

MEASURES RELATED TO JAPANESE PUBLIC SECTOR PROCUREMENTS OF
COMPUTER PRODUCTS AND SERVICES

I. General Policies

- A. In the interest of expanding trade opportunities based on the principles of non-discrimination, transparency, and fair and open competition in public sector procurements of computer products (including peripherals and packaged software) and computer services (operation and maintenance of computers; input of data into computers; development of computer systems, including development of software and systems integration; maintenance of computer software; and other related services) (collectively referred to as computer Products and Services), the Government of Japan ("the Government") will strive actively to further improve its public sector procurement procedures Accordingly the Government will initiate these "Measures Related to Japanese Public Sector Procurements of Computer Products and Services" (the Measures), set forth herein, with the aim of expanding procurements of competitive foreign computer products and services
- B. The Government reaffirms its commitment to the obligations of the General Agreement on Tariffs and Trade (GATT), the Agreement on Government Procurement done at Marrakesh on 15 April 1994 (hereinafter referred to as the "1994 Code") 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 Code"). The Measures will be implemented while ensuring consistency with the requirements of the Code and the revised Code.
- C. In order to implement these policies fully and effectively, the measures will govern all computer products and services procurements valued no less than 100,000 SDR by entities listed in Annex 1 and 3 of Government of Japan in Appendix I of the revised Code and additional entities listed in Annex 1 (hereinafter referred to as "the procuring entities"). Supercomputer procurements will continue to be covered by the Procedures to Introduce Supercomputers (Understanding among related ministries and agencies concerned in procurement, 31 March 2014), and will not be covered by the Measures.
- D. The Government further reaffirms the policies and measures set forth in the 1985 Action Program for Improved Market Access with respect to government procurement, confirms that it will continue to implement such procurement policies in the area of procurements of competitive foreign computer products and services, and welcomes efforts by foreign

computer manufacturers to increase their sales in the Japanese public sector market.

* Computer products include services incidental to the supply or products if the value of these incidental services does not exceed that of the products themselves.

II. Policies and Procedures

The Government herein clarifies certain existing policies and procedures, and establishes and implements policies and procedures, with respect to public sector computer procurement. The Government undertakes these policies and procedures to fully ensure non-discriminatory, transparent, and free and open competitive opportunities, with the aim of expanding its procurements of competitive foreign computer products and services.

Pre-solicitation Phase

- 1 All potential foreign and domestic suppliers will be accorded equal access to pre-solicitation information, where available, and provided with equal opportunities to participate in such pre-solicitation phase; and no advantage of advance knowledge will be given to any potential suppliers
- 2 The procuring entities will ensure that all potential suppliers are given the same opportunities to participate in technical reference committees, advisory groups, study councils, or any such groups, if established, that discuss the technology, budget, specifications, functions, or any other aspect of planned computer products and services procurements
- 3 Information disseminated during this pre-solicitation phase will not be used to exclude or pre-qualify any potential suppliers

Specifications

- 4 Specifications will be formulated in an impartial manner. If the procurement will replace or interconnect with an existing system, these specifications will not be designed to preclude competition. Features not essential to the assigned task will not be required
- 5 Any supplier directly involved in the development of final specifications in a procurement will not be allowed to participate in the tendering process, if such participation would result in an unfair competitive advantage, except such cases where potential suppliers provide information or assistance to a procuring entity in preparing or refining specifications in a situation where the entity is controlling the process and conducting it in a fair and impartial manner and where a supplier provides, at the request of an entity, product specifications or data about a product it supplies. In such cases, all potential suppliers will

be provided with an opportunity to participate or provide such product specifications or data

6 The Government will establish a program to centralize and to facilitate the dissemination of information and provision of training related to specifications-formulation efforts of procurement officials of the procuring entities.

Explanation Session

7 The procuring entity will hold, as necessary, an explanation session with regard to the procurement of computer products and services, including the opportunity for direct technical and administrative interaction between potential suppliers and the procuring entity.

Tendering and Bidding Procedures

8 All potential suppliers will be accorded fair and equal opportunities to respond to the requirements of the procuring entity in the tendering and bidding phase.

9 Because competitive procurements are the foundation of the Government's procurement policies and practices, limited tendering will be used only in exceptional cases, justified in accordance with the 1994 Code procedures, and will not be used to favor suppliers of domestic computer products or services. The procuring entities will reduce their use of single tendering.

