling with an interested party.

Integrity of bidders and suppliers:

23. Which penal sanctions are applied to a bidding company as a legal person and to its employees if it is found guilty of corruption related to the bidding procedure? Is the company liable for the economic damage that the procuring entity suffers?

Persons who offers or promises to offer a bribe to public officials in the process of bidding shall be punished by imprisonment for not more than three years or a fine of not more than 2,500,000 yen. [Article 198 of the *Penal Code*]

As crimes related to the bidding procedure, especially, the *Penal Code* stipulates the crimes of obstruction of bidding and collusion. Persons, who impair public bidding by fraudulent means or forces or collude for the purpose of unfair bidding, shall be punished by imprisonment for not more than two years or a fine of not more than 2,500,000 yen. [Article 96-3 of the *Penal Code*]

When the corruption related to the bidding procedure is considered as private monopolization or unreasonable restraint of trade under the *Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade*, persons who effected private monopolization or unreasonable restraint of trade shall be punished by imprisonment for not more than three years or a fine of not more than 5,000,000 yen. When a representative, an employee or any other person in the service of legal persons, with regard to the business, including bidding procedure, of the legal persons, committed a violation of private monopolization or unreasonable restraint of trade, the legal persons, in addition to the punishment of the offender, shall be punished by a fine of not more than 500,000,000 yen. [Article 3, 89 and 95 of the *Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade*]

Yes, the company is liable in some cases, because liability for economic damage is described in some contracts concluded between company and the procurement entity.

24. Do your country's laws and regulations permit authorities to suspend, temporarily or permanently, from competition for public contracts and/or from other commercial activities an enterprise determined to have bribed a public official? If yes, is such disqualification mandatory or optional and which body decides on the disqualification and its exact terms? Which means are employed to implement the disqualification (e.g. publicly available list, declaration in the bidding process...)?

Yes, they do temporarily from competition. Such disqualification is optional on case by case bases. The accounting section of each authorities decides, whether needed and its terms. Once decided, just notification is sent to that enterprise.

25. Do bidders have to explicitly declare their abstention from any means that could improperly influence the procurement process or decision and, if yes, do such declarations also cover such unlawful practices by subcontractors or other third parties?

No, bidders do not have to declare their abstention from any means.

26. Do bidders have to disclose commissions, gratuities, or fees that have been or have to be legally paid to individuals or sub-contractors for their services provided for instance in the preparation of a bid or the execution of the contract?

No, bidders do not have to disclose commissions, gratuities, or fees.

D. Accountability

Separation of responsibilities and independent scrutiny:

27. Which means are employed to avoid insulation of procurement staff and to ensure mutual control? (e.g. rotation of officers, decisions taken/validated by more than one actor, etc.)?

Regularly, decisions should be taken or validated by more than one actor of accounting division, and the rotation system of officers including procurement staff has been established, especially from the view point of personnel policy. At least, these kinds of means are usually employed by each procurement authority.

28. Are there regular and systematic internal and external audits of procuring entities/PPOs? If yes, are they mandatory; which bodies are in charge of this audit; are the audit reports publicly available? Are independent actors/NGOs invited to monitor the procurement procedures and what is the setting prescribed by law?

Yes, there are. As to internal audit, it is not mandatory, but regular and systematic auditing system has been promoted to establish within procuring entities.

No, the internal audit reports are not publicly available.

As to external audit, it is mandatory upon requirement of Constitution, and Board of Audit is in charge of this audit. Public procurement is one part of the subjects to be audited, because Board of Audit examines the revenue and expenditure of government and the legal entities to which government has made capital investments.

Yes, the external audit report is publicly available as “Audit Report”. This report includes findings and recommendations on public procurement and is annually submitted to the Diet through the Cabinet. The detail information is provided at <http://www/jbaudit.go.jp>.

No, independent actors/NGOs are not invited to monitor the procurement procedures.

Review and complaint mechanisms:

29. Do your laws and regulations provide for review and complaints procedures? If yes, are they at administrative and/or judicial levels; what is the time limit for complaint/appeal, if any? How many complaint cases related to procurement are handled per year?

Japan has established the Government Procurement Review Board (the Board) in the government to review complaints filed with respect to procurement by the central government entities and other central government-related entities impartially and independently. (Cabinet decision of December 1, 1995) The Board consists of scientists, scholars, and other members with experience in government procurement.

Persons or bodies wishing to file a complaint may do so with the Board within 10 days after the basis of the complaint is known.

Since the establishment of the Board in 1995, five complaints have been filed, and many inquiries have been resolved through consultation.

30. Who is entitled to initiate a complaint procedure (e.g. competing bidders, any citizen, etc.) and how are potential informants protected against retaliation (e.g. confidentiality, anonymity)? Are the decisions of the body handling complaints binding? What are the consequences if a complaint is proven valid (e.g. reopening of the bidding, liquidation of damages, etc.)?

Complaints may be filed by persons (bodies) participating in the government procurement concerned or qualified to do so.

Interested supplier may make inquiries with anonymity before filing formal complaints.

If the Board finds that procurement has been carried out in a manner inconsistent with any provision of the Agreement on Government Procurement or other applicable measures, it will draw up recommendations concerning appropriate remedies, which may include one or more of the following:

- i. that new procurement procedures be conducted.
- ii. that re-procurement be conducted without changing conditions for procurement.
- iii. that the procurement be reevaluated.

- iv. that the contract be executed with a different supplier.
- v. that the contract be terminated.

The procuring entity is required, as a rule, to follow the recommendations of the Board. (The “Review Procedures for Complaints Concerning Government Procurement” stipulates that “if the Procuring Entity has decided not to comply with the recommendations, it shall report to the Board with the reasons and the Board shall send a copy of the reasons to the Office of Government Procurement Review (OGPR) immediately upon receiving such report.” Since the OGPR is comprised of the Chief Cabinet Secretary as its head, and Vice-Ministers of relevant ministries as its members, with this provision entities are supposed to follow the Board recommendation unless there is a justifiable reason.)