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## **J.Y. Interpretation No. 719 (April 18, 2014)\***

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### **Mandatory Requirement to Employ a Certain Percentage of Indigenous Persons Case**

#### **Issue**

Is the law requiring government procurement winning bidders to employ a certain percentage of indigenous persons unconstitutional?

#### **Holding**

Article 12, Paragraphs 1 and 3 of the Indigenous Peoples' Employment Rights Protection Act and Article 98 of the Government Procurement Act, requiring that those winning bids for government procurement who have hired more than 100 employees locally shall employ indigenous persons in a number equivalent to a minimum of one percent (1%) of their total employees during the term of contract performance, and that in case the winning bidder fails to hire the number of indigenous persons as stipulated under the law, the bidder shall pay a fee as penalty to the employment fund of the Indigenous Peoples Comprehensive Development Fund, are not inconsistent with the equality principle under Article 7 and the proportionality principle under Article 23 of the Constitution and are consistent with the constitutional protections of the right to property and the right of freedom to operate business that is the essence of the right to work under Article 15 of the Constitution.

#### **Reasoning**

[1] People's freedom to operate a business falls under the constitutional

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\* Translation and Note by Wei-Feng HUANG

guarantees of the people's right to work and property rights under Article 15 of the Constitution (*see* J.Y. Interpretations Nos. 514, 606 and 716). Any restriction or limitation imposed by the state on people's freedom to operate a business and property rights shall be in compliance with the equality principle under Article 7 and the proportionality principle under Article 23 of the Constitution. Whether the stipulations of a law are in compliance with the constitutional principle of equality should hinge on whether the purpose of the differential treatment is justifiable, and whether there is a certain degree of relation between the distinctions created and the stated objective of the law (*see* J.Y. Interpretations Nos. 682, 694 and 701). When restraining people's rights for the ends of legitimate interests, it is not inconsistent with the proportionality principle under Article 23 of the Constitution if the means adopted are necessary and the restriction is not excessive.

[2] Article 12, Paragraph 1 of the Indigenous Peoples' Employment Rights Protection Act stipulates: "Those tenderers winning bids according to the Government Procurement Act, and hiring more than 100 employees locally, shall employ indigenous persons in a number equivalent to a minimum of one percent (1%) of the total number of employees during the term of contract performance." Paragraph 3 of same Article stipulates: "in the event that the winning bidder fails to hire the number of indigenous persons as required under the law, the bidder shall pay a fee in substitute to the employment fund of Indigenous Peoples' Comprehensive Development Fund." Furthermore, Article 98 of the Government Procurement Act regulates that: "those tenderers winning bids, and hiring more than 100 employees locally, shall employ the physically or mentally disabled or indigenous persons in a number equivalent to a minimum of two percent (2%) of the total number of employees during the term of contract performance; and in the event that the winning bidder fails to hire the number of indigenous persons

as required under the law..., the bidder shall pay a fee in substitute...” Said two percent (2%) consists of at least one percent (1%) of disabled and indigenous persons, respectively (*see* Article 38, Paragraphs 1 and 2 of People with Disabilities Rights Protection Act and Article 107, Paragraph 2 of Enforcement Rules of Government Procurement Act; and with the portion concerning indigenous people, hereinafter, collectively, being referred to as the “regulations in dispute”). The regulations in dispute require that a bidder winning the bid (the “winning bidder”) and hiring more than 100 employees locally shall employ indigenous persons in a number equivalent to a minimum of one percent (1%) of its total number of employees during the term of contract performance; consequently, the regulations in dispute restrict or limit the winning bidder’s freedom to operate their business, such as the freedom to determine whether it should increase the number of employees or who should be hired, and have thus infringed upon the winning bidder’s property rights and right to freely operate a business that is the essence of the right to work. Additionally, if the winning bidder fails to hire the number of indigenous persons as required, it is then obligated to pay a fee in substitute, which constitutes an infringement on the winning bidder’s property rights.

[3] Article 5 of the Constitution provides for “The various ethnic groups in the Republic of China shall be treated equally.” Article 10, Paragraph 12 of the Additional Articles of the Constitution stipulates: “The state shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of indigenous peoples. The state shall also guarantee and provide assistance and encouragement for indigenous peoples’ education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare.....” The regulations in dispute are set forth by legislators in order to fulfill the objectives contemplated by the Constitution and the Additional Articles

of the Constitution, to promote the employment of indigenous persons and to improve their economic and social conditions by means of a preferential measure to be taken by the winning bidder to hire a certain percentage of indigenous persons, which is in accordance with the spirit of international protection of indigenous people (*see* Article 1 of Indigenous Peoples' Employment Rights Protection Act and Article 21, Paragraph 2, the Forward of United Nations Declaration on the Rights of Indigenous Peoples, 2007, which stipulates: "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions." Article 20, Paragraph 1 of Indigenous and Tribal Peoples Convention, 1989 (No. 169) stipulates: "Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.") Consequently, the objective of the regulations in dispute is to maintain a paramount public interest and therefore is justifiable.

