Decision Against Ohki Corporation
(Bid Rigging for Civil Engineering and Construction Projects
Procured by the Defense Facilities Administration Agency)
(Tentative Translation)

July 31, 2008
Japan fair Trade Commission

The Japan Fair Trade Commission (JFTC) commenced the hearing procedures against Ohki Corporation (hereinafter referred to as the "Respondent") on September 12, 2007 and subsequently instructed the hearing examiners to go through the hearing procedures.. The JFTC issued a decision on July 29, 2008 against the Respondent to dismiss the hearing request from the Respondent in accordance with the provision of Paragraph 2, Article 66 of the Antimonopoly Act.

Outline of the Respondent etc. is as follows:

1. Outline of the Respondent

Entrepreneur	Address	Representative
Ohki Corporation	23-5, Higashi-ueno 6-chome, Taito-ku, Tokyo	Toru Ishikawa

(Note) The Respondent assigned the constructor goodwill to Kanda Ohki Corp. on March 31, 2005 and was dissolved on that day to be a clearing corporation.

2. Intention of the Respondent's Hearing Request

The Respondent requests for full rescission of the surcharge payment order No. 116 of 2007 (hereinafter referred to as the "Original Order").

3. Principal Text

JFTC dismisses Hearing request from the Respondent.

4. Progress

June 20, 2007	Cease and desist orders against 56 entrepreneurs; Surcharge payment orders against 51 entrepreneurs
August 16	Hearing request on surcharge payment order (from the Respondent only)
September 12	Sending of hearing commencement notice
October 18	The first hearing
↓	
March 11, 2008	The fourth hearing (closing of hearing procedures)
June 4	Service of draft decision to the Respondent
June 18	Objection against the draft decision and direct statement application
July 17	Direct statement hearing
July 29	Decision to dismiss the hearing request

5. Outline of the Decision

(1) Outline of the violation

A. 60 companies including the Respondent agreed as follows about the projects for which the results of assignment(Note 1) by the staff of Defense

Facilities Administration Agency (hereinafter referred to as the "DFAA") were obtained from the liaison personnel in the industry side(Note 2) among the specific civil engineering and construction projects (Note 3) procured by DFAA in and after FY 2004:

(a) The corporation which was notified that it was selected as the predetermined winner of bid or the specific construction projects joint venture (hereinafter referred to as the "specific JV") including that corporation shall win the bid.

(b) The price for winning the bid shall be decided by the predetermined winner of bid and others shall cooperate so that the predetermined winner of bid can accept the order for that price.

By deciding the predetermined winner of bid and arranging the order acceptance by that predetermined winner of bid under such agreement (hereinafter referred to as the "Basic Agreement"), they substantially restricted competition in the field of specific civil engineering and construction projects procured by DFAA contrary to the public interest (hereinafter referred to as the "Violation").

(Note 1) The practice of designating a predetermined winner of bid in consideration of how many former DFAA and other personnel have been employed by the corporation, continuity of and relevance to the project with its past procured projects, its demonstrated aspiration to win orders, among other factors.

(Note 2) Personnel of Kajima Corporation or Taisei Corporation at the rank of officer responsible for sales or those of Obayashi Corporation at the rank of sales manager in the Chugoku region.

(Note 3) Any comprehensive civil engineering or construction project that is procured by the DFAA through its regional branch, namely a Defense Facilities Administration Bureau (including Defense Facilities Administration Branches under the control of the Defense Facilities Administration Bureau) in the manners of general competitive bidding, public offering type of designated competitive bidding with enhanced competitiveness, public offering type of designated competitive bidding or designated competitive bidding (including a case in which the winner of a contract is determined on the basis of quotations collected from bidders participating in a bid that was unsuccessful because of the absence of a bidding price below the target price set by a procurement agency) and that falls under any of the following:

1. The estimated construction cost is 500 million yen or more.
2. The estimated construction cost is 300 million yen or more without exceeding 500 million yen and the project is concerned with any facility of special importance, which refers to any fuel facility, oil storage facility and other storage facility for comprehensive civil engineering projects, or to an agency or bureau building or a garage for comprehensive construction projects.
3. According to the eligibility criteria to participate in biddings, eligible bidders are required to have an overall assessment score of 1,150 or more as calculated pursuant to the provision in Paragraph 2, Article 29 of the Rules on the Contract under the Jurisdiction of the Cabinet Office. For any project in which bidding is open to joint ventures established for specific construction, any entrepreneur with the score of 1,150 or more may represent such a venture.

B. Among the projects above, the Respondent accepted the order for "New Construction Project of Ainoura (16) building for Fukuoka Defense Facilities Bureau" (hereinafter referred to as "Project 1"). The specific JV of which the Respondent was a member accepted the order for "New Construction project of Gifu (16) hangar for Nagoya Defense Facilities Branch" (hereinafter referred to as "Project 2").

(2) Facts as the basis of surcharge calculation and surcharge amount determination

The Respondent conducted its business activities while committing the Violation from January 11, 2005 to March 31, 2005. The sales of the

Respondent in relation to the above projects during this period amounted to 1,044,708,000 yen.

The surcharge amount was calculated by multiplying this sales amount by 3/100 and rounding off any fraction below 10,000 yen: 31,340,000 yen. (Note that the surcharge amount determination was made in accordance with the provision of Article 6 under the Enforcement Ordinance of Antimonopoly Act before amendment by Law No. 35 of 2005.)

