

# New Regulation on SOE Procurement: Redefining SOE Subsidiary and SOE- Affiliated Company

After the issuance of Presidential Regulation No. 16 of 2018 on Public Procurement of Goods and Services (“**Presidential Regulation No. 16**”), the public procurement landscape in Indonesia underwent another change when the government issued the Minister of State-owned Enterprise Regulation No. PER-08/MBU/12/2019 on Guideline for Procurement of Goods and Services by State-Owned Enterprise (“**SOE**”) (“**New Regulation**”). The New Regulation supersedes the entire previous regulation on the same subject (“**Previous Regulation**”).

Below we highlight some notable changes from the New Regulation:

## 1. Qualification as an SOE subsidiary or SOE-affiliated company

The New Regulation relaxes the shares percentage requirement for an SOE subsidiary or SOE-affiliated company. Previously, the law requires 90% ownership by one or more SOEs before a company can qualify as an SOE subsidiary or SOE-affiliated company. Now, the law only requires more than 50% ownership.

While the New Regulation still requires that a supplier must be an SOE subsidiary or SOE-affiliated company to qualify for direct appointment for the procurement of goods, the change from 90% to more than 50% SOE-ownership will widen the pool of companies that can qualify as an SOE subsidiary or SOE-affiliate. SOEs would not be limited in their choice and more private companies can now participate in government projects.

## 2. Utilisation of state budget

The Previous Regulation exempts the procurement by an SOE that is funded by the state budget. As such, this type of procurement must follow the tedious government procurement procedures set out under Presidential Regulation No. 16.

This distinction has not been retained in the New Regulation, which goes further to state that the New Regulation will apply to the procurement by an SOE that is funded by the SOE’s own budget, government’s equity contribution to that SOE, reimbursement of subsidies for public service obligations and government loan.

On the other hand, Presidential Regulation No. 16 does not specifically include SOE procurement using state budget. Consequently, it remains to be seen which law would actually apply for this type of procurement.

### 3. Optional adoption of the New Regulation

Interestingly, the application of the New Regulation is optional for an SOE subsidiary and SOE-affiliated company. As such, these companies can choose whether or not to adopt the requirements under the New Regulation or to set their own internal procurement procedure.

A key point to note here is that the New Regulation allows an SOE subsidiary or SOE-affiliated company to directly appoint another SOE, SOE subsidiary or SOE-affiliated company if the appointing SOE chooses to adopt the New Regulation. But it is unclear whether this privilege would still apply if the SOE subsidiary or SOE-affiliated company chooses not to adopt the New Regulation at the outset.

Thus, it is important for SOE subsidiaries and SOE-affiliated companies to weigh the flexibility of setting its own internal procurement procedure against the direct appointment privilege under the New Regulation.

### 4. Additional requirements for direct appointment

Under the Previous Regulation, an SOE needs to satisfy 11 conditions for the direct appointment of a supplier. While these conditions continue to apply, the New Regulation adds one new condition that allows an SOE to directly appoint a consultant if the service provided by the consultant is:

- a. unplanned;
- b. required to resolve certain issues; and
- c. intended for urgent work that cannot be postponed.

Consequently, this condition may allow an SOE to directly appoint, among others, legal consultants to provide legal assistance, such as in filing or defending a lawsuit/claim.

The New Regulation also prescribes general requirements for all direct appointment, one of them being that the supplied goods or services must be in line with the businesses of the supplier. It seems that this requirement is imposed to encourage SOEs to purchase goods and services directly from the producer and avoid the use of an intermediary. Further, the New Regulation also states that a direct appointment can only be done if it is allowed under the relevant sectoral regulation.

Where the direct appointment is made to another SOE, SOE subsidiary or SOE-affiliated company, the procuring SOE must also be able to justify the quality, price and purpose of the supplied goods or services.

## 5. Priority for domestic products

Although the Previous Regulation already required an SOE to prioritise the use of domestic products, in addition to utilising national engineering designs and expanding opportunities for small-scale businesses in its procurement, it does not provide detailed rules on this issue.

The New Regulation retains this prioritisation, in addition to requiring the board of directors of the appointing SOE to form a local content committee who will be responsible to monitor and ensure the use of domestic products and fulfilment of the prescribed local content in such SOE's procurement. The New Regulation also provides the following guidance for SOEs in granting price preference to bidders that use domestic products:

- a. bidders that supply domestic products having a local percentage of 25% or more is eligible for the price preference;
- b. the price preference must not exceed 25%; and
- c. specifically for construction services by a domestic construction company, the price preference must not exceed 7.5%.

However, the New Regulation does not set a formula to calculate the points for price in respect of a tender that has a local content percentage of 25% or more. As a reference, Presidential Regulation No. 16 sets the following calculation for the price preference:

$$\text{Final Evaluation Price} = (1 - (\text{local content percentage} \times \text{price preference})) \times \text{Offered Price}$$

## 6. Deadline to file a refutation

The New Regulation shortens the period in which a bidder can file a refutation against the SOE's determination of the winning bid or contract award. Previously, a bidder can file a refutation within 4 business days as of the date of announcement of the winning bidder or the date of the contract award (whichever is earlier), and the SOE will have 14 calendar days to respond.