[4] Government procurement is a component of the state's public functions, which not only involves the use of the state's budget but also carries a close relationship with the maintenance of public interests. Although the regulations in dispute restrict or limit the winning bidder's property right and freedom to operate their business, they only require that a winning bidder who hires more than 100 employees locally to employ indigenous persons in a number equivalent to a minimum of one percent (1%) of its total number of employees during the term of contract performance. Said one percent requirement is not burdensome and excessive. If the winning bidder fails to hire the requested number of indigenous persons, it can pay a fee in substitute on a monthly basis in a number equivalent

to the minimum wage as set forth by the government, which does not impose an excessive restriction on the winning bidder's freedom to operate their business. Furthermore, the regulations in dispute do not uniformly require that all the winning bidders pay a fee in substitute, but impose such obligation upon the winning bidders only when the hiring of indigenous persons does not reach the required percentage. Prior to bidders' participating in bids, they should assess whether the amount of the substitution payment is too high to bear. Given that the substitution payment is to replenish the employment fund of the Indigenous Peoples Comprehensive Development Fund to further promote employment of indigenous persons and to improve their economic and social conditions, the regulations in dispute requiring the substitution payment, and therefore the restriction on the winning bidder's property right do not fail to the balance between the restrictions and the safeguarding of public interests. Based on the above, the regulations in dispute are not in conflict with the proportionality principle under Article 23 and are not inconsistent with the protection of the right to property, and the right to freely operate a business, which is the essence of the right to work, under Article 15 of the Constitution.

[5] Based upon the meaning and purpose of the above-mentioned provisions under the Constitution and Additional Articles of the Constitution, the state is obligated to protect, assist and promote the development of indigenous peoples. Under the government procurement system, the regulations in dispute, using whether the number of the locally hired employees exceeds one hundred as the standard of classification, require a winning bidder hiring more than one hundred employees locally to employ a certain percentage of indigenous persons during the term of contract performance and make the substitution payment for not being able to meet the percentage, thus creating a differential treatment among the different sizes of the winning bidders within the government procurement market.

The reason why the regulations in dispute create such a differential treatment is because the bidders who hire more than one hundred employees have a larger business scale, greater hiring flexibility and better capability to further hire indigenous persons. Therefore, they are more capable of undertaking a part of the state's obligations by recruiting indigenous persons. Furthermore, given the regulations in dispute, using whether the number of the locally hired employees by the bidder exceeds one hundred as the dividing line for differential treatment simply requires that the award-winning bidder employ indigenous people in a number equivalent to a minimum of one percent (1%) of the total number of employees, this regulation intends to lower the impact of the differential treatment while realizing the above-stated objectives. There should be a reasonable connection between the differential treatment and the achievement of the objectives thereof. Since the level of the indigenous people's education and professional skill is by and large relatively less developed as opposed to the competitiveness of the job market, their living conditions are thus affected. The classification adopted by the regulations in dispute has therefore established a reasonable connection with the objectives anticipated to be achieved. Consequently, the regulations in dispute are not in conflict with the equality principle under Article 7 of the Constitution.

[6] While there are several alternative measures the state may take to achieve the objectives to protect, assist and promote the development of indigenous peoples, the measure adopted by the regulations in dispute to require that the winning bidder shall employ a certain percentage of indigenous persons during the term of contract performance also constitutes one among such measures. Nevertheless, given that most of the available jobs are short-term or require non-technical skills, these may be difficult to enhance long-term, stable employment opportunity and professional skills. Consequently, the state shall actively realize

the objective contemplated by the above-mentioned Additional Articles of the Constitution to protect indigenous peoples' right to work via substantive policies and measures and regularly review and revise such policies and measures based on the time and environment of the state and the society, as well as the need for the protection of the indigenous peoples' right to work. Moreover, when the winning bidder fails to hire a certain percentage of indigenous persons, the bidder is obligated to pay a fee in substitute. If the amount of the fee paid in substitute exceeds that of the government procurement, there should be an appropriate mitigating mechanism by which the amount can be adjusted. Consequently, pursuant to this interpretation, the relevant government agencies shall promptly review and improve the relevant provisions under the Government Procurement Act and Indigenous Peoples' Employment Rights Protection Act.