10 The tender documentation and evaluation criteria will be prepared in an impartial manner so as to ensure that equal opportunities are provided to all potential suppliers on a non-discriminatory basis

11 The bidding system, including the designated bidder system, will not be used to favor suppliers of domestic computer products or services. The procuring entities may restrict the number of suppliers that may bid on a procurement only in a non-discriminatory manner.

Evaluation of Bids

12 Evaluation of offers will be conducted in a transparent manner that ensures equal treatment of all bidders.

13 Technical evaluations, and system performance evaluations when used, will be conducted under the same conditions for all potential suppliers in the tendering process; and any testing criteria will be the same for all potential suppliers.

14 All evaluation factors will be clearly set forth in the tender documentation. Evaluation of bids will be conducted in accordance with the procedures consistent with the 1994 Code and the revised Code, and as described in (a) and (b) below. The particular tendering procedure will be chosen by the respective procuring entities on the basis of the objective and characteristics of the procurements. However, procurement for all computer products and services that exceed an anticipated price of 800,000 SDR shall be conducted using the Overall Greatest Value Evaluation method detailed in (b).

(a) Bids will be evaluated on a pass/fail basis based upon the specific technical and other evaluation criteria stated in the specifications. and contracts will be awarded to the lowest-priced bid among those bids which have met the evaluation criteria; or

(b) Contracts will be awarded to the supplier with the bid which meets the evaluation criteria and also best meets the requirements of the specifications in terms of technical and functional, as well as price cost, factors. Relative weights may be applied to the evaluation criteria, as necessary, and as specified in the tender documentation. The price/cost evaluation may be based on the total life cycle cost of the procurement.

Information on the Contract Award

15 After a final selection has been made, the procuring entities will publish information on the contract award and, upon request from an unsuccessful supplier who has submitted material, promptly provide such supplier with pertinent information concerning the reasons for not being selected, including the name of the selected system as well as information on its relative advantages. However, the information may exclude such information as would prejudice the legitimate commercial interest of particular suppliers or might prejudice fair competition among suppliers.

Information on Future Plans

16 Information made available on a budget request to any potential suppliers will be made available on a non-discriminatory basis. The procuring entities will announce in the Kanpo any plans to introduce computer products and services that exceed 800,000 SDR as early in the Japanese fiscal year (JFY) as possible, and issue a general invitation to potential suppliers for submission of materials and comments relevant to those plans.

Procuring Entity-specific Plans

17 Pursuant to the Measures, individual procuring entities are encouraged to adopt entity-specific plans that describe the efforts that the entity is making, or will make, to implement the policies and procedures set forth in the measures. Such entity-specific plans are encouraged to be updated every fiscal year.

Bid Protest System

18 An impartial bid protest system, described in Annex II, will be maintained to provide equitable, timely, transparent, and effective bid challenge procedures for potential suppliers of computer products and services covered by the Measures.

Local Governments

19 The Government will inform prefectural and local governments of the Measures, and request their cooperation in following the purport of fully competitive procurement policies and procedures consistent with the measures.

Multi-vendor Open Systems

20 An inter-ministerial group will be tasked to promote a multi-vendor open systems environment. Foreign and domestic computer companies will be invited on a fair and non-discriminatory basis to assist in the adoption of the multi-vendor open systems environment.

III. Unfair bids

Given that it is the policy of the Government to procure computer products or services based on bids that are consistent with the Anti-monopoly Act, including the prohibition against unjust low-priced sales, the procuring entities will take appropriate actions to address anticompetitive practices.

A. Where a bid is submitted that, because of its price or other terms, unlawfully impedes fair competition, the bid will be deemed void in its entirety and the procuring entity will not consider that bid in arranging the contract.

B. Any bidder that submits a bid referred to in Paragraph III. A above will, as a matter of principle, be deemed ineligible to resubmit a bid in that computer product or service procurement; and the name of such bidder will be announced publicly.

C. When the procuring entity obtains information indicating the existence of practices that may unlawfully impede fair competition in relation to its procurement, including the formulation of its procurement specifications, the procuring entity will provide such information on a timely basis to the Fair Trade Commission so as to enable the Commission to take such steps as it deems appropriate.

D. To this end, the procuring entities will assign a contact person with the Fair Trade Commission to facilitate procedures for the detection of, and exchange of information concerning, practices that may violate the Antimonopoly Act.

