

## **PROCEDURES FOR THE PROCUREMENT OF NON-R&D SATELLITES**

The Government of Japan will procure non-R&D satellites through an open, transparent and non-discriminatory competitive procedures, as outlined herein, in accordance with the results of the discussions with the Government of the United States concerning the satellite R&D/procurement issue (Attachment I to IV).

### **I. OVERVIEW**

#### **1 POLICY**

It is the policy of the Government of Japan (GOJ) to provide transparent, open and non-discriminatory competitive procedures for the procurement of non-R&D satellites. A competitive procedure will mean there is no tendency, whether intentional or unintentional, for any company domestic or foreign to be favored, hindered, or blocked in its ability to supply a non-R&D satellite which meets the needs of the procuring entity.

The following Procedures are adopted in order to implement that policy fully and effectively and will be followed for the procurement of all non-R&D satellites. These Procedures will be implemented while ensuring consistency with the requirements of the Agreement on Government Procurement done at Marrakesh on 15 April 1994 (hereinafter referred to as the "1994 Agreement") and the Agreement amended by the Protocol Amending the Agreement on Government Procurement done at Geneva on 30 March 2012 (hereinafter referred to as the "revised Agreement").

#### **2 SCOPE AND COVERAGE**

2.1 These Procedures govern the procurement of all satellites, other than R&D satellites and R&D payloads on non-R&D satellites, by or for the GOJ, or by any entity whose satellite procurement procedures are subject to direct or indirect government control, including NTT.

2.2. These Procedures will be applied to all procurements of non-R&D satellites, including those which include or involve new technologies.

2.3 The same considerations as those contained in the 1994 Agreement and the revised Agreement will apply to questions not specifically mentioned in these Procedures.

## II. DEFINITIONS

1 For the purposes of this Arrangement (these letters and Attachments):

"Entity" means the GOJ or any entity whose satellite procurement procedures are subject to direct or indirect government control.

2 "Procurement" or "to procure" means to acquire (through purchase or lease) all satellites (or more than minimal capacity thereon), other than R&D satellites and R&D payloads on non-R&D satellites, by or for the use of the procuring entity. Procurement encompasses the establishment of the entity's needs, the description of requirements to satisfy entity needs, solicitation and selection of suppliers, awards of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling entity needs.

3 "Minimal capacity" means not more than 15 percent of the satellite's total capacity. For example, in the case of a communications satellite, the total capacity will be determined by multiplying the number of transponders by the designed useful life (stated in months or years) of each transponder. In other cases, this formula will apply where applicable. When either side believes this formula is not applicable, it may request consultations, which will be initiated promptly.

## III. PROCEDURES

1 Classification of a Satellite

1.1 The GOJ will publish annually in the Kanpo etc., the Basic Plan for Space Policy ("Uchu Kihon Keikaku") (hereinafter referred to as "the Plan"), which includes the development plan for R&D satellites. If the GOJ, before the publication of the next Plan, decides to develop a satellite as an R&D satellite or an R&D payload on a non-R&D satellite which was not included in the previously published Plan, or decides to modify a satellite included in the previously published Plan, it will publish that determination in the Kanpo etc. in sufficient detail to enable the proper classification to be ascertained. The information that will be published will include a summary description of all relevant aspects of the satellites.

1.2 Where the GOJ has classified a planned satellite as an R&D satellite or an R&D payload on a non-R&D satellite, and a potential supplier or the Government of the United States (USG), believes that such classification is not consistent with the Arrangement, that supplier may request the USG to consult, or the USG may self-initiate consultations, with the GOJ with respect to the classification of the satellite. The USG will make such a request promptly following the publication on the information pursuant to Paragraph 1.1

above.

1.3 Upon such a USG request, the two Governments will engage in consultations in an expeditious manner.

## 2 Procurement Planning

2.1 When an entity has a requirement for a non-R&D satellite, it will perform procurement planning and conduct market research in order to promote and provide for competition to the maximum extent possible.

