

Public Procurement

New Regulation on Solicited PPP: Improvements to Procurement Procedure

In November 2018, the National Procurement Agency (*Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah* or “**LKPP**”) amended the regulation governing the procedure on public-private partnership (“**PPP**”). The previous procedure for procurement of Implementing Business Entity in solicited PPP under Head of LKPP Regulation No. 19 of 2015 on Procedure for Procurement of Implementing Business Entity in PPP for Provision of Infrastructure (“**LKPP Regulation 19/2015**”) was considered to be incomplete by many PPP participants. Therefore, the new procedure under LKPP Regulation No. 29 of 2018 on Procedure for Procurement of Implementing Business Entity in Solicited PPP for Infrastructure Provision (“**LKPP Regulation 29/2018**”) is aimed to provide more clarity for PPP participants. That being said, procedures for: (i) procurement of Implementing Business Entity in unsolicited PPP; and (ii) procurement of Preparation Agency are still subject to LKPP Regulation 19/2015.

The table below provides a comparison of the key changes to the procurement procedure in solicited PPP.

No.	Subject	Provisions		Remarks
		LKPP Regulation 19/2015	LKPP Regulation 29/2018	
1.	Qualification requirements	Tender participants must have experience and capability in implementing and financing PPP projects.	Tender participants must have experience and capability in: a. implementing similar infrastructure provisions; and b. financing infrastructure provisions.	In practice, prospective business entities found it difficult to meet the requirements set in LKPP Regulation 19/2015, as the number of implemented PPP projects in Indonesia is still quite low. The new requirement will provide bigger opportunity for any interested business entities to participate in PPP projects.
2.	Amendments to Request for Proposal (“ RfP ”)	Changes/additions/reductions to the evaluation criteria and procedure set in the RfP are prohibited after the deadline for proposal submission.	Changes/additions/reductions to the evaluation criteria and procedure or any other substantial matters set in the RfP are prohibited after the first determination of the RfP.	Although LKPP Regulation 19/2015 prohibited amendments to RfP after proposal submission, the actual practice under such regulation has raised several antitrust/competition law issues. It is common for the procurement committee (“ Procurement Committee ”) to deliver pre-bid

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				<p>briefing through one-on-one meeting with certain participant. Under LKPP Regulation 19/2015, the Procurement Committee can amend the RfP based on the input they received in such meeting, provided that the amendment is made prior to the deadline for proposal submission.</p> <p>This practice opens the possibility for the evaluation criteria and/or procedure to be tailored in the interest of a certain participant, which may be deemed as an indication of bid rigging from the perspective of antitrust/competition law.</p>
3.	Procurement bonds	<ul style="list-style-type: none"> • Bid bond (“Bid Bond”) shall be valid as of the proposal submission date up to one month after the issuance of the Letter of Award by the contracting entity (“Contracting Entity”) (<i>Penanggung Jawab Proyek Kerjasama</i>). • The implementing business entity must submit a Performance Bond in the amount of 1-5% of the proposal value or the estimated value of the PPP project. 	<ul style="list-style-type: none"> • Bid Bond shall be valid as of the proposal submission date up to the signing of the contract signing. • The Implementing Business Entity must submit a performance bond (“Performance Bond”) in the amount of maximum 5% of the proposal value or the estimated value of the PPP project. • Based on the signed PPP contract, the Contracting Entity, the Implementing Business Entity, and the lender may sign a consent letter which gives the lender certain rights over the PPP project. 	<p>LKPP Regulation 29/2018 makes it possible for the Contracting Entity to request submission of a Performance Bond that is less than 1% of the proposal value or the estimated value of the PPP project. Such change is crucial considering that PPP projects tend to have high monetary value and allowing Performance Bond that is less than 1% of the proposal value or the estimated value of the PPP project will make this requirement less burdensome for the Implementing Business Entity.</p>

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Besides the above, LKPP Regulation 29/2018 also introduced several provisions on matters that were not previously regulated under LKPP Regulation 19/2015, such as:

a. **Announcement of the initial information of a PPP project**

If necessary, the Procurement Committee may announce non-binding basic information regarding the procurement process for PPP projects that will be commenced. This announcement will serve as a cue for business entities to make the necessary preparation if they are interested in participating in the upcoming procurement process.

b. **Detailed procedure for pre-bid briefing**

Since there are no provisions in LKPP Regulation 19/2015 governing the detailed procedure for pre-bid briefing, in practice, the Procurement Committee often delivered pre-bid briefing through one-on-one meeting with a certain participant. Such practice may result in different information being received among the participants, which has the potential to raise issues from an antitrust/competition law perspective. Under the new regulation, pre-bid briefing must be delivered directly and simultaneously to tender participants in the pre-bid meeting, which is more in line with antitrust/competition principles.

c. **New procedure for objections on prequalification, evaluation, and/or tender result**

Under the new regulation, objections on the prequalification and evaluation result must be addressed and answered by the Procurement Committee. Further, it is possible to submit objection on the result of the first tender evaluation in a two-stage tender process.

