

Guidelines on the Right to Operate the Public Facility,  
etc. and the Public Facility, etc., Operating Project

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## Introduction

These guidelines explain the right to operate a public facility, etc. (hereinafter referred to as the "operating right") and the public facility, etc., operating project (hereinafter referred to as the "operating project"). When the national government implements, it is desirable to implement PFI projects in accordance with the guidelines, while complying with the Act on Promotion of Private Finance Initiative (Act No. 117 of 1999; hereinafter referred to as the "PFI Act") and subordinate laws and regulations, etc. (refer below; hereinafter referred to as the "PFI laws and regulations"). The guidelines can also serve as a reference in PFI projects implemented by persons other than the national government.

The guidelines do not prevent each ministry and agency from devising methods according to the situation in accordance with PFI laws and regulations for the smooth implementation of operating project, and implementing of the operating project by methods other than those indicated in the guidelines.

The guidelines (the first edition) summarize currently known issues, etc. in regard to the operating right. The operating project has yet to be implemented in full-scale, and based on the implementation status thereof and the progress, etc. of investigations and studies pertaining thereto in the future, a part or all of the guidelines will be changed as necessary (the second edition), or new guidelines will be provided.

Unless otherwise provided herein, the terms used herein shall have the meanings as provided in the PFI laws and regulations.

\*The following are mentioned as subordinate laws and regulations, etc. under the law.

[Cabinet Orders]

Enforcement Order of the Act on Promotion of Private Finance Initiative (Cabinet Order No. 279 of 1999)

Order of the Committee for the Promotion of the Private Finance Initiative (Cabinet Order No. 280 of 1999)

Order of the Council for the Promotion of Private Finance Initiative (Cabinet Order No. 177 of 2011)

Order on Registration of Right to Operate Public Facility, etc. (Cabinet Order No. 356 of 2011)

[Cabinet Office Orders]

Enforcement Regulations of the Act on Promotion of Private Finance Initiative (Cabinet Office Order No. 65 of 2011)

Enforcement Regulations on the Order on Registration of Right to Operate Public Facility, etc. (Cabinet Office Order No. 66 of 2011)

[Other]

Basic Policy on the Implementation of Projects on the Private Finance Initiative  
(Cabinet Decision of October 23, 2018)

## 1 Operating Right System

### 1. Main Points

- (1) The operating right establishes for private businesses the right to operate the public facility, etc. that performs collection of the usage fees.
- (2) By enabling private businesses to operate projects with a high degree of freedom, including the determination of the usage fees, etc., the ingenuity of private businesses will be leveraged, the value of existing infrastructure will be increased, and usage will be promoted, and thereby it is expected to be beneficial to each of the three parties of the administrator, etc. of the public facility, etc. (hereinafter referred to as the "administrator, etc."), private businesses, and users.  
For example, the administrator, etc. may transfer the risks of operation, etc. while holding the ownership of the facility, and may expect the realization of early recovery of facility revenue by the collection of the operating right consideration. In addition, the wisdom and know-how of the private businesses are expected to make project management and project implementation efficient and to realize improvement of services based on customer needs.
- (3) In addition, it is expected that by recognizing the operating right as a property right and making it transferable, the establishment of mortgages and depreciation, etc. will facilitate the procurement of funds, etc.

### 2. Points to be Noted

An outline of the points to note on the operating right is as follows.

#### <Implementation Policy>

- (1) In formulating the implementation policy, be as specific as possible about the project details of the operating project, and the selection method, etc. of the private businesses.

#### <Selection of Private Businesses>

- (2) It may be possible to utilize competitive discretionary contracts such as through competitive bidding and proposals on open invitation for participation. In addition, if it is found to be not necessary to use a competitive discretionary contract, it may be possible to select a private business by a comprehensive evaluation of an open competitive bidding.
- (3) If it is necessary to request a wide range of proposals from various aspects, such as project schemes, schemes for procurement of funds, and operation methods, etc. to prepare (adjust) the required level documents, etc., it may be possible to utilize competitive dialogue procedures at the determination of the administrator, etc.

#### <Risk Allocation>

- (4) Since the agreement on the implementation of the right to operate the public

facility, etc. (hereinafter referred to as the "implementation agreement") specifies the allocation of responsibilities and risks pertaining to the operating project and other rights and obligations of the parties to the implementation agreement, and the details of the risk allocation also affects the amount of monetary burden required by the contracting parties pertaining to the operating right, avoid ambiguity as much as possible and make it specific and clear.

<Usage Fees>

- (5) When providing in the implementation policy the matters regarding the usage fees of the public facility, etc. pertaining to the operating right, prescribe the appropriate maximum limit and range, etc. of the usage fees paying attention to the importance to respect the autonomy and ingenuity of the operating right holder of the public facility, etc. (hereinafter referred to as the "operating right holder").

<Lease of Land, etc.>

- (6) When the operating right holder operates the public facility, etc., unless there are special circumstances, it is considered that a lease agreement or license under the National Government Asset Act (Act No. 73 of 1948), etc., is not necessary, in addition to the implementation agreement.
- (7) On the other hand, since it is considered that the operating right holder is not allowed to lease the public facility, etc. on the basis of its authority as the holder of the operating right, in order for the operating right holder to lease a part of a building owned by the administrator, etc. to a specific third party such as a tenant as a part of the operating project, it is considered that it is necessary for the operating right holder to acquire the right of lease on the building to sublease the part of the building to the third party with that right of lease as the basis of its authority to lease.

<Operating Right Consideration>

- (8) The operating right consideration is the amount determined between the administrator, etc. and the operating right holder in the implementation agreement in advance, and the payment method and timing of the operating right consideration shall be determined by agreement between the administrator, etc. and the operating right holder.
- (9) As the calculation method of the operating right consideration, reasonable methods may include a method of deducting expenditure required for project implementation from the project revenue that is expected to be obtained in the future by the operating right holder, and recalculating it to the present value.

<Evaluation of Value for Money (VFM)>

- (10) In the operating project, it is important to quantitatively grasp and analyze risks based on the project scale, project details, and project period. On the

other hand, since there may be a certain amount of risk that cannot be evaluated quantitatively, even if there is no VFM in the quantitative evaluation, it may be possible to judge the suitability of implementation as a PFI project comprehensively by qualitative evaluation.

<Establishing the Operating Right>

- (11) It is understood that it is permitted under the PFI Act to apply the existing operating right to the extension and reconstruction of a facility.
- (12) When extension and reconstruction are performed, if the existing operating right extends to the extended and reconstructed portion, it is considered that the procedure for establishing a new operating right is unnecessary.
- (13) The establishment of the operating right and the designation of the designated administrator may be performed for the same person with the same content.

<Resignation and Dispatch System>

- (14) The purpose of the resignation and dispatch system (meaning the system in which a dispatched official is to be engaged in the project of an operating right holder as provided in Article 22, paragraph (1), item (iv) of the PFI Act; hereinafter the same applies) is to support the smooth launch of the operating project by the succession of the expert knowledge and skills of officials of the national government or local governments to the operating right holder in the early stages of the project, and it should be properly operated in a manner consistent with this purpose.

<Monitoring>

- (15) The implementation agreement provides that when a situation arises that may have a significant adverse effect on the implementation of the operating project, it is allowed to request an investigation conducted by a third-party expert and submission of an investigation report.

<Replacement Investment and New Investment>

- (16) In the case of so-called new construction or complete removal and redevelopment of the facilities, etc., it is considered possible to establish the operating right after the implementation as a PFI project.

<Share Transfer and Securitization of Receivables pertaining to the Operating Right Holder>

- (17) Among the operating projects, it is considered that there are many projects for which it is highly necessary to enable procurement of private finance by a variety of entities, and on the assumption that the performance ability is ensured, restrictions on the transfer of shares must be kept to the minimum necessary for the appropriate implementation of the project.

<Transfer of Operating Right>

- (18) If certain requirements are to be imposed on the transfer of the operating right, it is necessary to provide the conditions for the transfer of the operating right in the implementation policy in advance.

<Revocation, etc. of Operating Right>

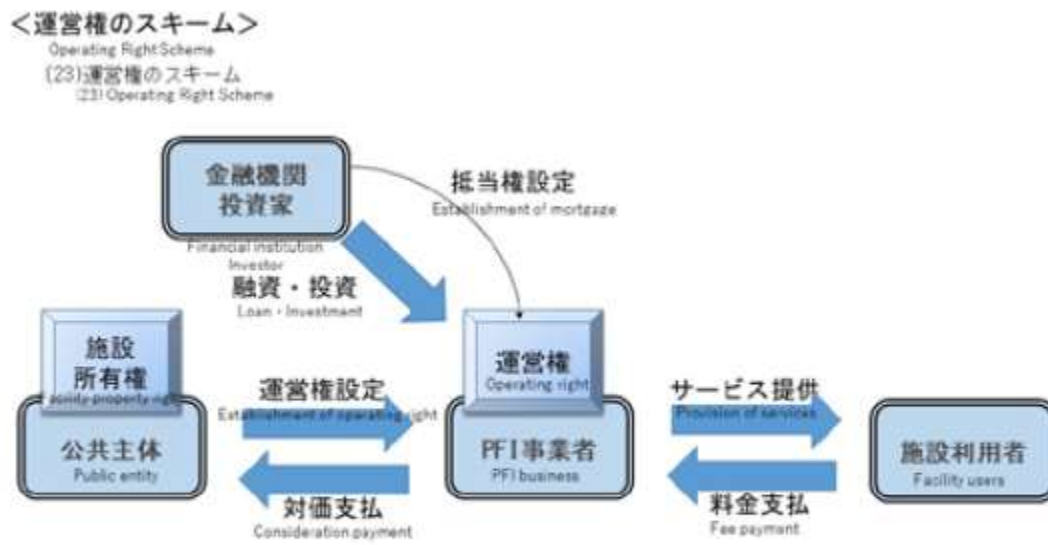
- (19) When the administrator, etc. intends to rescind the operating right based on public interest needs, the administrator, etc. will carefully make a decision on the rescission, etc. after it has objectively evaluated and compared the public interest of the services provided by the operating right with the newly emerged public interest needs.
- (20) It is considered that the compensation for loss incurred by the rescission of the operating right will be provided in accordance with the standards for compensation for business in the Compensation Standards for Public Use Land.
- (21) It is considered necessary to pay to the operating right holder, at the time of rescission of the operating right, the operating right consideration that has already been paid by the operating right holder for the remaining project period.

<Termination of Operating Project>

- (22) In regards to the optional extension and reconstruction by the operating right holder, it is considered that the newly selected operating right holder or the administrator, etc. will pay all or part of the market value, etc. equivalent to the value increase to the original operating right holder who performed such extension and reconstruction.



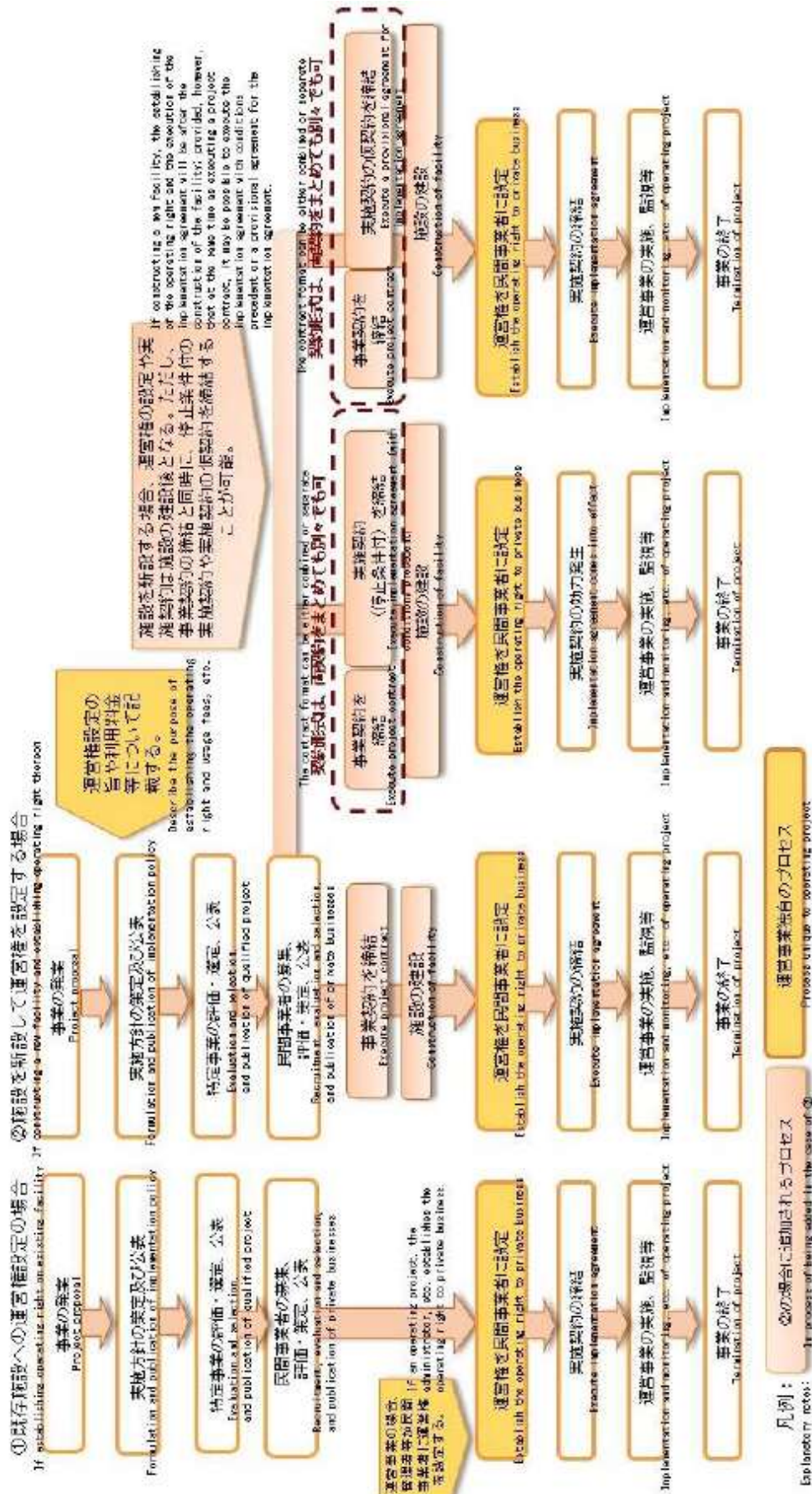
<Operating Right Scheme>  
 (23) Operating Right Scheme



図：運営権のスキーム  
 Figure: Operating Right Scheme

Figure: Operating Right Scheme

<Process of Operating Project>  
 (24) Process of Operating Project



図：運営事業のプロセス  
 Figure: Process of Operating Project

## 2 Implementation Policy

### (1) Implementation Policy

#### 1. Main Points

What are the specific contents to be provided in the implementation policy? Also, what are the contents of the provisions assumed in the Prefectural or Municipal Ordinance on the implementation policy?

