

## An Analysis of the Recusal Mechanism in the Latest Revision of the Government Procurement Act and Regulations Governing Procurements for Scientific and Technological Research and Development



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#### 1. Introduction

Article 1 of the Government Procurement Act (hereinafter referred to as the Act) reveals that “This Act is enacted to establish a government procurement system that has fair and open procurement procedures, promotes the efficiency and effectiveness of government procurement operation, and ensures the quality of procurement.” Therefore, a recusal mechanism for reviewing qualification/disqualification of tenders and bidders is highly essential, for example, the head of the agency or its related persons should disclose the conflict of interests. After amended and promulgated on May 22, 2019 (Presidential Decree Hua-tzung-1 Yi No. 10800049691), the Act was revised with the identical legislative principle of the Act on Recusal of Public Servants Due to Conflicts of Interest. In other words, a more flexible and transparent mechanism has been adopted, which is more advanced and ideal for both procurement authority and external supervisors.

#### 2. The New Recusal Mechanism of the Act Enhances the Flexibility and Transparency

The revision struck out the Paragraph 4, Article 15 of the Act, and the regulation related to the recusal mechanism shall be comply with the Act on Recusal of Public Servants Due to Conflicts of Interest, especially the qualification/disqualification provision of the “related persons.” The new government procurement procedure adopted a more flexible and transparent practice, “disclosure in advance and publication afterwards.” The detailed analysis is as follows.

##### **(1) Before the Act amended, the personnel of a procuring entity and its related persons shall withdraw themselves from the procurement.**

Before the Act amended, the personnel of a procuring entity and its related persons shall withdraw themselves from the procurement. According to the previous Paragraph 4 of Article 15 (4), “Suppliers or persons in charge shall not participate in the procurement if they have connections with the agency’s head described in Paragraph 2. However, if the implementation of this paragraph is against fair competition or public interest, the exclusion can be exempted with the authority’s approval.” The Paragraph 2 mentioned specified, “The personnel of a procuring entity shall withdraw themselves from procurement and all related matters thereof if they or their spouses, relatives by blood or by marriage within three degrees, or family members living together with them have interests involved therein.” Simply put, legislators considered that suppliers or persons in charge shall not participate in an agency’s procurement if they have conflict of interests with its head. For instance, the spouses, all the relatives within the third degree by consanguinity (blood) or by affinity (marriage), or family members living together with the head of the agency, cannot involve in the procurement of the agency. Furthermore, if a legal entity or an organization is directed by the relatives of the head of a government agency mentioned, it is disqualified from the procurement.

##### **(2) After the Act amended, the recusal of related persons substituted by self-disclosure and information publication norms**

According to the Amendment, the Act was amended because the content of the article is existed in Article 9 of Act on Recusal of Public Servants Due to Conflicts of Interest; thus, Article 15 of the Act is hereby deleted. Recalling Article 9 of the previous Act on Recusal of Public

Servants Due to Conflicts of Interest, “A public servant and his related persons shall not conduct transactions such as subsidizing, sales, lease, contracting, or other transactions conducted with consideration with the organ with which the public servant serves or the organs under his supervision.” For this reason, the amendment to Article 15 of Government Procurement Act is to regulate the mechanism of withdrawal of relevant parties by Article 14 of the existing Act on Recusal of Public Servants Due to Conflicts of Interest. However, the amendment of this article is greatly affected by the interpretation of judicial court no. 716, so it is necessary to briefly describe its key points as follows.

On the basis of the Judicial Yuan Justice Interpretation No. 716 [Transactions between public officials and their associates and service agencies shall be prohibited), adopting a constitutional interpretation of Article 9 of Act on Recusal of Public Servants Due to Conflicts of Interest, grand justice agreed this article does not contradict the proportion principle of article 23 of Constitution of the Republic of China (Taiwan), and it does not violate Article 15 “The right of existence, the right of work, and the right of property shall be guaranteed to the people” and Article 22 “All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution”, either. However, for public officials, if they are not allowed to participate in trading competition, it will result in the monopoly of other minority traders, which is not conducive to the public interest. Therefore, this interpretation holds that if the agency has conducted open and fair procedures in the transaction process, and there is sufficient anti-fraud regulation, whether there is still a risk of improper benefit transmission or conflict of interest, and it is necessary to prohibit the transaction of public officials' associates, the relevant authorities should make comprehensive review and improvement as soon as possible.

