

Review Procedure for Complaints Concerning Government Procurement

December 14, 1995
Council of Government Procurement Review decision
January 11, 1999 – Revision
January 11, 2008 – Revision
March 7, 2014 – Revision
April 4, 2014 – Revision

Under "Establishment of the Council of Government Procurement Review" (Cabinet decision, December 1, 1995), we adopt the Review Procedures for Complaints Concerning Government Procurement (hereafter referred to as "the Procedures") as follows.

1. Government Procurement Review Board

- (1) The Government Procurement Review Board (hereafter referred to as "the Board") receives a complaint in written form, investigates the facts of the situation (including every aspect of the procurement by the procuring entity identified in the complaint), and issues proposals to the procuring entity.
- (2) Exclusion and Avoidance
 - i. Board members who are recognized as having interests in the complaint may not participate in its review.
 - ii. Board members who recognize themselves as having interests in the complaint may avoid participation in its review with the permission of the Chairperson of the Board.
- (3) The Board may establish subcommittees for specific product or service if necessary.
- (4) The Chairperson of the Board appoints those who chair the subcommittees.

2. Filing of Complaints

- (1) For the purposes of the Procedures, the term "supplier" referred to in the Procedures is defined as follows:
 - i. Government procurement other than for public projects:

Agents that supplied or were capable of supplying the product or service when the procuring entity procured the same
 - ii. Government procurement for public projects:
 - a. For complaints concerning the registration of eligible agents, an agent that performed the registration
 - b. For complaints concerning open competitive bidding, any of the following:
 - (i) For complaints concerning confirmation of eligibility to participate in competitive bidding, an agent that petitioned for confirmation of eligibility to participate in competitive bidding
 - (ii) For complaints concerning procurement procedures other than those indicated in a. and b.(i), an agent that was confirmed as eligible to participate in competitive bidding
 - (iii) For complaints concerning bidding results, an agent that placed a bid
 - c. For complaints concerning procedures other than b., an agent that has been registered as eligible for the procurement contract in question (or for limited-tender contracts, an agent with an interest in said contract)
 - iii. Design/consulting operation government procurement for public projects:
 - a. For complaints concerning the registration of eligible agents, an agent that performed the registration
 - b. For complaints concerning publicly solicited proposals or publicly solicited competitive bidding, any of the following:
 - (i) For complaints concerning the selection of agents eligible to issue a proposal (for publicly solicited proposals) or the selection of agents eligible to engage in competitive bidding (for publicly solicited competitive bidding), an agent that has expressed interest in the procurement
 - (ii) For complaints concerning procurement procedures other than those indicated in iii.a. and iii.b.(i) above, an agent that was eligible to submit a proposal (for publicly solicited proposals) or an agent that was eligible to participate in competitive bidding (for publicly solicited competitive bidding)
 - (iii) For complaints concerning the selection of proposals (for publicly solicited proposals), an agent that has submitted a proposal. For complaints concerning bidding results (for publicly solicited competitive bidding), an agent that has submitted a bid
 - c. For complaints concerning procedures other than iii.b., an agent that has been registered as eligible for the procurement contract in question (for limited-tender contracts, an agent with an interest in said contract)
- (2) Any supplier deeming that procurement has been performed in breach of the Agreement on Government Procurement done at Marrakesh on 15 April, 1994, the revised Agreement on Government Procurement amended by the Protocol Amending the Agreement on Government Procurement done at Geneva on 30 March, 2012 and/or international agreements and regulations designated by the Chairperson (hereafter referred to as the Agreement on Government Procurement, etc.) may file a complaint with the Board. If a supplier believes that there has been a breach of the Agreement on Government Procurement, etc., it is recommended that the supplier first engage in consultations with the procuring entity and seek to resolve the problem.

- (3) If a supplier believes that there has been a breach of the Agreement on Government Procurement, etc. and requests to engage in consultations with the procuring entity, the procuring entity must promptly comply and work to resolve the complaint.

3. Calculation of time in the Procedures

For the purposes of the Procedures:

- (1) Calendar days are to be used when numbers of days are calculated unless otherwise specified.
- (2) Work days are defined as those that are not holidays for Japanese governmental organizations.
- (3) The first day is not included when periods are determined.
- (4) When the last day of a period falls on a holiday for Japanese governmental organizations, the period shall be considered to end on the following day.

4. Participants

- (1) All suppliers with an interest in the procurement that generated the complaint may participate in the complaint review procedure.
- (2) The organization that engaged in the procurement that generated the complaint (hereafter referred to as the "related procuring entity") must participate in the complaint review procedure.
- (3) Suppliers with an interest in the procurement that generated the complaint who want to participate in the complaint review procedure must notify the Board of their will to do so within 5 days of the public disclosure defined in 5.(5). Suppliers who submitted such notification (hereafter referred to as "participants") shall be subject to the Procedures.
- (4) Notifications submitted by participants as specified in (3) may be rescinded at any time.