#### 2. Points to be Noted

(1) If it is an operating project, the matters to be additionally described to the implementation policy are set forth below:

- (i) that the operating right will be established for the appointed business;
- (ii) the details of the administration, etc. of the public facilities, etc. pertaining to the operating right (including the range established); the details that enable the private businesses to decide whether or not to participate in the operating project;
- (iii) the duration of the operating right; for the duration, if it is assumed that a proposal will be made or it is assumed that there will be an extension option, describe to that effect in consideration of the possibility;
- (iv) if the operating right holder is required to pay the expenses provided in Article 20 of the PFI Act or other monetary burden under the implementation agreement, describe to that effect; in addition, if the burden amount is determined in advance, the fact that the burden is required and the amount thereof; it is not necessarily required to specify the amount of the burden in the implementation policy because it is assumed that it will be determined by the proposal by the private business or discussion between the administrator, etc. and the appointed business; further, for example, it is also considered that the implementation policy describes the approach to the evaluation, etc. of the financial burden on the private businesses;
- (v) the matters to be determined in the implementation agreement and measures to be taken if there is any doubt about the interpretation of the implementation agreement; further, since the so-called risk allocation is expected to be based on the proposal of the private businesses, these possibilities are to be considered;
- (vi) the matters related to the usage fees; prescribe the appropriate maximum limit and range, etc. of the usage fees paying attention that it is important that the autonomy and ingenuity of the operating right holder be respected, they do not unfairly discriminate against a specific person, they are not significantly inappropriate in light of socio-economic circumstances, and there is no risk that they hinder the interests of users of the public facility, etc.; further, if there is a provision in regards to the fee in an individual law, perform the

prescribed procedure in accordance with that provision and also submit a notification pursuant to the PFI Act (provided, however, that unless it is otherwise provided in the individual law);

- (vii) if transferring the operating right, provide the conditions for the transfer as it is necessary to confirm that it is appropriate in light of the implementation policy; for example, it is also considered to make it subject to the cancellation of designation of the previous designated administrator and resolution of designation of a new designated administrator;
  - (viii) if a policy on the transfer of shares has already been formulated, that policy;
  - (ix) prior to conducting an open invitation for participation, the administrator, etc. is required to understand through market sounding, etc., whether or not a competition-restricted company (a company that would find it difficult to apply if the company providing the service is not included in the consortium, since the number of companies that can provide similar services is extremely small, and at the same time they are essential for the implementation of the project) is included, in relation to the project details that are assumed to be performed by the operating right holder; as a result of the investigation, if there is a competition-restricted company, from the viewpoint of fairness, in addition to studying the conditions for participation in an open invitation for participation, such as prohibiting the participation as a constituent member of the consortium, due regard shall be paid to ensure that all applicants receive cooperation such as receiving information from that company in the process of the open invitation for participation;
  - (x) the selection method of the private business; further, when hearing opinions from a review committee, etc., composed of experts, etc., after the implementation policy is formulated, publicize such in the application guidelines or bidding instructions, etc. as promptly as possible; and
  - (xi) other items necessary for the implementation of the operating project.
- (2) In formulating the implementation policy, describe the project details of the operating project and the selection method, etc. of the private businesses as specifically as possible to make it easier for the private businesses to consider participating in the operating project.
- (3) If the administrator, etc. is the head of the local government, the assumed provisions for the Prefectural or Municipal Ordinance on the implementation policy include the following matters. The provisions have the same intent as the ordinance on the designated administrator (Article 244-2, paragraph (4) of the Local Autonomy Act (Act No. 67 of 1947)).

- (i) procedure of selection; the application method and selection standards;
  - (ii) standards of operation, etc.; basic matters of business operations such as closed days and opening hours;
  - (iii) scope of business; the services to be performed by the business (e.g., whether all the services that have been performed by the administrator, etc. should be performed by the operating right holder, or only a part of it, etc.); and
  - (iv) matters related to the usage fees; the basic framework of the usage fees (such as the maximum limit).
- (4) When formulating the implementation policy, if there are any uncertainties concerning the content of support measures related to the qualified project to be implemented, it may be possible to use a one-stop window system pursuant to Article 15-2 of the PFI Act.

## **2 Implementation Policy**

### **(2) Matters to Consider when Formulating the Implementation Policy**

#### **1. Main Points**

What points should be noted on the operating right so that there is no inconsistency with the implementation policy?

#### **2. Points to be Noted**

- (1) After the publication of the implementation policy, through the business selection process, the following points are to be noted in formulating the implementation policy to ensure that there is no inconsistency between the contents of the implementation agreement to be executed and the implementation policy:
  - (i) in regards to the location, scale, and allocation of the public facility, etc., consider the possibility of future extension and reconstruction, etc.;
  - (ii) if requesting a proposal for the project period, there is a possibility that the period may be changed, etc.;
  - (iii) if extension and reconstruction can be foreseen when formulating the implementation policy, it is desirable to provide the timing and scale, etc. of the facilities, etc. for extension and reconstruction in advance;
  - (iv) provide whether the resignation and dispatch system can be used, the details of the business expected to be conducted by a dispatched official, the dispatch period, the number of persons, and the types of occupation, etc.;
  - (v) if participation from overseas companies is expected in the business selection process, an English version of the implementation policy, the application guidelines, the bidding instructions, the draft implementation agreement and financial statements (including those for a certain period in the past) or (according to the nature of the project, etc.) documents similar to financial statements will be prepared on the administrator's side, and provided to private businesses; and
  - (vi) contribution up to a fixed amount made to an operating right holder by a local government or specific companies is not to be made unless it is clearly needed and if it is clearly not possible to meet the need by any means other than contribution; in addition, even if the contribution is allowed, do not set conditions that require excessive shareholder authority (such as the ratio of officers) for the amount of the contribution or conditions that make the required amount of funding for applicants uncertain.

### **3 Selection of Private Businesses**

#### **(1) Selection Method**

##### **1. Main Points**

What selection process is desirable for the private businesses and the administrator, etc.?

##### **2. Points to be Noted**

- (1) To select the optimal selection method and selection process that can make use of the ingenuity of the private sector while ensuring fairness, transparency, and competitiveness, and comprehensively considering the scale, content, and characteristics, etc. of the project. In this case, it is considered a useful method to carry out market sounding and take into account the results thereof. If a large number of applicants are expected, they need to be narrowed down to carry out efficient and effective competitive dialogues, etc. In this case, private businesses may be selected in two stages. More specifically, participation qualification examination and proposal examination are conducted in the first stage, and then more detailed proposal examination, etc. is conducted in the second stage. Further, according to the nature of the project, the administrator, etc. shall disclose the information indicated in 7, (-2), 2., (1) at the market research stage as much as possible to enable private businesses to assume the operating right consideration, etc. on a large scale. For points to note on selecting a private business in two stages, refer to 3-2.
- (2) In the case where it is necessary to request a wide range of proposals for open invitation for participation from various perspectives, such as project schemes, financing schemes, and operation methods since it is difficult for the administrator, etc. alone to set a method and a required level, etc. that can meet project purpose and needs, and where a discretionary contract provided in Article 29-3, paragraph (4) of the Public Accounting Act (Act No. 35 of 1947) may be adopted, it may be possible to adopt the so-called competitive discretionary contract such as competitive bidding and proposals on open invitation for participation.
- (3) If it is not considered necessary to adopt a competitive discretionary contract, a business will be selected by a comprehensive evaluation of an open competitive bidding. In this case, the technical proposal system based on the provisions of Article 10 of the PFI Act may be utilized.
- (4) Beyond what is provided above, the selection process shall be implemented based on 4-1, (11), (i) and (ii), etc. of the "Guidelines on PFI Projects Implementation Process".

### 3 Selection of the Private Businesses

#### (2) Two-stage Examination

##### 1. Main Points

In a project involving two-stage selection of preferential negotiation right holders, what are the points to be noted regarding how the examination in the first stage should be conducted and how information should be disclosed after the examination result of the first stage comes out?

##### 2. Points to Be Noted

- (1) If narrowing down the number of applicants to only a few may lead to implementation of efficient and effective competitive dialogues, etc., it may be beneficial that the proposal examination on the basic project policies, etc. is conducted in the first stage in addition to the participation qualification examination.
- (2) If a preferential negotiation right holder is selected in two stages, the examining entities, and examination items, criteria, procedure, method, etc. at each stage should be publicized in advance. How addition or removal of members to or from an applicant consortium between the first and second stages is handled should also be clarified.
- (3) If the proposal examination is conducted in the first stage in addition to the participation qualification examination, a professional judgment may be required in various fields, but such judgment can only be made based on a qualitative evaluation, so objectivity must be ensured. To achieve that, a committee comprised of experts, etc. may be established from the first stage for the proposal examination. In establishing such a committee comprised of experts, the aptitude of experts, interests between the experts and the applicants, and the division of authority and responsibility, etc. between the administrator, etc. and the experts should be thoroughly examined to ensure fairness, transparency, and competitiveness in the private business selection system. It may be also advisable to include local stakeholders as members or observers of the committee comprised of experts, etc., depending on the characteristics of the project and the actual conditions of the region.
- (4) Examination criteria at each stage must be clarified in the application guidelines, etc. The items and format of the proposal in the first stage should be carefully considered so as not to overburden the applicants. In particular, the appropriateness of including the amount of operating right consideration in proposal items, as well as the amount itself needs to be given a careful consideration. To ensure the continuity and consistency of the proposal contents at both stages, it may be necessary to consider unifying the items and format of the proposal at both stages, etc..
- (5) Regarding the information disclosure from the time when the administrator, etc. decides passers of the first stage examination to the time when the same passers make a proposal in the second stage, the information disclosed up to the first stage may not be sufficient. If it is difficult to expect a proposal with the



appropriate content, it should be considered to additionally disclose the information necessary for considering the proposal in the second stage, such as detailed drawings of the target facility and documents showing the repair history of the target facility, to ensure that the passers can make a fulfilling proposal. Such information to be disclosed should be selected depending on the characteristics of the project. In the disclosure, the administrator should impose an obligation of confidentiality of relevant contents, while ensuring transparency, objectivity, and fairness. It is desirable to disclose the disclosed materials in a format that reduces the burden on the applicant as much as possible, and it is desirable to make efforts to make the disclosure time and the amount of disclosed information appropriate for each business.

- (6) If the applicants so wish, the administrator, etc., may consider sharing the evaluation of the content of the proposals in the first stage after deciding on the passers of the first stage examination or the preferential negotiation right holders while ensuring fairness, transparency, and competitiveness of the selection procedure.

### 3 Selection of the Private Businesses

#### (3) Usage of the Technical Proposal System

##### 1. Main Points

How can we consider using the technical proposal system introduced pursuant to the Act on Promoting Quality Assurance in Public Works (Act No. 18 of 2005)?

##### 2. Points to be Noted

- (1) In the case of a qualified project where it is expected that there are several major methods to meet the required level, and that a wide range of proposals, including advanced technology and superior ingenuity will be made, and it is difficult for the administrator, etc. alone to confirm the validity of the proposal's contents, technical evaluation, and whether or not the required level has been reached using the proposal, if the private business will be selected by the comprehensive evaluation bidding method, it may be possible to utilize the technical proposal system introduced pursuant to the Act on Promoting Quality Assurance in Public Works.
- (2) In this case, by requesting the applicants for proposals on the technology or ingenuity related to the qualified project (hereinafter referred to as the "technical proposal"), and in cases where an excellent technical proposal can be made by improving a part of the contents of the technical proposal, it may be possible to seek a wide range of proposals including advanced technology and excellent ingenuity of the private businesses by requesting improvement or providing an opportunity to propose improvement of the technical proposal (technical dialogue), or making a target price based on the most excellent proposal.
- (3) In addition, in the business selection process, in the case of allowing the applicants to propose that a person other than the operating right holder (including the parent company of the operating right holder) implements a project other than the public facility, etc., operating project, it is necessary to examine whether a person who is the implementing entity other than the operating right holder has the ability to implement the proposal, and to ensure the steady implementation of the proposal by a method other than the implementation agreement (such as executing a contract with a person other than the operating right holder). If these measures have not been taken, what the applicants are made to propose shall be limited to acts to be taken by the operating right holder (including the actions that the operating right holder cause a third party to take upon assuming contractual responsibility).
- (4) Beyond what is provided above, the technical proposal system will be implemented pursuant to 4-1, (11), (ii)-3, etc. of the "Guidelines on PFI Projects Implementation Process".

