

GUIDELINES CONCERNING THE ACTIVITIES
OF FIRMS AND TRADE ASSOCIATIONS
WITH REGARD TO PUBLIC BIDS

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Fair Trade Commission

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Introduction

1. Objective of Guidelines

- (1) The Antimonopoly Act (The Act Concerning Prohibition of Private Monopolization and the Maintenance of Fair Trade (Law No.54 of 1947)) prohibits firms from, among others, conducting private monopolization, unreasonable restraints of trade, and unfair trade practices. At the same time, it prohibits trade associations that are combinations or federations of combinations of firms from engaging in conduct which similarly restrains or impedes competition. The aim of the Antimonopoly Act is to promote fair and free competition by eliminating such violation.

Bids organized and called for by the national government, local governments, public corporations or others are taken to determine, through competition among the participants, the contract awardee and the price set forth in an order. Conduct by bid participants of predetermining an expected bid winner or minimum bid price or others, leading to restrain competition in the transaction of goods or services ordered through the bid procedure, constitutes what is known as bid-rigging. Such conduct undermines the bid system and violates the provisions of the Antimonopoly Act which prohibits conduct that restrains competition.

- (2) In view of the frequent recurrence of bid-rigging which violates the Antimonopoly Act by firms and trade associations, these guidelines, by specifically describing various violations cases, aim to facilitate better understanding about what kind of activities by firms and trade associations may raise problems under the Antimonopoly Act. Through this means, these guidelines aim to prevent bid-rigging and to promote lawful activities on the part of firms and trade associations.

2. Outline of the Guidelines

- (1) Part I outlines the provisions of the Antimonopoly Act by introducing what kind of conduct by firms or trade associations is prohibited by the Antimonopoly Act in connection with bids, and by describing the legal action against such violation. Part II provides an outline of the viewpoint of the Fair Trade Commission (FTC) in interpreting firms' or trade associations' actual activities in connection with bids, in light of the provisions of the Antimonopoly Act with reference to the past experiences of the FTC in enforcing the Act. In addition, examples classified into the following are given for certain primary categories of conduct, "Conduct in principle constituting violation," "Conduct suspected to be in violation" and "Conduct in principle not constituting violation".
 - a. For "Conduct in principle constituting violation," examples of the conduct are given on the basis of the past FTC rulings and surcharge payment orders. In addition, some points to be noted are described for the purpose of preventing bid-rigging in relation to examples for "Conduct in principle constituting violation".
 - b. For "Conduct suspected to be in violation," examples of the conduct are given on the basis of violation and facts relating to violation in the past FTC rulings; this conduct includes that which tends to accompany violation or that which may lead to violations.
 - c. For "Conduct in principle not constituting violation," examples of the conduct which in itself is not deemed as violation in principle are given.

- (2) These guidelines provide principles of the Antimonopoly Act for the purpose of preventing bid-rigging, focusing on bids held in accordance with laws and regulations by the national government, local governments, or other similar entities. "Other similar entities" include wide range of organizations such as public corporations, local public corporations, foreign-government agencies and international organizations.

These guidelines may apply to firms' or trade associations' activities in connection with the submission of estimates by certain selected firms to contract awarding public agency in the process of a discretionary contract.

- (3) The aim of these guidelines is to explain as plainly as possible the relation between the Antimonopoly Act and the firms' or trade associations' actual activities in connection with bids. The examples cited herein are nothing but illustrations, and the specific case(s) attached to each example are for the clear understanding of conduct and the point of issues of each example. Needless to say, judgements whether specific conduct, including any activities related to bids not cited herein, and activities related to procurements without bids taken, constitutes violation will be made on a case-by-case basis in accordance with the provisions of the Antimonopoly Act.
- (4) For the purpose of simplification, the examples described herein basically concern bids for procurement. Bids related to sales by public agencies are mentioned in terms of each specific situation only when needed to make the examples easier to understand.

The descriptions included herein of the conduct of trade associations include conduct which trade associations have made their members commit (For examples, references to cases in which "trade association's conduct of predetermining an expected bid winner" include cases in which "trade association's conduct of making its members predetermine an expected bid winner.").

The descriptions included herein of the conduct of "trade associations of small-and medium-scale firms" mean the activities which trade associations, consisting mainly of small- and medium-scale firms, do for these member firms.

- (5) When the guidelines are adopted, "The Antimonopoly Act Guidelines Concerning the Activities of Trade Associations of the Construction Industry in Relation to Public-Works" (published February 21, 1984) will be repealed.

Part I Outline of the Provisions of the Antimonopoly Act Regarding Firms' and Trade Associations' Activities in Connection with Bids

1. Prohibited Conduct

- (1) The objective of the Antimonopoly Act is to promote fair and free competition, so as to stimulate the creative initiative of firms, to encourage business activities, to heighten the levels of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy and to protect the interests of consumers in general (Antimonopoly Act, Sec. 1).

To achieve this objective, the Antimonopoly Act prohibits such conduct as follows: firms' concerted conduct or a trade association's conduct that substantially restrains competition in a particular field of trade; a trade association's conduct that limits the number of firms, that unjustly restricts the functions or activities of the members, or that causes firm to employ such conduct as constitutes unfair trade practices; and firms' conduct that constitutes unfair trade practices (Sec. 3, 8 (1), 19).

Contracts for the procurement of goods or services by the national government, local governments or other organizations are paid for by taxes paid by the people, and therefore special efforts are required to assure fairness and impartiality in the making and execution of such contracts while pursuing economic viability for contract awarding public agency. To this end, the Accounts Law and the Local Autonomy Law require in principle that the national government and local governments enter into such contracts through a competitive process and that a bid system be used for the competitive process.

Bid-rigging undermines the bid system. Likewise, it contravenes the provisions of the Antimonopoly Act which prohibits restraint on competition.

