



## **Amendment to the Electronic Information and Transaction Law**

*by Oka Anantajaya, S.H., LL.M (research by Miranda Mamahit, S.H.)*

The bill on the amendment to Law No. 11 of 2008, regarding Electronic Information and Transactions which was passed by the House of Representatives on October 2016 was enacted in December 2016 under Law No. 19 of 2016 (“**2016 ITE Law**”). Several provisions in Law No. 11 of 2008 have been amended in order to accommodate developments in Information Technology, in particular, addressing problems and issues arising from the implementation of Law No. 11 of 2008.

We would like to highlight several amendments in the new law:

1. To avoid multiple interpretations of the restrictions on distribution, transmission and/or accessibility of Electronic Information containing insults and/or defamatory statements in Article 27 paragraph (3), the three (3) following amendments have been incorporated:
  - (a) an elucidation has been added to the terms “to distribute, to transmit, and/or to make Electronic Information accessible;
  - (b) a confirmation has been made that the provisions refer to a crime by accusation and not a general criminal offense;
  - (c) an affirmation has been added that the criminal elements in those provisions refer to the defamation and slander provisions set out in the Criminal Code.
  
2. There is a decrease in the penalties in the two (2) following provisions:
  - (a) For Insults and/or defamation, the period of imprisonment has been decreased from six (6) years maximum to four (4) years maximum, and the financial sanction has been reduced from Rp1 billion maximum to Rp750 million maximum;
  - (b) criminal sanctions pertaining to threats and intimidation through electronic transmission of twelve (12) years maximum shall be reduced to four (4) years and financial sanctions from Rp2 billion maximum shall be reduced to Rp750 million maximum.
  
3. As an implementation to the Supreme Court Verdict against certain provisions in Law No. 11 of 2008, there is an amendment and addition to the following provisions:

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- (a) The provisions in Article 31 paragraph (4) which originally mandated the guidelines and procedures on interception and phone tapping in a government regulation are to be included in a new law addressing such matter;
  - (b) An explanation was added to the provisions in Article 5 paragraph (1) and paragraph (2) regarding Electronic Information and/or Electronic Documents as valid legal evidence.
4. The criminal procedural law in Article 43 paragraph (3) and paragraph (6) has been synchronized to put it in line with the provisions in the Criminal Procedures Code.
- (a) Search and/or foreclosure which previously had to obtain permission from the Head of the Local District Court has now been re-adjusted according to the Criminal Procedures Code;
  - (b) Detention, which previously had to obtain a stipulation from the Head of the Local District Court within 24 hours, has now been re-adjusted to be in line with the Criminal Procedures Code.
5. The role of the Civil Servant Investigator (*Penyidik Pegawai Negeri Sipil/PPNS*) in the New Law in Article 43 paragraph (5) has been expanded:
- (a) There is an authorization to limit or to authorize accessibility in crimes involving information technology;
  - (b) There is an authorization to request information from Electronic Systems Operators pertaining to information and technology criminal offenses.
6. Provisions on the “right to be forgotten” have been added in Article 26, as follows:
- (a) Electronic System Operators shall delete electronic information that should not be under their control upon a request from the person concerned;
  - (b) Electronic System Operators shall provide a mechanism to remove irrelevant Electronic Information; however, this will be further elaborated upon in a Government Regulation.
7. The government’s role has been expanded in providing protection to the public from any kind of interference resulting from the misuse of information and electronic transactions by giving additional authorization/powers in Article 40:
- (a) The government shall take preventive action;
  - (b) The authorized government officials shall terminate access and/or give the order to Electronic System Operators to terminate access to electronic information, which is in violation of the law.



## Construction update

by Ferdinand Jullaga, S.H., LL.M (with research by Indra Dwinugroho and Kirana Dewayani)

### 1. Background

President Joko Widodo has pursued policies to develop infrastructure and has introduced various ambitious programs. The government has also enacted numerous regulations to simplify the procedures and mechanism to make investment more attractive to investors. In this short note, we will provide an overview of the sector and some of the opportunities available to foreign construction companies.