### 3 Selection of the Private Businesses

#### (4) Competitive Dialogue Procedures

##### 1. Main Points

What is the usage of the so-called competitive dialogue procedures and the points to be noted for dialogue with the private businesses for setting up the required level in projects where private know-how and ingenuity should be actively utilized?

##### 2. Points to be Noted

- (1) If it is necessary to request a wide range of proposals from various aspects, such as project schemes, schemes for procurement of funds, and operation methods, etc. to prepare (adjust) the required level documents, etc., it may be possible to utilize competitive dialogue procedures at the determination of the administrator, etc.
- (2) Specifically, it may be possible for (i) the administrator, etc. to confirm and negotiate the proposals with the applicants, and to prepare (adjust) the required level, etc. based on the results thereof; (ii) after the dialogue in (i), to make a request to submit proposals; and (iii) to narrow down the number of dialogue participants to approximately three as necessary. Further, the procedures for such dialogue (such as the number of times, period, and number of persons at the location of the dialogue) should be flexible, so that both parties may obtain sufficient information, considering that the applicant prepares a proposal and that the administrator, etc. prepares the required level documents, etc. The examples of specific countermeasures are as indicated below.

##### <Number of Times>

- According to a request of an applicant, additional dialogue will be conducted taking into account fairness between the applicants and the selection schedule. Ensure that the dialogue is completed by giving questions and answers in writing prior to any additional dialogue.

##### <Period>

- In consideration of the number of the above dialogue, from the viewpoint of document preparation, a period of dialogue should be set so that about one month is secured from the last dialogue to the submission deadline of the proposal documents.

##### <Number of Participants in the Dialogue>

- In consideration of the viewpoint of fairness among the applicants, allow an increase of the number of participants to a certain level. Beyond that, consider appropriate measures depending on the situation, such as allowing recording of the dialogue.

##### <Other Matters>

- The questions from the applicants and answers thereto at the time of competitive dialogue are to be shared with all the applicants as a general rule, while the questions related to the applicant's know-how, etc. are to be

responded only to the applicant who asked the questions upon request. The answers will comprise a part of the contract together with the application guidelines, etc.

- If it is necessary to rewrite the required level documents, etc. during the dialogue process, after presenting the proposal of rewritten required level documents, etc. to, and asking for opinions from, all the applicants, the administrator, etc. side will consider the merits of certain descriptions and the details thereof.
- (3) The required level documents are to specify as much as possible the performance and service level to be achieved by the operating right holder, and the specific method for that is to be left to the ingenuity of the operating right holder. In addition, if there are any rules, etc. formulated by the administrator, etc. that apply to the subject project in relation to the required level documents, make the rules and the required level documents as consistent as possible, while organizing and simplifying the rules to avoid any duplication in the reports, etc. to the administrator, etc. and relevant administrative organs.
  - (4) In the case of a contract to which the Public Accounting Act applies, that contract should be a competitive discretionary contract (such as proposal on open invitation for participation and competitive bidding, etc.). In addition, it is necessary to set the target price in accordance with the provisions of Article 99-5 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting (Imperial Ordinance No. 165 of 1947).
  - (5) Beyond what is provided above, the competitive dialogue procedures will be implemented pursuant to 4-1, (11), (i)-2, etc. of the "Guidelines on PFI Projects Implementation Process".

### 3 Selection of the Private businesses

#### (5) Possibility of Disclosing Necessary Information in the Proposal of the Operating Right Consideration

##### 1. Main Points

The unit price and the basis for calculation, etc. necessary for considering the proposal of the operating right consideration of the private businesses may be the basis for calculating the target price, but how much can such information be disclosed?

##### 2. Points to be Noted

- (1) By disclosing information as detailed as possible, while contributing to the smooth study of the private businesses, attempt to ensure fairness, transparency and competitiveness in selecting the businesses. At that time, care should be taken to disclose necessary information (for assets, procurement prices, repair histories, etc.) such as fixed assets, movables, contracts, etc. that are managed by the operating right holder, together with a list in a stage as early as possible in the selection process, and it is also desirable to disclose to prospective applicants' information that may be useful for the bidding, such as engineering reports by an expert.
- (2) As to the due diligence common to the applicants in the business selection process, it is desirable that the administrator, etc. performs vender due diligence as much as possible prior to the open invitation for participation, so that by providing the results to the applicants the duplicate costs of applicants performing it individually will be avoided. At that time, it may be possible for the administrator, etc. to indicate to the applicant that the results of the investigation performed by the administrator, etc. may not necessarily replace the due diligence performed by the applicant, and that the administrator, etc. (including experts engaged by the administrator, etc.) is not responsible for the disclosed contents.
- (3) In some cases, information related to the target price is disclosed, such as man-hours used for estimation, so it may be possible to present a detailed income and expenditure statement, etc. even if it is not target price itself.
- (4) The administrator, etc. bears contractual obligations to participate in explanations to persons concerned as necessary in regards to the handovers to take place between the contract execution date and the operation commencement date, and to cooperate in providing lectures from the responsible person on-site from the administrator, etc. to the responsible person from the operating right holder, and other matters.
- (5) In order to contribute to the smooth study of the private businesses, paying attention to the fairness, transparency and competitiveness, it is desirable to publicize as promptly as possible when formulating the implementation policy, etc. the basis for calculating the target price or information that is particularly necessary for the calculation, which can be publicized.

### **3 Selection of the Private businesses**

#### **(6) Publicize the Examination Results**

##### **1. Main Points**

In the examination of proposals from the private businesses, if expert judgment in various fields is required, judgment can only be made by qualitative evaluation, and it is necessary to ensure objectivity, it is necessary to establish an appropriate system for selecting the private businesses, such as establishing a committee comprised of experts, etc., including experts in technology, finance, and legal affairs, etc. Establishment of such system includes publicizing the results of examination, but what are the points to be noted at that time?

##### **2. Points to be Noted**

- (1) When the private businesses have been selected, the results will be promptly publicized. In the case of two-stage selection of a private business, the applicants should be notified of the result as soon as the administrator, etc. decides on the passers of the first-stage examination so that they are not left in an unstable position for a long period of time.
- (2) In the publication, also publicize the evaluation results, evaluation standards and the necessary materials to ensure the transparency of the selection process according to the selection method. In particular, when an examination committee is established to perform an examination, the minutes of the examination committee are to be publicized; provided, however, that the publication excludes any information that may harm the rights of the private businesses, competitive position, and other legitimate interests (such as presentation parts of the private businesses, proper nouns, specific figures such as expenses, and ideas specific to the private businesses), and information that may identify the names of the examination committee members.
- (3) It is necessary to provide an opportunity to explain the reasons for non-selection to applicants that were not selected from the viewpoint of appropriate promotion of the public facility, etc., operating project.
- (4) Publicize a reduction of public financial burden based on the business plan of the appointed business, etc.

To ensure the transparency of the project, after the selection of the private business, it is appropriate to publicize the expected amount of reduction in the public financial burden based on the business plan of the appointed business, etc., and it is permissible to use the method of publication that is the same procedure as the publication of normal bidding results, etc.

#### **4 Risk Allocation**

##### **(1) Risk Allocation**

###### **1. Main Points**

Are there any special points to be noted in regards to the operating project on risk allocation between public and private sectors?

###### **2. Points to be Noted**

- (1) Since the implementation agreement specifies the allocation of the responsibilities and risks pertaining to the operating project and other rights and obligations of the parties to the implementation agreement, and also the content of the risk allocation affects the monetary burden required of the parties to the agreement pertaining to the operating right, avoid ambiguity and be as specific and clear as possible.
- (2) The demand risk is to be set for each project since the nature, content and risk factors differ among projects. In this case, it may be possible to evaluate the contents of the burden of the private sector in the business selection process. In addition, look at and consider how to address not only a decrease in demand but also an increase in demand. Further, it may be possible to ensure the stability of the project by providing a profit-sharing clause\*, etc. in the implementation agreement.

\* A clause under which the operating right holder pays money to the administrator, etc. if the profit for each business year exceeds the standard provided in advance, in the corresponding amount.

- (3) Defect risk in existing facilities is to be minimized by sufficient confirmation of existing materials and facilities, etc. on-site, in light of the fact that defects cannot be found with ordinary attention. Further, it is desirable to provide in the implementation agreement that the administrator, etc. shall be responsible for defects for a certain period (the necessary period to discover any defect) depending on the nature, etc. of the project. (no budgetary measures are required at the time of the implementation agreement, and it is sufficient if budgetary measures are taken by the time of determining the payment). In addition, it is also desirable for the local government to provide similar provisions in the implementation agreement (the same applies for budgetary measures). In this case, when determining the amount of damages, it is necessary to have a resolution of the local government's parliament (Article 96, paragraph (1), item (xiii) of the Local Autonomy Act; provided, however, that the same does not apply to projects related to the business of local public enterprises, except as provided in Prefectural or Municipal Ordinance (Article 40, paragraph (2) of the Local Public Enterprise Act)).
- (4) In regards to force majeure risk, the public and private sectors are to hold discussions according to the nature of the project, analyze the risk and make efforts in order to appropriately allocate risk. Further, it may be

possible to designate the scope that can be covered by insurance to be the scope of burden of the private businesses.

(Reference)

As an example of risk allocation between the public and private sectors, there is a case where it is provided that the administrator, etc., is to take such measures as restoring the facility for which the operating right has been established when the administrator, etc. obligates the operating right holder to take out insurance such as earthquake insurance, and the insurance provided by the operating right holder is not sufficient to cover the damages related to the operating project.

- (5) In particular, if requiring the operating right holder to takeover an existing project owned by a person other than the administrator, etc., it is necessary to pay due regard to ensure that the operating right holder does not bear excessive risks by taking over the project. For example, a possible method would be to have a share transfer option agreement executed between the shareholders of the existing project entity and the administrator, etc., and to provide in that agreement the liability for representations and warranties and defect liability of the shareholders of the existing project entity.
- (6) With regard to price fluctuation risk, sudden price fluctuations may occur that cannot be addressed by the efforts of the operating right holder to improve efficiency, etc., depending on the characteristics of the project. To deal with such cases, a system should be established that passes on the increased cost to usage fees. At that time, attention should be paid to 5-1. 2., (5).
- (7) In regards to the risk of general changes in laws and regulations, etc., as a general rule, the administrator, etc. and the operating right holder are to clarify the risk allocation through discussion; provided, however, that if there are changes in laws and regulations, etc. that apply only to specific operating right holders, or changes resulting in discriminatory treatment for projects performed by the public facility, etc. operating project against those by different means (including cases where the changes in laws and regulations, etc. have not been made by the administrator, etc. itself), it is desirable to provide in the implementation agreement that the administrator, etc., shall take remedial measures for the operating right holder.

Further, it is desirable that remedial measures can be selected from the following items (a combination is also possible):

- (i) the administrator, etc. pays compensation for the increased expenses or damages caused to the operating right holder due to the changes in laws and regulations, etc.;
- (ii) extend the term of the implementation agreement upon agreement within the scope provided therein; and
- (iii) (only if the operating right holder is not authorized to review the usage



fees) allow the increased expenses or damages incurred by the operating right holder by changes in laws and regulations, etc. to be added to the usage fees as expenses.

- (8) Make appropriate allocation of each risk according to the nature of the project and the capabilities, etc. of both the public and private sectors, based on the approach of "the person who can best manage the risk will bear the risk". In addition, identify potential risks as much as possible in advance, and determine the allocation of those risks. At that time, also pay due regard to the matters specified in 15-3, 2., (6) and 16-1, 2., (2), (i), etc.
- (9) Unexpected increases in disaster risk and significant changes, etc. in the business environment may make it significantly inappropriate to share risk in accordance with the predetermined risk allocation during the project period. In such cases, the scope of business and risk allocation should be discussed and reviewed as needed. In the review, it should be kept in mind that such review should not impair the fairness, transparency, and competitiveness of the bidding process. Alternatively, provisions relating to discussions for reviewing the scope of business and risk allocation may be included in the implementation agreement.
- (10) The provisions regarding compensation for losses normally incurred due to the rescission of the operating right for reasons of public interest provide the compensation under those provisions, and they do not restrict the implementation agreement from providing risk allocation for reasons other than the rescission of the operating right for reasons of public interest.
- (11) Further, when addressing these risks, it is possible to use performance bond insurance.
- (12) If there is a possibility that proper and reliable implementation of the qualified project will not be ensured, such as when the content of the risk allocation between the public and private sectors is extremely irrational, note should be taken that the Prime Minister may collect reports from, advise, or make recommendations to the administrator, etc. of the public facility, etc.

## 5 Usage Fees

### (1) Usage Fees

#### 1. Main Points

What are the points to consider for usage fees?

