



JOURNAL OF LEGAL STUDIES

<https://e-journal.uum.edu.my/index.php/jls>

How to cite this article:

Richo Andi Wibowo & Karina Dwi Nugrahanti Putri. (2024). Government assignment of contracts to state-owned enterprises to provide infrastructure: Indonesia's experience. *UUM Journal of Legal Studies, 15*(2), 675-705. <https://doi.org/10.32890/uumjls2024.15.2.11>

GOVERNMENT ASSIGNMENT OF CONTRACTS TO STATE-OWNED ENTERPRISES TO PROVIDE INFRASTRUCTURE: INDONESIA'S EXPERIENCE

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Received: 29/9/2024 Revised: 19/2/2024 Accepted: 29/4/2024 Published: 30/7/2024

ABSTRACT

This paper aims to evaluate the peculiarities of a mechanism utilised by the Indonesian government to conduct infrastructure development, that is, the government's assignment of contracts to state-owned enterprises (SOEs). This mechanism differs from public procurement or public-private partnership. This paper raises three questions: (1) What are the advantages and disadvantages of employing government assignment of contracts to SOEs? (2) What should be done to prevent the disadvantages? and (3) What lessons can be learned by other countries from the Indonesian experience? This paper employs qualitative legal research. It starts by analysing public satisfaction and dissatisfaction as reflected in the news, literature and interviews. The

legal causes of dissatisfaction which are basically the problematic regulations, are then analysed. Finally, the legal principles and legal concepts enshrined within the regulations are examined to seek legal solutions. The advantages of the government's assignment of contracts to SOEs are to simplify the tender process and to enable the government to quickly provide infrastructure. Nonetheless, the private sector feels aggrieved because the regulations that dictate when a project may be contracted to an SOE are unclear, and public funding is predominantly circulated among the SOE groups. To address these problems, the government should adhere to the globally recognised principles of equality and accountability and the concepts of competitive neutrality and the right to development. The bittersweet Indonesian experiences maybe not only the refinement of the Indonesian law and policy, but also their use as food for thought for any country considering infrastructure development.

Keywords: State-Owned Enterprises (SOEs), Government's Assignment of Contracts, Public Procurement, Public-Private Partnership, Infrastructure Development.

INTRODUCTION

Studies have shown that good infrastructure exerts a significant positive effect on long-term economic growth and income equality (Calderón & Servén, 2004, 2014). Therefore, many countries, including Indonesia, have attempted to enhance the quality of their infrastructure. However, the quality of infrastructure in Indonesia can vary widely. Good infrastructure can be found in Java and the Bali islands, but the infrastructure in other islands needs significant improvement.

In 2004, when Susilo Bambang Yudhoyono became President, Indonesia's infrastructure ranked among the lowest in Southeast Asia (Negara, 2016). However, this problem was not prioritised, as his first term of administration was focused on preventing social conflict, separatism and public disorder (Presidential Regulation [PR] 07/2005 concerning the national five-year development plan [RPJMN] 2004–2009).

The infrastructure problem had received central attention during Yudhoyono's second term of presidency. It was acknowledged in

the RPJMN 2010–2014 that low-quality infrastructure reduces Indonesia's competitiveness because it creates obstacles to the mobility of persons, goods and services (PR 05/2010 concerning RPJMN 2010–2014). Therefore, the Yudhoyono administration hosted several infrastructure summits to attract investors and opened its infrastructure sectors to private sector participation (Negara, 2016). These were followed by the issuance of many technical regulations to ensure a well-developed public-private partnership, such as: creating fairer regulations in sharing the burden of risk allocation between a public body and a private undertaking. The technical regulations also provide clearer solutions when problems occur, such as providing compensation, extending the concession period or a combination of these two (Wibowo et al., 2021)

The Yudhoyono administration also launched the so-called Master Plan for the Acceleration and Expansion of Indonesian Economic Development (MP3EI) in 2011 through PR 32/2011. This was a list of infrastructure and industrial projects that could boost Indonesia's economy and make it more competitive. However, the MP3EI was unsuccessful due to the lack of a coherent strategy for planning and delivery (Ray & Ing, 2016). Research shows that at the end of Yudhoyono's presidency, Indonesia was still losing more than 1 percent of additional Gross Domestic Product growth due to the lack of infrastructure (World Bank, 2014), which thus hindered Indonesian economic development (Lin, 2014).

Joko Widodo (Jokowi) stepped in as the Indonesian president in 2014. He and his administration again mentioned the necessity to improve national connectivity as mentioned in the five-year development plan (PR 02/2015 concerning RPJMN 2015–2019). The PR highlighted that a good or product might take more time to be available on the market due to the low quality or unavailability of infrastructure; this creates extra cost and makes the product more expensive than it should be. Hence, the planning document explicitly stated that infrastructure development needed to result in quick wins – observable by the citizens at the earliest opportunity. The Jokowi administration was still employing the concept of the MP3EI but with a more operational approach by allocating huge budgetary amounts to be spent on infrastructure (Ray & Ing, 2016).

The budget was used by the government to conduct classical public procurement and create public–private partnerships. The former aspect

refers to a process of selecting private undertakings, normally through competitive tenders. The private party builds the infrastructure, and the government pays them for their service. The latter aspect refers to a process for selecting a private undertaking through a competitive tender. The private undertaking and the public body build the infrastructure based on a sharing of burdens. Usually the undertaking focuses more on financing the project, while the government focuses on ensuring the land is cleared and providing financial incentives. The undertaking obtains a financial return from the long concession rights. They obtain money either from the citizens who access and utilise the infrastructure, i.e., a toll road; or from the public body who regularly pays them based on the undertaking's service performance, i.e., a hospital; or a combination of both of these, i.e., water infrastructure (Wibowo, 2021).