- (2) Firms' concerted conduct or a trade associations' conduct of substantially restraining competition in a particular field of trade by predetermining an expected bid winner or a minimum bid price constitutes violation of Section 3 (unreasonable restraint of trade) or Section 8 (1) (i).

(Such conduct is commonly referred to as bid-rigging; and these guidelines are intended to prevent such violation. Unless otherwise specified, the term "violation" in these guidelines primarily means that of Section 3 or Section 8 (1) (i).)

Unjust restrictions on the functions or activities of members by a trade association's activities in connection with bids violate Section 8 (1) (iv).

Firms' conduct of employing unfair trade practices in connection with bids violates Section 19. A trade association's conduct of making firms employ such conduct violates Section 8 (1) (v).

2. Measures against Violation

(1) Elimination Measures

a. In cases of the above-mentioned violation, the FTC orders a firms or a trade association committing the violation to take necessary measures to eliminate such violation (Sec. 7(1), 8-2(1), 20(1)).

An example of necessary measures is as follows in a case predetermining of an expected bid winner; abrogation of the agreement concerning the predetermination of the expected bid winner, publicizing the abrogation of the agreement, prohibition of the recurrence of such conduct, and the submission of reports to the FTC concerning measures taken.

b. Even when violation has already ceased, the FTC may, if it finds it particularly necessary, order a firm or a trade association concerned to take measures to publicize the cessation of the violation and other measures necessary to ensure that the violation does not recur (Sec. 7(2), 8-2(2), 20(2)).

c. When ordering a trade association to take such measures as indicated under a. and b. above, the FTC, if particularly necessary, orders the executive officers, managers, and members of the trade association in question to take such appropriate measures (Sec.8-2(3)).

(2) Surcharge

If a firm violates Section 3 by unreasonably restraining trade, or if a trade association violates Section 8-1(1), and if either violation pertains to the price of goods or services or in effect affects the prices of goods or services by restraining the volume of supply thereof, the FTC orders the firm or members of the trade association in question to pay a surcharge (Sec. 7-2, 8-3).

Bid-rigging constitutes violation for which a surcharge is imposed.

Surcharge shall be calculated using the following method.

It is calculated by way of multiplying the sales amount of goods or services covered by the above-mentioned violation during the period of its implementation, by the following groups of rates.

	Large-scale firms	Small- and Medium-scale firms
Non retail and non-wholesale	6%	3%
Retailers	2%	1%
Wholesalers	1%	1%

Note: a. As a general rule, the sales amount is the total value of goods or services delivered during the implementation period.

b. In a case when a substantial difference exists between the amount contracted and the value of goods or services delivered during the implementation period, the sales amount shall be determined according to the total value of contracts undertaken during the period.

(Section 5 and 6 of the Enforcement Ordinance of the Antimonopoly Act (Cabinet Ordinance No.317 of 1977))

The period for calculation of surcharges shall be three years retroacting from the day of the cease of the implementation in the case when the implementation period is longer than three years.

Furthermore, as a general rule, no surcharge payment will be ordered if three years have passed since the end of the implementation period.

(3) Penal Provisions

Regarding the violation described in 1(2) above, penal provisions are provided for the conduct which is in violation of Section 3 or Section 8 (1) (i), (iv) (Sec.89, 90(ii)).

Regarding the violation of Section 3 or Section 8(1) (i), penalty of a maximum sentence of three years of penal servitude or a maximum fine of 5,000,000 JPY is provided for (Sec 89(1)). When representatives, employees or others of firms or trade associations commit violation of Section 89 in relation to business, they shall be punished accordingly, and in this case, however, firms or trade associations, in question shall be punished for the same violation by fine not exceeding 100,000,000 JPY (Sec.95). Furthermore, in the case of the violation of Section 89(1) is conducted, representatives of judicial persons or executive officers or members of trade associations shall be punished by fine not exceeding 5,000,000 JPY, if they were aware of the plan of the violation but failed to take necessary preventive measures, or if they were aware of the violation but failed to take necessary corrective measures (Sec.95-2, 95-3).

The above-mentioned offences shall be considered only after an accusation by the FTC has been filed (Sec.96).

Note: The FTC has announced the adoption of a policy to actively accuse to seek criminal penalties on the following cases:

- a. Vicious and serious cases which are considered to have wide-spread influence on people's livings, out of those violations which substantially restrain competition in certain areas of trade such as price-fixing cartels, supply restraint cartels, market allocations, bid-rigging, group boycotts, and other violations.
- b. Among violation cases involving those firms or industries who are repeat offenders or those who do not abide by the elimination measures, those cases for which the administrative measures of the FTC are not considered to fulfill the purpose of the Act.

("The FTC's Policy on Criminal Accusation Regarding Antimonopoly Violations" published on June 20, 1990)

(4) Indemnification of damages

Regarding a violation described in 1(2) above, firms who conduct unreasonable restraints of trade or unfair trade practices assume absolute liabilities to the injured party if the ruling are made by the FTC (Sec. 25, 26).

When a damage suit is filed against a firm in question in accordance with Section 25, the FTC will submit, at the court's request, the FTC's views on the amount of damages caused by the violation (Sec. 84).

The FTC will provide documents requested by a court in order to promote the effective operation of the damage-suit system.

Part II The Antimonopoly Act and Firms' and Trade Associations' Real Activities in Connection with Bids

1. Conduct Related to the Selection of Conduct Awardee

(1) Viewpoint

The Accounts Law and the Local Autonomy Law prescribe bid procedures in which, in principle, contract awarding public agency selects the bidder, for a contract awardee, who tenders the most advantageous terms for the agency, and then award the contract according to the terms the bidder offers.

The functions of the bid system will be undermined by firms' concerted conduct or a trade association's conduct of predetermining an expected bid winner, or of predetermining a procedure for selecting an expected bid winner. Moreover, such

conduct will result in the restraint of competition in the transaction of goods or services through bid process, and, in principle, constitute violation of the Antimonopoly Act.