#### 2. Points to be Noted

- (1) When providing the matters of the usage fees of the public facilities, etc. pertaining to the operating right in the implementation policy, prescribe the appropriate maximum limit and range, etc. of the usage fees, taking note of the following points:
  - (a) it is important that the autonomy and ingenuity of the operating right holder be respected;
  - (b) they do not unfairly discriminate against a specific person; and
  - (c) they are not significantly inappropriate in light of socio-economic circumstances, and there is no risk that they hinder the interests of users of the public facility, etc.
- (2) If there is a provision in regards to the fee in an individual law, perform the prescribed procedure in accordance with that provision and also submit a notification pursuant to Article 23, paragraph (2) of the PFI Act (except as otherwise provided in the individual law).
- (3) In other cases, the administrator, etc. is to provide necessary matters regarding fees (maximum limit and range, etc. of and method to revise the usage fees) in the implementation policy, etc., pursuant to the provisions of Article 17, item (vi) of the PFI Act and V, 1, (1), (c) of the basic policy. In light of the above, the operating right holder is to submit a notification.
- (4) When revising the usage fees, notification under Article 23, paragraph (2) of the PFI Act is to be made in accordance with the implementation policy. In this case, if there is a provision in regards to the fee in an individual law, the operating right holder needs to determine the fee after performing the prescribed procedure in accordance with that provision.
- (5) The acceptability of revising the usage fee and the content of the revision should be agreed in advance as much as possible. Depending on the characteristics of the project, price fluctuations may occur that exceed a certain defined range, which cannot be addressed by the efforts of the operating rights holder to improve the efficiency, etc.. In such a case, it is advisable to establish a system that passes on the increased cost to the usage fees, taking into consideration (6) and (7), after considering appropriate public-private risk allocation.
- (6) Price fluctuations are defined as price indexes, such as the wage index and the domestic corporate price index, fluctuating for a certain period of time by a certain percentage or more from the index of that period.
- (7) The following calculation formula is an example of a formula for passing on price fluctuations to usage fees. However, the matters to be considered in the

calculation differ from project to project. If a formula for calculating the usage fee according to the characteristics of the project or the impact, etc. of each price fluctuation on the cost of the entire project, etc. is set forth in the guidelines and the guides, etc. for each project field, the administrator, etc. should refer to them.

- Revised usage fee = Current usage fee × Fluctuation index

- Fluctuation index =  $a + b \times (\text{Labor}/\text{Labor}') + c \times (\text{Power}/\text{Power}') + d \times (\text{Price}/\text{Price}')$

\* a = Fixed cost ratio (cost not affected by price fluctuations)

b = Cost ratio of labor costs, Labor = Revised labor unit price

c = Cost ratio of power costs, Power = Domestic corporate price index (electricity, city gas, water)

d = Cost ratio of variable costs other than those set forth in b and c, Price = Domestic corporate price index (total average)

(a + b + c + d = 1)

○ ○ ' indicates a pre-revision value.

At present, the following guidelines, etc. are provided by the relevant ministries and agencies.

(1) "Guidelines on Public Private Partnership for Water Supply Business" (revised by the Ministry of Health, Labour and Welfare in September 2019)

(2) "Guidelines for the Implementation of Business Operations, etc. of Public Facilities, etc. in Sewerage Works" (issued by the Ministry of Land, Infrastructure, Transport and Tourism in March 2019)

(8) In the case where a public facility, etc. pertaining to the operating right is a "facility for public welfare" under the Local Autonomy Act and an operating right holder administers the "facility for public welfare" as a designated administrator under the Local Autonomy Act, when using the system of special measures of the Local Autonomy Act to the effect that the approval of a local government is not required to set the usage fees, the following points are to be noted:

(a) the system of special measures above may not be used beyond the duration of the operating right; even if the operating right holder has an option to extend the duration of the operating right (see 16-2), the extendable period may not be included in the duration of the operating right.

(b) for the range of usage fees that should be provided in the Prefectural or Municipal Ordinance on the implementation policy, make it a rule to, in principle, provide both the maximum limit and minimum limit of the usage fees; from the viewpoint of protecting the interests of users, endeavor to provide the range of usage fees as specifically and restrictively as possible; and

(c) beyond what is provided for in Cabinet Office Order, the operating right holder is not prevented from voluntarily adding to the matters regarding usage fees to be provided in the Prefectural or Municipal Ordinance on the implementation policy, anything that the operating right holder considers necessary to protect the interests of users; in that case, use of

the public facility, etc. by users must not lead to unfair discrimination.

- (9) In the case where a public facility, etc. pertaining to the operating right is a "facility for public welfare" under the Local Autonomy Act and an operating right holder administers the "facility for public welfare" as a designated administrator under the Local Autonomy Act, whether or not to use the system of special measures of the Local Autonomy Act to the effect that the approval of a local government is not required to set the usage fees should be determined appropriately for each individual case, in light of the actual conditions of the region, precedent cases, etc., and taking into account the necessity, etc. to allow the operating right holder's flexible response to setting the usage fees.

## **6 Lease of Land, etc.**

### **(1) Relationship between the Operating Right and the Lease of Land, etc.**

#### **1. Main Points**

Is it necessary to establish the right of lease, separately from the operating right, on the public facility, etc. subject to the operating right and its site? What about the relationship with the National Government Asset Act? If so, what are the matters to be noted?

#### **2. Points to be Noted**

- (1) The operating right is the right to operate, etc. a public facility, etc. and receive usage fees (earn a profit) which is separated out from the set of rights of ownership in the public facility, etc. held by the administrator, etc.
- (2) For this reason, the operating right includes the right and title to operate the public facility, etc. and make a profit commonly required for operation, etc. of the public facility, etc., and it is considered that when the operating right holder implements operation, etc. of the facility, unless there are special circumstances, a lease agreement or license under the National Government Asset Act, etc. is not necessary in addition to the implementation agreement. Also, for the case of the site of the public facility, etc. as well, if it is a project where the site is included in the public facility, etc. in which the operating right is established the right of use within the ordinary scope is included in the operating right, and it is considered that unless there are special circumstances, a lease agreement or license under the National Government Asset Act, etc. is not necessary in addition to the implementation agreement.
- (3) On the other hand, considering the nature of the operating right, in that it is a right to implement operations, etc. of the public facility, etc. and make a profit, which is one right separated out from the set of rights of the ownership, since the operating right will not be the subject of any right except for those listed in the PFI Act, and the transfer of the operating right requires the permission of the administrator, etc., it is considered that the operating right is a right for the administrator, etc. to operate, etc. the public facility, etc. and to make a profit which is established for the operating right holder and that it does not allow the operating right holder to lease the public facility, etc. with that right as the basis of its authority to lease.
- (4) If the operating right is established on a building owned by the administrator, etc., it is considered that the operating right holder is not allowed to lease a part of the building to a third party with the operating right as the basis of its authority to lease because that would appear as if the operating right holder is, at its own decision, leasing a part of the right to operate and make a profit, included in the operating right, to a third party.
- (5) Accordingly, in order for the operating right holder to lease a part of a building owned by the administrator, etc. to a specific third party such as a tenant as a part of the operating project, it is considered that it is necessary to

execute in advance, a lease agreement, etc. for example, together with the implementation agreement between the administrator, etc. and the operating right holder and to sublease the part of the building to the third party with the right of lease, etc. as the basis of the operating right holder's authority to lease after the operating right holder has acquired the right of lease, etc. on the building, pursuant to Article 69 of the PFI Act or Article 238-4, paragraph (2) of the Local Autonomy Act, etc.

If the building is a facility for public welfare (meaning a facility for public welfare provided in Article 244, paragraph (1) of the Local Autonomy Act; the same applies hereinafter), 9, (2), 2., (9) needs to be noted.

- (6) Special circumstances that require a lease agreement or license under the National Government Asset Act, etc. in addition to the implementation agreement can include cases such as where the operating right holder leases the site of the building to the operating right holder for the purpose of owning the building relating to the operating project and where the operating right holder uses the site for the purpose of being used for the project not covered by the operating right, etc., in addition to the case where the operating right holder leases a part of a building owned by the administrator, etc. to a specific third party such as a tenant as in (5).

## **7 Operating Right Consideration**

### **(1) Nature, Calculation Method, etc. of the Operating Right Consideration**

#### **1. Main Points**

How should the operating right consideration and its calculation method be interpreted? Also, how should the calculation method of the target price of the operating right consideration be interpreted?

#### **2. Points to be Noted**

##### **2-1. What is the Operating Right Consideration?**

- (1) The operating right is the right to operate, etc. the public facility, etc. and receive usage fees (earn a profit), which is separated out from the set of rights of the ownership of the facility owned by the administrator, etc.
- (2) As is the case with other deemed real right, the operating right is to be established by the administrator, etc.
- (3) The operating right consideration is the amount determined between the administrator, etc. and the operating right holder in the implementation agreement in advance pursuant to the provisions of Article 6, item (i) of the Enforcement Regulations of the Act on Promotion of Private Finance Initiative (Cabinet Office Order No. 65 of 2011; hereinafter referred to as the "Enforcement Regulations"), etc. in collecting fees pursuant to the provisions of Article 20 of the PFI Act, etc.
- (4) Collection of fees by the administrator, etc. from the operating right holder is not to be limited to the fees required for provision, etc. of the public facility, etc. provided in Article 20 of the PFI Act.
- (5) Since the operating right consideration is a price specified by the administrator, etc. and the operating right holder in the implementation agreement, it is considered that the price is a fixed value. Accordingly, the operating right consideration is considered to be a fixed price.
- (6) It may be determined that the operating right consideration not be collected by an agreement between the administrator, etc. and the appointed business.
- (7) The payment method and timing of the operating right consideration shall be determined by agreement between the administrator, etc. and the operating right holder.
- (8) Separately from the operating right consideration, it may be possible to provide a profit-sharing clause, etc. in the implementation agreement.

##### **2-2. Calculation Method of the Operating Right Consideration**

- (1) As the calculation method of the operating right consideration, reasonable methods may include a standard method of deducting expenditure required for project implementation from the project revenue that is expected to be obtained in the future by the operating right holder, and recalculating it into the present value (income), and taking into account the risks, advantages, etc. of each project, further deducting adjustment by discount or addition, etc. on the operating right consideration and the purchase amount of the facility or

- goods, etc. sold by the administrator, etc. incidentally to the operating project.
- (2) Convert and include risks into the amount as much as possible. For example, analysis of demand fluctuation risks and risks of increasing costs, etc. of operation, etc. and utilization of quote of insurance premium required may be considered.

### 2-3. Calculation Method of the Target Price of the Operating Right Consideration

- (1) When collecting the operating right consideration, etc. from the operating right holder in a public facility, etc., operating project, set the NPV' or NPV calculated by the method indicated in 8-1, 2-2 or 2-3. as the lowest price in the business selection process.
- (2) If calculated by the method indicated in (1) above and if the lowest price turns negative, it is expected that the lowest price be zero.
- (3) If there is any debt that should be repaid by the administrator, etc. in a project subject to the public facility, etc., operating project, there are cases where that debt exceeds the lowest price calculated by the method referred to in (1) above. It is expected that the method indicated in (1) above will not be adopted and the lowest price be set, taking into consideration any debt that should be repaid only in that case.
- (4) If adopting the method indicated in (3) above, it is desirable to take note of the following points. This, as an approach, also applies to cases where excluding anything required for repayment of debt by the administrator, etc. from the scope of revenue to be transferred from the administrator, etc. to the operating right holder.
  - (i) perform evaluation of VFM regardless of the payment method of the operating right consideration, etc. through the evaluation method indicated in 8-1, 2-1;
  - (ii) as indicated later in 7-3, 2., (2), considering the purpose of the PFI which is utilization of private finance, avoid the payment of the operating right consideration, etc. to be completely in installment payments, and ensure to incorporate a lump-sum payment of a certain amount (for the initial portion); and
  - (iii) in the case of causing businesses to propose payment of the operating right consideration, etc. exceeding the lowest price in the business selection process, and if adopting installment payments as the method of paying the portion of the consideration exceeding the lowest price, use the method referred to in 7-3, 2., (3) below for the evaluation of that part.
- (5) When calculating the target price of the operating right consideration, hear opinions from private businesses, etc. adequately, and determine the price, taking note to ensuring fairness, transparency, and competitiveness.
- (6) In order to contribute to the smooth study of the private businesses, paying attention to the fairness, transparency and competitiveness, it is desirable to



publicize as promptly as possible at the time of market sounding, etc. the basis for calculating the target price or information that is particularly necessary for the calculation, which can be publicized.

2-4. Prescribing the Monetary Burden Other than the Expenses Provided in Article 20 of the PFI Act in the Implementation Policy and Implementation Agreement, and Publicizing Thereof

- (1) If the operating right holder is required to pay the monetary burdens other than expenses provided in Article 20 of the PFI Act under the implementation agreement, it should be provided in the implementation policy and implementation agreement similarly for cases of collecting the expenses pursuant to the provisions of that Article, and the content of that provision is to be publicized.

## **7 Operating Right Consideration**

### **(2) Information Necessary for the Calculation of the Operating Right Consideration**

#### **1. Main Points**

What information is particularly necessary when calculating or evaluating the operating right consideration?

#### **2. Points to be Noted**

- (1) Since the basic approach to the operating project (such as risk allocation between the operating right holder and the administrator, etc., and the degree of freedom of the business such as change of usage fees) and matters related to revenue and expenditure affect the formation of the operating right consideration:
  - (i) data relating to the statement of revenues and expenditures thus far (such as number of users, usage fee regulations, assets composing the facility and equipment, operating ratio, operating expenses such as personnel expenses, the past record of repairs and investments, and the service providers engaged);
  - (ii) matters that may affect the future revenue and expenditure (plans of maintenance and replacement of the facility and equipment, scope of business that can be implemented as an operating project, information of similar facilities nearby (including information of facilities to be developed)); and
  - (iii) grounds of discount rate, etc. to be considered when the administrator, etc. calculates the lowest price of the operating right consideration;  
are considered to be necessary.
- (2) For the information above, it is considered desirable to give consideration such as making adjustments by a certified public accountant or submitting verified data.
- (3) If disclosure of the information above is insufficient, it is considered that there may be cases where the operating right consideration is affected.
- (4) In order to contribute to the smooth study of the private businesses, it is considered desirable to publicize the information above as promptly as possible at the time of formulating the implementation agreement, etc.