Accordingly, following interpretation no. 716, Act on Recusal of Public Servants Due to Conflicts of Interest was amended and published with 23 articles on 13 June, 2018. The withdrawal of interested parties is provided for in Article 14 and an additional six exceptions are provided, including: (1) The procurement carried out by public notice under the Government Procurement Act or pursuant to Article 105 of the same Act. (2) The property right in interest created for the procurement, sale by tender, lease by tender or tender solicitation carried out by public notice in a fair competitive manner pursuant to laws. (3) Subsidy requested in the legal capacity under laws; the subsidy to the public servant's related person in an open and fair manner pursuant to laws, or the subsidy which might be against the public interest if it is prohibited and is granted subject to the competent authority's approval. (4) The subject matter of the transaction is provided by the organ with which the public servant serves or the organs under his supervision, and traded at the official price. (5) The lease, acquisition, discretionary management, improvement and utilization of national non-public real estate requested by the state-owned enterprise in order to execute the national construction projects or public policies, or for the purpose of public welfare. (6) The subsidy and transaction under the specific amount.

The above amendments make the transactions between public officials and related parties that should be avoided in the past partially flexible now. In accordance with Paragraph 2 of the same article, in the case of the first three paragraphs of the proviso of Paragraph 1, the applicant or bidder shall voluntarily state his/her identity in the application or tender documents. After the subsidy or transaction is established, the agency shall disclose it together with its identity. That is to say, the self-disclosure is required beforehand and the information will go public afterwards to meet public expectations of transparency. This is also conducive to the supervision of all sectors, and conforms to the intention of the grand justice's interpretation.

The reason why there is no need for government procurement to withdrawal is that the announcement process of the procurement is made in accordance with Government Procurement Act (including open tendering, selective tendering and restricted tendering through the announcement). There are strict procedures to follow and there is no conflict between the conflict of interest of public officials and the spirit of legislation. As to Paragraph 2 of other legal orders, the property right in interest created for the procurement, sale by tender, lease by tender or tender solicitation carried out by public notice in a fair competitive manner pursuant to laws. The legislative explanations are exemplified by the procurement (e.g. procurements for scientific and technological research and development) handled by the announcement in accordance with Fundamental Science and Technology Act.

### **3. Conclusion: It is suggested that relevant withdrawal regulations should be amended as soon as possible in procurements for scientific and technological research and development**

The strike-out of the recusal provision of the Act does not mean that government procurement stoke out the recusal mechanism. The recusal mechanism is still stated in Article 14 of Act on Recusal of Public Servants Due to Conflicts of Interest. In addition to the advantages of the same regulations on the prohibition of transactions between related parties, it also enables the regulators with open and fair procedures and sufficient prevention of fraud, such as government procurement, to avoid evading so as not to harm the public interest. At the same time, supplemented by open and transparent disclosure, the amendment is a positive change of legislation.

Meanwhile, this paper believes that Government Procurement Act has adopted the mechanism of flexibility and transparency requirements for the procurement object avoidance regulations, and procurements for scientific and technological research and development should revise relevant withdrawal regulations as soon as possible. In accordance with Paragraph 4 of Article 6 of Fundamental Science and Technology Act and the authorization, Regulations Governing Procurements for Scientific and Technological Research and Development (hereinafter referred to as the regulatory regulations) is established. According to Article 8 (2) and (3) of the regulation, a responsible person, partner, or representative of the public school, public research institute (organization), or juristic person or entity performing the scientific research procurement may not serve as a responsible person, partner, or representative of the supplier. The supplier and the juristic person or entity performing the scientific research procurement may not at the same time be affiliated with each other, or affiliated to the same other enterprise. From the perspective of the article structure, the withdrawal regulation for scientific research procurement is within the norm of Article 15 of Government Procurement Act before the amendment, but it includes regulations for affiliated enterprises, which is not included in Article 15. The amendment to Article 14 of Act on Recusal of Public Servants Due to Conflicts of Interest also states that the proviso of Paragraph 1 of scientific research procurement “other procurements that are regulated by fair competition and by means of an announcement procedure” can also prove that the mechanism for scientific research procurement should adopt this provision. Therefore, it is recommended

that the original procurements for scientific and technological research that is independent from Government Procurement Act should be amended by the competent authority as soon as possible in order to comply with the relevant provisions of Article 8 of Regulations Governing Procurements for Scientific and Technological Research and Development and to comply with the original intention of the Regulations Governing Procurements for Scientific and Technological Research and Development, and to avoid stricter regulations on scientific procurement than government procurement. Meanwhile, it is in accordance with the spirit of the grand justice's interpretation No. 716.



**Chen, Shih-Chieh**  
Section Manager

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