Besides public procurement and public-private partnerships, the government also 'assigns' SOEs to provide infrastructure. The SOEs may finance the project by themselves (i.e., by stocks, bonds or in cooperation with private undertakings), and after the accomplishment of the project, they may obtain concession rights. The SOEs may at times also obtain financial backup from the state. This third approach is officially called the '*penugasan BUMN*,' or the government's assignment of contracts to these SOEs (Ray & Ing, 2016)).

The term *penugasan BUMN* has been used by Yudhoyono since his first presidency; for instance, the PR 71/2006 assigned the SOE in the electricity sector – PLN – to build coal power plants. This approach was again taken when the PR 36/2012 ordered the SOE in port affairs – Pelindo II – to build and operate the Kalibiru Terminal Tanjung Priok Port. These SOEs used their personal funds or sought partners to carry out the projects; the PR did not mention the opportunity to be financed by the state budget. Presumably, this was because the PLN has stable customers and the government subsidises some of the electricity prices, while the PR 36/2012 granted concessionaire rights to Pelindo to compensate for their construction costs.

In the last month before Yudhoyono's second presidential term ended, he issued PR 100/2014 that assigned an SOE in the infrastructure sector – the PT Hutama Karya [HK] – to build several routes of Sumatra toll roads. This also opened the opportunity for this SOE to seek financing from business to business cooperation, obligations,

and financial backup from the government through the injection of state equity.

The approach to the government's assignment of contracts to SOEs – either with or without financial backup from the government – was continued, but at a far larger scale by Jokowi in his first term presidency. He expanded the budgets to ministries and injected state equity into the contracted SOEs. These approaches were all accompanied by an opportunity for the private sector, both national and international, to participate in Indonesian infrastructure development. In the second term of Jokowi's presidency, the same strategy has been maintained (PR 18/2020 concerning RPJMN 2019–2024).

Estimates from the Ministry of Finance valued the figure that needed to be invested in infrastructure from 2015 to 2019 at almost 4.8 trillion Indonesian rupiah, or approximately 347.4 million US dollars. Of this, 41.3 percent would be financed by the central and local government budgets, 36.7 percent would be funded by private participation and 22 percent would be funded by selected SOEs (Kemenkeu, 2018). The budget needed for the infrastructure from 2020 to 2024 is even higher; the PR 18/2020 concerning the RPJMN 2019–2024 estimated that this would cost more than 6.4 trillion Indonesian rupiah or approximately 441.7 million US dollars. Of this, only 37 percent would be funded by the central government. The RPJMN does not explicitly mention the estimated percentage for SOEs and private participation, but it is assumed that these proportions would be higher than before. Therefore, from a legal perspective, the Indonesian government uses three mechanisms to effect infrastructure development, namely (1) public procurement, (2) public-private partnerships, and (3) government assignment of contracts to SOEs – either with or without government financial support.

This paper focuses on the third mechanism (the government assignment of contracts to SOEs). It is worth noting to explain that in 2018, there were 118 SOEs in Indonesia, as well as hundreds of subsidiaries (Santika, 2023). Due to the government's commitment to consolidating SOEs, there are currently 41 SOEs, and eight of these are in the infrastructure sector (BUMN, 2024).

The government's assignment of contracts to SOEs to provide infrastructure may not be perceived as a common approach in other

countries. Although it can be seen as the ‘third mechanism’ (after exercising public procurement or public–private partnerships), the three are intertwined. The assignment of contracts to SOEs may thwart private actors from being able to compete to obtain government contracts offered through public procurement or public–private partnerships. Hence, the Indonesian situation may provide insights into the viability of this solution to boost infrastructure development, what advantages and problems have occurred and what should be done to address those problems. This experience may be considered a case study for other countries that may be contemplating a similar approach.

To achieve the present research aims, it is useful to first provide examples of how the government assigns contracts to SOEs to build infrastructure. Some of the positive outcomes of the assignment of contracts will then be discussed. Next, criticisms voiced by stakeholders will be outlined, including the adverse effects of these contracts. The legal discussion will then begin by explaining the legal basis upon which the government favours SOEs; this legal basis will then be countered from the perspective of the public law argument: the concept of competitive neutrality and the right to equal development. Finally, it will be recommended that the regulations to give favourable treatment be revised to ensure competition, adhere to the Constitution, observe the principles of equal opportunity and accountability, and prevent a moral problem.

DISCUSSION

Examples of Government Contracts with SOEs to Provide Infrastructure

This study will begin by presenting four examples of government contracts awarded to SOEs to build, operate and maintain infrastructure to boost the nation’s connectivity (e.g., railways, airports, light rail transits and toll roads) in several areas in Indonesia. These examples have been selected to illustrate different governmental approaches towards financing the projects. A description of the legal justifications for giving a contract to the SOE will accompany the examples. Therefore, it is useful to provide a brief overview of the hierarchy of regulations present in the administration of the Indonesian central government.

The highest law in the hierarchy in Indonesia is the Constitution, followed by a decision passed by the People's Consultative Assembly, then an Act or a government regulation in lieu of an Act. Below these are the government regulations (GR) and the presidential regulations (PR). The GR is usually used as a delegated regulation instructed by the Act. The PR is used more often as a legal basis for an action initiated by the President. At the sectoral level, each ministry may release ministry regulations (MR). However, the MR is only applicable to the specific areas under the ministry's purview.