## 7 Operating Right Consideration

### (3) Payment Method

#### 1. Main Points

What matters should be noted for the payment method of the operating right consideration?

#### 2. Points to be Noted

- (1) Since there are no particular restrictions regarding the payment method of the operating right consideration in the PFI Act, not only a lump-sum payment but installment payments are also available.
- (2) However, when considering the purpose of the PFI which is utilization of private finance, it is not desirable for the public sector side to bear the financial risks, and from the viewpoint of promoting introduction of a mechanism where the private sector will bear the risks (such as the operating right holder receiving a loan from a financial institution, etc.), a lump-sum payment should be considered for the payment. Even if installment payments are to be adopted, efforts should be made to incorporate a lump-sum payment of a certain amount (for the initial portion).
- (3) Also, in the case where installment payments are to be adopted for the payment method and when causing businesses to propose payment of the operating right consideration, etc. exceeding the lowest price in the open invitation for participation, determine whether or not the lowest price is exceeded and evaluate the score of the proposal after discounting the operating right consideration, etc. to be paid by installment payments proposed by each business, using the discount rate based on either of discount rate (i) or (ii) indicated in 8, (1), 2-2., (1).

#### (Reference)

It is considered that the installment payments for the sale of national government asset are treated as a "delayed payment" referred to in Article 31 of the National Government Asset Act, and an interest rate for the delayed payment will be used for the installment interest rate arising from installment payments. The interest rate for the delayed payment is to be set based on the lending interest rate for the fiscal loan fund pursuant to Article 17 (Interest Rate for the Delayed Payment) of the Regulations on Handling of Ordinary Property (Official Directives of the Ministry of Finance No. 2 of 1965).

The lending interest rate for the fiscal loan fund is to be determined by the Minister of Finance, depending on the loan period, based on the market yield of the Japanese Government Bonds, and upon reflecting the difference in the forms of redemption such as the means of redemption and grace periods.

## 8 Evaluation of VFM

### (1) Evaluation of VFM

#### 1. Main Points

How should the evaluation of VFM be considered in the operating project?

#### 2. Points to be Considered

##### 2-1. Basic Matters of VFM

- (1) PFI projects that entail receipt of usage fees, including operating projects, are also to be evaluated on whether or not they can be implemented efficiently and effectively by implementing them as PFI projects. It is desirable to evaluate them quantitatively if, by implementing the project as PFI projects, there will be more revenue and whether the public facility, etc. will be utilized more effectively, etc. in order to do comparative verification with the case of the project implemented by the administrator, etc.
- (2) Particularly, in the operating project, it is important to quantitatively grasp and analyze risks based on the project scale, project details, and project period. For example, analysis of demand fluctuation risks and risks of increasing costs, etc. of operation, etc. and utilization of quote of insurance premium required may be considered.
- (3) Since there may be a certain amount of risk that cannot be evaluated quantitatively, even if there is no VFM in the quantitative evaluation, it may be possible to judge the suitability of implementation as a PFI project comprehensively by qualitative evaluation.
- (4) The timing of evaluation is to be, as a general rule, at the time of selecting a qualified project and at the time of selecting a business. At the time of selecting a qualified project, if the particulars of project details necessary for the quantitative evaluation of VFM are not determined and the quantitative evaluation is difficult, it is justifiable to use qualitative evaluation.
- (5) It may be possible to do quantitative evaluation by, for example, comparing the income earned during the project period if the administrator, etc. implements the project on its own which is recalculated into the present value with the operating right consideration to be paid by the operating right holder.
- (6) For the discount rate required for converting into the present value, since project details, risks and project period are expected to vary among individual operating projects, it is considered desirable for the administrator, etc. to set an appropriate value for each individual operating project.

##### 2-2. Evaluation Method of VFM for a Stand-Alone-Type Public Facility, etc.,

##### Operating Project

- (1) For the calculation of VFM for a stand-alone-type public facility, etc., operating project, it is desirable to calculate the net present value of the project when implemented by the administrator, etc. (hereinafter referred to as the "NPV") and the net present value of the project when implemented by a

business (hereinafter referred to as the "NPV'") with the following approach, respectively, and determine whether or not the project will create VFM from whether the difference obtained from NPV' minus NPV is a positive value or not:

- NPV: a value obtained by converting the difference between the gross revenue and gross expenditure (including capital expenditure but excluding redemption of principal and interest) based on forecasted cash flow of the subject project when implemented by the administrator, etc. into the present value with the discount rate taking into consideration the risk borne by the administrator, etc. for that project ((i)); and
  - NPV: a value obtained by converting the difference between the gross revenue and gross expenditure (the same as above) based on forecasted cash flow of the subject project when implemented by a business into the present value with the discount rate taking into consideration the risk borne by the business for that project ((ii)).
- (2) It is desirable that the discount rate ((i)) is calculated from a case of a project similar to the subject project or an overseas project of the same sort, and it is desirable that the discount rate ((ii)) is calculated by hearing opinions from businesses that showed interest in market sounding, etc. in addition to the value for the discount rate ((i)).

### 2-3. Evaluation Method of VFM for a Combined-Type Public Facility, etc., Operating Project

- (1) For the calculation of VFM in a combined-type public facility, etc., operating project, it is desirable to compare VFM in the same manner as in the case of a stand-alone-type project, and also compare the amount of administrative burden to be incurred by the administrator, etc. expected for the NPV and NPV' respectively to evaluate VFM.

### 2-4. The Lowest Price of the Operating Right Consideration for a Public Facility, etc., Operating Project

- (1) When collecting the operating right consideration, etc. from the operating right holder in a public facility, etc., operating project, it is desirable to set the NPV' or NPV calculated with the method indicated in 2-1 as the lowest price in the open invitation for participation.

## 9 Establishment

### (1) Establishment Procedures, etc.

#### 1. Main Points

Are there any matters to be noted in the procedure for establishing an operating right?

#### 2. Points to be Noted

- (1) When the administrator, etc. establishes an operating right, it shall deliver an establishment document to the appointed business. The establishment document is to include the name, location, scale, and layout of the public facility, etc., contents of the operation, etc., and the duration of the operating right pursuant to Article 19 of the PFI Act.
- (2) When establishing an operating right in conjunction with the construction of the public facility, etc., the establishment of the operating right and execution of the implementation agreement will be after that construction. In this case, an implementation agreement with conditions precedent and a provisional agreement for the implementation agreement may be executed simultaneously with the execution of the project contract of the construction.
- (3) When extension and reconstruction are performed for the public facility, etc. where the operating project is to be implemented, if the existing operating right extends to the extended and reconstructed portion, it is considered that the identity of the operating right will be maintained, no change will be made to the registered information, and the procedure for establishing an operating right is unnecessary.
- (4) In case of new construction, extension, or reconstruction of a public facility, etc. for which an operating project is implemented, if the existing operating right does not extend to the newly constructed, extended or reconstructed portion, it is considered that it is necessary to newly establish an operating right for that portion, as needed.
- (5) It may be considered that, in principle, the operating right is to be established for each public facility, etc. for which a single operating project is to be implemented, but depending on the contents of the operating project, such as the form of such as operation, etc. being the operation, etc. of a part of a public facility, etc., or the operation, etc. of multiple public facilities, etc. may be imagined, at the determination of the administrator, etc., it may be possible to treat a part of a public facility, etc. or multiple public facilities, etc. as a single unit for establishing the operating right. In this case, since the operating right is a deemed real right, the following points need to be noted:
  - (i) since the operating right may not be split or consolidated (Article 26, paragraph 1 of the PFI Act), the determination at the time of establishment is important;
  - (ii) if an operating project is to be implemented for a part of a public facility, etc., in order to clarify the scope of the project to be implemented, it is

desirable that the operating right be established within the scope of the operating project which is to be implemented; and

- (iii) if a single operating right is to be established on multiple public facilities, etc., in light of the high degree of physical unity, or unity of use and functionality between the public facilities, etc., and how the facility is treated, etc. under individual laws, those facilities are required to be recognizable as a single facility under socially accepted conventions; in light of the above, even if a single operating right cannot be established for multiple public facilities, etc., it is considered possible to achieve an integrated operation, etc. by covering multiple facilities in a single implementation agreement.
- (6) An operating right does not include the authority to dispose of the use of the public facility, etc.
- (7) How a public enterprise will be treated after an operating right is established is to be determined individually depending on the division of the authority with the operating right holder, but in light of the fact that, under the PFI Act, a certain authority for rights to rescind the operating right and matters regarding usage fees, and, the authority, etc. to set the scope of the business to be performed by the operating right holder are held by local governments, considering that, in general, local governments are to undertake businesses such as monitoring of projects, redemption of existing bonds, and restoration of facilities at the time of large-scale disaster, it could be said that local governments have the ultimate authority for management of the public enterprise and it continues to be regarded as a public enterprise. (Notice issued by Director-General for Regional Vitalization, Minister's Secretariat, Ministry of Internal Affairs and Communications on June 30, 2014)

## 9 Establishment

### (2) Relationship with Designated Administrator

#### 1. Main Points

Are there any matters to be noted in relation to the designated administrator system?

#### 2. Points to be Noted

- (1) The Prefectural or Municipal Ordinance on the implementation policy under the PFI Act and the Prefectural or Municipal Ordinance on designation of a designated administrator and usage fees under the Local Autonomy Act can be established as a single Prefectural or Municipal Ordinance to which authority is delegated by both laws.
- (2) It is considered that resolution on a project contract and designation of a designated administrator can be voted on in a single meeting of a local council, and similarly, a resolution on a project contract and establishment of an operating right and a resolution on designation of a designated administrator can be voted on in a single meeting of a local council.
- (3) It is possible to establish an operating right for a person and designate that person as a designated administrator with the same content. Accordingly, it is possible to designate a designated administrator with the same duration period and the scope of business as the operating right.
- (4) On the assumption that the Prefectural or Municipal Ordinance on the implementation policy under the PFI Act and the Prefectural or Municipal Ordinance on the designated administrator's usage fees under the Local Autonomy Act are made consistent regarding usage fees, as long as the usage fees are in accordance with the implementation policy and the Prefectural or Municipal Ordinance, it is considered that, in principle, both the notification under the PFI Act will be accepted and the approval under the Local Autonomy Act will be granted. When using the special measures referred to in the Local Autonomy Act in relation to special measures on setting usage fees, see 5, (1), 2, (8) and (9).
- (5) For the transfer of an operating right, if there are special provisions in the Prefectural or Municipal Ordinance on the implementation policy under the PFI Act, such as the requirements for a business that will be the transferee and that a resolution of the local council is not required for the transfer, a resolution is not required. Under the Local Autonomy Act, resolutions on the rescission of designation of the previous designated administrator and designation of a new designated administrator are required, but it is considered that, for practical purposes, they should be treated as one thing, including the discussions on the transfer of the operating right, and there is no inconsistency, etc. When using the special measures referred to in the Local Autonomy Act in relation to a resolution on designation of a designated administrator in association with the transfer of the operating right, see 14,



(1), 2, (6) and (7).

- (6) If the transfer conforms to the examination criteria for the transfer of the operating right, and the transfer of the operating right is permitted, it is possible to designate the transferee as the designated administrator for the duration of the operating right and for the same scope of business.
- (7) For the rescission of the operating right and the rescission of the designation of the designated administrator, it is considered that no problem will arise due to making the rescission requirements the same in the implementation agreement and the designated administrator's agreement.
- (8) With regard to the relationship between the applications of the operating right system and the designated administrator system, in order for the head of a local government, to establish an operating right for an appointed business with respect to a facility for public welfare to cause that appointed business to implement an operating project and to make an administrative disposition, usually, it is necessary to also apply the designated administrator system. However, for some facilities, etc. for public welfare, according to the construction of a relevant individual law, an appointed business may not be permitted to make an administrative disposition, or, it is separately provided by an individual law that an appointed business may make an administrative disposition.

With regard to the public facilities, etc. [where construction of an individual law provides for application of the designated administrator system] at present, the relevant ministries have issued guidelines, notices, etc. with respect to the following facilities.

- (i) "Treatment of the Designated Administrator System under the "Local Autonomy Act" in relation to the Implementation of a Qualified Project for Local Airport Operation under the "Act on Operation of National Airports Utilizing Skills of the Private Sector"" (issued by the Ministry of Land, Infrastructure, Transport and Tourism in August 2014)

In general, the actions of management, such as regulating businesses within the premises of an airport and restricting the use of the facility within an airport, is based on the ownership and other title under private law (the right of administration of structure) in the facility, but for a local airport which is a facility for public welfare, Article 244-2 of the Local Autonomy Act applies.

If an operating right is established for the management of an airport, there are special provisions of the Airport Act (Act No. 80 of 1956) and the Civil Aeronautics Act (Act No. 231 of 1952) under the Act on Operation of National Airports Utilizing Skills of the Private Sector (Act No. 67 of 2013), and on behalf of an establisher and administrator of an airport, the operating right holder of the airport is to formulate the airport service regulations and airport security control regulations, and the operating right holder is to manage in accordance with these

regulations. Furthermore, if that airport is a local airport, the local government is to develop necessary provisions in the Prefectural or Municipal Ordinance in light of the fact that the operating right holder of the local airport will manage the airport in accordance with the established operating right.