Now, a bidder can only file a refutation within 2 days as of the date of announcement of the winning bidder or the date of the contract award (whichever is earlier), and the SOE will have 7 calendar days to respond. Consequently, bidders have very little room to move after the date of announcement or contract award.

## 7. Multi-year procurement contract

The New Regulation clarifies the detail of the requirements for a multi-year procurement contract whereby:

- a. the required scope of work can only be completed within more than 12 months or 1 fiscal year;
- b. it is more beneficial for the SOE to use a single contract for several years, provided that the term of the contract does not exceed 3 fiscal years;
- c. the work requires a long-term investment; or
- d. the work constitutes routine items that must be available at the beginning of the year.

As with the Previous Regulation, the board of directors of an SOE is allowed to formulate the price adjustment for multi-year contracts based on market conditions and prevailing best practices.

#### **8. Bid bond**

The New Regulation stipulates that an SOE may set a bid bond as a requirement in an open tender, general selection, selective tender, or selective selection process, unless the supplier of the goods/service is an SOE or ex-SOE.

However, an SOE will still have to consider the relevant sectoral laws and regulations as certain sectors will require bidders to submit a bid bond regardless of their status.

As seen from above, the New Regulation sets comprehensive terms and conditions for SOE procurement. While SOEs now enjoy more flexibility in appointing an SOE subsidiary or SOE-affiliated company in the procurement goods/services, SOEs have to navigate the New Regulation carefully. In particular for awarding direct appointment to other SOE, SOE subsidiary or SOE-affiliated company, the SOE will need to check the requirements of any other laws as a direct appointment may not be in line with the objectives of other laws, for instance, the Indonesian Competition Law.

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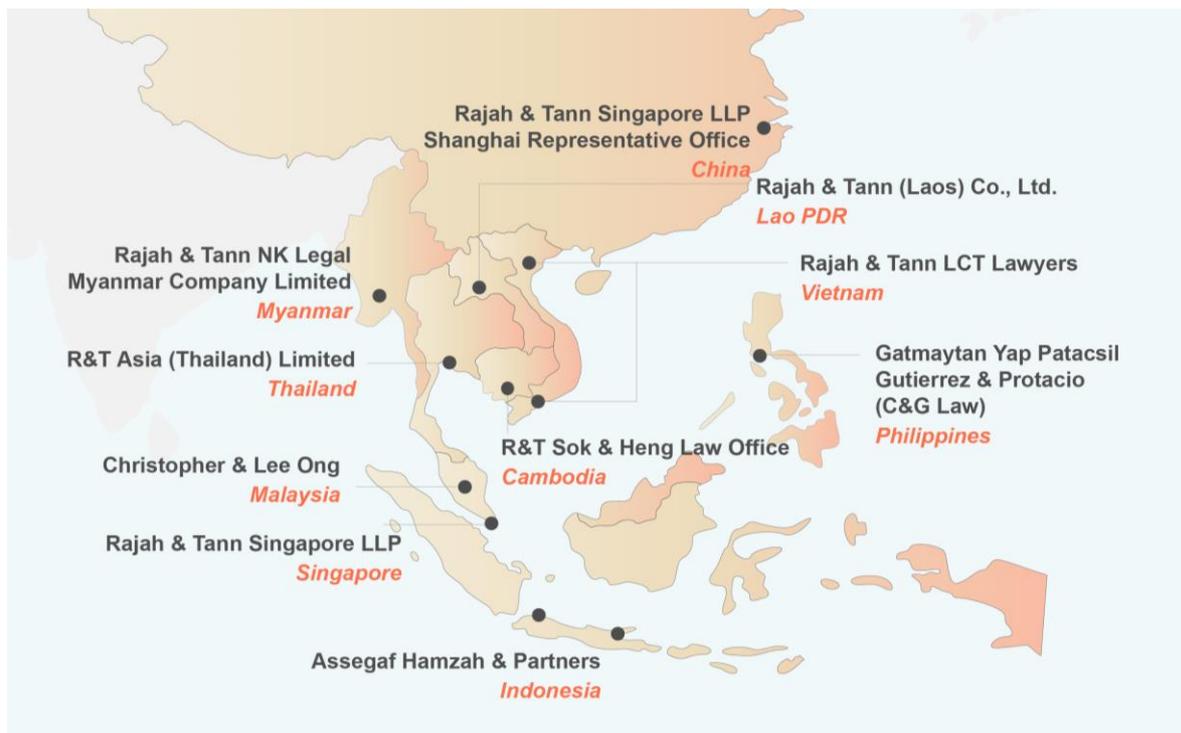
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