Conduct of predetermining an expected bid winner or conduct of predetermining a procedure for selecting an expected bid winner is basically defined as any conduct, regardless of the specific methods or procedures employed, that is engaged in to specify the awardee in a bid so as to make the contract awarded to him.

As used in this context, predetermination is not limited to the explicit predetermination of an expected bid winner or of a procedure for selecting expected bid winner, but extends to the formation of any tacit understanding or common intent concerning an expected bid winner or a procedure for selecting an expected bid winner.

Conduct of predetermining an expected bid winner or conduct of predetermining a procedure for selecting an expected bid winner, is held in violation regardless of the purpose or the intent of the conduct. Such purposes as to assure the quality of the goods or services supplied, to equalize the opportunities for being awarded contracts, or to take into account the business activities of individual firms, and to respect continuity and established relations with previously contracted work do not justify such conduct.

If a third party recommends a certain firm as an expected bid winner, and if firms concertedly decide, or if a trade association decides, to accept this recommendation, such conduct of firms or a trade association results in predetermining an expected bid winner.

(2) Examples

The following section describes various types of conduct that can be used as reference cases in realizing whether or not such conduct constitutes violation.

- Conduct in principle constituting violation

1-1 (Predetermining an expected bid winner)

- Firms' concerted conduct or a trade association's conduct of predetermining an expected bid winner or predetermining a procedure for selecting an expected bid winner.

[Specific cases]

The Case against Firm X and other construction firms (FTC Recommendation Decision No.16 of 1992)

In this case, involving bids competed by designated firms for general contracting of civil engineering work ordered by Prefecture A, the designated firms had predetermined the expected bid winners from among them under the agreement that they hold meetings, that they predetermine the expected bid winner from among those expressing an interest in winning a forthcoming bid, taking into consideration such factors as the submission of "PR forms" (in which they described the site of the work and work previously done at neighboring sites, etc.) for each ordered work, the date of submission of those documents and the accuracy of those documents, and that they cooperate so that the expected bid winner may be awarded the contract. This was found to be in violation of Section 3.

The Case against Firm Y and other suppliers of adhesive seals for payment notices (FTC Recommendation Decision No.9 of 1993)

In this case, involving bids for special seals for payment notices ordered by Ministry B, the designated firms and another firm had decided that they would predetermine the expected bid winner for each bid by collusion, and that the designated firms would hold discussions to select the expected bid winner and would cooperate so that the expected bid winner may be awarded the contract. And then, based on this Decision, they had predetermined the expected bid winners. This was found to be in violation of Section 3.

The Case against Trade Association Z of construction firms (FTC Surcharge Payment Order No.15 of 1988)

In this case, involving bids for construction work in Japan ordered by the Officer in charge of the Construction Far East of Navy of Country C, the trade association had decided that the expected bid winner would be predetermined through discussions held among the firms participate in a bid, and had made its members predetermine the expected bid winners. This was found to be in violation of Section 8 (1) (iii).

The Case against Trade Association U of surveyors (FTC Recommendation Decision No.5 of 1993)

In this case, involving bids competed by designated firms for aerial-photographic surveying work ordered by Ministry D, the trade association had decided that the expected bid winner would be predetermined under a point system (a specific formula was used in determining the points assigned to members based on their past records of designation and winning; the member with the highest point total was given priority in the predetermination of the expected bid winner), or under a take-turn system (the expected bid winners were predetermined according to a previously determined order) according to the type of the work. And the trade association had made its members predetermine the expected bid winner. This was found to be in violation of Section 8(1)(i).

The Case against Trade Association V of building maintenance firms (FTC Recommendation Decision No.10 of 1993)

In this case, involving bids competed by designated firms or comparison of estimates

submitted by designated firms for environmental sanitation-control work ordered by government agencies in District E, the trade association had decided that the member would be predetermined as the expected winner of the next bid or the next comparison process for the same work, if the member had been awarded the previous contract for the certain work, that as for work to be newly ordered, the designated members would collude to predetermine the expected winner, and that designated members except the expected winner would cooperate so that the expected winner would be awarded the contract. Based on this Decision, the trade association had made its members predetermine the expected winners. This was found to be in violation of Section 8(1)(i).

[Important Notes]

In relation to the example described in 1-1 (Predetermining an expected bid winner) of "Conduct in principle constituting a violation," some points are noted below for the purpose of preventing bid-rigging.

- A. The following conduct would be used as a means for the predetermination of an expected bid winner, or has a high probability of leading to the formation of a tacit understanding or common intent concerning an expected bid winner. Thus, such conduct is highly suspect

1-1-1 (Exchange of information concerning interest in being awarded a contract)

- Conduct of exchange such information among firms intending to participate in a bid, which may lead to the selection of an expected bid winner, such as interest in being awarded the contract, past business activities concerning the bid, past contracts awarded in related projects, and others. Or conduct of collecting and offering such information by a trade association which includes such firms, or conduct of promoting the exchange of such information among such firms by it.

[Specific cases of violation]

The Case against Trade Association X of construction firms (FTC Recommendation Decision No.13 of 1982)

In this case, involving bids competed by designated firms for construction work ordered by Prefecture A and City B, the trade association had decided to make its members predetermine the expected bid winner, by making designated firms hold meetings, and by making the selected official of the trade association chair the meetings, inquire whether or not each designated firm has interest to be awarded and make recommendations to facilitate discussions, and by making certain methods for arbitration be established. This was found to be in violation of Section 8(1)(i).

The Case against Firm Y and other construction firms (FTC Recommendation Decision No.19 of 1993)

In this case, involving bids competed by designated firms or comparison of estimates

submitted by designated firms for civil engineering work ordered by City C, the designated firms had predetermined the expected winners in such a way that when there was only one firm which showed interest in being awarded the contract, the firm was selected as the expected winner, and when two or more firms showed interest, the expected winner was determined by collusion among the firms interested in being awarded the contract. This was found to be in violation of Section 3.

