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BRIEF REVIEW ON GOVERNMENT REGULATION NUMBER 22 OF 2020 CONCERNING IMPLEMENTING REGULATION OF LAW NUMBER 2 OF 2017 CONCERNING CONSTRUCTION SERVICES: ONE OF THE KEY REGULATIONS FOR CONSTRUCTION SERVICES SECTOR IN INDONESIA

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General Overview

Government of the Republic of Indonesia (“**GoI**”) enacted Government Regulation Number 22 of 2020 concerning Implementing Regulation of Law Number 2 of 2017 on the Construction Services (“**GR 22/2020**”). such construction services area key regulation was enacted on last week of April 2020, in the early days of covid 19 pandemic in Indonesia. The enactment of GR 22/2020 was the good news for construction services society who more than 3 years waiting for this regulation since enactment of Law Number 2 of 2017 concerning the Construction Services (“**Construction Law 2/2017**”). For some reasons, enactment of GR 22/2020 is particularly important, including enabling the implementation of the Construction Law 2/2017 become more effective.

We remember that during such 3 years gap period, there were many questions from our clients in connection with their respective construction projects which we, as their lawyer must be extra carefully in providing our advices due to lack of regulations. Why we said “due to the lack of regulations”?, that was because of asynchrony in certain aspects between Construction Law 2/2017 and the implementation regulations applicable at the time of enactment of Construction Law 2/2017, i.e. Government Regulation Number 29 of 2000 concerning Operation of Construction Services that has been amended several times, lastly by Government Regulation Number 54 of 2016.

The backgrounds of the enactment of GR 22/2020 are to improve a conducive business climate, the implementation of transparent construction services, fair business competition, simplification of the scheme and regulation of construction services and to ensure a good policy direction for construction services as well as promoting construction services professionalism.

GR 22/2020 provides comprehensive guidelines in terms of the of responsibilities and authority of the Central Government, Regional Governments, both provincial/district/city in the implementation of guidance, supervision of construction services and the imposition of sanctions, as well as restructure the business structure and market segmentation of construction services, managing the supply chain of construction resources and expanding the roles of the construction services community.

The followings are certain issues we consider important to be reviewed.

Market Segmentation and Implementation of Construction Services

Under GR 22/2020, the market for construction-service businesses is segmented based on criteria of (a) **Risk**, which is determined based on scope of works, location of work, and workforce demand; (b) **Technology**, which is determined based on materials, equipment, experts and implementation methods; and (c) **Cost**, which is defined as the amount of money required to complete the works. Based on such criteria, types of business entities and market segmentation for construction services can be divided into: (i) individual or small business entities; (ii) medium business entities; and (iii) incorporated large business entities and representatives of foreign construction-service business entities. All construction-service business entities shall have Business Entity Certificate (*Sertifikat Badan Usaha/SBU*). Such certificate shall be obtained through certification processes organized by certification agencies established by accredited construction business associations, as well as through registration processes organized by the Minister of Public Works and Public Housing.

Construction-service companies may, either independently or jointly through construction-service agreements, organize construction service business which may comprise: (a) **Construction Consultancy Service** with scope of activities comprising of assessment, design, supervision and construction management; (b) **Construction Works** with scope of activities comprising of construction, operation, maintenance works, demolition works and reconstruction; and (c) **Integrated Construction Works** with scope of activities comprising of Design-Build and Engineering, Procurement and Construction (EPC).

Foreign Construction Company

Regarding foreign construction company, GR 22/2020 provides sanctions for the failure of a foreign construction company to comply with requirements specifically obliged to it in carrying out construction services in Indonesia. As provided under Construction Law 2/2017, a foreign construction company that intends to carry out construction services in Indonesia must either establish a foreign investment construction company in cooperation with Indonesian construction company ("**Foreign Investment Construction Company**") or establish its representative office ("**Representative Office**"), and both shall have Business Entity Certificate. In addition, the said Foreign Investment Construction Company shall also have Construction Business License (*Izin Usaha Jasa Konstruksi*), whilst the Representative Office shall secure its Foreign Construction Company Representative License (*Izin Perwakilan Badan Usaha Jasa Konstruksi Asing*).

A foreign construction company that carrying out its Indonesian construction project shall fully understand and make sure that all requirements applicable to it under Indonesian regulations have been duly met, otherwise it might be imposed by various sanctions, starting from fines, temporarily cessation of construction services, and even blacklisted. The fine is in the form of certain percentage of the total contracts value under which the foreign construction company doing its construction services. For example, if a Representative Office does not have Business Entity Certificate, then pursuant to Article 156 second paragraph of GR 22/2020, a fine amounting 20% of the total value of its Indonesian project construction contracts will be imposed to it.