### 2. Overview of the construction sector

Indonesia's construction sector has been heating up since the government decided to focus on infrastructure as a means to accelerate economic growth. This focus is evidenced by the issuance of regulations concerning construction over the past few years, and by government plans, such as the ambitious *Master Plan for Acceleration and Expansion of Indonesia's Economic Development* (MP3EI) during the previous presidential era (2009-2014). In the subsequent five-year period (2015 to 2019), the government hopes to ramp up infrastructure investments in the amount of Rp4,886 trillion of which Rp3,386 trillion is slated for strategic infrastructure and Rp1,500 trillion for basic infrastructure.<sup>1</sup> Major projects have been initiated by the government, such as 1,000 km of new toll roads, 35 GW of power plants, 3,258 km of railways, 24 new seaports, 15 new airports and revitalization of 10 airports, and the one million houses program. Further sustainable construction initiatives will be made to foster capacity building of the Indonesian construction supply chain.<sup>2</sup>

<sup>1</sup> Akhmad Suraji & Khrisna S Pribadi, *The Construction Sector of Indonesia*, (21<sup>st</sup> Asia Construct Conference: Asia Construct Conference, 2016), page 1.

<sup>2</sup> Muhammad Abduh & Jimmy S. Juwana, *Indonesian Theme Paper: Sustainable Construction Policies and Market in Indonesia*, (21<sup>st</sup> Asia Construct Conference: Asia Construct Conference, 2016), page 2.

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There are three types of construction services that can be provided by investors in Indonesia: construction services (actual construction work), consultation services and integrated services which cover both construction work and consultation on a project. Each category has its own licensing requirements and pre-requisites regulated by Indonesian law. Foreign companies that wish to establish a construction services business are required to comply with provisions in Indonesia's 2016 Revised Negative List, which will be discussed further below. Nevertheless, Indonesia has applied *Law No. 18/1999 on Construction Services* for over sixteen years. The latest law on construction services was approved by the People's Representative Council in December 2016.

There are important differences in how a local versus a foreign construction company conduct business in Indonesia. Local construction companies typically conduct business through an Indonesian liability limited corporation (*Perseroan Terbatas (PT)*, commonly translated as a "limited liability company") or by a private partnership. A foreign construction company, however, can provide construction services by either establishing a joint venture company incorporated in Indonesia and applying for a "doing business license", i.e. construction service business license (*Izin Usaha Jasa Konstruksi*), or by establishing a foreign construction service representative office, which acts like a branch operating office (rather than a typical representative office).<sup>3</sup> Unlike a typical representative office which cannot provide services nor generate revenue, a foreign construction service representative office is allowed to provide construction services and therefore generate revenue. Nonetheless, in doing so, it must comply with the requirements as well as the structure mandated by the prevailing regulations.

### **3. Legal Issues**

#### 1. Negative List

According to Indonesia's 2016 Revised Negative List (*Regulation of the President of the Republic of Indonesia No. 44 of 2016*) under the sector of Public Works, a foreign party may have 67 percent capital ownership (for non-ASEAN countries) with certain conditions.

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<sup>3</sup> Ferdinand Jullaga et al, *Practical Law: Construction and Projects Multi-jurisdictional Guide 2014/15: Q&A chapter*,

- Foreign capital ownership in the construction services/construction implementation services (*jasa konstruksi/jasa pelaksana konstruksi*) business field is allowed when the service is considered to employ advanced technology and/or high risk and/or if the work value is more than Rp50 billion.
- ‘Construction service’ area under the law includes:
  - CPC 511 – Pre-erection work at construction sites;
  - CPC 512 – Construction work for buildings;
  - CPC 513 – Construction work for civil engineering;
  - CPC 514 – Assembly and erection of prefabricated constructions;
  - CPC 515 – Special trade construction work;
  - CPC 516 – Installation work;
  - CPC 517 – Building completion and finishing work;
  - CPC 518 – Renting services related to equipment for construction or demolition of buildings or civil engineering works with an operator.
- Foreign capital ownership for the business service/construction consultant (*Jasa Konsultan Konstruksi*) business field is allowed when the service is considered to employ advanced technology and/or be high risk and/or if the work value is more than Rp10 billion.
  - ‘Business service/construction consultant’ area under the law includes:
    - CPC 8671 – Architectural services;
    - CPC 8672 – Engineering services;
    - CPC 8673 – Integrated engineering services;
    - CPC 8674 – Urban planning and landscape architectural services; and
    - CPC 9403 – Sanitation and similar services (in terms of sewage and refuse disposal, sanitation, and other environmental protection services)