Accordingly, when an operating right holder of a local airport implements a qualified project for local airport operation, it is not necessary to separately apply the designated administrator system.

- (ii) "Guidelines on Public Private Partnership for Water Supply Business" (revised by the Ministry of Health, Labour and Welfare in September 2019)

Under the Water Supply Act (Act No. 177 of 1957), if a person other than a municipality (including private businesses) obtains the approval of the Minister of Health, Labour and Welfare after obtaining consent of the municipality, that person may manage a water supply business and will be able to exercise the authority of a water utility (including the exercise of public authority) under the Water Supply Act just like the municipality. Accordingly, it is not required to use the designated administrator system in combination for an operating project of a water supply business; provided, however, that if a local government determines that an administrator needs to be involved in the form of approval under the Water Supply Act for the change of water charges made by an operating right holder, the combined use of the designated administrator system is not barred.

- (iii) "Guidelines for the Implementation of Business Operations, etc. of Public Facilities, etc. in Sewerage Works" (issued by the Ministry of Land, Infrastructure, Transport and Tourism in March 2019)

For an operating project of sewerage works, it is interpreted that an operating right holder may not exercise public authority, such as granting a license for the use of a public facility. Accordingly, the combined use of the designated administrator system is not assumed for an operating project of sewerage works.

- (9) In order for an operating right holder to establish a right of use for a specific third party such as a tenant, and to allow that tenant to use a facility for public welfare:
  - (i) it may be possible to use a method of making administrative dispositions, such as granting a license for the use of that facility for public welfare in conjunction with the designated administrator system; or
  - (ii) As described in 6, (1), 2., (5), it may be possible to use the method of subleasing to a third party with the right of lease, etc. as the basis of the operating right holder's authority to lease after the operating right holder has acquired the right of lease, etc. for the facility for public

welfare pursuant to Article 69, paragraph (6) of the PFI Act or Article 238-4, paragraph (2) of the Local Autonomy Act;

If the act of causing that third party to use the facility by establishing the right of use is for achieving the purpose of establishing the facility for public welfare, (i) applies, but for other cases, (ii) may be applied. This is to be determined by the local government that establishes the facility for public welfare depending on the purpose for which the facility for public welfare is established.

- (10) Beyond what is listed above, regardless of whether it is to achieve the purpose of establishing a facility, in order for the operating right holder to allow a specific third party to use the facility, upon revising the status as a facility for public welfare by amendment or repeal of the Prefectural or Municipal Ordinance referred to in Article 244-2, paragraph (1) of the Local Autonomy Act and changing the status of that facility from administrative property to ordinary property, it may be possible to use the method of, for example, executing in advance, a lease agreement, etc. together with the implementation agreement between the administrator, etc. and the operating right holder, and to sublease the facility to the third party with the right of lease, etc. as the basis of the operating right holder's authority to lease after the operating right holder has acquired the right of lease, etc. on the facility.
- (11) According to the amendment of the Act in 2018, if an operating right holder concurrently holds the position of the designated administrator due to the combined use of the designated administrator system, note that special measures referred to in the Local Autonomy Act were introduced with respect to setting usage fees and resolutions of local councils regarding permission for the transfer of operating rights and the designation of a designated administrator (for specific details of each matter, see 5, (1), 2, (8) and (9), and 14, (1), 2, (6) and (7), respectively).

## 10 Resignation and Dispatch System

When operating the resignation and dispatch system, take note of the following points.

- (1) Since private businesses may have difficulties securing human resources with the necessary expert knowledge and skills due to public facilities, etc. being solely operated by the national government or local governments in the past, the purpose of the resignation and dispatch system is to support the smooth launch of operating projects by the succession of the expert knowledge and skills of officials of the national government or local governments to the operating right holders in the early stages of the projects, and this system should be properly operated in a manner consistent with this purpose and in light of the operating right holder's requests.
- (2) When under the PFI ACT, incorporating into a project the dispatching of public employees to an operating right holder, in order to ensure the succession of the project and to ensure the stability of the project during the project period, do not set evaluation standards for proposals to be made for the open invitation for participation that would value a smaller number of dispatched public employees or shorter dispatch term, particularly for fields concerning the safety of the subject project, etc.
- (3) In order to enable prospective applicants to consider at the time of bidding, not only when the actual dispatched official is decided but even for the period when the dispatched officials are not decided yet, the administrator, etc. is, as a general rule, by the time of the competitive dialogues, to publicize information to prospective applicants regarding the number and conditions of the dispatched officials, and skills the dispatched officials will be expected to have, etc.
- (4) For the details of the agreement referred to in Article 5, see paragraph (1) of the Enforcement Regulations, the "Template of the Agreement under the Act on Promotion of Private Finance Initiative (Act No. 117 of 1999)".
- (5) The early stages of the operating project provided in V, 2, (6) of the basic policy are assumed to be up to roughly five years from the commencement of the operating project, in a manner consistent with the purpose of the resignation and dispatch system.
- (6) With respect to the following provisions regarding remuneration, appointment, annual leaves, etc. prescribed for officials dispatched from the national government, considering the purpose of those provisions, it is appropriate to prescribe provisions equivalent to those provisions for officials dispatched from local governments as well in relevant Prefectural or Municipal Ordinances, etc.:
  - (i) Re: Remuneration
    - Article 78, paragraphs (3) and (4) of the PFI Act; Article 2 of the Supplementary Provisions of the Act Partially Amending the Act on Promotion of Private Finance Initiative (Act No. 71 of 2015)

- Article 11, paragraphs (1) and (2), and Article 12 of the rules of the National Personnel Authority 9-49 (Area Allowance)
- Paragraph (2), item (vi) of Re: Article 2 of the rules of the Operation of Single Transfer Allowance (Notice A No. 660 of Second/Third Remuneration Division, Remuneration Bureau)
- (ii) Re: Appointment
  - Article 18, paragraph (1), item (vii) of the rules of the National Personnel Authority 8-12 (Appointment and Dismissal of Officials)
  - Re: Article 18 and Re: Article 25 of the Operation of the rules of the National Personnel Authority 8-12 (Appointment and Dismissal of Officials) (Notice No. 532 of Recruitment Policy Division, Human Resources Bureau of 2009)
- (iii) Re: Annual Leave
  - Article 78, paragraph (6) of the PFI Act
- (iv) Re: Reimbursement of Expenses for Studying Abroad
  - Article 78, paragraph (7) of the PFI Act
- (v) Re: Public Service Ethics
  - Article 5 of the Enforcement Order of the Act on Promotion of Private Finance Initiative (Cabinet Order No. 279 of 1999)
- (vi) Re: Medical Examinations
  - Article 22 of the rules of the National Personnel Authority 10-4 (Health and Maintaining the Safety of Officials)
  - Paragraph (1), item (2) of Re: Article 22 of the Operation of the rules of the National Personnel Authority 10-4 (Health and Maintaining the Safety of Officials) (Notice No. 691 of Welfare Division, Employee Bureau of 1987)
- (vii) Re: Mandatory Retirement Age
  - Article 5, paragraph (1) of the rules of the National Personnel Authority 11-8 (Mandatory Retirement Age of Officials)
  - Paragraph (1), item (iii) of Re: Appointment of Those who have Reached the Mandatory Retirement Age of the Operation of the Mandatory Retirement System (Notice No. 219 of Recruitment Policy Division, Recruitment Bureau of 1984)
  - Article 3 of the rules of the National Personnel Authority 11-9 (Reappointment of Officials after Mandatory Retirement Age)
  - Paragraph (3), item (iii) of the Operation of Reappointment of Officials after Mandatory Retirement Age (Notice No. 978 of Policy Planning for Aged Personnel Office, Administration Bureau of 1999)

## 11 Monitoring

### (1) Monitoring

#### 1. Main Points

Is there anything that needs to be noted as matters unique to operating projects, in addition to matters provided in the existing guidelines on monitoring?

#### 2. Points to be Noted

- (1) Since the purpose of the operating project is to operate a public facility, etc., and maintenance of the facility are important, pursuant to the provisions of Article 28 of the PFI Act, an administrator, etc. is to ensure the appropriateness of an operating project by requesting reports on the status of businesses or accounting, and conducting onsite inspections and providing necessary instructions (order for improvement), as necessary.
- (2) For the status of achievement of the required level, in addition to self-monitoring by an operating right holder and monitoring by an administrator, etc., from the viewpoint of requesting technical cooperation, if there is a request by the administrator, etc. or the operating right holder, it is desirable to have monitoring carried out by utilizing a third-party expert. Also, in order to be prepared for a case where there is inconsistency between perception of the operating right holder and the administrator, etc. regarding the content of the monitoring, prepare a mechanism to hear opinions of third-party experts in the implementation agreement. Further, prescribe in the implementation agreement that the results of monitoring and the abovementioned inquiry be published, except for information that requires a certain due regard, such as information concerning national security, the operating right holder's business know-how, and information that causes disadvantage to a specific person.
- (3) The implementation agreement is to provide that when a situation arises that may have a significant adverse effect on the implementation of the operating project, the administrator, etc. is allowed to request a report from the operating right holder and request that an investigation be conducted by a third-party expert and the investigation report thereof be submitted.
- (4) For operating projects and PFI projects that entail receipt of usage fees that are not for operating projects, as measures for a case where the appropriate and steady provision of public services required by the required level documents and the implementation agreement cannot be secured even by collecting reports, conducting investigations, etc., it may be possible to provide collection of penalty, etc. in the implementation agreement or project contract.
- (5) If there is a possibility that proper and reliable implementation of the qualified project will not be ensured, for reasons such as monitoring not being appropriately conducted after the contract is executed and a dispute is expected to arise, note should be taken that the Prime Minister may collect reports from, advise, or make recommendations to the administrator, etc. of

the public facility, etc.

## **12 Replacement Investment and New Investment**

### (1) Replacement Investment and New Investment in the Operating Project

#### 1. Main Points

- (1) How should the replacement investment (maintenance) or new investment (construction) be positioned in the implementation agreement, etc.?
- (2) How should the scope of business covered by the operating rights be interpreted?
- (3) How should the division of the roles between the public and private and procedures at the time of extension and reconstruction?

#### 2. Points to be Noted

2-1. Scope of Business (Definitions, etc. of "Constructions", "Renovation", "Maintenance" under the PFI Act) covered by the Operating Rights

- (1) Operating project means the "operation, etc." of the public facility, etc. in which the administrator, etc. has the ownership, and does not include "construction" nor "renovation".

This is considered to be because the operating right, which is the deemed real right to operate, etc. and profit from the public facility, etc., is a right separated out from the ownership of public facility, etc., and is established with respect to an "object" that exists at the time the operating right is established.

"Construction" and "renovation" that are not covered by the operating project is considered to refer to creating a new facility, a so-called new construction work, and complete removal and redevelopment of the facilities, etc.

On the other hand, "maintenance" is considered to refer to capital expenditures or repairs (including so-called extension and major overhaul) excluding so-called new construction or complete removal and redevelopment of facilities, etc. The reason why "renovation" that is not covered by the operating project is to exclude the redevelopment that results in complete removal of the facilities, etc., causing the ownership therein to cease to exist in the first place.

	既存施設の拡張・増改築、新たな施設の増設 Extensions and reconstructions of the existing facility and extensions of a new facility	既存施設の補修 Maintenance and repair of the existing facility
PFI法 PFI Act	建設 Construction 改修 Rehabilitation	維持管理 Maintenance and Administration
	(新設) (New establishment) (改修) (Rehabilitation)	
会計制度 Accounting system	資本的支出 Capital expenditure (使用可能期間の延長・価格の増加) (Extension of the usable period and increase of the price)	修繕費 Repair Cost

\*Redevelopment in connection with the complete removal

## 2-2. Regarding Treatment of Extension and Reconstruction and Operating Right

- (1) In light of the nature of the operating right as a deemed property right, which is separated out from the set of rights of the ownership, the operating right can be established for an "object" which exists at the time of establishment, and it is theoretically possible to newly establish an operating right for any portion of that object which is extended or reconstructed after the establishment of the operating right.
- (2) When the facility is extended or reconstructed, if the operating right automatically extends to the extended or reconstructed portion of the facility without limit, operating right holder may be forced to bear an unexpected burden and there is a risk that the transparency of the private business selection procedure may be undermined in the relationship with other businesses.
- (3) On the other hand, if the existing operating right does not extend and establishment of a new operating right is required for small extension or reconstruction, there may be a practical interference with the operation, etc. of the facility in spite of the long-term project period of PFI generally assumed. In addition, in the case of extension or reconstruction of a building, the identity as the object of the ownership shall be determined by whether the extension or reconstruction can be seen as an addition of a constituent part of the previous building or as the construction of a separate building beyond that extent. Therefore, it is considered permissible under the PFI Act to apply the existing operating right to the extension or reconstruction of a facility to a certain extent necessary for the operation, etc. of the facility.
- (4) It is considered that the scope of extension and reconstruction to which the existing operating rights are to extend should be specifically determined by



the administrator, etc. for each individual case. For example, when the operating right has been established on the overall water supply facility, etc., if the extension and reconstruction of the piping and water purification facility is implemented, it is considered possible that the existing operating right extends also to the piping and water purification facility, etc., provided, however, that, from the relationship with the provisions of the PFI Act, the following points need to be noted.