Annex I
(Other Quasi-governmental Agencies)

Japan Aerospace Exploration Agency

The Shoko Chukin Bank, Ltd

New Kansai International Airport Co.,Ltd.

The Nippon Foundation

Japan Broadcasting Corporation

Japan Worker's Housing Association

ANNEX II COMPLAINT MECHANISM

1 Overview

In order to provide for fair and open competition and to achieve consistency with the provisions of the Measures in procurements of computer products and services, the following complaint process will become effective 30 days after the Measures go into effect.

2 Procurement Review Board

2.1. The Government will maintain a Procurement Review Board (Board), as an independent reviewing organ, to review complaints by potential suppliers of any aspect of a procurement of a computer product or service subject to the Measures. The Board will have no substantial interest in the outcome of a computer products and services procurement subject to its review

2.2. The Board will receive complaints in writing, conduct investigations of the facts and make recommendations with respect to any aspect of a procurement of a computer product or service by an entity.

2.3. Exclusions and Avoidance

(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) 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 Preview 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 the Measures. It may also file a complaint based upon the allegation that the contract was awarded to a supplier that had submitted a bid in violation of the Anti-monopoly Act. Potential suppliers are encouraged to seek resolution initially with the entity of any alleged inconsistency with these Measures.

3.2. Timing of Complaints

(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 procuring entity within

one day of filing it with the Board.

- (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) 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 the Measures.

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

- (1) not submitted in timely manner;
- (2) not subject to these Measures;
- (3) frivolous or trivial on its face;
- (4) not submitted by a potential supplier; or
- (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 within one working day of the complaint.

3.5. Suspension of award or procurement process

- (1) Within 12 working days of the filing of a pre-award complaint, the Board will issue written requests for suspension of the procurement process pending resolution of the complaint.
- (2) Within 10 days of the filing of a post-award complaint, the Board will request in writing suspension of performance of the contract pending resolution of the complaint.
- (3) The procuring entity will, as a matter of principle, suspend the procurement process or performance of the contract immediately after it receives the Board's request.
- (4) In the case of (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.
- (5) In the case of a notification as detailed in (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

- (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.
- (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

- (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:
 - (a) the solicitation, including the specifications or portions thereof relevant to the complaint;
 - (b) all other documents relevant to the complaint;
 - (c) a statement that sets out all findings, actions and recommendations of the entity and responds fully to all allegations of the complaint; and
 - (d) any additional evidence or information that may be necessary in order to resolve the complaint.
- (2) The Board will, forthwith after receiving the report referred to in (1) above, send a copy or 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 procuring entity.

3.8. Participants: The entity and potential suppliers whose direct economic interest would be affected by the award of, or the failure to award, a contract may participate in a complaint proceeding.

4 Findings and recommendations

4.1. The Board will make a report of its findings and recommendations 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 the Measures.

4.2. (1) Where the Board finds that there is a significant likelihood that a contract was awarded to a supplier that had submitted a bid that contravened the prohibition in the Anti-monopoly Act against unjust low-priced sales, 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.

(2) Pending the notification by the FTC of its final findings, the Board will request the

entity to suspend performance of the contract. With this request, the entity, 25 a matter of principle, will suspend performance of the contract. Upon receipt of the FTC's 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 that the entity adopt a remedy set forth in 4.4 below.

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

4.4. Where the Board finds that the intent or any provision of the Measures has not been realized, it may recommend an appropriate remedy, including one or more of the following:

- (1) that a new tender package be issued;
- (2) that new bids for the contract be sought;
- (3) that the bids be re-evaluated;
- (4) that the contract be awarded to another supplier; or
- (5) that the contract be terminated.

4.5. 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 respond to external inquiries concerning the findings.

4.6. Where the entity does not follow the Board's recommendation, the entity will send a copy of its decision, and the rationale for it, to the Board within one working day after issuance. The Ministry of Foreign Affairs will respond to external inquiries concerning the decision.

4.7. Whenever the Board discovers evidence of misconduct, or contrary to law or regulation, such evidence will be referred to law enforcement authorities for appropriate action.

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 focusing 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 and entity 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:

- (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 Section 3.7. The Board will forthwith after receiving the report, send a copy of the relevant material to the complainant. The Board will give the complainant 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 procuring entity.
- (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.