The purpose of this planning is to ensure that the entity meets its needs in the most effective and timely manner.

The market research will be used to identify potential suppliers.

To the maximum extent possible, information will be exchanged between the entity and potential suppliers.

2.2 The entity will publish an announcement in the Kanpo (hereinafter referred to as "the announcement") of its plan to procure a non-R&D satellite in accordance with its minimum needs.

The announcement will constitute an invitation to suppliers for submission of general information material and comments on the basic need requirements (including available specifications and other technical information).

Equal treatment will be accorded to those suppliers responding to the announcement.

The announcement mentioned above will be published at least 40 calendar days prior to the last day of the period set for receiving submission of the said material and comments from suppliers.

2.3 The announcement will contain the following:

2.3.1 the plan to acquire a satellite and the actual minimum needs thereof;

2.3.2 the deadline for submission of material and comments;

2.3.3 notice that the introduction documentation will be sent, upon request, to suppliers responding to the announcement, as well as the place where, and the period when, suppliers can obtain the introduction documentation; and

2.3.4 notice of an explanation session for the acquisition of a non-R&D satellite.

2.4 Suppliers responding to the announcement will be, upon request, provided with the relevant introduction documentation by the entity.

2.5 The introduction documentation will contain, inter alia, the following:

2.5.1 the place where suppliers' material must be submitted (contact points);

2.5.2 the place where suppliers' inquiries will be received and/or additional information can be obtained;

2.5.3 the deadline for submission of material;

2.5.4 preliminary detailed requirements of the non-R&D satellite planned to be acquired (as set forth in available specifications, statement of work and other relevant documentation);

2.5.5 the date and place of the explanation session for the acquisition of a non-R&D satellite; and

2.5.6 The draft of the actual solicitation and all related documents thereto, and a preliminary description of all evaluation factors to be utilized in the evaluation of tenders submitted in response to the solicitation to the extent these are available.

2.6 The entity will always hold an explanation session with regard to the acquisition of a non-R&D satellite. In case the date and place is not contained in the introduction documentation, the entity will send an invitation to attend the explanation session to all suppliers responding to the announcement, while allowing sufficient time for suppliers to consider the information.

2.7. The entity will promptly respond to inquiries made by suppliers with respect to the content of the announcement or introduction documentation.

2.8 When the entity makes any amendment to or has any additional information concerning the introduction documentation, it will simultaneously provide the amendment or additional information to all interested suppliers responding to the announcement and allow sufficient time for suppliers to submit additional material so that they can consider and respond to such amendment or information.

2.9 The entity may ask questions or make inquiries to suppliers with regard to submitted material, but will not do so in a manner that provides a discriminatory advantage to any supplier. The entity may also, as necessary, conduct research including performance and function verifications with respect to submitted material.

2.10 The entity will not disclose or divulge material or information provided by a supplier without its consent to any third party, including other suppliers, at any stage of the procurement.

2.11 The entity will not provide or deny information in such a manner as would give any supplier a discriminatory advantage, at any stage of the procurement.

### 3 Specifications

When the procuring entity determines that a requirement exists for a non-R&D satellite, it will develop suitable specifications for the satellite which will include the entity's actual minimum needs.

Specifications shall conform to the requirements stipulated in Article VI of the 1994 Agreement and Article X of the revised Agreement, in particular the following requirements:

3.1 Technical specifications laying down the characteristics of the non-R&D satellites to be procured such as quality, performance, safety and dimensions, testing and test methods, symbols, terminology, packaging, marking and labelling, and conformity certification requirements prescribed by the procurement entity, will not be prepared, adopted or applied with a view to creating obstacles to international trade nor have the effect of creating unnecessary obstacles to international trade.

3.2 Any technical specification prescribed by the procuring entity will, wherever possible:

3.2.1 be in terms of performance rather than design; and

3.2.2 be based on international standards, national technical regulations, or recognized national standards.

4 There will be no requirement or reference to a particular trademark or name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tenders.