The first example of a government assignment of a contract to an SOE is the PR 83/2011 concerning the assignment of a contract to the Indonesia Railway Corporation (PT KAI) to provide railway infrastructure at the Soekarno Hatta Airport and to build a circular line going through Jakarta, Bogor, Depok, Tangerang and Bekasi. According to the regulation, providing infrastructure means that the PT KAI shall build, operate, maintain and generate profits from the infrastructure. The PT KAI shall finance the construction by themselves and shall not obtain any budget from the central or local governments.

The second example is the PR 98/2017 concerning the acceleration of the construction and operationalisation of a New Yogyakarta International Airport in Yogyakarta province. The government instructed the PT Angkasa Pura, a government enterprise that is responsible for the management of the airport in Indonesia, to build and operate the airport. The regulation stipulates that the SOE should decide how to finance the construction.

The third example is different in nature from the first two. The government issued the PR 116/2015 and the PR 55/2016 concerning the acceleration of the availability and operation of the light rail transit (LRT) in the South Sumatra Province. These assigned (1) the building of the rail, the station, the operational facilities and the storehouse of the LRT to the PT Waskita Karya – an SOE in infrastructure; and (2) the purchasing and operating of the LRT to the PT KAI. These PRs stated that the government assists these SOEs with an injection of equity, although they are still encouraged to seek other financial sources.

The fourth example was briefly highlighted earlier as it was the approach used by President Yudhoyono at the very end of his first

presidency. President Yudhoyono conducted the government's assignment of contract to the PT HK to provide toll roads in four locations in Sumatera. The PR 100/2014 explicitly declares that the PT HK has been granted the rights to the concession for 40 years after the toll roads are built. The adoption and expansion approach used by President Jokowi is worthy of further discussion.

President Jokowi altered the regulation by the PR 117/2015 to add and expand the construction to 24 locations. The government assisted in this contract by injecting equity into the PT HK and instruct them to issue a bond and seek a loan from abroad or domestically to support the assignment. Two years later, the PR 81/2017 stated that the government gave a contract to the PT HK to operate and generate income from a toll road in Tanjung Priok, the busiest and most advanced seaport in Indonesia. The PT HK receive concession rights in the Tanjung Priok toll road for 40 years and the income from this shall finance the toll road construction in Sumatra.

These four examples show that the government gives contracts to the SOEs by issuing the PRs as the underlying legal basis. However, it is unclear how the decision is made to award a specific contract to one of the eight SOE(s) working in the infrastructure sector. There is also no legal basis that elucidates or guides the matter. The contracts have never been accompanied by a construction budget or its estimation; however, there are projects in which the government has injected equity into the SOEs. Since the equity injection might not be sufficient, the SOEs are also instructed to seek other alternatives to finance the construction. Although the matter is not explicitly mentioned in the regulations, the SOEs will usually obtain concessionaire rights to manage the physical infrastructures that they have built. In a particular situation, an SOE may also obtain additional concessions in a different place as an alternative to ensure the assignment is completed.

Positive Results of Government Contracts to SOEs

There are at least three positive outcomes of the government policy of assigning contracts to SOEs to build infrastructure. First, SOEs are generally perceived as having better technical and financial capabilities than private actors, which makes it easier for them to contribute to the building of an infrastructure. A representative of the

association of Indonesian businesspeople (KADIN) acknowledged this by highlighting an example of some toll projects in Java. The projects had been previously stalled under the management of private actors, but were successfully finished after the projects were transferred to SOEs (Nasution, 2016a).

Second, the assignment of government contracts to SOEs is more effective in terms of time used and procedures undertaken because the government does not need to conduct tender processes and undergo the bid-protest procedure. The government simply creates an assignment using the PR as its legal basis; prepares the budget or grants concessionaire rights, or both, as the compensation for the assignment whenever relevant; conducts technical supervision, which can be done by a relevant ministry, and provides financial supervision by assigning an internal government auditor.

This effectiveness seems consistent with the Jokowi administration's desire to manifest the quick wins mentioned in the midterm planning. This desire is indicated by the titles of the various regulations issued by the government, the majority of which use the word 'acceleration'. It also seems that the government genuinely trusts the SOEs and believes that their directors will take the contract assignments seriously; indeed, the directors must be loyal to the government, as the government can dismiss them if they perform poorly.

Third, President Jokowi and his administration have enjoyed a relatively consistent, positive impression from society due to the impressive output of infrastructure development. Four surveys were conducted in 2017 by different organisations, and these had shown that a majority of the citizens were satisfied with the government's performance. Their findings were similar; according to the polls, the most impressive aspect of that performance came from infrastructure development (Prasongko, 2017). In 2021, two different organisations conducted a similar survey. The result was consistent with the previous surveys: Infrastructure development was deemed the most significant achievement of the Jokowi administration, with 68.7 percent of the respondents satisfied with the result (Dirgantara, 2021; Pusparisa, 2021). The most up-to-date survey was released in April 2022 by Kompas, the most influential newspaper in Indonesia. According to that survey, public satisfaction with the government's performance reached 73.9 percent, the highest since the first time Jokowi served

as president in 2014 (Mantalean & Meiliana, 2022). Instead of utilising detailed parameters such as ‘infrastructure’, it used four broader classifications, namely economy, politics and security, law enforcement, and social welfare. Nonetheless, based on journalists’ interviews, both bureaucrats and laypeople tended to focus on the Jokowi administration’s success in infrastructure development (Aco, 2022; Purnamasari et al., 2022).