5. Complaint Review Procedure

- (1) A supplier judging that procurement has been made in breach of any of the provisions of the Agreement on Government Procurement, etc. at any stage of the procurement process may register a complaint with the Board within 10 days of discovering or being reasonably capable of having discovered the conditions prompting the complaint. The Board immediately sends a copy of the complaint to the Council and the related procuring entity.
- (2) If the Board finds problems in the documentation used to file the complaint, it may ask the party filing the complaint (hereafter referred to as the "complainant") to make the necessary correction. The Board may correct minor problems with documentation at its own discretion.
- (3) In principle, the Board completes the review within 10 working days of the complaint being filed. However, complaints may be rejected in writing with the reason indicated if they:
 - i. are made late;
 - ii. do not relate to the Agreement on Government Procurement, etc.;
 - iii. are minor or insignificant;
 - iv. are not filed by a supplier; or
 - v. are otherwise unsuitable for review by the Board.
- (4) A related procuring entity that believes a complaint should be rejected may inform the Board of such in writing together with the reasons therefor.
- (5) The Board may receive late complaints if it deems that they have a reasonable cause.
- (6) Once the Board recognizes a complaint as valid and receives it, it immediately notifies the complainant, the Council and the related procuring entity in writing, as well as issuing a public announcement via a channel or channels decided by the Chairperson.
- (7) Suspension of contract conclusion and execution
 - i. In regard to complaints filed before a contract has been concluded, the Board shall, in principle, issue the related procuring entity within 12 working days of the receipt of the complaint a written request purporting that the entity should not conclude contracts during the review period.
 - ii. In regard to complaints filed within 10 days of the conclusion of a contract, the Board shall, in principle, issue a written request to the related procuring entity in a timely manner stipulating that the entity should suspend the execution of the contract during the review period.
 - iii. If the Board decides, due to unavoidable emergency circumstances, not to send a request to the related procuring entity purporting that it not conclude a contract or that it suspend the execution of a contract, the Board shall notify the complainant and the Council of such immediately in writing outlining the basis of the decision.
 - iv. The related procuring entity shall promptly comply with any requests from the Board not to conclude a contract or to suspend the execution of a contract.
 - v. In the event of iv. above, if the head of the related procuring entity determines that the entity cannot comply with the Board's request due to unavoidable circumstances, the Board must be immediately notified of such with an explanation of the reasons therefor. The Board shall immediately send a copy of this notification to the complainant and the Council.
 - vi. When a notification is issued as in v. above, the Board must evaluate whether the reason given is sufficient to justify the decision and immediately notify the complainant, the Council and the related procuring entity in writing of its decision.
- (8) Review
 - i. The Board shall conduct review of a complaint based on explanations, statements of position, provision of documentation and other evidence, which it shall request the complainant and the related procuring entity to file.

- ii. The related procuring entity may not refuse explanations, statements of position, provision of documentation and other evidence unless doing so would damage the public interest or seriously impede the performance of its public duties.
- iii. The Board may demand that the related procuring entity provide explanations, statements of position, documentation and other evidence if the Board determines that such resources are necessary to determine whether their release would damage the public interest or seriously impede the performance of the related procuring entity's public duties. When explanations, statements of position, documents and other evidence are requested for this purpose, no other parties may request their disclosure.
- iv. The Board shall conduct review of a complaint based on the Procedures even in case where a lawsuit has been filed before a Court relating to the procurement that is the subject of the complaint.
- v. Before the Board decides on the results of the review, the complainant, participants, and/or the related procuring entity may ask to meet with the Board to present their views.
- vi. The complainant, the participants and the related procuring entity may be represented by a lawyer or another party authorized by the Board.
- vii. The authorization in vi. above may be rescinded at any time.
- viii. The authority of the representative must be certified in writing.
- ix. If there are two or more representatives, each one may represent the relevant party.
- x. The complainant, the participants, the related procuring entity and the representative may attend together with an assistant with the authorization of the Board.
- xi. The authorization in x. above may be rescinded at any time.
- xii. The complainant, the participants and the related procuring entity may each hear statements made at Board meetings held in regard to the complaint unless the Board deems it inappropriate.
- xiii. The Board may call witnesses at its own discretion.
- xiv. The complainant, the participants and the related procuring entity may ask that the opinions and reports they present to the Board be released publicly, and may request the attendance of witnesses. The Board should in principle comply with such requests. However, decisions on the public release of opinions/reports and the attendance of witnesses must be made in consideration of protection for the trade secrets, confidential information regarding manufacturing processes, intellectual property and other confidential business information of the complainant, the participants, the related procuring entity and other parties involved in the procurement that generated the complaint.
- xv. The Board may hold public hearings regarding the complaint if requested to do so by the complainant or the related procuring entity, or of the Board's own accord.
- xvi. The Board may, if necessary, ask the opinions of technical specialists and other authorities on the procurement in question. Technical specialists and other authorities may not be agents with a practical interest in the relevant procurement.

(9) The complaint filed as detailed in (1) may be withdrawn at any time.