The Case against Firm Z and other surveyors (FTC Recommendation Decision No.7 of 1993)

In this case, involving bids competed by designated firms or comparison of estimates submitted by designated firms for aerial-photographic surveying work ordered by the government agencies in District D, the designated firms had predetermined the expected winners taking into consideration such factors as their past records of business activities concerning the work in question, and their past records of winnings for the works in connection with the work in question by holding meetings and other collusion. This was found to be in violation of Section 3.

1-1-2 (Collating and offering information regarding the number of times designated and past record of contracts awarded)

- Firms' concerted conduct or a trade association's conduct of collating information concerning the number of times that individual firms have been designated for participation in past bids and their past records of contracts awarded, in such a manner that the information can be used to establish an order of priority in the selection of future expected bid winners and to offer such information to firms intending to participate in bids.

[Specific cases of violation]

The Case against Firm X and other manufacturers and distributors of fire-fighting hoses (FTC Recommendation Decision No.2 of 1986)

In this case, involving bids competed by designated firms for fire-fighting hoses ordered by Fire Department A, the designated firms had predetermined the expected bid winners by identifying the firm which had the lowest record of adjusted cumulative sales based on their records of past sales to Fire Department A. The designated firms had confirmed the expected bid winners and had behaved to enable the expected bid winners to be awarded the contracts prior to bids. This was found to be in violation of Section 3.

The Case against Firm Y and other construction firms of road-sign and marker (FTC Recommendation Decision No.29 of 1992)

In this case, involving bids competed by designated firms or comparison of estimates submitted by firms for construction work of road signs and markers ordered by Prefecture B, the designated firms had predetermined the expected winners in such a way that the firm with the highest number of past designations, as computed according

to a certain formula, would be selected to be the expected winner. This was found to be in violation of Section 3.

The Case against Trade Association Z of landscape gardeners (FTC Recommendation Decision No.17 of 1992)

In this case, involving bids competed by designated firms or comparison of estimates submitted by firms for landscaping work ordered by City C and by foundations funded by City C, the trade association had decided to make its members predetermine the expected winners in such a way that the firm with the highest point total, which was calculated under a certain formula where points were deduced on the basis of the value of orders received while they were added on the basis of the number of times designated, according to the type of work. This was found to be in violation of Section 8(1)(i).

B. The following conduct, which accompanies predetermination of an expected bid winner or a procedure for selecting an expected bid winner (1-1), aimed at ensuring that the contract is in fact awarded to the expected bid winner, is included in the violation under 1-1.

1-1-3 [Adjustment of bid prices]

- Conduct of adjusting bid prices by bid participants other than an expected bid winner after receiving information or directives from the expected bid winner concerning bid prices so as to allow the expected bid winner to be awarded.

[Specific cases of violation]

The Case against Firm X and other electrical-construction firms (FTC Recommendation Decision No.13 of 1993)

In this case, involving bids competed by designated firms or comparison of estimates submitted by designated firms for electrical-construction work ordered by City A, the designated firms predetermined the expected winners and had behaved to enable the expected winners to be awarded the contracts, obtaining cooperation of other designated firms than the parties of this Decision, as the need arose, under the agreement that they predetermine the expected winner and that designated firms except the expected winner would cooperate so that the expected winner would be awarded the contract, by submitting bid prices or estimate prices higher than those informed by the expected winner as their own prices. This was found to be in violation of Section 3.

The Case against Trade Association Y of surveyors (FTC Recommendation Decision No.5 of 1993)

In this case, involving bids competed by designated firms for aerial-photographic surveying work ordered by Ministry B, the trade association had decided that the expected bid winner would be predetermined and that designated members would cooperate by adjusting their bid prices in such a way that the bid price of the expected

bid winner would be the lowest so that the expected bid winner would be awarded the contract. This was found to be in violation of Section 8(1)(i).

- C. The following conduct premises predetermination of an expected bid winner or a procedure for selecting an expected bid winner (1-1), and aims to facilitate or to enforce or otherwise such predetermination. The conduct of predetermining an expected bid winner or a procedure for selecting an expected bid winner in principle constitutes violation even if it is not accompanied by the conduct described below. In certain cases, the conduct described below constitutes violation inherently and of itself (Sec. 8(1)(iv), (v), Sec.19)

1-1-4 (Distribution of benefits to others such as participating firms)

- Firms' concerted conduct or a trade association's conduct of making an expected bid winner distribute benefits to others such as participating firms through such means as the subcontracting of work or the payment of money.

[Specific cases of violation]

The Case against Firm X and other construction firms (FTC Recommendation Decision No.16 of 1992)

In this case, involving bids competed by designated firms for general contracting of civil engineering work ordered by Prefecture A, the designated firms had predetermined the expected bid winners. In order to facilitate the predetermination process of the expected bid winner, the bid winner had subcontracted, as the need arose, part of the awarded contracts as "relief measures" to other firms who had expressed an interest in the contract, or to other firms who had not been awarded a contract during a certain period of time. This was found to be in violation of Section 3.

The Case against Firm Y and other distributors of prophylactic pesticides (FTC Recommendation Decision No.3 of 1992)

In this case, involving bids competed by designated firms or comparison of estimates submitted by designated firms for prophylactic pesticides ordered by municipalities in Prefecture B, the designated firms had predetermined the expected winners and the expected winning prices, and they had decided a method of profit distribution under which the expected winner would distribute part of the profits from the contract to other firms in order to equalize the profits of firms participating in the bid or comparison. This was found to be in violation of Section 3.