Stakeholders’ Criticisms and the Adverse Effects of the Assignment Policy

President Joko Widodo had just begun his first term in 2014 when he announced his commitment to involve the private sector in infrastructure projects; this announcement was positively received by the private sector (Kompas.com, 2014). However, this assurance belies the reality of his administration. The private sector has noted that SOEs have obtained more privileges than they previously had under Widodo’s administration. This criticism has been raised with increasing frequency.

The private sector started publicly voicing its concerns in early 2016. Erwin Aksa, one of the central figures in the KADIN, stated that SOEs were awarded too many strategic infrastructure projects, while private-sector entities received only those strategic projects that had a low internal rate of return (Nasution, 2016b). Aksa then asked the government to create regulations that would require SOEs to cooperate with private companies, thus allowing SOEs and the private sector to develop their businesses together (Nasution, 2016b).

At the end of 2017, the KADIN continued to voice its concern by calling on the government to treat SOEs and the private sector equally. The KADIN highlighted the following three points: (1) the government too often grants projects to SOEs via government contracts; (2) although some private actors have been involved in the SOE infrastructure projects, their engagement was based solely on a subcontract instead of a joint operation; and (3) SOEs rarely pay the subcontractors on time (Nasution, 2017).

At the beginning of 2018, another association, the Association of Indonesian Construction Implementers (GAPENSI), called on the government to pay attention to private contractors. The GAPENSI

estimated that approximately 37,000 private contractors had gone bankrupt over the last three years (Uly, 2018). Bambang Rahmadi, the GAPENSI's representative, explained that contractors face difficulties in obtaining government projects because they were paid late (Prabowo & Alexander, 2018; Uly, 2018).

In mid-2018, the GAPENSI adopted a different strategy. Instead of voicing its concern in the media, it came before the Indonesian Vice President, Jusuf Kalla. The GAPENSI again highlighted its concerns and expressed additional relevant grievances, such as difficulty in obtaining loans from banks (Wiangga, 2018). This situation is contrasted with that of SOEs because SOEs may obtain equity injections from the government, and as a consequence, banks consider these undertakings to have a better financial profile. Therefore, it is not surprising that banks prefer to grant loans to government enterprises rather than to private enterprises (Wiangga, 2018).

Private contractors understand that the banks have to act prudently by diversifying their loans among numerous sectors, with each sector having a ceiling budget; however, this has created additional problems for the private contractors because the loans granted in the infrastructure sector may have been fully allocated towards the SOEs (E. Siregar, 2019). In addition, a representative from the GAPENSI explained that even if the private enterprises could manage to obtain loans, the banks usually charge a high annual interest rate of 12–13 percent (Ulya & Sukmana, 2019). This is different from the SOEs, which may obtain a lower interest rate because of the positive profile that results from government backing (World Bank, 2018). Consequently, private contractors face a problem. One example of the issues they face due to the combination of high interest rates and a delay in obtaining payments is found in Riau province, where a local contractor's house was confiscated by the bank (Jannah, 2019).

The government has also been criticised for giving contracts to SOEs without sufficient assessments. For example, the LRT in South Sumatera Province is used by relatively few people. A newspaper reported that even though each LRT compartment can carry 125 passengers, fewer than a dozen passengers use each compartment on average (R. A. Siregar, 2019). The director-general of the Railway of the Ministry of Transportation admitted that the LRT was initially intended as a method of transportation for athletes and officials during

the Asian Games—a continental multisport event held every four years—which South Sumatera province hosted in 2018 (Sidik, 2019). The fact that the LRT has not been used to capacity since the Games indicates that the assignment was based on political considerations—to confer a positive impression on the athletes and officials from neighbouring countries—rather than on an economic analysis and needs assessment of local citizens. Years ago, when this infrastructure was being constructed, the authors met with some local residents to ask them for their thoughts on the LRT. All doubted that the LRT was truly necessary for the local population.

Some of these criticisms were echoed in a World Bank report titled ‘Infrastructure Sector Assessment Program’ (Infra SAP). The report highlighted that Indonesia needs substantial private equity to implement its ambitious agenda of providing infrastructure; however, there are impediments to private investment. One of the obstacles is the government’s assignment of contracts to SOEs to provide infrastructure (World Bank, 2018). As the report further explains, despite the government’s claims that, in principle, SOEs are only assigned to non-viable projects, there are no clearly established criteria to determine which projects should be assigned to SOEs, pursued by a ministry or competitively tendered (World Bank, 2018). These matters may explain the counterintuitive situation in which the share of infrastructure investment financed by the private sector has fallen from 17 percent of the total investment in 2010–2012 to 9 percent in 2011–2015, despite Indonesia’s macroeconomic stability and credible fiscal management (World Bank, 2018).

The debate concerning the Infra SAP report should be mentioned. It was finalised in June 2018 and was published on the World Bank’s website. The report became part of public discussion after CNN Indonesia reported the Infra SAP publication (CNN, 2019). A few days later, the World Bank removed the report from its website, stating that the report was still being prepared and was not ready to be shared (World Bank, 2019). The authors believe the World Bank removed the report to avoid its use as political ammunition during the presidential campaign. Jokowi—the Indonesian President at that time—was running for a second presidential term. Months later, he won the election. Having considered this, the present authors decided to cite this publication despite its controversy.

Although many criticisms of both the private sector and the World Bank have been voiced, the dominance of SOEs in handling infrastructure has continued. The authors conducted personal interviews with a representative of the GAPENSI and received a copy of points of thought based on the the GAPENSI annual national meeting in January 2022, which was officially sent to the Minister of Public Works. It again criticised the unfair situation, as the government awards too many projects to SOEs and money is only circulated among the SOE groups.

