

Subject:

Inquiry by your government regarding the applicability of the Act on Recusal of Public Servants Due to Conflicts of Interest (hereinafter referred to as “This Act”) to the solicitation by your government of independent private planning and application for participation in the XX Rehabilitate-Operate-Transfer Program.

Description:

1. Reply to Official Letter No. 1050127695 issued by you on June 29, 2016
2. Where public servants, their spouses, or family members living under one roof, or relatives by the second degree of kinship serve as CEO, director, supervisor or manager of a for-profit enterprise they shall be considered related persons of the public servant as defined in Article 3, Clause 4 of this Act. The term “Transactions” as used in Article 9 of this Act shall refer to non-gratuitous acts with consideration relationships such as sales, lease, and contracting. Paid appointments and public tender for entrusted management also belong in this category. Official letters No. 0970037113 and 1010501790 issued by this Ministry on November 21, 2008 and September 24, 2012, respectively may serve as reference as stated herein.
3. With reference to the contents of the ROT investment contract program attached to your letter, you plan to solicit independent private planning and application for participation in accordance with Article 46 of the Act for Promotion of Private Participation in Infrastructure Projects (Hereinafter referred to as “Act for Promotion of Private Participation”). The private institution(s) make(s) certain initial investments, while the authority in charge provides land and buildings and charges rent, fixed and variable royalties. Upon operation by private institution(s) for a specified concession period, all facilities are transferred to the city government without charge. This investment contract falls in the category of non-gratuitous acts with consideration relationships. It has nothing to do with this investment contract applying to the Government Procurement Act or Act for Promotion of Private Participation .
4. Article 9 of this Act defines transactions in a legal sense. Transactions shall be judged based on whether or not contractual relationships exist at the time of occurrence. This is documented in Official Letter No. 0980005494 issued on March 27 2009, by this Ministry. As stated in your official letter, the CEO of one of the private institutions applying for the preliminary review process for this ROT investment contract program is a councilor of your county. If the private applicant is a for-profit enterprise, said person falls into the category of related persons as defined in Article 3, Clause 4 of this Act. However, due to the fact that no investment contract has been signed with the agency in charge,

it cannot be said that transactions as specified in Article 9 of this Act, exist. Since said private applicant is not authorized to sign an investment contract with the authority that is supervised by county councilors, thus whether or not the authority in charge organize a public hearing based on the planning concepts of the private applicant to allow participation in the stage prior to contract conclusion, the competent authority for the Act for Promotion of Private Participation shall determine conformity to the normative intent of the Act and economic development effectiveness principles.