1-1-5 (Inviting or compelling firms to participate in the predetermination of an expected bid winner)

- Firms' concerted conduct or a trade association's conduct of inviting or compelling other firms to participate in the predetermination of an expected bid winner or to abide by the outcome of such a predetermination; or of interfering with

participation in a bid of firms which do not participate or cooperate in the predetermination of an expected bid winner, through such means as boycott, discriminatory treatment by other firms or by the trade association; or of imposing disadvantages on firms which fail to abide by such predetermination, through such means as boycott, discriminatory treatment by other firms or by the trade association and the levying of money.

[Specific cases of violation]

The Case against Trade Association X of road-paving firms (FTC Recommendation Decision No.2 of 1979)

In this case, involving bids competed by designated firms for asphalt paving work ordered by local government agencies in Prefecture A, the trade association had decided that it would make its members predetermine the expected bid winner at so-called "study meetings," and that, in order to ensure the predetermination, it would invite designated non-member firms to the study meetings and would refuse to supply asphalt materials to the firm which would not cooperate. This was found to be in violation of Section 8(1)(i).

The Case against Trade Association Y of surveyors (FTC Recommendation Decision No.7 of 1982)

In this case, involving bids competed by designated firms or comparison of estimates submitted by firms for surveying and designing work ordered by local government agencies in Prefecture B, the trade association had decided that it would make its members predetermine the expected winner, and had formulated a set of "punitive rules," which provided that the association would consider temporary suspension or expulsion from the association of any member who would be awarded a contract at lower price than that of the expected winner, according to the number of such contracts awarded. This was found to be in violation of Section 8(1)(i).

The Case against Trade Association Z of building maintenance firms (FTC Recommendation Decision No.10 of 1993)

In this case, involving bids competed by designated firms or comparison of estimates submitted by firms for environmental sanitation-control work ordered by government agencies located in Prefecture C, the trade association had decided that it would make its members predetermine the expected winner, and that, in order to ensure the predetermination, if a member except the expected winner would be awarded a contract through mistake, the actual winner would have to compensate the expected winner by paying sum equivalent to the profit on the contract, and if a member except the expected winner would be awarded a contract by willfully offering the lowest price, the other members would refuse to act as underwriters guaranteeing the completion of the work. This was found to be in violation of Section 8(1)(i).

- Conduct suspected to be in violation

1-2 (Reporting the fact of designation and planned participation in bids)

- Firms' concerted conduct or a trade association's conduct of requiring individual firms to report the fact of their designation for participation or their intent to participate in a forthcoming bid.

[Point at issue]

Such conduct is often undertaken to identify the firms participating in a bid, in order to predetermine an expected bid winner. In such a case, the conduct would raise problems under the Antimonopoly Act, regarded as accompanying the predetermination of an expected bid winner.

[Specific cases of violation]

The Case against Firm X and other manufacturers of water meters (FTC Recommendation Decision No.35 of 1992)

In this case, involving bids competed by designated firms or comparison of estimates submitted by designated firms for water meters ordered by municipalities and a water-supply agency in Prefecture A, the designated firms had agreed to notify the leader firm that they had been designated to participate in a forthcoming bid or comparison of estimates, as a rule, no later than two days, before the day of a bid or the submission of an estimate, and had predetermined the expected winners in accordance with a certain method. This was found to be in violation of Section 3.

The Case against Trade Association Y of pipe-laying firms (FTC Recommendation Decision No.5 of 1990)

In this case, involving bids competed by designated firms for pipe-laying work ordered by Prefecture B, City C, and public corporations funded by the foregoing, the trade association had decided that it would make its members immediately notify the association that they have been designated to participate in a forthcoming bid and that it would make its members predetermine through collusive discussion the expected bid winner. This was found to be in violation of Section 8(1)(i).

1-3 (Exchange of information concerning combination of partners in a joint venture)

- Conduct of exchanging information concerning combinations of partners in joint ventures between a firm intending to participate in a bid as a partner in a joint venture and a firm intending to participate in a bid individually or as a partner in other joint venture, or , of promoting such kind of exchange of information by a trade association (Excluding such conduct which comes under 4-9).

[Point at issue]

Such exchange of information is often transformed into the exchange of information for

the predetermination of an expected bid winner. In such a case, it would raise problems under the Antimonopoly Act, regarded as leading to the predetermination of an expected bid winner.

Moreover, a trade association's conduct of giving to its members instructions of , or predetermining among its members combination of partners in a joint venture might raise problems under the Antimonopoly Act, regarded as accompanying the predetermination of an expected bid winner. In certain cases, such conduct inherently and of itself constitutes violation, regarded as unjustly restricting the functions or activities of members (Section 8(1) (iv)).

[Specific cases of violation]

The Case against Firm X and other construction firms (FTC Recommendation Decision No.20 of 1993)

In this case, involving bids competed by designated firms or comparison of estimates submitted by designated firms for laying sewer pipes ordered by City A, the designated firms, being divided into Group-1 and Group-2 by City A as candidates of partners of joint ventures, had held meetings named as "combination meetings," and each group had selected the firm to compose the joint venture which would be the bid winner and they had predetermined the joint venture composed by the selected firms as the expected winner. This was found to be in violation of Section 3.

1-4 (Levying of special membership-fees or charges)

- A trade association's conduct of levying special membership-fees or charges on its member, according to each contract awarded through a bid.

[Point at issue]

Such conduct is often undertaken to facilitate the predetermination of an expected bid winner. In such a case, it would raise problems under the Antimonopoly Act, regarded as accompanying the predetermination of an expected bid winner.

[Specific cases of violation]

The Case against Trade Association X of surveyors (FTC Recommendation Decision No.5 of 1993)

In this case, involving bids competed by designated firms for aerial-photographic surveying work ordered by Ministry A, the trade association had decided that it would make its members predetermine the expected bid winner, and would make the bid winner pay special membership-fees to the association after being awarded the contract. This was found to be in violation of Section 8(1)(i).