It is no wonder that a report released by the oldest and most-trusted rating agency in Indonesia showed that the debts of SOEs have skyrocketed by almost 1,500 percent between 2012 and 2021 (Pefindo, 2022). The Indonesian stock exchange noted that the 2020 profit of several SOEs in infrastructure sectors dropped by around 85 percent to 96 percent compared to the previous year; it has been determined that this situation was caused by the government's assignment of contracts to SOEs (IDX Channel, 2021). Recently, the government - officially admitted the financial problem of the SOEs in infrastructure sectors (Majalah Tempo, 2022).

Although the government has faced criticism from numerous stakeholders, it seems that its bureaucrats do not always have a similar perception of the issue. The Ministry of Finance has publicly shared its opinion that the domination of SOEs in infrastructure projects has made foreign investors reluctant to invest in Indonesia (Julita, 2019). The Ministry of Public Works embodied its commitment in the MR of Public Works 14/2020, which ensures that large companies – predominantly SOEs – cannot participate in public tenders with small-to-medium budgets ranging from 50–100 billion rupiah (approx. 3.45 to 6.90 million US dollars). Years later, the Ministry of Public Works declared its commitment at the front of the GAPENSI annual meeting 2022 that the Ministry will involve local contractors in various infrastructure projects 2022 (Dirgantara, 2022). Nevertheless, it is questionable whether these positive gestures will be implemented due to the President's style of decision making and the legal basis that exists in the Ministry of SOEs.

President's Style of Decision Making

Political economy observers have mixed views on how the Indonesian government manages the country's development. Some say that rent-

seeking elites have captured Indonesia, which hinders the country from providing good and fair regulations and promoting legal certainty for private sectors (Robison & Hadiz, 2017). Others say in a more positive tone that President Jokowi conducts direct activism in the economy to support and use SOEs for development (Kim, 2021). This approach is more-or-less understandable due to moderately successful public governance, some of which were built and operated by the SOEs (Davidson, 2021). Although these analyses are interesting, the focus here is on what can be confirmed publicly, namely about the President's decision-making style regarding infrastructure development. This decision making has raised doubt as to whether the policy has been evidence based or merely based on his intuition.

For example, the President instructed that some national airports should be upscaled into international airports, such as Malang and Lampung Airports (Prasetyo, 2018; Sofya, 2019). The Ministry of Transportation followed up on the instruction. A year later, the President questioned the Ministry of Transportation as to the reason Indonesia has so many international airports, which led to budget inefficiency (Puspa, 2020; Ramli & Sukmana, 2020).

In addition, the President instructed the inspectorate and internal government audit body to allow the public body to select national products through government procurement, albeit their prices are far higher and the quality is lower than those of imported products (Setkab, 2022). The President thought this would create added value to the domestic market and absorb local labour. However, the instruction was unreasonable for the following three reasons: (1) if the price gap is significant, it will result in users getting a smaller amount or number of what is required; (2) if the quality of local products is not reliable, it will have a negative impact not only on users, but also citizens as taxpayers; and (3) the instruction may enable the public body to step into illegal agreements with local suppliers to buy local products at unreasonable prices due to bribery or kickbacks (Wibowo, 2022).

These types of instructions amplify the analysis that President Jokowi conducts ad hoc approaches to the nation's economic policy (Warburton, 2016). Moreover, Bland (2020) interviewed the President's inner circle and found that President Jokowi does not like research and analysis; he likes action and decisions and, therefore, just pushes projects depending on where he visits.

If seen from an administrative law perspective, the provided examples indicate a violation of the principle of carefulness. The President may have neglected at least two parameters of this principle: to conduct research to find the information that must be taken into account in a decision; and to adequately identify the relevant facts and interests related to a decision (Addink, 2019).

While the bureaucrats in the Jokowi administration may have provided alternative views or suggestions to the President, culturally speaking, they are not accustomed to being too vocal. The culture in Indonesia is essentially geared towards 'keeping boss happy' (Hofstede-insights, 2024). This situation is exacerbated by President Jokowi's tough mindedness towards developing infrastructure (Bland, 2020) which is perhaps due to the fact that the majority of the citizens have been pleased with the development.

Legal Bases Underpinning the Problems

A return will now be made to the legal argument. While the gesture from the Ministry of Public Works is appreciated, it may not be helpful to fulfil the private-sector demand. Before the MR of Public Work 14/2020 was released, SOEs rarely participated in the tender below 100 billion rupiah (Novalius, 2017). Hence, the issue is not about creating a minimum threshold for the SOEs; rather, it is underpinned by two other legal problems: (1) the existence of a legal basis for the government to give contracts to SOEs; and (2) the existence of a legal basis for SOEs to circumvent competitive tenders by directly appointing their subsidiaries, affiliates, other SOEs or a combination thereof.

Legal Basis for the Government to Award Contracts to SOEs

All the PRs that assign contracts to SOEs refer to Act No 19/2003 concerning SOEs as the source of law. Two related Articles are relevant to this discussion.

Article 2 (1) of the Act details five objectives of the establishment of SOEs: (a) to contribute to national economic development, especially to the state income; (b) to create profit; (c) to provide public utilities; (d) to be pioneers in specific economic sectors into which private actors are reluctant to step in because they are not profitable; and (e)

to actively provide assistance and aid to society. The explanatory note of point (b) mentions that SOEs may be given a particular contract from the government, but the contract shall adhere to good corporate governance. The note emphasises that the assignment for SOEs must be provided with compensation based on a commercial calculation.

The matter of assigning contracts to SOEs is discussed again in Article 66 (1). This article explicitly states that the government may give a government assignment of contracts to SOEs. However, it shall be in line with the purpose and business area of the SOE. In its explanatory note, the article mentions that although the SOEs are established to seek profit, they may be assigned to address urgent tasks. The note also explains that if the contract is not financially feasible, the government shall compensate and provide margins.