5 The procurement entity will not seek or accept, in manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

### 6 Tendering Procedures

6.1 Open tendering procedures will be utilized, to the maximum extent possible, for the procurement of non-R&D satellites. Open tendering procedures are those procedures under which all interested suppliers may submit a tender.

6.2 Limited tendering procedures will not be used to contravene any provision in these Procedures or the intent and purpose of this Arrangement.

Limited tendering procedures are those procedures where the entity contacts suppliers individually in accordance with the 1994 Agreement, Article XV.

6.3. The entity will, when procuring non-R&D satellites by limited tendering procedures, publish in the Kanpo information concerning the procurement at least 40 calendar days prior to the award of the contract. The entity will promptly provide related information to suppliers who make inquiries to it based on the information in the Kanpo.

6.4 When, for reasons of extreme urgency brought about by events unforeseeable by the entity as provided in the 1994 Agreement, Article XV paragraph 1(c), a non-R&D satellite will be procured by means of limited tendering procedures, the 40-day notice requirement in Paragraph 6.3. above need not be provided.

## 7 Notice of Proposed Procurement

7.1 The entity will publish a notice of each proposed procurement in the Kanpo. The notice will constitute an invitation to participate in tendering procedures and will include sufficient information for a prospective supplier to make an informed business decision as to whether or not to participate in the procurement.

7.2 Each notice of proposed procurement shall include matters stipulated in Article IX-6 of the 1994 Agreement and Article VII-2 of the revised Agreement, in particular information about the following matters:

7.2.1 a summary description of all relevant aspects of the non-R&D satellite to be procured including any performance requirements;

7.2.2 any delivery date;

7.2.3. the address and final date for requesting tender documents, as well as the language or languages in which they must be submitted;

7.2.4 the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;

7.2.5 any economic and technical requirements, financial guarantees and information required from suppliers;

7.2.6 the amount and terms of payment of any sum payable for the solicitation;

7.2.7 whether the entity is inviting tenders for purchase or lease;

7.2.8 the approximate date on which the solicitation will be issued; and

7.2.9 the date that a pre-solicitation conference will be held.

7.3 The entity will publish in one of the official languages of the WTO a summary of the notice of the proposed procurement containing at least the following:

7.3.1 subject matter of the contract;

7.3.2 time limits set for the submission of tenders or an application to be invited to tender; and

7.3.3 addresses from which documents relating to the contracts may be requested.

8 If after publication of the notice, but before the time set for receipt of tenders, it becomes necessary to amend or re-issue the notice, this shall be conducted in accordance with Article IX-10 of the 1994 Agreement and Article X-11 of the revised Agreement.

#### 9 Tender Documentation/Solicitation

9.1 The entity will use a written solicitation to communicate the entity's needs to prospective suppliers and to solicit tenders from them, and will for each proposed procurement invite tenders widely from domestic and foreign suppliers of which it has knowledge, including those that have expressed an interest in supplying the satellite.

The solicitation will be distributed to all suppliers who request a copy.

The solicitation will contain all information necessary to enable prospective suppliers to prepare tenders properly.

If after publication and distribution of the solicitation, but before the time set for receipt of tenders, it becomes necessary to amend the solicitation, the amendment will be given the same circulation as the original solicitation.

9.2 The entity will furnish identical information concerning the procurement to all prospective suppliers and will not provide the advantage of advance knowledge Concerning a future solicitation to any one prospective supplier. However, the entity may provide information concerning the solicitation to all known prospective suppliers for purposes of planning and establishing minimum needs as provided for in Paragraph 2 above.

9.3 A pre-solicitation notice and conference will be used as preliminary steps in order to develop or identify interested suppliers, request preliminary information based on a general description of the non-R&D satellite, explain complicated specifications or aid prospective suppliers who may later submit tenders. The entity will issue the pre-solicitation notice to all potential suppliers and will publish the notice in the Kanpo. Each pre-solicitation notice will include as a minimum the following:

9.3.1 The information to be furnished in response to the notice;

9.3.2 Specific information concerning the pre-solicitation conference, including the date, time, location and any other relevant information; and

9.3.3 A request and specified date for receipt of an expression of interest in the procurement. The entity will request from each potential supplier an indication that the supplier does or does not intend to submit a proposal in response to the solicitation.