- (i) If the previous facility is completely removed, the ownership of the administrator, etc. will then cease to exist and so will the operating right. Therefore, it is necessary to establish a new operating right.
  - (ii) Due to change of the location of the facility or a significant increase in the size of the facility, it is considered possible depending on the contents thereof that the location of the facility, or the address may be changed. In this case, it is considered necessary to establish a new operating right since the identity of the operating right cannot be maintained due to changes to the registered matters.
  - (iii) While it is considered that the contents of the operation, etc. stated in the register need to indicate the matters to the extent that a third party may identify the contents of the project, if changes are made to the registered matters due to changes to the contents of the operation, etc. of the facility, the identity of the operating right cannot be maintained due to changes to the registered matters, and that it is necessary to establish a new operating right.
- (5) Even if the existing operating right extends to the extension and reconstruction of the facility, for clarification of the burden of the operating right holder and securing transparency of the selection procedures, it is desirable to state in the implementation policy and implementation agreement the scope and outline of the assumed extension and reconstruction and to the effect that the operating right will extend to those extension and reconstruction.

### 2-3. Regarding Possibility of Extension and Reconstruction by the Operating Right Holder

- (1) Based on the premise that the existing operating right may extend to the extended or reconstructed portions, extension and reconstruction that are necessary for operation, etc. of the facility by the operating right holder are considered possible.
- (2) What specific extension and reconstruction should be allowed for the operating right holder should be determined by the administrator, etc. in each individual case taking into account the division of roles between the operating right holder and administrator, etc. regarding the facility development.
- (3) Provided, however, that the following points need to be noted:
  - (i) any extension or reconstruction that requires a complete removal of the

facility or change to registered matters may not be deemed within the scope of the operating right;

- (ii) extended or reconstructed portions will be owned by the administrator, etc.;
- (iii) it is desirable that the scope and outline of assumed extension or reconstruction be specified in the implementation policy and implementation agreement; and
- (iv) it is desirable that procedures necessary in the relationship with the administrator, etc. (prior and subsequent consents, etc. for extension and reconstruction) be specified.

#### 2-4. Division of Roles and Procedures Between Public and Private Sectors at the Time of Extension and Reconstruction

- (1) If any extension or reconstruction can be foreseen at the time of formulation of the implementation policy, the required level for the timing and scale, etc. of the facility, etc. to be extended or reconstructed are to be provided in the implementation policy, the required level documents and implementation agreement in advance.
- (2) If extension or reconstruction cannot be foreseen at the time of the formulation of the implementation policy, the method of discussion and decision-making between administrator, etc. and operating right holder regarding the scale, implementing entity, the ownership, the establishment of the operating right, etc. of the facility, etc. to be extended or reconstructed are to be provided in the implementation policy, required level documents and implementation agreement. For example, it is considered possible that the administrator, etc. and the operator agree on the extension and reconstruction plan for a certain subsequent period upon discussion on a regular basis. In this case, it is considered possible to enable both the administrator, etc. and the operator to propose extension and reconstruction.

### **13 Share Transfer and Securitization of Receivables for Operating Right Holder**

#### **(1) Share Transfer and Securitization of Receivables**

##### 1. Main Points

- (1) In the case of operating projects utilizing the operating right, are there any points to be especially noted in comparison to the PFI projects that entail receipt of usage fees?

##### 2. Points to be Noted

- (1) Also in the operating projects utilizing the operating right, similarly with the selected projects other than operating projects, while it is necessary that the operating right holder has the performance ability equivalent to that assumed in the selection of a business during the duration of the operating right, it is not necessarily by means of restriction on the transfer of shares, etc.
- (2) Among the operating projects, considering the scale or contents of the project, it is considered that there are many projects for which it is highly necessary to enable procurement of private finance by a variety of entities, and on the assumption that the performance ability is ensured, restrictions on the transfer of shares must be kept to the minimum necessary for the appropriate implementation of the project. As a result, the degree of freedom of management of the operating right holder will increase, which will then be reflected to the operating right consideration, thereby benefiting the administrator, etc.
- (3) For example, in an operating project that needs a large-scale procurement of funds, it is considered possible to enable smooth procurement of funds from a variety of investors, by issuing voting shares to investors who aim to participate in the management with minimum conditions on transfer thereof necessary for the appropriate implementation of the project on one hand, and on the other hand, by issuing nonvoting shares to institutional investors whose sole purpose is to earn business profits, with no restrictions on transfer, etc. thereof.
- (4) The administrator, etc. is to approve any transfer of voting shares by the operating right holder to a third party, if all of the following conditions are satisfied.
  - (i) the assignee is a person who satisfies the participation qualification established at the time of open invitation for participation; and
  - (ii) transfer of shares will not impair the continuation of implementation of the project (not resulting in the officials seconded to the operating right holder from the corporation that conducts transfer of shares leaving as a result of the transfer of shares, which gives rise to a situation where the required level or performance of the contents of proposal will be interfered).
- (5) When assuming that the operating right holder is a corporation newly established for conducting the public facility, etc. operating project, in

qualification for participation in open invitation for participation or proposals to be made by applicants, the applicants shall not be prevented from utilizing an investment limited partnership or any similar mechanism as considered by the administrator, etc. of the public facility, etc. (hereinafter referred to as "LPS, etc.") to become a representative enterprise or a constituent member that owns the voting shares of the operating right holder, solely because of utilizing LPS, etc. (care should be taken to ensure that it is not eliminated in effect in the evaluation). If the administrator, etc. of the public facility, etc. approves utilization of LPS, etc., it is desirable to provide the following matters in the basic agreement, etc.:

- a. the limited liability partner may not be added or replaced (including the transfer of interests) without the consent of unlimited liability partner;
  - b. addition and replacement of the unlimited liability partner requires prior approval of the administrator, etc. of the public facility, etc.; if the approval of the administrator, etc. of the public facility, etc. cannot be obtained (excluding cases where addition or replacement of the unlimited liability partners does not take place), the voting shares in the operating right holder held by LPS, etc. is to be sold; provided, however, that it should be noted that a certain period is required for sales procedures.
- (6) If the requirements of past results are included in the qualification for participation in the open invitation for participation, it is assumed that any matters that should not be confirmed using the past results of LPS, etc. may be confirmed using the past results of the unlimited liability partner or the actual controller of the unlimited liability partner of that LPS, etc. It is desirable to present any key information regarding the LPS, etc., to the administrator, etc. as much as possible at the stage of the open invitation for participation (for a newly established LPS, etc. that does not exist at the time of open invitation for participation provided in (8), that information is to be presented when it becomes known).
- (7) If the LPS, etc. holds the voting shares, it is assumed that the administrator, etc. of the public facility, etc. will confirm that the unlimited liability partners have the right to execute business of the partnership in accordance with the laws and regulations, and will enter into the basic agreement, etc. with the unlimited liability partners in the name with the title of a partner. For the transfer of the voting shares at that time, the same conditions as applicable to other legal personalities shall apply.
- (8) If the LSP, etc. is a newly established entity that does not exist before or at the time of open invitation for participation (hereinafter referred to as "newly established LPS, etc."), the following conditions are to be satisfied:
- a. LPS, etc. is not the representative enterprise;
  - b. if it becomes unable to procure funds from the LPS, etc., it is affirmed that the representative enterprise and other constituent members

(excluding the constituent members that are LPS, etc.) will hold the voting rights instead; and

- c. If it is a newly established LPS, etc., by the time when the implementation agreement is executed, an LPS, etc. must be formed without fail; provided, however, that if an LPS, etc. has not been formed at the stage of execution of the basic agreement, all the unlimited liability partners shall be parties to the basic agreement and it is to be provided that the LPS, etc. shall be formed by the time of the execution of the implementation agreement, and that the LPS, etc. after the formation shall assume the shares, etc. in the operating right holder.
- (9) In light of the fact that the transfer of the operating right should be permitted from the viewpoint of whether it constitutes a reason for disqualification, or whether it is appropriate in light of the implementation policy, it may be considered possible to apply the same conditions that apply to transfer of the operating right to the transfer of shares in the operating project.
- (10) Beyond what is provided above, transfer of receivables shall be implemented based on 5-1, (6), and 6-2, etc. of the "Guidelines for Contracts"

## 14 Assignment and Transfer of the Operating Right

### (1) Assignment and Transfer

#### 1. Main Points

What are the points to be noted for the assignment and transfer of the operating right?

#### 2. Points to be Noted

- (1) Considering the fact that the operating right system is intended to provide an environment that enables smooth implementation of the operating project including procurement of funds by the operating right holder from the financial institutions, etc. by making the operating right the object of mortgages, etc. as a transferable deemed real right, while ensuring the steady and continuous provision of public services pertaining to public facility, etc., in regards to the operation of permission, etc. of the transfer, while considering the interests of the users of the facilities, private businesses including financial institutions, etc., and other relevant parties, consideration should be made so that the operating right will be transferred appropriately and smoothly.
- (2) In regards to whether or not the administrator, etc. permits transfer of the operating right, in order to reduce the risk that the transfer of the operating right will not be permitted by increasing the foreseeability of the persons who wish to become transferees of the operating right or the financial institutions, etc., if (i) the transferee does not give rise to reasons for disqualification, and (ii) the transfer of the operating right is appropriate in light of the implementation policy, then the administrator, etc. is to permit it, and therefore it is interpreted that permission of the transfer is not discretionary.
- (3) Based on the above, if the administrator, etc. decides to impose certain requirements on the transfer of the operating right in addition to the provisions of laws and regulations from the viewpoint of ensuring the appropriate implementation of operating project, it is necessary to provide in advance in the implementation policy, the conditions regarding the transfer of the operating right such as requirements to be fulfilled by the transferee.
- (4) In addition, in regards to transfer of the operating right, if the administrator, etc. deems that a subsequent report is sufficient in place of a resolution at the local council, pursuant to the provisions of the proviso of Article 26, paragraph (4) of the PFI Act, it is necessary to provide special provisions in a Prefectural or Municipal Ordinance on the implementation policy and other Prefectural or Municipal Ordinance to the effect that a resolution of the local council is unnecessary for the transfer of the operating right.
- (5) If the administrator, etc. is the head of a local government, it is necessary to note the provisions of 9-2, (2), (5).
- (6) In the case where a public facility, etc. pertaining to the operating right is a

"facility for public welfare" under the Local Autonomy Act and an operating right holder administers the "facility for public welfare" as a designated administrator under the Local Autonomy Act, in designating the transferee of the operating right from the operating right holder with the permission of the administrator, etc. as the designated administrator of the "facility for public welfare", if special measures that a subsequent report is deemed to be sufficient in place of resolution at the local council for designation of the designated administrator is used, the following points are to be noted:

- (a) The period for designation of the designated administrator may not exceed the duration of the operating right; Furthermore, even if the operating right holder is able to voluntarily extend the duration of the operating right (see 16, (2)), the period available for extension may not be included in the duration of the operating right;
  - (b) In the "special provisions" to be provided in the Prefectural or Municipal Ordinance on establishment and administration of "facilities for public welfare" under Article 244-2, paragraph (3) of the Local Autonomy Act, while ensuring compliance with the notifications of the relevant ministries and agencies pursuant to the provisions of Article 26, paragraph (5) of the PFI Act, it is to be clearly stated that "if the public facility, etc. pertaining to the right to operate the public facility, etc. is a facility for public welfare and the person who has received permission under Article 26, paragraph (2) of the PFI Act, and transferred the right to operate the public facility administers the facility for public welfare as a designated administrator at the time of the transfer, and in designating that person to whom the operating right has been transferred as the designated administrator of the facility for public welfare, a resolution at the local council for that re-designation is unnecessary". In addition, taking into account the purpose of the special measures, that they are to replace the function of the resolution under Article 244-2, paragraph (6) of the Local Autonomy Act, it may be possible to provide procedures for designating the designated administrator, the criteria of the administration conducted by the designated administrator, the scope of business, and other necessary matters (Article 244-2, paragraph (4) of the Local Autonomy Act) as "special provisions";
  - (c) After designation of the designated administrator, the head of a local government should in principle report the designation to the local council as promptly as possible and unless there are special circumstances, the report must be made within the first session held after the designation.
- (7) In the case where the public facility, etc. pertaining to the operating right is a "facility for public welfare" under the Local Autonomy Act and the operating right holder administers the "facility for public welfare" as the designated

administrator under the Local Autonomy Act, in designating the transferee of the operating right with the permission of the administrator, etc. from the operating right holder as the designated administrator of the "facility for public welfare", in light of the actual situation in the region and preceding cases, whether or not to use the special measures referred to in the Local Autonomy Act to the effect that a subsequent report is sufficient in place of resolution at the local council for designation of the designated administrator should be appropriately determined by individual matters, taking into consideration the necessity, etc. to transfer the operating right with the permission of the head of a local government without passing a resolution at the local council from the viewpoint of smooth procurement of funds for, and succession, etc. of, the operating project.



## 15 Rescission, etc. of the Operating Right

### (1) Points to be Noted, Relation with Cancellation of Contracts

#### 1. Main Points

- (1) In regards to the rescission of the operating right and cancellation of the implementation agreement, in providing the requirement and burden for each attributable reason, as compared PFI projects in general, are there any points to be especially noted?
- (2) If the implementation agreement is cancelled, how should the reasons for extinguishment of the operating right for cause, etc. be positioned.