(10) Related procuring entity report

i. Once a complaint is received by the Board, the related procuring entity must submit to the Board a report on the procurement that generated the complaint, including the following items, within 14 days from the date when the copy of the complaint was sent to it by the Board:

(A) Specification documents, bidding documents containing specifications, and other documentation related to the procurement that generated the complaint

(B) A written explanation that states related facts, clearly outlines identified truths and actions/proposals of the related procuring entity, and addresses all complaint items

(C) Additional items and information necessary for complaint resolution

ii. After receiving the report designated in i. above, the Board shall immediately send a copy to the complainant, the participants and the Council. The Board shall also give the complainant and participants the opportunity to make comments to the Board or to request that the complaint be reviewed by the Board on the basis of the report within 7 days of receiving the copy of the report, respectively. Upon receiving such comments or requests, the Board shall immediately send a copy of them to the related procuring entity.

iii. Without the consent of parties with an interest in the procurement that generated the complaint, the Board shall not disclose to third parties any trade secrets, confidential information regarding manufacturing processes, intellectual property or other confidential business information provided by suppliers.

6. Review Results and Proposals

(1) The Board shall create a written report containing the results of its review within 90 days after the complaint is filed (or 50 days for complaints regarding public projects). The report shall include an explanation of the basis of the Board's conclusions, clearly indicate whether the complaint is recognized in whole or in part, and specify whether the procurement procedure involved any breach of the Agreement on Government Procurement, etc.

(2) If the Board concludes that measures defined in the Agreement on Government Procurement, etc. have not been implemented, it shall create a written proposal together with the report to outline appropriate corrective measures, which may include one or more of the following:

i. Implementation of the procurement process again from the start.

ii. Reperformance of procurement without modification of the procurement conditions.

iii. Re-examination of the procurement decision.

iv. Choice of a different supplier as the contract signatory.

v. Cancellation of the contract.

(3) In the creation of the review result report and the proposal, the Board shall take into consideration the conditions of the procurement, including the degree of procurement procedure error, the amount of adverse impact on all or certain suppliers, the

- degree to which the purposes of the Agreement on Government Procurement, etc. were impeded, the good faith of the complainant and the related procuring entity, the extent of the procurement contract's execution, the impact the proposal is expected to have on the government, the urgency of the procurement, and the impact of the proposal on the operations of the related procuring entity.
- (4) If a Board member calls for the announcement of a minority opinion, the Board may include this opinion in the report.
 - (5) Upon creating the report and the proposal, the Board shall immediately send the report and the proposal to the complainant, the related procuring entity, the participants and the Council.
 - (6) In principle, the related procuring entity shall implement the proposals issued by the Board in response to formally filed complaints as their own decisions. If the related procuring entity has decided not to comply with the Board's proposals, it must notify the Board of such and of the reasons why within 10 days of receiving the proposal (or 60 days for complaints regarding public projects). Upon receiving this report, the Board shall immediately send a copy to the Council.
 - (7) The Board shall respond to external inquiries regarding review results and proposals.
 - (8) In the event that the Board, in conducting review of a complaint, discovers evidence of illegal impropriety or actions in the procurement that generated the complaint, it shall report the matter to the relevant enforcement authorities so that appropriate measures can be taken.

7. Expedited Processing

- (1) If the Board receives a written request from the complainant or the related procuring entity for expedited processing of the complaint, the Board shall consider the feasibility of applying the expedited processing procedure defined in this section.
- (2) If the Board receives a request for expedited processing, it shall immediately decide whether or not to perform such processing and notify the complainant, the related procuring entity, the participants and the Council of its decision.
- (3) The deadlines and procedures for expedited processing are as indicated below.
 - i. The related procuring entity must provide the Board with the report described in 5.(10) within 6 working days of receiving notification from the Board that expedited processing will be performed. Upon receiving the report, the Board shall immediately send a copy to the complainant and participants. The Board shall give the complainant and participants an opportunity to make comments to the Board or to request that the case be decided within 5 days of receiving this copy, respectively. Upon receiving the comments or requests, the Board shall immediately send a copy to the related procuring entity.
 - ii. Within 45 days after the complaint is filed (or 25 days for complaints regarding public projects, telecommunications equipment or medical technology products and services related to such equipment and products), the Board shall create a report containing the results of its review and a proposal.

8. Public Disclosure of Complaint Receipt and Review Status

The Executive Board, as required separately by the Chairperson, shall summarize the situation of the government procurement complaint receipt and related processing conditions, and shall publicly disclose overviews of said conditions on a regular basis.

9. Retention of Procurement-Related Documents

In order to contribute to complaint review procedures, procuring entities engaged in procurement covered by the Agreement on Government Procurement, etc. must retain documents related to said procurement (including data that can be used to appropriately confirm the history of procurement based on electronic methods) for a period of 3 years from the contract date of said procurement (or 5 years for public projects, telecommunications equipment or medical technology products and services related to such equipment and products).

10. Application

- (1) The Procedures shall be applied to complaints filed on or after January 1, 1996.
- (2) In the event that the Procedures overlaps with the complaint review procedures based on Attachments 2, 3 or 4 of the Operational Guidance on Procedures for Government Procurement etc. (March 31, 2014 agreement between related ministries), the review procedures set forth in the quoted documents shall be applied with priority.