In the event a prospective supplier elects not to respond to the solicitation, appropriate rationale and/or reasons should be sought and provided.

9.4 The solicitation provided to suppliers will contain the information necessary to permit

them to submit responsive tenders, including information required to be published in the notice of the proposed procurement, and at a minimum the following:

- 9.4.1 the address of the entity to which tenders should be sent;
- 9.4.2 the address where requests for supplementary information should be sent;
- 9.4.3 the language or languages in which tenders and tendering documents must be submitted;
- 9.4.4 the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;
- 9.4.5 the persons authorized to be present at the opening of tenders and the date, time and place of this opening;
- 9.4.6 any economic and technical requirement, financial guarantees and information or documents required from suppliers;
- 9.4.7 a complete description of the non-R&D satellite required or of any requirements including technical specifications, conformity certification to be fulfilled by the products, necessary plans, drawings and instructional materials;
- 9.4.8 the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of foreign products, customs duties and other import charges, taxes and currency of payment;
- 9.4.9 the terms of payment; and
- 9.4.10 any other terms or conditions.
- 9.4.11 The solicitation will also contain the date, time and address of a pre-tender conference.

9.5 Any prescribed time-limit for receipt of tenders will be adequate to allow foreign as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time limit, entities will, consistent with their own reasonable needs, take into account such factors as the complexity of the proposed procurement, the extent of sub-contracting anticipated, and the normal time for transmitting tenders by mail from foreign as well as domestic points.

- 9.5.1 Consistent with the entity's own reasonable needs, any delivery date will take into account such factors as the complexity of the proposed procurement, the extent of sub-contracting anticipated, and the realistic time required for production, de-stocking and transport of goods from the points of supply.
- 9.5.2 For purposes of these Procedures applicable to the procurement of non-R&D satellites, the prescribed time limit for receipt of tenders will not be less than 45 days from the date of the notice of the proposed procurement in the Kanpo.



## 9.6 Pre-Tender Conference

After issuance of the solicitation and any related documentation, and reasonably in advance of the due date established in the solicitation for receipt of tenders, the entity will conduct pre-tender conference. The solicitation will set forth specific information concerning date, time, location and any other applicable information concerning this pre-tender conference. The solicitation will clearly state that attendance at the pre-tender conference is recommended; however, attendance is neither required nor a prerequisite for tender submission and will not be considered in the evaluation.

## 9.7 Submission, Receipt and Opening of Tender

9.7.1 Tenders will normally be submitted in writing directly or by mail and must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer (including cost and pricing data, broken down in sufficient detail to permit a thorough evaluation of the various cost factors) and a statement that the tenderer agrees to all the terms, conditions and provisions of the solicitation. If tenders by telex, telegram or fax are permitted by the procuring entity, they must also meet that requirement. The tender must be confirmed promptly by letter or by the dispatch of a signed copy of the telex, telegram or fax. Tenders presented by telephone will not be permitted. The content of the telex, telegram or fax will prevail where there is a difference or conflict between that content and any documentation received after the time limit;

9.7.2 The opportunities that will be given to suppliers to correct unintentional errors between the opening of tenders and the awarding of the contract will not be permitted to give rise to any discriminatory practice;

9.7.3 A supplier will not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide;

9.7.4 All tenders solicited by entities will be received and opened under procedures and conditions guaranteeing the regularity of the openings as well as the availability of information from the openings.

To this effect, and in connection with open procedures, entities will establish provisions for the opening of tenders in the presence of either tenderers or their representatives, or an appropriate and impartial witness not connected with the procurement process. A report on the opening of tenders will be drawn up in writing and retained by the procuring entity.