#### 2. Points to be Noted

- (1) In contrast to PFI projects in general, where an appointed business assumes the contractual position to implement the project under the project contract, in an operating project, the right to implement the operating project arises through the act of establishment of that right by the administrator, etc., and the implementation agreement only regulates the implementation method of the operating project. Thus, even if the implementation agreement is cancelled during the project period of the operating project, in order for the operating right to be extinguished, except in cases where the administrator, etc. no longer possesses the ownership of the public facility, etc., the procedure for rescission or waiver of the operating right is required.
- (2) Reasons for extinguishment of the operating rights are positioned based on the cause of cancellation of the implementation agreement, and existence or non-existence of the consent of the operating right holder, etc. as follows:

	Reasons for the extinguishment of the operating right	Compensation
Attribution to government	Waiver of the operating right (the consent of the operating right holder is required) (Article 26, paragraph (5) and (6))	Risk allocation under the implementation agreement
	Rescission of the operating right (Article 29, paragraph (1), item (ii))	Compensation under Article 30
Attribution to the operating right holder	Waiver of the operating right (the consent of the operating right holder is required) (Article 26, paragraph (6) and (7))	Risk allocation under the implementation agreement
	Rescission of the operating right (Article 29, paragraph (1), item (i))	Risk allocation under the implementation agreement
Force Majeure (natural disasters, etc.)	If the public facility, etc. is completely lost, the operating right will automatically be extinguished (Article 29, paragraph (4))	Risk allocation under the implementation agreement
	• Rescission of the operating right (Article 29, paragraph (1), item (ii))	Compensation under Article 30

	<ul style="list-style-type: none"> <li>• Waiver of the operating right (the consent of the operating right holder is required) (Article 26, paragraph (5) and (6))</li> </ul>	Risk allocation under the implementation agreement
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- (3) The administrator, etc. will carefully make a decision on the rescission of the operating right after taking into account the importance of continuously providing public services, the gravity of the breach of contract, etc., interests of the mortgagees, etc. of the operating right, and the interests, etc. protected by the rescission of the operating right, and considering whether there is any method available other than rescission of the operating right, such as requesting that the operating right holder eliminate the cause of rescission of the operating right.
- (4) When the administrator, etc. intends to rescind the operating right based on public interest needs, the administrator, etc. will carefully make a decision on the rescission, etc. after objectively evaluating and comparing the public interest of the services provided by the operating right with the newly emerged public interest needs.
- (5) When rescinding the operating right, in light of the importance of the public services provided at the public facility, etc., the administrator, etc. must make arrangements in advance for the system necessary for continuing, etc. the public services.

## **15 Rescission, etc. of the Operating Right**

### **(2) Cancellation of Contract Before Establishing the Operating Right**

#### **1. Main Points**

- (1) (1) Is there any matter that should be especially noted when the cancellation event for a construction contract occurs during the construction work for a public facility, etc. for which the establishment of an operating right is planned?

#### **2. Matters to be Noted**

- (1) The operating right, which is a deemed real right, can be established after completion of the construction of the public facility, etc. which is the subject of the right established. Therefore, the cancellation of the contract during the construction period will not be subject to rescission of the operating right or compensation due to rescission.
- (2) Thus, in the project contract for the construction, it is necessary to provide provisions on allocation of risks.
- (3) The use of prepayment guarantee, performance bond insurance, contract guarantee, etc. may be considered.

## **15 Rescission, etc. of the Operating Right**

### **(3) Matters to be Noted for Compensation**

#### **1. Main Points**

(1) What matters should be noted for compensation for loss in connection with the rescission, etc. of the operating right?

#### **2. Matters to be Noted**

(1) The provisions of Article 30, paragraph (1) of the PFI Act impose the obligation to compensate for losses that would normally occur (hereinafter referred to as "normal losses"), and while the provisions do not refer to the method of calculation, it may be anticipated that the compensation would be made in accordance with the approach taken in the Compensation Standards for Public Use Land.

(2) Specifically, in accordance with the examples of compensation under other systems such as the Fishery Act (Act No. 267 of 1949), etc., compensation may be made pursuant to the vision of the "Cabinet Order to provide the details of Article 88-2 of the Expropriation of Land Act (Cabinet Order No. 248 of 2002, hereinafter referred to as "Cabinet Order on expropriation"), which provides the standards for the administrative determination by the expropriation committee for the expropriation procedures and the "outline of standards for compensation for losses in connection with acquisition of the public lands (Cabinet Decision as of June 29, 1962)", which provides the standards of compensation of the business in the case of acquiring the lands for public use.

(3) Since the operating right holder does not hold the ownership in the buildings, etc. or lands that constitute a public facility, etc., and holds solely the right pertaining to operation, etc. of the facility, etc., it is considered that the compensation will be provided pursuant to the standards for compensation for business among the compensation that is provided in Cabinet Order on expropriation.

(4) The administrator, etc. may provide in advance, in the implementation agreement, the method of compensation for normal losses in connection with the rescission of the operating right for reasons of public interest.

(5) The provisions of Article 30, paragraph (1) of the PFI Act will not restrict provisions relating to the allocation of risk in the implementation agreement other than compensation provided in Article 30, paragraph (1) of that Act in the case provided in Article 29, paragraph (1), item (ii) of that Act.

(6) If the operating right is rescinded for reasons of public interest, it is considered that, at the time that the operating right was rescinded, the amount of the operating right consideration already paid by the operating right holder that corresponds to the remaining duration should be paid to the operating right holder. In addition, it is desirable to provide for the return of the operating right consideration for the portion of the operating right

consideration that corresponds to the remaining duration in the implementation agreement, even in a case other than rescission of the operating right due to a reason of public interest, if the administrator, etc. determines that it is appropriate to return the operating right consideration considering the amount and payment method, etc. of the operating right consideration budgetary measures are unnecessary at the time of implementation agreement and it is sufficient if the budgetary measures are implemented by the time the payment is decided.). Additionally, when the consideration for the operating right is returned, compensation for damages and penalties may be offset. It is also desirable for local governments to include the same provisions in implementation agreement (the same applies to budgetary measures.).

Subject of compensation under the outline of standards for compensation for losses in connection with acquisition of the public lands	Outline
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◇In the case of compensation for discontinuance of business

In regards to the rights of business that are customarily traded as independent assets, and other intangible assets pertaining to business, their proper transaction prices	Various business interests such as so-called "goodwill"
The amount of losses from sale, etc. of machinery and equipment, farming equipment, fishing equipment, goods, and work in progress, and other losses normally arising in connection with assets	Facilities, etc. installed by the operating right holder and remaining inventory of goods purchased for users
The amount equivalent to the dismissal notice payment required for dismissing an employee and in the case where change of business is reasonable and it is considered necessary to continuously employ the employee, the amount equivalent to the allowance for temporary absence from work during the period normally required for change of business, and other amounts of losses normally incurred in connection with labor	Employees hired by the operating right holder
The amount equivalent to the previous revenue during the period normally required for change of business	Assuming that the operating right holder changes business, the revenue that would have been expected if the business had continued during the period up to the change of business

◇In the case of compensation for business suspension

During the period normally required for suspension, the fixed expenses incurred during the period of business suspension, including taxes and public dues on the assets for business and the amount equivalent to the employees' allowance for temporary absence from work	<ul style="list-style-type: none"> <li>--Basic costs such as taxes and utility costs that are necessary for the operating right holder to maintain the office during the suspension period</li> <li>-- Allowance for temporary absence from work.</li> </ul>
Reduced amount of revenue during the period for which suspension is normally required	Revenue that would have been expected if the business had continued during the suspension period

<p>The amount of loss normally occurring due to temporarily losing clients because of suspending the business or relocating the place of business (excluding those set forth in the preceding item)</p>	<p>Decrease in revenue occurring until the valued clients who are temporarily lost due to the suspension or relocation of the business are regained</p>
<p>The amount of loss of goods, work in progress, etc. in transportation in connection with the relocation of the place of business, relocation advertisement expenses, and other losses that will normally arise in connection with relocation</p>	<p>Advertisement expenses, etc. to publicly announce relocation of the office place</p>

## 16 Termination of the Operating Project

### (1) Evaluation and Purchase of the Project Value, etc. at the End of the Project Period

#### 1. Main Points

- (1) How are valuation and disposition of the project value or project assets after termination of the implementation agreement considered?
- (2) If assets that are deemed to be of value exist as a result of valuation after the termination, how should their treatment be considered?

#### 2. Matters to be Noted

- (1) In regards to the valuation and disposition regarding the public facility, etc. pertaining to the maintenance or extension and reconstruction that are required at the minimum under the implementation policy, required level documents, or implementation agreement, etc., it is considered that the valuation and disposition have been reflected in the operating right consideration and that receipt of individual consideration is not necessary.
- (2) In regards to the valuation and disposition of the public facility, etc. pertaining to the extension and reconstruction implemented voluntarily by the operating right holder, these are considered to be as follows:
  - (i) extension and reconstruction within the scope of the operating right:
    - (a) when a newly appointed business is to purchase the extended and reconstructed portion:
      - In order to grant incentives for appropriate extension and reconstruction, after the end of the project period, it may be possible to reestablish the operating right for the public facility, etc., and it may also be possible that the newly appointed operating right holder will pay all or part of the market value, etc., equivalent to the value increase of the facility through extension and reconstruction, to the original operating right holder that implemented the extension and reconstruction (hereinafter referred to as "original operating right holder") in accordance with the calculation method agreed to in advance between the administrator, etc. and the original operating right holder;
      - In this case, in the selection process of the new operating right holder, it is necessary to clarify the handling of the consideration for the amount equivalent to the value increase. It is necessary to note how to evaluate both the amount to be paid to the administrator, etc. for the operating right consideration and the consideration for the amount equivalent to the value increase to be paid to the original operating right holder; and
      - It may be possible that a three-party agreement may be executed among the original operating right holder, new operating right

- holder, and the administrator, etc., or it may be possible that, as a supplementary condition for the establishment of the operating right for the new operating right holder, a payment of the amount equivalent to the value increase be paid to the original business;
- b. when the administrator, etc. is to purchase the extended and reconstructed portion:
    - when the project period ends, it is necessary to enable the administrator, etc. to pay all or part of the market value, etc. equivalent to the value increase of the facility through extension or reconstruction in accordance with the calculation method agreed in advance between the administrator, etc. and the original operating right holder, if the administrator, etc. takes the budgetary measures. Based on this, it is desirable to provide the following in the implementation agreement;
      - a. procedures to be followed when a private business makes a replacement investment for an amount equivalent to the value increase of the facility, which is hard to recover during the project period, and the residual value of the investment can be anticipated at the end of the project period;
      - b. in the case where the replacement investment is decided to be made as a result of the procedures, the method or procedures, etc. for deciding the purchase price by the administrator, etc. for the amount equivalent to the value increase for which residual value exists at the time of the end of the project;
 

It is also desirable for local governments to provide similar provisions in the implementation agreement. In providing the same, it should be noted that a resolution at the local council may be required if an agreement is to be executed for expenditure of beneficial expenses (Article 96, paragraph (1), item (viii) of the Local Autonomy Act; provided, however, that the item shall not apply for businesses of local public enterprise (Article 40, paragraph (2) of the Local Public Enterprise Act));
    - c. From the viewpoint of ensuring fairness, transparency, and competitiveness, the assessment may be conducted through procedures such as determination of the estimated amount by a neutral third party;
    - d. It may be possible to carry out separate accounting necessary for maintenance, extension and reconstruction required at minimum in the implementation policy, etc. and extension and reconstruction voluntarily implemented by the operating right holder respectively, and based on that separate accounting, to calculate the market value equivalent to the value increase; and



- (ii) Valuation and Disposition of the New Establishment Outside the Scope of the Operating Right:
  - In regards to valuation and purchase of the portion equivalent to the value increase of the facility through new establishment outside the scope of the operating right, it may be possible that this is decided upon discussion between the original operating right holder and new operating right holder who both hold ownership.
- (3) In addition, in either case of (2), (i) or (ii) above, it may be possible that the value increases due to business value, such as goodwill and branding, can be handled in accordance with the value increase portion of the facility.

## **16 Termination of the Operating Project**

### **(2) Extension Option**

#### **1. Main Points**

- (1) How should the necessity of, and challenges related to, the extension options during the project period which are observed in various foreign countries, be considered?

#### **2. Points to be Noted**

- (1) Under the PFI Act, the limit of the duration of the operating right is not provided, and the duration may be determined at the discretion of the administrator, etc.
- (2) Since the operating right includes the right to use the public facility, etc. as normally required for the operation, etc. of the public facility, etc. and a separate lease agreement, etc. is not necessary, it is considered that the restrictions on lease period, etc. provided under Article 21 of the National Government Asset Act do not apply.
- (3) On the other hand, since the duration of the operating right is an objective matter that shows the scope of business of the operating right, it is designated as a registered matter in the title section of the register pursuant to the provisions of Article 22 of the Order on Registration of Right to Operate Public Facility, etc. (Cabinet Order No. 356 of 2011), and in order to change that matter, it is necessary to newly establish an operating right.
- (4) In cases where an additional duration is determined under certain conditions (the so-called “extension option”), in addition to the determined duration, it is possible that that fact will be stated in the implementation policy, that the condition for granting the additional duration added to the determined duration will be set in a supplementary article at the time of establishing the operating right, and that fact will be set forth in the implementation agreement. In addition, it is also possible that the determined duration and the additional duration period which is permitted to be added to the determined duration under certain conditions may be registered in the register.

#### **Supplementary Provisions**

The guidelines come into effect as from July 17, 2020.