These two articles provide the legal justification for the assignment of government contracts to SOEs. They highlight that the nature of the contract shall be in the non-profit sector or related to a public function (or both) but that the government shall provide a commercial calculation in this instance.

Legal Basis for SOEs to Circumvent Tender by Directly Appointing Their Groups, Other SOEs or Both

Certain regulations allow SOEs to pass some contract opportunities to their groups and other SOE peers. The norms can be seen at the GR and the MR levels. To provide a thorough picture, the authors will now discuss both the past and present regulations.

Previously, Indonesia was subject to the GR 29/2000 concerning the management of construction services. This regulation has been amended three times. In its most recent iteration, the GR 54/2016, stipulated that an SOE that obtains a contract from the government to provide infrastructure might conduct the SOE's internal public procurement by the so-called direct appointment method. According to the GR 59/2010, this is a procurement method to acquire contractors, construction planners and construction supervisors by immediately selecting one potential partner and then conducting negotiations to obtain a reasonable price and accountable technical specification. The GR 54/2016 also stipulated that an SOE can exercise the direct appointment method only with another SOE or towards an SOE's

subsidiary. In its explanatory note, an SOE subsidiary was described as a subsidiary company with the majority of its shares owned by the assigned SOE, another SOE or both.

In 2020, the government issued the GR 22/2020 to repeal the GR 54/2016. The new GR provides the legal basis for the government to assign (to contract) SOEs and even expand assignment to any undertaking affiliated with the local government. Interestingly, it is silent on providing a legal basis for SOEs to circumvent competition tender by conducting direct appointments to their subsidiaries and affiliates and to subsidiaries and affiliates of other SOEs. However, the absence of this norm in the GR should not be interpreted as the government no longer supporting the SOEs' actions to circumvent the tender competition because the MR of SOEs remains to provide legal justification.

Previously, the Ministry of SOEs released the MR of SOEs 05/2008 concerning General Guidelines on Procurement in SOEs. This regulation provided flexibility to SOEs in conducting their tenders to ensure SOEs could perform efficiently and that they would not lose business opportunities as a consequence. Under this regulation, when SOEs need goods or services, they have an option to directly appoint (1) their subsidiaries, (2) other SOEs or (3) other SOEs' subsidiaries.

Four years later, the General Guidelines on Procurement in SOEs were revised through the MR 15/2012. This MR not only retained the mentioned norm but also expanded SOE flexibility in conducting procurements by stating that they could also apply the direct appointment method to any business enterprise 'affiliated with an SOE'. An affiliated enterprise means any business enterprise in which 90 percent of its shares are owned by (1) a subsidiary of an SOE, (2) a combination of any number of subsidiaries of SOEs or (3) a combination of both subsidiaries of SOEs and an SOE.

The regulations do not specify the circumstances and sectors to which they apply. This can be interpreted to mean that the regulations apply in normal circumstances and any sector. The regulations only offer two vague guidelines about when a direct appointment is justified. The first guideline is 'as long as the quality, price, and purpose can be accounted for'. The second guideline states that the goods or services must be materially produced by an SOE's subsidiaries or affiliates, or

by other SOEs, or by other SOEs' subsidiaries or affiliates. In other words, the SOE is forbidden to contract with a broker or a middleman since this may not offer optimal value for its money.

Seven years later, this regulation was replaced by the MR of SOEs 08/2019, and this regulation remains valid as of the writing this paper. The expansion of the flexibility that SOEs have for conducting procurements remains unchanged.

Refining the Legal Substance

In what follows, two suggestions are provided for the government to refine regulations. The first one is to clarify the government's parameters for assigning a contract to an SOE by taking into consideration the legal concept of competitive neutrality. The other suggestion is to revoke the GR and the MR of SOEs that enables SOEs to circumvent tender by taking into account the principle of equal opportunity. By doing so, the principle of accountability will be preserved. Both suggestions are based on a public law perspective.

The Legal Concept of Competitive Neutrality and (Equal) Right to Development

The present authors have found no regulation that guides when a project should be assigned to an SOE, pursued by a ministry (via classical procurement) or completed through a public-private partnership. What is available is merely the midterm planning document that provides the budget needed for the infrastructure and the percentage estimation on how to fulfil the needs, either via public procurement, public-private partnership or the government's assignment of contracts to SOEs. Besides this lack of clarity, there is also a lack of coherence between the government statements and the realisation of the project. The government explains that the assignment of SOEs is only for non-viable projects; however, some projects have been assigned to SOEs even though the private sector has been very interested in them (World Bank, 2018).

While this situation may cause the private sector to have a negative perception of government contracts, the lack of clarity could also cause concern for the taxpayers. It may be true that the government's assignment of contracts to SOEs is usually assisted by an internal

government audit board, as promulgated in the President Instruction No. 01/2016 concerning Accelerating the Implementation of the National Strategic Project. The executive may also be overseen by an external - independent - state branch on audit. However, this supervision may not be standardised since the underlying problem lies in the unavailability of regulations to guide the government in calculating the compensation. In addition, the regulations do not specify any government obligation to publicly announce the results of the calculations. The public may thus remain uninformed on the matter. Moreover, the government's assignment does not have a natural corrective oversight mechanism, such as the bid protests that are present in public tenders.