## 10 Award Criteria

10.1.1 The procuring entity will utilize a selection procedure designed to:

10.1.2 Maximize competition;

10.1.3 Minimize the complexity of the solicitation, evaluation, and the selection decision;

10.1.4 Ensure impartial and comprehensive evaluation of tenders submitted by suppliers;  
and

10.1.5 Ensure selection of the supplier whose tender is of the overall greatest value to the entity, considering only those evaluation factors set forth in the solicitation.

10.2. Tenders will be evaluated based on overall greatest value to the entity which is determined by considering mission suitable functional performance factors, relevant experience, and past performance world-wide, price, terms and conditions, and other specified factors. Such factors must be employed in a manner that ensures open, transparent and non-discriminatory procedures. All factors used to evaluate a particular procurement must be specified in the solicitation for that procurement.

10.3 The procuring entity will establish the estimated contract price for the procurement of the subject non-R&D satellite based on the prices for similar non-R&D satellites in similar working environments in the private sector. If that is impossible, then the best available information will be used.

10.4 When one or more tenders are offered at a price equal to or less than the estimated contract price established by the procuring entity and meet the minimum requirements established by the procuring entity, additional rounds of tendering will be expressly prohibited.

10.5 The procuring entity will not require additional tendering rounds when only one supplier is participating, once that supplier meets the minimum requirements established in the solicitation and has offered a price that is equal to or less than the estimated contract price that has been established in accordance with Paragraph 10.3 above for the procurement of a non-R&D satellite.

10.6 The factors that will be considered in the evaluation of tenders and in the selection decision should be tailored to each particular non-R&D satellite. Once established, and set forth in the solicitation, evaluation factors and their relative importance for a specific procurement may not be changed without formally amending the solicitation. Any other relevant factors may also be included which the entity considers necessary.

10.7 To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the solicitation. If an entity has received a tender abnormally lower than other tenders submitted, it may inquire with the tenderer to ensure that it

can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

10.8 Unless in the public interest an entity decides not to issue the contract, the entity will make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic or foreign products, is the tender which in terms of the specific evaluation factors set forth in the solicitation is determined to be the best overall value.

10.9 If it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation factors set forth in the solicitation, the entity will, in any subsequent negotiations, give equal consideration and treatment to all tenders within the competitive range.

10.10 It is not the policy of the GOJ or any procuring entities within their direct or indirect control to procure non-R&D satellites based on a tender that contravenes the Anti-Monopoly Act, including the prohibition against unjust low-priced sales.

10.11 Where a tender is submitted that, because of its price or other terms, unlawfully impedes fair competition, the tender will be deemed void in its entirety and the procuring entity will not consider that tender in awarding the non-R&D satellite contract.

10.12 Any supplier that submits a tender referred to in matter of principle, be Paragraph 10.11 above will, as deemed ineligible to resubmit a tender in that non-R&D satellite procurement; and the name of such supplier will be announced publicly.

## 11 Post Award Information and Notification to Offerors

11.1 The entity will make awards as soon after completion of the evaluation process and will promptly notify each supplier whose tender is determined to be unacceptable or whose tender is not selected for award unless disclosure might prejudice the entity's interests. The notification will, upon the request of an unsuccessful supplier, set forth the reason(s) a tender was not accepted or selected.

In no event will the entity disclose to any third party a supplier's trade secrets, manufacturing processes and techniques or other confidential business information provided by a supplier.

11.2 Upon the request of an unsuccessful supplier, the entity will provide an opportunity to review the unsuccessful supplier's tender and will provide information concerning why the supplier's tender was rejected, in accordance with the provisions of the 1994

Agreement, Article XVIII and the revised Agreement, Article XVI.

#### IV. COMPLAINT MECHANISM FOR THE PROCUREMENT OF SATELLITES

##### 1 Overview

In order to provide for fair and open competition and to achieve consistency with the provisions of these Procedures in procurements of non-R&D satellites, the following complaint process will be effective 30 days after these Procedures go into effect.