- Conduct in principle not constituting violation

1-5 (Expression of interest in participation in a bid to the contract awarding public

agency)

- A firm's conduct of expressing, to the contract awarding public agency, interest to participate in a forthcoming bid and such pertinent technical information as its past records of similar types of work done, description of its technical and engineering staff, and an implementation plan for the work to be awarded, responding to the institutional request of such agencies, prior to the agency's designation of firms, without consultation and adjustment with other firms or a trade association.

1-6 (Declining to participate in a bid on one's own judgement)

- A designated firm's conduct of declining to participate in a bid, based on the business management Decision of the firm itself, without consultation or adjustment with, or without requests from other firms or a trade association.

2. Conduct Related to Bid Prices

(1) Viewpoint

Prices must be determined through fair and free competition among firms. It is highly probable that firms' concerted activities or trade association's activities related to prices raise problems under the Antimonopoly Act.

With regard to bids generally, the Accounts Law and the Local Autonomy Law prescribe strict conformity to the principle of price competition. These laws stipulated, in principle, that the contract must be awarded to the participating firm that submits the lowest bid (or the highest bid, depending on the aim of the contract) so long as this does not exceed the estimated price of agency, and that the winning bid price is to be applied as the contract price.

The functions of the bid system are undermined by firms' concerted conduct or a trade association's conduct of predetermining a minimum bid price (or a maximum bid price, depending on the aim of the contract), an expected winning bid price or standards for the determination of these prices (hereinafter the "minimum bid price" includes a minimum bid price, an expected winning bid price and such standards). Moreover, this conduct results in the restraint of competition in the transaction of goods or services through bid process, and, in principle, constitutes violation of the Antimonopoly Act.

As used in this context, predetermination is not limited to explicit predetermination of a minimum bid prices but extends to the formation of any tacit understandings or common intent concerning a minimum bid price.

Conduct of predetermining a minimum bid price is held in violation regardless of the

purpose or the intent of the conduct. Such purposes as to maintain appropriate price levels, to assure the quality of the goods or services supplied, or to prevent contracting at unreasonably low prices do not justify such conduct.

(2) Example

- Conduct in principle constituting violation

2-1 (Predetermining a minimum bid price)

- Firms' concerted conduct or a trade association's conduct of predetermining a minimum bid price.

[Specific cases]

The Case against Firm X and other manufacturers of water meters (FTC Recommendation Decision No.33 of 1992)

In this case, involving the purchase of water meters by local government X by means of a fixed-unit-price method (unit price for delivery during a specified fiscal year is determined through a bid competed by designated firms, with no reference to quantities to be delivered, and contracts are awarded to the lowest bidder and to any other firm prepared to supply at the determined unit price), the designated firms had predetermined the minimum bid price, the firm to submit the minimum bid price, and the bid prices to be submitted by all other participants, in order to prevent the lowering of the minimum bid price. This was found to be in violation of Section 3.

The Case against Trade Association Y of distributors of petroleum products (FTC Recommendation Decision No.5 of 1984)

In this case, involving bids for the petroleum products ordered by City B and others, the trade association had predetermined the expected bid winners and the prices to be bid by the expected bid winners according to the category of petroleum products. This was found to be in violation of Section 8(1) (i).

[Important Notice]

In relation to the example described in 2-1 (Predetermining an expected bid winner) of "Conduct in principle constituting violation," some points are noted below for the purpose of preventing bid-rigging.

2-1-1 (Exchange of information concerning bids prices)

- Conduct of exchanging information concerning bid prices among firms intending to participate in a bid. Or, conduct of collecting and offering such information by a trade association which includes such firms, or conduct of promoting the exchange of such information among such firms by it.

[Specific cases of violation]

The case against Firm X and other manufacturers of plywood (FTC Hearing Decision No.2 of 1948)

In this case, involving bids for plywood ordered by Ministry A, a number of domestic plywood manufacturers, through various conversations concerning their bid prices in advances, had reached to rough recognition of the others' bid prices. Then, the great majority of them had submitted almost the same bid prices. This was found to be in violation of Section 3.

- Conduct suspected to be in violation

2-2 (Exchange of information concerning price levels of goods or services subject to a bid)

- Conduct of exchanging information among firms intending to participate in a bid concerning the price levels or trends in prices of goods or services subject to a bid, or conduct of collecting and offering such information by a trade association which includes such firms or conduct of promoting the exchange of such information among such firms by it, in such as case that contract awarding public agency requests firms or a trade association to submit information to be used in the computation of the estimated price for the bid of the agency.

[Point at issue]

Such collecting, offering and exchanging of information is often transformed into the collecting, offering and exchanging of information concerning bid prices. In such a case, it would raise problems under the Antimonopoly Act, regarded as leading to the predetermination of a minimum bid price.

Moreover, firms' concerted conduct or a trade association's conduct of predetermining the contents of the information concerning the prices of goods or services to be submitted to contract awarding public agency, while knowing that this information is to be used as a base in the computation of the estimated price of the agency, would raise problems under the Antimonopoly Act, regarded as leading to restraint on price.

[Specific cases of violation]

The Case against Firm X and other manufacturers and distributors of metal covers for public-sewer manholes (FTC Hearing Decision No.2 of 1991)

In this case, the firms had been aware that roughly 90 percent of the estimated prices, of city-type metal covers (metal covers as specified by City A), which City A obtained from selected firms for computation of sewage construction costs, was used by City A as the design unit-price when placing an order, and that the sales price by the firms for the sewage constructors could be derived by deducting the profit margins of the constructors and trading companies from that design unit-price. Based on this knowledge, the firms had predetermined the minimum estimates to be submitted to City A and predetermined the sales prices by taking into account the profit margins of the sewage constructors and

trading companies. This was found to be in violation of Section 3.

- Conduct in principle not constituting violation

2-3 (Study concerning computation criteria)

- Firms' concerted conduct or a trade association's conduct of studying computation criteria which have been made public by contract awarding public agency (Excluding such conduct which gives common standards of the computed prices of contracts among firms.).

