



To: The Ministry of Finance
The Ministry of Information Industries
People's Republic of China

Date: April 8, 2005

US-China Business Council Comments on Proposed PRC Rules on Government Procurement of Software

We greatly appreciate the opportunity to provide comments on the draft Implementing Measures for Government Procurement of Software. We believe this is an important effort to provide more openness and transparency in formulating policy and legislation.

We believe that PRC government departments would benefit greatly by being able to have access to the best possible software at the best value. We also strongly support the PRC government's stated intention to join the World Trade Organization (WTO) Government Procurement Agreement (GPA) at the earliest possible time and in the meantime to encourage the development of rules consistent with the GPA.

However, we respectfully submit that the proposed rules on the procurement of software by PRC government departments contain a number of concerns. On a technical level, the rules appear to contradict open procurement principles by effectively prohibiting access by international software providers to the PRC government market. The definitions of "domestic software products" and "domestic software services" are restrictive to a point that even those international companies with PRC subsidiaries, manufacturing facilities, and large levels of investment in China might be unable to qualify their products as "domestic" as that term is defined in the proposed rules. Since the rules would grant an absolute preference to domestic products and services, this in effect amounts to a prohibition on the procurement of products developed and distributed by international suppliers.

Furthermore, placement of a product on the *Catalogue of Non-Domestic Software Products with Priority Purchasing Preference* appears to give international companies only the most minimal level of market access. PRC government entities will only be allowed to purchase software listed in the Catalogue if there is no domestic substitute and if they obtain a waiver from the relevant ministries. The proposed rules will therefore effectively block international software companies from competing in the PRC government procurement market on an equal basis with Chinese suppliers.

Many countries, including the United States, grant domestic firms some form of preference in government procurement contracts. These, however, are almost always accompanied by cost thresholds or other mechanisms that limit the use of such preferences. With thresholds, for example, when a contract is valued at more than the specified threshold, no preferences are awarded to domestic goods. In contrast, the PRC's proposed software procurement rules set out an absolute preference for domestic goods. There are no general circumstances described in the proposed rules in which an international company would enjoy the same access to the PRC government software market as a domestic supplier. When this absolute preference is combined

with the highly restrictive definition of “domestic software,” the proposed rules essentially block international companies from competing for PRC government procurement contracts. As such, the proposed rules clearly do not conform to the requirements of the GPA.

Moreover, the preference for open-source software distributed by Chinese suppliers would exclude competing products that are based on the development or licensing model. This preference runs counter to the fundamental international practice of merit-based procurement, which is recognized in several GPA principles. These principles include the requirement that technical specifications in procurement rules be specified in terms of performance characteristics and similar function-based criteria.

We were greatly encouraged by the Five Principles for US-China trade proposed by Premier Wen Jiabao during his visit to the United States in December 2003. Premier Wen called for the expansion of US exports to China to help reduce the US trade deficit. Premier Wen also said the US-China trade relationship should be based on the principles of mutual benefit and that each side should consider what effects their policies have on the other. Software is certainly a world-class product that American companies can provide to the benefit of PRC government departments. We would be disappointed to see policies develop that would greatly limit American software access to the PRC government procurement market at such a critical time in the US-China trade relationship. Such an outcome would harm the interests of both sides.

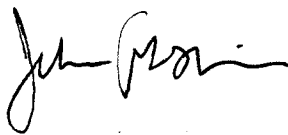
We believe that access to the PRC government procurement market for software would be a “win-win” outcome of significant mutual benefit. The USCBC respectfully suggests that the PRC government suspend further action on these rules pending discussion during the US-China Joint Commission on Commerce and Trade (JCCT) meeting to be held in Beijing in the coming months. The JCCT meeting should provide a fitting venue for PRC and US trade officials to discuss the concerns of each side.

More comprehensively, USCBC encourages the PRC government to move as quickly as possible to sign the GPA and, until doing so, to implement government procurement regulations that are consistent with the GPA.

We would be pleased to have the opportunity to discuss our concerns in more detail at your convenience.

Thank you again for the opportunity to submit our comments on the draft Rules.

Respectfully,

A handwritten signature in black ink, appearing to read "John Frisbie". The signature is fluid and cursive, with a large initial "J" and "F".

John Frisbie
President, US-China Business Council