##### 2 Procurement Review Board

2.1 The GOJ will ensure that a Procurement Review Board (Board) is established, as an independent reviewing organization, to review complaints by potential suppliers concerning procurement of non-R&D satellites subject to these Procedures. The Board will have no substantial interest in the outcome of a non-R&D satellite procurement subject to its review.

2.2 The Board will receive complaints in writing, conduct investigations of the facts and make recommendations to an entity with respect to any aspect of a procurement of a non-R&D satellite by the entity.

##### 2.3 Exclusions and Avoidance

2.3.1 The Board will be comprised of persons who have knowledge and experience related to public sector procurements. No member of the Board will participate in the review of a complaint in which that member has a conflict of interest.

2.3.2 A member of the Board who is recognized to have a conflict of interest relating to a complaint that has been filed may, with the permission of the Chair of the Board, avoid taking part in the examination of the complaint in question.

##### 3 Procurement Review Process

3.1 A potential supplier may file a complaint with the Board when it believes the procurement has been carried out in a manner inconsistent with the intent or any provision of these Procedures. Potential suppliers are encouraged to seek resolution initially with the entity of any alleged inconsistency with these Procedures.

##### 3.2 Timing of complaints

3.2.1 A complaint may be filed at any time during the procurement process, but no later than 10 days after the basis of the complaint is known or reasonably should have been known. The potential supplier will submit a copy of the complaint to the entity within one day of filing it with the Board. (Days will be considered calendar days unless otherwise

specified.)

3.2.2 If the Board finds the documentation relating to the complaint to be inadequate, the Board may request the filer of the complaint in question to correct the documentation. In the case that the inadequacy is minor in nature, the Board shall have the authority to implement the correction itself.

3.2.3 The Board may consider a complaint, even though not timely filed, if it finds that good cause is shown or that a complaint raises issues significant to the purpose of these Procedures.

3.3 The Board will review a complaint within 10 working days of its filing and may, in writing and with reasons given, dismiss any complaint found to be:

3.3.1 not submitted in a timely manner;

3.3.2 not subject to these procedures;

3.3.3 frivolous or trivial on its face;

3.3.4 not submitted by a potential supplier; or

3.3.5 otherwise inappropriate for review by the Board.

3.4 Where the Board determines that a complaint has been filed properly, it will notify in writing all potential suppliers of the complaint within one day.

3.5 Suspension of award or procurement process

3.5.1 Within 12 working days of the filing of a pre-award complaint, the Board will promptly issue written requests for suspension of the procurement process pending resolution of the complaint.

3.5.2. In the case of a post-award complaint, filed within 10 days after the award, the Board will promptly request in writing suspension of performance of the contract pending resolution of the complaint.

3.5.3. The entity will suspend the procurement process or performance of the contract immediately after it receives the Board's request.

3.5.4 In the case of 3.5.3 above, in the event that the head of the entity concerned judges that there is an unavoidable situation that means the entity cannot acquiesce to the Board's request, the head of said entity must notify the Board of this situation and its reason immediately in writing. Immediately upon receiving this notification the Board shall make copies to be sent to the complainant and the Office of Government Procurement Review.

3.5.5 In the case of a notification as detailed in 3.5.4 above, the Board shall judge whether the reason given in the notification is sufficient to be accepted and shall notify the complainant, the Office of Government Procurement Review and the entity in question immediately in writing of its decision.

### 3.6 Investigation

3.6.1 The Board will conduct an investigation of the complaint, which may include the filing of briefs, pleadings and other documentation by the complainant and entity.

3.6.2 The Board may, on the request of the complainant or entity or on the Board's own initiative, hold a hearing on the merits of a complaint.

### 3.7 Entity Report

3.7.1 Within 25 days after the day on which a copy of the complaint was sent to the entity, it will file with the Board a complete written report on the complaint, containing the following:

3.7.1.1 The solicitation, including the specifications or portions thereof relevant to the complaint;

3.7.1.2 all other documents relevant to the complaint;

3.7.1.3 a statement that sets out all relevant facts, findings, actions and recommendations of the entity and responds fully to all allegations of the complaint; and

3.7.1.4 any additional evidence or information that may be necessary in order to resolve the complaint.