d. **Changes to consortium**

It is possible to change the composition of a consortium prior to proposal submission, provided that it does not adversely affect the competition in tender process and the consortium still satisfy the required qualification. Further, the new regulation also provides the opportunity to change the composition of a winning consortium prior to contract signing, provided that such change is necessary as a result of a force majeure event.

e. **Financial close preparation**

Under the new regulation, the Procurement Committee shall provide necessary assistance to the Contracting Entity until the financial close of the PPP project to ensure that there are no changes to the substance of the PPP contract, which has been completed in the procurement process. Further, the Contracting Entity, the Implementing Business Entity, and the lender may sign a consent letter that gives the lender certain right over the PPP project.

In conclusion, the new regulation will provide bigger opportunity for any interested business entities to participate in solicited PPP projects, as well as clarity to the procurement procedure.

Contacts



Farid Fauzi Nasution
Partner

D +62 21 2555 9998
F +62 21 2555 7899
farid.nasution@ahp.id



Vovo Iswanto
Of Counsel

D +62 21 2555 9938
F +62 21 2555 7899
vovo.iswanto@ahp.id



Asep Ridwan
Partner

D +62 21 2555 7819
F +62 21 2555 7899
asep.ridwan@ahp.id



Berla Wahyu Pratama
Associate

D +62 21 2555 9923
F +62 21 2555 7899
berla.pratama@ahp.id

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
F +65 6225 9630
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN NK LEGAL | *Myanmar*

Rajah & Tann NK Legal Myanmar Company Limited

T +95 9 7304 0763 / +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP
Shanghai Representative Office**

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 894 0377 to 79 / +632 894 4931 to 32 / +632 552 1977
F +632 552 1978
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Sole Co., Ltd.

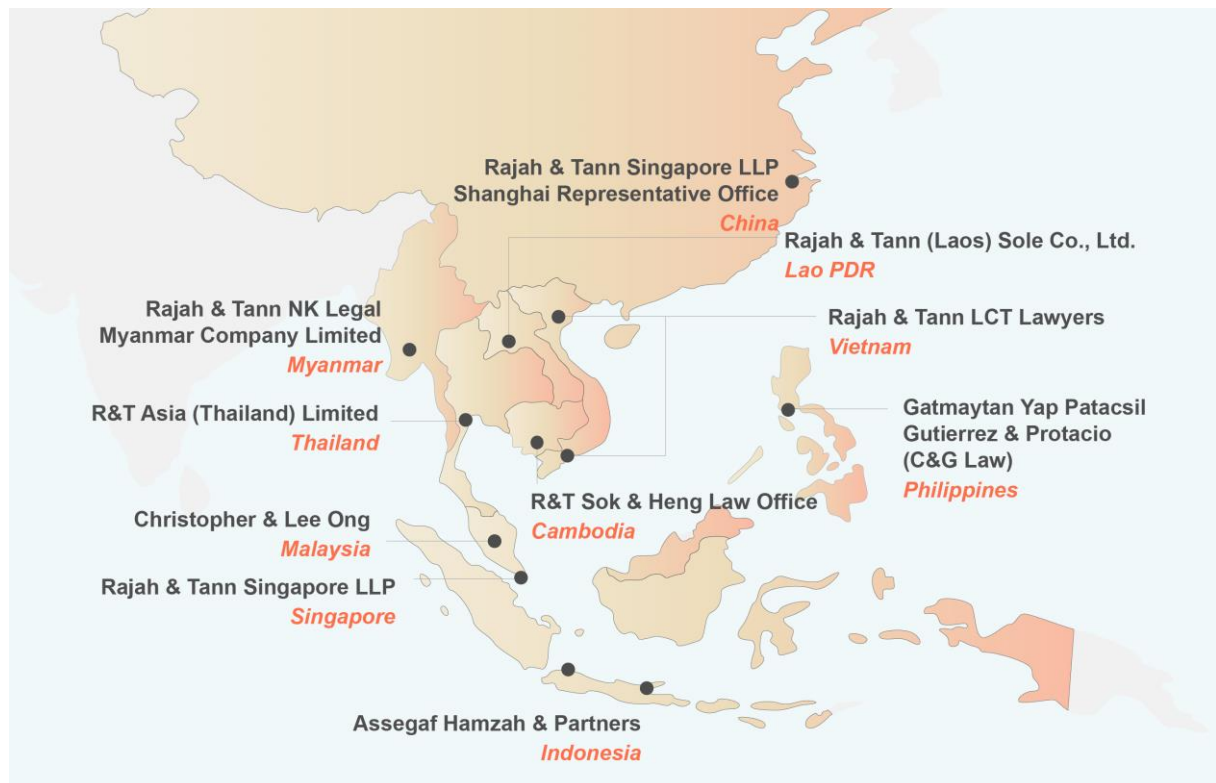
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

Hanoi Office

T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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