Please note that the sanctions under GR 22/2020 will be also imposed to Representative Office in case it fails to fulfil its obligations under GR 22/2020, such as to establish joint operation with Indonesian construction company in carrying out construction services or appoints Indonesian citizen as its high rank leader.

Construction Contract

Since the enactment of Construction Law 2/2017, the most important issues relating to the construction contract are: (a) requirements to use Indonesian Language as the language of the contract in a single language contract and the using of Indonesian language version as the prevailing language in case of different interpretation in a bilingual contract; (b) requirement that the construction contract subject to Indonesian law.

The requirement as mentioned in (a) above causes the parties and their lawyers must be extra carefully in preparing a bilingual construction contract. The English version shall not be in contradiction with the Indonesian language version. Please be aware that if we are referring to a construction contract then it means we are talking about body contract and its attachments that includes project specifications and the last one mentioned is full of technical terms. From our experience, to make sure that the project owner and contractor have the same understanding on each provision of the contract, including technical related provisions is particularly important to avoid any dispute in the future.

Selection of Construction Services Provider

GR 22/2020 provides comprehensive and quite detailed provisions concerning selection of construction services provider. For the construction project using fund from or funded by State Finance, certain provisions must be taken into account, including methods and evaluation in the selection process. Therefore, prior to commencing selection process, project owner must firstly consider and determine on the status of project funding. In brief, the selection of construction services provider for construction project funded by State Finance shall be carried out using tender (or selection), direct appointment, direct procurement and the procurement using of e-catalogue. The conditions allowed for the using each of such selection methods are also stipulated in GR 22/2020, *for example*, direct appointment selection method shall be used for: (a) construction project related to emergency situation for public security and safety; (b) complex construction project that can only be carried out by very limited provider or by party reserving certain right; (c) secret construction project in connection with state safety and security; (d) small scale works; and/or (e) specific conditions as set out in Article 65 second paragraph of GR 22/2020.

Especially for the selection of integrated construction service provider, tender with pre-qualification method shall be used. Integrated construction works normatively defined as combination of construction consultation services and construction works services, comprising of design-build and engineering, procurement, and construction (EPC).

In connection with the GR 22/2020 selection of construction services provider related provisions, Minister regulations have also been enacted or being drafted by the Gol. Intervention of Gol in construction services provider selection through enactment of lots of multi-level regulations obviously showing intention of Gol in developing system of construction services selection.

Dispute Settlement Mechanism

In line with Construction Law 2/2017, GR 22/2020 encourages construction dispute settlement through alternative dispute resolution (ADR) mechanism, i.e. mediation, conciliation, and arbitration (of course in case of deliberation to reach mutual consensus as first step of amicable settlement failed to reach resolution). It is well understood since construction dispute mostly involves complex claims filed either by contractor or project owner which sometimes difficult to understand for non-technical people, including court judge and even project owner/constructor's lawyers.

By using of mediation, conciliation or arbitration, the parties in dispute can appoint independent qualified person in resolving their dispute. Especially for arbitration, in Indonesia there are at least 2 arbitration institutions that may be considered in resolving construction disputes, i.e. Badan Arbitrase Nasional Indonesia (BANI Arbitration Center) and Badan Arbitrase dan Alternatif Penyelesaian Sengketa Konstruksi Indonesia (BADAPSKI), however the firstly mentioned is the most popular.

GR22/2020 also induces the using of Board of Settlement Dispute (BSD) (*Dewan Sengketa*) with function in preventing and resolving construction dispute between contractor and project owner. The using of a BSD by the contractor and project owner is not mandatory, and subject to the parties' mutual agreement that shall be provided in their construction contract and set out in a tripartite agreement. From our perspective, BSD is similar with construction dispute settlement vehicle encouraged by FIDIC, as set out in FIDIC Conditions of Contract for EPC/Turnkey Project.

It seems that Gol is directing the development construction services in Indonesia to meet the standards that internationally accepted, whilst FIDIC's standard is one of the internationally accepted standards. From our analysis, it can be understood since it also has connection with promoting investment in Indonesia, why? In some of our past projects, foreign investors in investment projects that involve construction projects have interest to make sure the construction will be done smoothly, and one of the risk mitigation is by using their familiarized construction arrangement, which in this case is FIDIC's standards.

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