2-4 (Formulation of general rule of computation)

- Conduct, by a trade association of small- and medium-scale firms, of formulating methods of computation that list standard expense items, or of indicating the standard materials and labor required, for the purpose of improving the computational capabilities of members, for bids in general (Excluding such conduct which gives common standards of the computed prices of contracts among firms.).

3. Conduct Related to Contractual Quantity

(1) Viewpoint

In certain bid systems, due to the characteristic and aim of contract, participants may be asked to submit such offers as quantities in addition to prices. In such cases, the bid process is used to determine the awardees, the contract prices and also such terms as contractual quantities in accordance with the contents of the offers. Firms' concerted conduct or a trade association's conduct of predetermining such terms as quantities or shares of a contract results in the restraint of competition in the transaction of goods or services through bid process, and, in principle, constitutes violation.

As used in this context, predetermination is not limited to explicit predetermination of quantities or shares of a contract, but extends to the formation for any tacit understanding or common intent concerning quantities or shares of a contract.

Firms' concerted conduct or a trade association's conduct of predetermining quantities or shares of a contract is held in violation regardless of the purpose or the intent of the conduct.

(2) Examples

- Conduct in principle constituting violation

3-1 (Predetermining quantities or shares of contract)

- Firms' concerted conduct or a trade association's conduct of predetermining quantities or shares of a contract through a bid process.

[Specific case of violation]

The case against Firm X and other distributors of silk fabrics (FTC Consent Decision No.14 of 1950)

In this case, involving bids competed by firms for the domestic sale of inventories of silk fabrics held for export by Public Corporation A, the firm had decided that 10 out of the 25 firms participating in the bid would win the bid for the minimum bid quantity equivalent to one-tenth of the entire quantity. At the same time, the firms had predetermined the bid prices. This was found to be in violation of Section 3.

- Conduct in principle not constituting violation

3-2 (Publishing rough aggregate of past public procurements)

- For the purpose of grasping the general trends in related public procurements, a trade association's conduct of requesting its members to voluntarily submit rough aggregate of past public procurements awarded without individual procurement specified, or collecting information which has been made public by contract awarding public agency concerning past public procurements or forthcoming public procurements scheduled, and conduct of publishing rough aggregate of past public procurements or general outlook for forthcoming public procurements in question without those of individual firm specified.

4. Collecting and Offering Information and Management Guidance

(1) Viewpoint

A trade association's conduct of collecting and offering information and materials concerning the bid system in general or propagating general knowledge relevant to the relation between the Antimonopoly Act and the firms' or trade associations' activities in connection with bids in accordance with these Guidelines does not constitute violation in principle.

As opposed to this, conduct, by a trade association which includes firms intending to participate in a bid, of collecting and offering information concerning the bid or promoting the exchange of such information among such firms would raise problems under the Antimonopoly Act, in a case that such conduct leads to the one which restrains or impedes competition or is used as a method or a procedure for the conduct which restrains or impedes competition.

Needless to say, conduct of collecting information, as far as undertaken independently and not concerted by individual firms, does not raise problems under the Antimonopoly Act. As opposed to this, conduct of mutually exchanging information concerning a bid by firms intending to participate in the bid would raise problems under the Antimonopoly Act.

Conduct of providing management guidance by a trade association is needed in principle only in the case of the trade association of small- and medium-scale firms. While taking the form of management guidance, conduct, by a trade association which includes firms intending to participate in a bid, of providing these firms guidance concerning activities relevant to the bid, tends to lead to such conduct which restrains or impedes competition as the indications of bid prices and invitation to participate in the predetermination of an expected bid winner, and in such cases would raise problems under the Antimonopoly Act.

Conduct of expressing opinions or requests concerning the management and content of the bid system in general does not raise problems inherently and of itself, regardless of whether this is done independently by individual firms, concerted by firms, or by a trade association.

Also, firms' conduct of giving general information on technology to contract awarding public agency, not related to specific bids, does not raise problems inherently.

(2) Examples

[Important Notice Concerning Conduct in Principle Constituting Violation]

(Points to be noted concerning conduct of predetermining an expected bid winner)

Conduct which comes under 1-1-1 or 1-1-2, as mentioned in the points to be noted for 1-1 (predetermining an expected bid winner), would be used as a means for the predetermination of an expected bid winner, or has a high probability of leading to the formation of a tacit understanding or common intent concerning an expected bid winner. Thus, such conduct is further suspected to be violation.

(Exchange of information concerning interest in being awarded a contract)

- Conduct of exchanging such information among firms intending to participate in a bid, which may lead to the selection of an expected bid winner, such as interest in being awarded the contract, past business activities concerning the bid, past contracts awarded in related projects, and others. Or, conduct of collecting and

offering such information by a trade association which includes such firms, or conduct of promoting the exchange of such information among such firms by it.
(Previously described in 1-1-1)

(Collating and offering information regarding the number of times designated and past record of contracts awarded.)

- Firms' concerted conduct or a trade association's conduct of collating information concerning the number of times that individual firms have been designated for participation in past bids and their past records of contracts awarded, in such a manner that the information can be used to establish an order of priority in the selection of future expected bid winners and to offer such information to firms intending to participate in bids.
(Previously described in 1-1-2)

(Points to be noted concerning conduct of predetermining a minimum bid price)
Conduct which comes under 2-1-1, as mentioned in the points to be noted for 2-1 (predetermining a minimum bid price), would be used as a means for the predetermination of a minimum bid price, or has a high probability of leading to the formation of a tacit understanding or common intent concerning a minimum bid price. Thus, such conduct is further suspected to be violation.