Foreign capital ownership for construction and consultation under the Energy and Mineral Resources Sector is limited to certain areas:

- Oil and Gas offshore pipeline installation in the amount of 49% foreign capital ownership;
- Oil and Gas ‘Platform’ construction services in the amount of 75% foreign capital ownership;

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- Oil and Gas ‘Spherical Tank’ construction services in the amount of 49% foreign capital ownership;
- Power installation consultation in the amount of 95% foreign capital ownership;
- Construction and installation of electric power for electric power supply in the amount of 95% foreign capital ownership; and
- Construction and installation of electric power for high/extra-high voltage electric power utilization in the amount of 49% foreign capital ownership.

### 2. Presidential Regulation No. 54 of 2010 (as amended)

Presidential Regulation No. 54 of 2010, concerning Government Goods/Services Procurement (“**Presidential Regulation 54/2010**”) was issued to implement efficient, transparent and competitive goods/service procurement in order to improve the quality of public services. The scope of the provisions contained in this regulation covers all goods/services procurement using the state or regional budget done by governmental institution(s) in Indonesia. Among the types of procurement regulated in this regulation are construction and consultation work. It has been amended four times in *Presidential Regulation No. 35 of 2011*, *Presidential Regulation No. 70 of 2012*, *Presidential Regulation No. 172 of 2012* and *Presidential Regulation No. 4 of 2015*. Under this regulation and its amendments, foreign companies are only allowed to participate in a tender with a value of:

- Rp 100 billion (US\$ 10.87 Million) and above for construction services;
- Rp 10 billion (US\$ 1.087 Million) and above for consulting services

In the second amendment of the regulation, projects with a value of under Rp 10 billion, if they cannot be carried out by local consultants may be carried out using foreign consulting services via an international competitive bidding method, which will be published on the international organization’s web page. The regulation also requires procuring entities to seek to maximize local content in procurement, use foreign components only when necessary, and designate foreign contractors as sub-contractors to local companies.

### 3. Ministry of Public Works No. 10 of 2014

Foreign Construction Service companies may establish a representative office in Indonesia with certain conditions. The license is issued by the Minister of Public Works and People’s Housing. The business license will give permission to the license holder to perform construction services everywhere in Indonesia and is valid for three years (and is extendable).

To acquire a new representative license, a foreign construction service company needs to apply to the Minister of Public Works and People's Housing and pay an administration fee. For a construction consultant, the fee is USD 5,000, and for construction implementation services, the fee is USD 10,000.

Every foreign construction service company is obliged to form a joint operating agreement with a local construction service company. However, the local company in the joint operating agreement must hold a 'large' business qualification. The construction implementation service has to be shared with the local construction service company from the beginning until the end of the construction project. This is the government's way of protecting local construction firms from uneven competition, based on the principal of equality and equity.

#### **4. Opportunities for foreign construction companies**

There are many opportunities for foreign companies, but major Indonesian Construction Companies will be competitors. Foreign firms can leverage off access to capital, their ability to undertake complex construction projects or to bring unique design to the table as their comparative advantage. Indonesia has made various representations to the international community regarding its commitment to green projects, notably at the *Climate Change Summits* in Copenhagen and in Paris, and thus foreign companies could use their expertise to bid for projects using green technology or design. Prestige projects which would be considered 'top end' projects would also be an area of opportunity. Many of Indonesia's seaports and airports are outdated, and fresh capital and design ideas are needed to revitalize them.

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