3.7.2 The Board will, forthwith after receiving the report referred to in 3.7.1 above, send a copy of the relevant material to the complainant and give the complainant an opportunity, within seven days after it receives the relevant material, to file with the Board comments or request that the case be decided on the existing record.

The Board will, forthwith after receiving the comments, send a copy to the entity.

### 3.8 Participants

The entity, the complainant, plus any potential supplier whose direct economic interest would be affected by the award of, or the failure to award, a contract may participate in a complaint proceeding provided any potential supplier notifies the Board of such intent within seven days after receipt of the notice in Paragraph 3.4 above, and whereupon they would be subject to the procedures in Paragraph 3.7.2 above, unless barred by Paragraph 3.3 above.

### 4 Findings and recommendations

4.1 The Board will make a report of its findings and recommendations to the entity within 90 days after the day on which the complaint is filed. Its findings, in which the Board will grant or deny the complaint in whole or in part, will specify whether the procurement process or award was inconsistent with the intent or specific provisions of these Procedures.

4.2 Whenever the Board finds evidence of misconduct, actions or behavior contrary to law, it

will refer the matter to the appropriate enforcement authorities for action. For example, when it finds that there is significant likelihood that a contract was awarded to a supplier that had submitted a tender that contravened any provision of the Anti-Monopoly Act, it will report the case to, and request that, the Fair Trade Commission (FTC) determine whether or not the Anti-Monopoly Act has been violated and take appropriate measures.

4.3. When the Board has referred a case to the FTC pursuant to Paragraph 4.2 above, it will request the entity to suspend performance of the contract, pending the notification by the FTC of its final findings. With this request, the entity, as a matter of principle, will suspend performance of the contract.

Upon receipt of the FTC notification, the Board will complete its review of the complaint and where the FTC found a violation of the Anti-Monopoly Act, the Board will recommend an appropriate remedy to the entity.

4.4 In making its findings and recommendations, the Board will consider all the circumstances surrounding the procurement process or award, including the seriousness of any deficiency in the procurement process, the degree of prejudice to any or all potential suppliers or to the integrity and effectiveness of these Procedures, the good faith of the participants and the extent of performance of the contract to which the procurement relates.

4.5 where the Board finds that the intent or any provision of these Procedures has not been realized, it may recommend an appropriate remedy, including one or more of the following:

- 4.5.1 that a new tender package be issued;
- 4.5.2 that new offers for the contract be sought;
- 4.5.3 that the offers be re-evaluated;
- 4.5.4 that the contract be awarded to another supplier; or
- 4.5.5 that the contract be terminated.

4.6 The Board will send its findings in writing with its recommendations to the complainant, the entity and any other potential suppliers, within one working day after issuance. The Ministry of Foreign Affairs will be provided with a copy of the findings and will respond to external inquiries concerning the findings.

4.7 The findings of the Board on any complaint brought appropriately before it will be duly followed, as a matter of principle, by the procuring entity as its own decision.

## 5 Express Option

5.1 Where the complainant or entity requests in writing an expeditious handling of a complaint, the Board will consider the feasibility of using the procedure set out in this section, referred to herein as the "express option."

5.2 The Board will determine whether to apply the express option within two working days after receiving a request therefore, and will notify the complainant, the entity, and any others affected, as referred to in Paragraph 3.8 above, as to whether the express option is to be applied.

5.3 Where the express option is applied, the time limits and procedures will be as follows:

5.3.1 The entity will, within 10 days after the day on which it is notified by the Board that the express option is to be applied, file with the Board a complete report on the complaint, as specified in Paragraph 3.7 above. The Board will, forthwith after receiving the report, send a copy of the relevant material to the complainant and participating suppliers. The Board will give the complainant and participating suppliers five days to file with the Board comments on such material or request that the case be decided on the existing record. The Board will, forthwith after receiving the comments, send a copy to the entity.