(Exchange of information concerning bid prices)

- Conduct of exchanging information concerning bid prices among firms intending to participate in a bid. Or, conduct of collecting and offering such information by a trade association which includes such firms, or conduct of promoting the exchange of such information among such firms by it.
(Previously described in 2-1-1)
- Conduct suspected to be in violation

4-1 (Reporting the fact of designation and planned participation in bids)

- Firms' concerted conduct of a trade association's conduct of requiring individual firms to report the fact of their designation for participation or their intent to participate in a forthcoming bid.
(Previously described in 1-2)

4-2 (Exchange of information concerning combination of partners in a joint venture)

- Conduct of exchanging information concerning combination of partners in a joint venture between a firm intending to participate in a bid as a partner in a joint venture and a firm intending to participate in a bid individually or as a partner in other joint venture, or, of promoting the exchange of such information by a trade association (Excluding such conduct which comes under 4-9).

(Previously described in 1-3)

4-3 (Exchange of information concerning price levels of goods or services subject to a bid)

- Conduct of exchanging information among firms intending to participate in a bid concerning the price levels or trends in prices of goods or services subject to a bid, or conduct of collecting and offering such information by a trade association which includes such firms or conduct of promoting the exchange of such information among such firms by it, in such a case that contract awarding public agency requests firms or a trade association to submit information to be used in the computation of the estimated price for the bid of the agency.

(Previously described in 2-2)

- Conduct in principle not constituting violation

4-4 (Collecting and offering general information concerning bids)

- A trade association's conduct of collecting and offering general information concerning bids (information regarding the records of past and future contracts to be awarded by contract awarding public agencies, information concerning the qualifications for participation in bids or designation criteria, or information concerning the objective data of trends in labor wages and prices of materials including raw materials) made public by governments, public agencies or private research organizations.

4-5 (Publishing rough aggregate of past public procurements)

- For the purpose of grasping the general trends in related public procurements, a trade association's conduct of requesting its members to voluntarily submit rough aggregate of past public procurements awarded without individual procurement specified, or collecting information which has been made public by contract awarding public agency concerning past public procurements or forthcoming public procurements scheduled, and conduct of publishing rough aggregate of past public procurements or general outlook for forthcoming public procurements in question without those of individual firm specified.

(Previously described in 3-2)

4-6 (Formulating and offering average management indicators)

- A trade association's conduct of formulating and offering average management indicators based on information voluntarily submitted by members regarding such management information which normally is of a non-confidential nature as their financial indicators or the numbers of employees.

In such information is published by the members themselves, or if the members have given their prior consent, the trade association may organize and publish this information as pertaining to individual firms.

4-7 (Collecting and offering information concerning the content of a bid and the required level of technical capabilities)

- In order to supplement the deficiencies of members in collecting information, conduct, by a trade association of small- and medium-scale firms intending to participate in a bid, or collecting and offering information, made public by the contract awarding public agency, concerning the content of the object of the bid and the required level of technical capabilities for the bid (Excluding such conduct which may lead to the predetermination of an expected bid winner.).

4-8 (Offering information concerning combination of partners in permanent joint venture)

- Conduct, by a trade association of small- and medium-scale firms, in response to the request of the members, of offering information of past objective facts concerning combination of partners in a joint venture, when the members are preparing to submit an application to qualify as a permanent joint venture for participation in bids.

4-9 (Collection of information for selection of partners in a joint venture)

- Firm's conduct of individually collecting information necessary in the selection of partners from each candidate for partnership, in seeking for partners for a joint venture to participate in a bid; or of sharing views and setting specific conditions concerning establishment of partnership in a joint venture with a candidate for partnership (Excluding such conduct which may lead to the predetermination of an expected bid winner.).

4-10 (Expression of interest in participation in a bid to the contract awarding public agency)

- A firm's conduct of expressing, to the contract awarding public agency, interest to participate in a forthcoming bid and such pertinent technical information as its past records of similar types of work done, description of its technical and engineering staff, and an implementation plan for the work to be awarded, responding to the institutional request of such agencies, prior to the agency's designation of firms, without consultation and adjustment with other firms or a trade association.
(Previously described in 1-5)

4-11 (Formulation of general rule of computation)

- Conduct, by a trade association of small- and medium-scale firms, of formulating methods of computation that list standard expense items, or of indicating the standard materials and labor required, for the purpose of improving the computational capabilities of members, for bids in general (Excluding such conduct which gives common standards of the computed prices of contracts among firms.).

(Previously described in 2-4)

4-12 (Formulating and offering guidelines for the operation of permanent joint ventures)

- Conduct, by a trade association of small- and medium-scale firms, of formulating and offering to members general guidelines concerning the operation of permanent joint ventures (methods for the distribution of necessary expenses for the implementation of the work allotted to each member, and methods for the sharing of common cost).

4-13 (Study concerning computation criteria)

- Firms' concerted conduct or a trade associations' conduct of studying computation criteria which have been made public by contract awarding public agency (Excluding such conduct which gives common standards of the computed prices of contracts among firms.).

(Previously described in 2-3)

4-14 (Activities for the propagation of general knowledge relevant to the Antimonopoly Act)

- Firms' concerted conduct or a trade association's conduct of propagating general knowledge relevant to the relation between the Antimonopoly Act and the firms' or trade associations' activities in connection with bids in accordance with these guidelines.

4-15 (Activities for the enlightenment of firms on the necessity of the fulfillment of contractual obligations)

- Firms' concerted conduct or a trade association's conduct of general enlightenment on the necessity of the fulfillment of contractual obligations, the necessity of proper conduct of subcontract transactions, and, of safe operation, undertaken through bids, or, for this purpose, conduct of studying technical trends and content of the bid system, or, of related laws and regulations, and propagating general knowledge thereof (Excluding such conduct which may lead to the exchange of information, issuance of guidance or requests concerning a specific bid.).

4-16 (Expression of opinions or requests to the national and local governments)

- Firms' concerted conduct or a trade association's conduct of expressing opinions or requests to the national and local governments concerning the content or management of the bid system in general.

4-17 (Giving technical information to contract awarding public agency)

- Firms' conduct of giving general information on technology to contract awarding public agency, not related to specific bids.