The government cannot respond by saying that no one will challenge the assignment as its nature is not profit-oriented because: (1) the SOEs Act has stated that the compensation shall be calculated based on a commercial calculation and (2) it has been reported that the SOEs may be overcompensated for their services in the government contract (World Bank, 2018). Take for example, the scenario provided at the beginning of this paper: the authors believe that the government owes an explanation to the public as to why it gave concessionaire rights to the PT HK both for the Sumatera tolls and the Tanjung Priok tolls for 40 years and why this period was not shorter.

In addition to being of concern to the private sector and the public, the lack of clarity may concern the directors of SOEs. Having realised the possibility of obtaining commercial compensation, the directors may question why an assignment is given to a certain SOE instead of theirs. However, they may be hesitant to criticise this issue, realising that the government is their majority shareholder and that they can be dismissed at any time.

Therefore, the situation may create the public impression that the government provides certain privileges for SOEs. This situation is not desirable because Indonesia needs private funding to build infrastructure. According to the United Nations Commissions on International Trade Law the unclear regulations coupled with this impression may hinder the private sector's participation in the financing of infrastructure projects (UNCITRAL, 2001).

This impression occurs because the government may have been neglecting the so-called concept of competitive neutrality. The

Organisation for Economic Co-operation and Development explains that this concept refers to a regulatory framework in which public and private enterprises are subject to the same set of rules and no contact with the state confers a competitive advantage to any market participant (OECD, 2009). This concept acknowledges that in a particular situation, the privileged position of SOEs may negatively affect competition and harm consumer welfare (OECD, 2009).

This concept may not have even been operational in OECD countries (Lanneau, 2017) and may warrant further discussion. However, the idea should be considered because the legal concept could be developed as a legal principle that will have a direct influence on the legal system, which is where this argument is also valid for the public contract law issue (Wibowo, 2017).

The argumentation of the principle of competitive neutrality may be linked with the human right to development. As stated in the General Assembly resolution 41/128 of 4 December 1986, the right mandates that equal opportunity for development is a prerogative of nations and individuals who make up nations. It is done by, *inter alia*, fair policymaking and distribution to ensure the development of the entire population; equal opportunity for access to resources; and fair distribution of income. In this way, each person will have the equal right to develop, participate and contribute socially, culturally and economically to society (Bilge et al., 2019; Office of the United Nations High Commissioner for Human Rights [OHCHR], 2016).

‘Each person’ may be interpreted as a company structure, either government enterprises or non-government enterprises. These shall be treated equally in the context of the opportunity to compete in winning the government contract. Contracting out SOEs without facilitating competition among them may be seen as violating the principle of competitive neutrality and the right to development. If the government considers that SOEs shall be one of the pivotal agents of development, then let it be. However, it should at least be consistent with the SOEs Act and the government promises, such as assigning contracts only for non-viable projects and being accountable for the compensation given to SOEs. The other projects should be tackled by classical public procurement or public-private partnerships based on competition.

Otherwise, the public may criticise the government as being inconsistent with its official statements. The government expects

the private sector to invest in and finance the infrastructure projects, whereas the private sector (in this context, the contractors) has not obtained equal opportunity to enjoy public funds allocated for infrastructure development. The opportunity growth of the contractors has been hampered. To strengthen our argument, we close this subsection by citing a concept written by an ex-minister of the State Secretary in a leading Indonesian newspaper, Kompas. In essence, he questioned why the government, via SOEs, wants to compete with its citizens while the principal obligation of the government is to provide welfare to its citizens (Kesowo, 2020).

The Regulations that Enable SOEs to Circumvent Competition in the Tender Should Be Revoked

Based on the authors' numerous personal communications with officials from an SOE utility sector, the SOEs claim they are keen on applying direct appointment procedures for their subsidiaries, affiliated companies or other SOEs because the procedure is effective. They also explain that they are often hurried and under pressure to accomplish the government contract on time. Therefore, they cannot proceed with the tender; they will appoint their groups or other SOEs directly.

Direct appointment may offer 'effectiveness' since it may 'shortcut' the complex tender. Nonetheless, considering the significant criticisms discussed earlier, this perspective and its supporting regulations should be reviewed by keeping in mind the following points.

Conceptually, the government (including the SOEs) owes a fiduciary duty to the public; it mandates that public bodies give all public members an equal opportunity to enjoy the public benefit they have decided to allocate (Dekel, 2008). Therefore, an equal opportunity here shall be seen as a legal principle, the logic of which is valid in any country. As a legal principle, it has a particular binding effect. It refers to the government's obligation to provide fair chances for actors to compete in a tender; whenever certain restrictions are applied, they should be legally justified and not be designed to distort the competition (Wibowo, 2017). Hence, the norms in the previously mentioned GR and the MR of SOEs infringe on the principle of equal opportunity.

The norms may also be questioned from a constitutional perspective. It is relevant to start by bringing to light a widespread assumption in

Indonesia suggesting that the Indonesian Constitution endorses the idea of state protectionism, which may be manifested by allowing—and even empowering—SOEs to dominate the market. However, this assumption may be challenged (Wibowo, 2019). Arguably, the principle of equal opportunity is based on Article 28 D (3) of the Indonesian Constitution: ‘Every citizen shall have the right to obtain equal opportunities in government’. The Article was originally intended to highlight the equal rights of every citizen to become a member of parliament or a public official; however, it can also be interpreted to mean that every citizen shall have equal opportunity to compete for government contracts, whether offered by a classical public body or by SOEs (Wibowo, 2019).