5.3.2 The Board will issue its findings and recommendations on the complaint in writing within 45 days after the day on which the complaint is filed.



Attachment I  
Policies and Procedures Regarding Satellite R&D/Procurement

As a result of the recent discussions concerning the satellite R&D/procurement issue, the Government of Japan and the Government of the United States confirm the following:

- 1 It is the policy of the Government of Japan to procure non-R&D satellites on an open, transparent and non-discriminatory basis.
- 2 (1) The procurement of all satellites, other than R&D satellites and R&D payloads on non-R&D satellites, by or for the Government of Japan or any entity whose satellite procurement procedures are subject to direct or indirect government control, including NTT, will be conducted in accordance with open, transparent and non-discriminatory procedures.  
(2) Government of Japan will not otherwise in license obstruct, or hinder the procurement of non-R&D satellites by NHK or any other entity, nor attempt to do so.  
(3) These procedures are set forth in Attachment II and are consistent with the GATT Agreement on Government Procurement, as amended.
- 3 The two Governments have decided, as a practical approach, to set forth the following understandings with respect to R&D satellites:
  - (1) The term "R&D satellites" means satellites designed and used entirely, or almost entirely, for the purpose of in-space development and/or validation of technologies new to either country, and/or non-commercial scientific research.
  - (2) The term "R&D payloads" means payloads designed and used entirely for the purpose of in-space development and/or validation of technologies new to either country, and/or non-commercial scientific research.
  - (3) Satellites designed or used for commercial purposes or for the provision of services on regular basis are not R&D satellites.
  - (4) Typical examples of US and Japanese R&D satellites which have been in use since 1988 or are scheduled currently for development are set forth in Attachments III and IV. 4.
- 4 The Government of Japan will take measures to alter the existing CS-4 project, whereby NASDA will develop an R&D satellite for the purpose of the in-space validation of technologies new to Japan which will be consistent with the definition in Paragraph 3 above of an R&D satellite.
- 5 This policy will apply to all satellite procurements by the Government of Japan or any entity referred to in Paragraph 2 above, that are initiated or on-going on or after June 14, 1990,

with the exception of satellites for which development contracts have been legally entered into prior to that date.

## Attachment II

(As detailed in the Attachment “Procedures for the Procurement of Non-R&D Satellites”)

### Attachment III

#### TYPICAL EXAMPLE OF JAPANESE RESEARCH AND DEVELOPMENT SATELLITES\*

##### SATELLITES FY OF LAUNCHING

EXOS-D 88

MUSES-A 89

MOS-1b 89

IML-1 90

SEPAC 90

FMPT 91

SOLAR-A 91

ERS-1 91

GEOTAIL 92

IML-2 92

ASTRO-D 92

ETS VI 93

SFU 93

MUSES-B 94

ADEOS 94

JEM 97

\* For the purposes of the Arrangement, all manned space systems are defined as R&D satellites.

Attachment IV

TYPICAL EXAMPLES OF UNITED STATES RESEARCH & DEVELOPMENT SATELLITES\*

OCEAN TOPOGRAPHY EXPERIMENT (TOPOX/POSEIDON)

COMET RENDEZVOUS ASTEROID FLYBY (CRAF)

CASSINI

COSMIC BACKGROUND EXPLORER (COBE)

HUBBLE SPACE TELESCOPE (HST)

ADVANCED COMMUNICATIONS TECHNOLOGY SATELLITE (ACTS)

EARTH OBSERVING SYSTEM (EOS)

MARS OBSERVER

GAMMA RAY OBSERVATORY (GRO)

ADVANCED X-RAY ASTROPHYSICS FACILITY (AXAF)

UPPER ATMOSPHERE RESEARCH SATELLITE (UARS)

GLOBAL GEOSPACE SCIENCE (GGS) PROGRAM -- POLAR, WIND

MANNED SPACE SYSTEMS

\* For the purposes of the Arrangement, all manned space systems are defined as R&D satellites.