(3) Issues

A. Whether or not the Respondent is an "entrepreneur" which should be ordered to pay the surcharge (Issue 1).

B. Whether or not the JFTC (government) can order payment of the surcharge considering the fairness doctrine and clean hands doctrine because this is a case of so-called "Kansei Dango" (bid-riggings in which government officials involve) (Issue 2).

C. Whether or not the Respondent is the one who decided the predetermined winner of bid in concert with other entrepreneurs (Whether it can be said that the Respondent and other entrepreneurs did not decide on who would be the predetermined winner of bid in concert because DFAA decided it) (Issue 3).

D. Whether or not Project 1 and Project 2 are "goods or services" in Paragraph 1, Article 7-2 of the Antimonopoly Act before amendment (Issue 4).

6. Judgment on the Issues

(1) Issue 1 (Whether the Respondent is an "entrepreneur" which should be ordered to pay the surcharge)

The "entrepreneur" ordered to pay the surcharge needs to be an "entrepreneur" in Paragraph 1, Article 7-2 of the Antimonopoly Act before amendment. In other words, it needs to be an entity which was conducting business activities when the Violation was committed. It is sufficient to judge whether an entity was an entrepreneur or not when the Violation was committed. It is not necessary that the entity is actually conducting business when the surcharge payment is ordered.

In addition, a corporation is deemed to be existing until completion of liquidation within the scope of liquidation purposes even after dissolution (Article 2 of Supplementary Provisions and Article 476 of the Companies Act). Because the Original Order was made and a transcript of the surcharge payment order was served while the Respondent was involved in the liquidation procedure, the Respondent was already obliged to pay the surcharge to the national treasury. Unless this obligation lapses, the liquidation procedure is not completed and the corporate entity of the Respondent continues.

Thus, the Respondent is an entrepreneur which should be ordered to pay the surcharge and its corporate entity is still in existence. There is no reason to rescind the Original Order or close the hearing procedures of this case.

(2) Issue 2 (Whether the JFTC (government) can order payment of the surcharge considering the fairness doctrine and clean hands doctrine because this is a case of so-called "Kansei Dango")

Even if involved by governmental officials, unreasonable restraint of trade constitutes a violation. According to the provision of Paragraph 1, Article 7-2 of

the Antimonopoly Act before amendment, when an entrepreneur effects unreasonable restraint of trade pertaining to consideration of goods or services and the like, the JFTC shall order the entrepreneur to pay to the national treasury a surcharge. Even when a governmental organization is involved in the violation, there is no reason to suspend ordering of surcharge payment considering the purpose of the surcharge system.

(3) Issue 3 (Whether the Respondent is the one who decided the predetermined winner of bid in concert with other entrepreneurs)

For the term "In concert with" used in relation to unreasonable restraint of trade in Paragraph 6, Article 2 of the Antimonopoly Act before amendment, it is interpreted that "communication of intention" needs to be found among several entrepreneurs which are going to conduct bid rigging. "Communication of intention" here means that several entrepreneurs have intention among them to decide the predetermined winner of bid according to certain rules, to recognize or forecast cooperation for let the predetermined winner of bid accept the order and to act in concert with other entrepreneurs toward such cooperation (Judgment by Tokyo High Court on September 25, 1995, in the case of request for rescission of decision against Toshiba Chemical Corporation).

Considering that there were statements by a person who was actually in charge of order acceptance coordination among entrepreneurs participating in the bid rigging, that the entrepreneurs behaved as described in such statements and that orders for individual projects were accepted according to certain rules and the like, it can be supposed that there were certain rules among 60 companies. According to such rules, DFAA, ordering party, made assignment and the entrepreneur intended by DFAA was planned to be the predetermined winner of bid, and other entrepreneurs cooperated in the predetermined winner of bid's acceptance of the relevant order at the price determined by the predetermined winner of bid. Because it can be said that 60 companies intended to mutually decide the predetermined winner of bid according to certain rules, recognized or forecasted cooperation for let the predetermined winner of bid accept the order and acted in concert with others toward such cooperation, "Communication of intention" can be found.

Even though DFAA decided the predetermined winner of bid and showed its intention to 60 companies, they were not fully deprived of their option not to follow such intention, because the bidding procedure was followed. They behaved according to such intention while recognizing that acceptance of the intention would be profitable to themselves. The fact that order acceptance was thus coordinated according to the rules where they accept the intention given by DFAA and cause such intended company to be the predetermined winner of bid exactly means that these 60 companies decided who the predetermined winner of bid would be.

(4) Issue 4 (Whether Project 1 and Project 2 are "goods or services" in Paragraph 1, Article 7-2 of the Antimonopoly Act before amendment)

"Goods or services" in Paragraph 1, Article 7-2 of the Antimonopoly Act before amendment should be interpreted to include any goods or services subject to the violation unless there are any particular circumstances.

Projects 1 and 2 in this case were the services subject to the Violation and

there were no particular circumstances to the contrary. Therefore, they are "goods or services" and both of them are subject to a surcharge payment order.

For Project 2, the Respondent claimed that it was just a member of a specific JV and did not coordinate order acceptance. However, considering that the Respondent knew the rules for order coordination and that the order for Project 2 was also accepted according to the order coordination rules, the Project order was received on the basis of the Basic Agreement and the Respondent should be naturally ordered to pay the surcharge. It is not necessary that the Respondent as a member of a specific JV be directly involved in order coordination including communication of prices etc.