[7] The petitioners (#1 and #3 as listed in the attachment) also alleged that Articles 107 and 108 of the Enforcement Rules of Government Procurement Act as amended and promulgated on November 27, 2002, violate the equality principle, the Gesetzesvorbehalt principle, the proportionality principle and the principle of clarity of authorization of law, but the petitions did not present concrete reasons to pinpoint which parts of the above-mentioned regulations were unconstitutional. Furthermore, petitioners (#1 and #3) alleged that in regard to Article 24, Paragraphs 2 and 3 of Indigenous Peoples' Employment Rights Protection Act, petitioner 2 asserted in regard to Paragraph 1 of same Article, and petitioner 4 claimed in regard to Paragraph 2 of same Article, that their right to equality and right to property protected by the Constitution were violated; however, upon examination, the regulations alleged to be unconstitutional were not actually applied in rendering in the final judgement of each of petitioners' cases, and as such they were not eligible for petitioners to file the petitions for interpretation. Pursuant to Article 5, Paragraph 3 of the Constitutional Court

Procedure Act, these parts of the petitions shall be dismissed for failing to meet the requirements as set forth in Article 5, Paragraph 1, Subparagraph 2 of the same Act.

### **Background Note** by the Translator

The petitioners Sinon Corporation, Next Media Ltd., Apply Daily Ltd., and Taiwan High Speed Rail Corporation each participated in government procurement bidding. Having won their respective bids, they all failed, however, to recruit indigenous persons in a number equivalent to a minimum of one percent (1%) of the total number of employees during the term of contract performance in accordance with Article 12, Paragraph 1 of Indigenous Peoples' Employment Rights Protection Act and Article 98 of the Government Procurement Act. Consequently, each and every petitioner was ordered by the Council of Indigenous Peoples under the Executive Yuan ("the Council of Indigenous Peoples") to pay the fees in substitution of employment, ranging from TWD 500,000 to TWD 4,000,000, in accordance with Article 12, Paragraph 3 of the Indigenous Peoples' Employment Rights Protection Act and Article 98 of the Government Procurement Act. Considering that the amount of the fees they paid in substitution of employment constituted a quite significant portion of their income generated from their contract performance, all of the four petitioners appealed their cases, respectively, but eventually they all lost. After exhausting ordinary judicial remedies, all four petitioners filed their petitions with the Constitutional Court for constitutional interpretation (four cases in total), asserting that the above-mentioned regulations were unconstitutional and thus infringed upon their right to equality, freedom to operate their businesses and right to property. The Constitutional Court granted review of all of four petitioners' cases.

J.Y. Interpretation No. 719 might be the first case in Taiwan's constitutional



interpretations to uphold the constitutionality of “affirmative action” (also known as “preferential treatment”). Nevertheless, the first case related to Affirmative Action was J.Y. Interpretation No. 649, in which the Constitutional Court held it was unconstitutional to provide preferential treatment to vision-impaired individuals, requiring that “those who were not vision-impaired were not to engage in the practice of massage business” under the Physically and Mentally Disabled Citizens Protection Act as amended and promulgated in November, 2001; because by giving such a preferential treatment to vision-impaired individuals, it also restricted others’ freedom to choose occupations, and the category of above restriction was based on objective conditions (being vision-impaired) that people could do nothing to change, which fell into the category of strict scrutiny under the standard of constitutional review. Thus, upon applying strict scrutiny, there needed to be a compelling government end to sustain, and the means could only be necessary and directly related to the relevant end and needed to be the least restrictive means. In the end, the Act in dispute could not pass the examination of strict scrutiny, was inconsistent with the proportionality principle under Article 23 of the Constitution and was thus declared unconstitutional.

Furthermore, the equality principle prescribed by Article 7 of the Constitution does not refer to equality that is absolute, mechanical, or formal. The equality principle rather protects “substantive equal status” or “substantive equality” under the law, which can be defined as “Similar matters shall be treated similarly, but differential treatment shall be justified by appropriate reasons.” Therefore, whether a particular legal rule is consistent with the equality principle depends on whether the purpose of the differential treatment is constitutional and whether there is a certain level of nexus between the classification and the purpose that the classification seeks to achieve (*see* J.Y. Interpretations Nos. 682, 694, and 701).

Insofar as the standard of Constitutional review is concerned, J.Y. Interpretation No. 719 falls, however, into the category of rational-basis review, because the regulations in dispute merely restrict the bidding winners by requiring them to hire a certain percentage of indigenous persons, or alternatively, to pay a fee in substitution of employment. The restriction does not infringe upon the right to operate a business, and the regulations in dispute have a legitimate end (improving the socioeconomic conditions of indigenous people), and the means is reasonably related to the end above; meanwhile, there is no less restrictive alternative among any feasible means that reaches the same effect. Consequently, the regulations in dispute are not inconsistent with the equality principle and proportionality principle protected by Articles 7 and 23 of the Constitution.