Moreover, it is relevant to point out the note by an important Indonesian scholar, Emil Salim, in his introductory chapter to relaunch Mohammad Hatta’s book. Hatta is one of the Indonesian founding fathers and Indonesia’s first Vice President; his thoughts heavily influenced the Indonesian Constitution’s economic concept. Salim underscored that Hatta did not favour state corporations; on the contrary, Salim believed that Hatta suggested the government should welcome the economic activities conducted by private undertakings (Salim, 2015). The present authors agree with Salim. State corporations should be focused on providing public utilities; however, this should be seen in his thoughts during the early days of Indonesian independence. At that time, private sectors were not mature; therefore, those roles had to be undertaken by the state either directly or through state corporations. Hatta never set aside the role of the private sector, as he explicitly asserted the important role of private parties in filling the market gap that the state may not provide (Hatta, 2015). By this, Hatta never suggested that the government treat private undertakings unfavourably or distort the competition.

The necessity of private sectors and the concept of fair treatment towards them was reiterated by Mr Latief, a member of parliament, during the constitutional amendment meetings conducted by the People’s Consultative Assembly from 1999 to 2002. He suggested that the Indonesian economy should ‘provide equal opportunity towards every business player’ (Setjen MK, 2010). This concept was confirmed by Jimly Asshidiqie, a legal scholar who had prepared the conceptual note for the constitutional amendment. He underlined the necessity of fair competition and fair market. He asserted that Indonesia — as also

influenced by Hatta — always aspired to the concept of Scandinavian welfare-state countries. Hence, it shall not deny the existence of the market; it should accommodate the efficiency that may be achieved through market competition, although the government should still protect the market from harmful access (Asshidique, 2018).

Adherence to the principle of equal opportunity is also important because this is instrumental towards the principle of accountability; equality may help the accountability of the procurement system (Wibowo, 2017). A recent Indonesian corruption case underpins the call for accountability.

The Corruption Eradication Commission brought to light the case of a financial director of the PT AP II — an SOE that is authorised to manage some airports in Indonesia — who had an illegal agreement with other persons from the PT INTI, an SOE that focuses on manufacturing and assembly, managed service, digital service and system integrations (Mashabi & Meiliana, 2020). The PT INTI bribed the financial director, asking the director to instruct his subordinates to avoid a competitive tender for the baggage handling system in numerous airports under the management of the PT AP II. The financial director ordered his men to directly appoint the PT INTI (Mashabi & Meiliana, 2020).

It may be true that the PT AP II was not technically under the government's assignment of contracts to SOEs when exercising the direct appointment procedure; however, the point here is that SOEs may legally exercise the direct appointment procedure, which has reduced competition and equal opportunity. This could then lead to corruption and undermine accountability. If the Commission had not conducted wiretapping, the director might argue that the procurement mechanism was justified based on the MR of SOEs. Hence, the government should take this case seriously, especially because Indonesia ratified the United Nations Convention Against Corruption [UNCAC] through Act No 07/2006.

It may be useful to recall the UNCAC technical guide. It states that open tenders shall be prioritised because they accommodate the highest possibility of the principle of equal opportunity. The United Nations Office on Drugs and Crime points out that the procuring entity may exercise simpler tender procedures if there are considerations

of effectiveness; however, the competition must still be considered (UNODC, 2009). The competition may only be exempted entirely (via a direct appointment procedure) for extraordinary or very strong reasons, such as, *inter alia*, the necessity for rapid responses to cope with catastrophic events, for defence or security reasons, for a tender with a low estimated value contract or due to the unavailability of other suppliers because of intellectual property rights (UNODC, 2013). None of these reasons exists in the Indonesian situation in granting the SOEs the authority to conduct a direct appointment to their internal groups.

CONCLUSION

The government's assignment of contracts to SOEs to provide infrastructure development has created a dilemma; it has produced both solutions and problems. Some favourable aspects are that SOEs in the infrastructure sector generally have good qualifications when compared to private enterprises. Thus, the contract may be completed with more certainty. Contracting SOEs also allows the government to skip the bureaucratic tender process. Finally, Indonesian citizens have been impressed by the massive infrastructure projects, which are also provided by the government's practical approach of assigning contracts to SOEs.

Nevertheless, the assignment of contracts to SOEs has many significant problems. The private sector feels aggrieved because public money is only circulated towards SOEs and their groups. They do not enjoy fair access to public contracts because the regulations are unclear on when the projects shall be taken via public procurement, through a public-private partnership, or by government contracts to SOEs. Furthermore, the regulations enable the assigned SOEs to circumvent competition in tender opportunities by conducting direct appointments of their subsidiaries, affiliates or other SOEs. These regulations may not only bankrupt private contractors, but also undermine the integrity of the SOE officials due to a lack of accountability, thus providing a wider possibility of bribery.

This paper has provided two suggestions stemming from public law arguments (the principle of competitive neutrality and the (equal) right to development). First, the government should provide a clear

regulatory framework for assigning government contracts to SOEs. The assignment of contracts should only be allowed for non-viable projects, whereas competitive measures should be used for viable projects under classical procurement or public-private partnerships. Moreover, the compensation given to the assigned SOEs must be publicly announced to ensure the preservation of the principle of transparency and accountability and to avoid overcompensation. Additionally, the regulations that enable the contracted SOEs to conduct direct procurements to the internal group of SOEs should be revoked. The revocation of direct procurement can also be regarded as the government's willingness to learn from the recent corruption case in the tender of SOEs. Lastly, other countries that wish to take a similar approach to Indonesian infrastructure development through assigning contracts to SOEs should be mindful of the undesirable effects that have been explained in this paper.

ACKNOWLEDGMENT

This research was supported by the Research and Publication Unit of the Faculty of Law, Universitas Gadjah Mada. It did not receive any other specific grants from any other public agency, commercial, or not-for-profit sectors.

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