

Subject:

Inquiry of your agency regarding contract validity in case of violation of the regulations set forth in Article 9 of the Act on Recusal of Public Servants Due to Conflict of Interest (hereinafter referred to as "This Act"). Please take note of detailed explanations provided below.

Description:

1. Reply to Official Letter No. 10340006280 issued by your Agency on April 10, 2014
2. Your agency inquired in said letter whether violation of public policy or morals as defined in Article 72 of the Civil Code or impossibility of performance as defined in Paragraph 1, Article 246 of the Civil Code is applicable to a contract in violation of the regulations set forth in Article 9 of this Act and what the legal basis for contract invalidity is where no other statutory or stipulated conditions for contract invalidity exist :
 - (1) Article 71 of the Civil Code stipulates that "A juridical act which violates an imperative or prohibitive provision of the act is void except voidance is not implied in the provision." In line with the imperative nature of applicability of laws, there are mandatory and discretionary provisions. Mandatory provisions are applicable regardless of the intent of involved parties. This includes imperative and prohibitive provisions that have mandatory applicability and validity. The term "imperative provision" refers to provisions that prescribe a certain type of conduct, while the term "prohibitive provisions" refers to provisions that prohibit a certain type of conduct. Prohibitive provisions can be further divided into banning provisions and effectiveness provisions. In case of violations of the former, juridical acts are still valid. In case of violations of the latter, juridical acts are void. Official letter No. 10100698430 issued by this Ministry on May 30, 2013 may be cited as reference. The legislative intent of Article 9 of this Act is to prevent corruption and conveyance of unjust interests. In case of violations of the prohibitive provisions set forth in Article 9 of this Act, Pursuant to the regulations set forth in Article 15 of this Act, a penalty equivalent to 100% to 300% of the transaction amount shall be imposed. These penalties have a deterrent effect and deprive violators of their improper gains. The legislative intent of this Article can therefore be achieved without voiding of transactions. Indiscriminate voiding of transactions has an excessive impact and violates legal stability principles. As for the validity of transactions in violation of the regulations set forth in Article 9, this Act does not prescribe that all contracts in

violation of said regulations shall be considered invalid. The validity of such transactions shall be determined pursuant to relevant provisions set forth in the Civil Code.

- (2) Juridical acts that violate public policy or morals and are therefore considered void pursuant to Article 72 of the Civil Code are acts that violate the general interests or moral concepts of the nation and society (Verdict No .2603 of the Supreme Court in 1980 may be cited as precedent). Article 71 of the Civil Code prescribes a lawful mechanism for control of contract contents based on freedom of contract principles. This represents a restriction of the freedom of juridical acts. This Act is a concrete written law. Abstract concepts of public order or good morals shall be incorporated as legislative or policy considerations in the law enactment process. It is therefore not appropriate to consider a contract invalid because its contents violate public order or morality based on violations of the regulations set forth in Article 9 of this Act.
- (3) Paragraph 1, Article 246 of the Civil Code stipulates that “If the prestation of a contract is impossible, it is void. However, if the impossibility can be removed and if the parties, at the time when the contract was constituted, intended to have it performed after the removal of the impossibility, the contract is still valid.” In legal theory and practice, this Article is generally considered to refer to initial objective impossibility of the subject matter of the contract. In other words, prior to contract conclusion the performance subject matter is impossible for all parties de facto or de jure (e.g., lost or non-transferable transaction objects). Despite the fact that Article 9 of this Act prohibits transactions such as sales, lease and contracting etc. with the agency with which the public servant serves or the agencies under his supervision, this regulation represents a banning provision rather than an effectiveness provision. The subject matter of the contract is therefore not impossible, non-transferrable, or non-executable. Despite violation of the regulations set forth in Article 9 of the aforementioned Act, such contracts shall not be indiscriminately considered void.(Verdict No. 1469 of the Supreme Court in 1996, and Verdicts No. 543 and 73 of Taiwan High Court in 2007 and 2002, respectively, may be cited as reference). The interpretations of this Ministry in Official Letter No. 10303509420 issued on August 12, 2014 may also serve as reference (see appendix) with supplementary explanations in Official Letters No. 10205037160 and 10305004100 issued by this Ministry on December 4, 2014 and February 19, 2014,

respectively.

3. As for the inquiry of your agency regarding the principles governing the determination of penalties for transactions specified in Article 9 of this Act, this Ministry is unable to provide relevant details since these principles govern the internal operations of penalty jurisdiction cases.