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## Implementation of Public-Private Partnership in Indonesia

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**Abstract:** The Public-Private Partnership (PPP) concept has been widely used by either developed or developing countries to describe the involvement of private entity in public sector. To implement PPP in Indonesia, the Government of the Republic of Indonesia has inaugurated Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure. This Regulation was then replaced in 2015 with Presidential Regulation No.38 Year 2015.

The aim of this research is to explain the implementation of PPP concept in Indonesia according to the prevailing regulations.

This research is a normative legal research. It conducts literatures review, including review on the prevailing rules and regulations in Indonesia. A comprehensive legal reserach was conducted in order to understand the concept of PPP.

The results of the research showed that the implementation of PPP in Indonesian, named as Cooperation Between Government And Business Entities (Kerjasama Pemerintah dan Badan Usaha abbreviated as KPBU) is by involving private entity to build social and economic infrastructure, as determined by the government, with possibility to operate and provide maintenance service to the infrastructure. Private entity is selected by way of public tender or through direct appointment. Private entity shall get back its cost of capital, operational cost and profit after the end of KPBU. A KPBU Agreement is made in order to provide fair distribution of risk. It is recommended to the private entity to read and understand carefully its obligations and rights in KPBU Agreement.

**Key words:** government financing, Public-Private Partnership, PPP.

### I. INTRODUCTION

#### I.1. Background

The cooperation between government and private entity has been conducted long time ago, event before the terminology of Public-Private Partnership (PPP) was created. The involvement of private entity in

public sectors can be found for more than hundred years ago. A book 50 of the Digests in public and private law, published in A.D. 530 was believed as one of the evidence that private had been involved in public sector activities (Saiyed; 2015).

Nowadays, PPP was conducted by, either developed or developing countries. Austria, Belgium, France, German, Greece, the Netherland, Switzerland, Czech Republic, Slovakia, United Kingdom, Ukarine in Europe; United States, China, Singapore, Vietnam Japan in Asia; Australia and South Africa were some among many countries that have used PPP to develop public sectors. Indonesia has issued Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR67/2005) as the basis for conducting PPP in the field of infrastructure. The PR67/2005 was then amended 3 times before it was replaced by Presidential Regulation No.38 Year 2015 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR38/2015) in 2015.

From the title of the Presidential Regulation, either PR67/2005 or PR38/2015, it was clear that the PPP in Indonesia is only conducted to build infrastucture. From the first consideration of PR67/2005, as the first regulation issued for conducting PPP in Indonesia, it can be read *“that the availability of adequate and sustainable infrastructure is an urgent need to support the implementation of national development in order to improve the economy and public welfare, and to improve Indonesia’s competitiveness in a global society.”* Further consideration of the PR67/2005 clearly said *“that in order to speed up infrastructure development, it is necessary to take comprehensive steps to create an investment climate to encourage the participation of business entities in the provision of infrastructure based on healty business principles.”* With those statement, it was clear that PPP is only opened and available for construction of infrastructure.

## I.2. Objective

The aim of this research is to explain the implementation of Public-Private Partnership (PPP) concept in Indonesia based on the prevailing regulations.

## I.3. Implementation

A good understanding on the implementation of Public-Private Partnership (PPP) concept in Indonesia as stipulated in the prevailing and governing regulation in Indonesia will enchanced the development of PPP itself in Indonesia. This will not only benefit the Government of the Republic of Indonesia, but will also attract foreign private entity to involved in doing PPP in Indonesia.

## II. STUDY REFERENCES

### II.1. Public-Private Partnership (PPP) Concept

There is no single definition to describe Public-Private Partnership. As indicated by Jomo (2016) quoting Whitfield (2010), PPP all around the world has been modelled to adapt each economic, political and legal environments of different countries. Its function cannot be separated from the government policy and used as a tool for government. Some expert argued that the failure of PPP’s implementation in many countries was caused by the incongruence of objectives of the public and private sectors (Jomo; 2016 quoted Loxley and Loxley (2010)).

Rakić and Rađenović (2011) also agreed that there is no single definition in of PPP in literature. The simple definition of PPP as the cooperation between the public and private sector in public services provision, cannot be justified and may arise many questions. There are several reasons that people may object to that simple definition. First the statement cooperation was not easily understood. Like mentioned in the background, the cooperation between public and private in public sector has been done long time ago and has evolved in so many ways. It was implemented in different way that depend on the environment at that time when and where the cooperation was conducted. Second is the relation between public and private, which may be changed from past to present. Under present situation where democracy systematically reducing the responsibility, capability, and power of the state, private sector may play much more influence. This will mean that private sector cannot be easily dictated by public. Private sector has option to agree or disagree with government offers. This is probably one of the reason why PPP did not work well in some countries. Where there is no equality (in benefit) between public and private, PPP seemed to be useless in democratic countries.

Alfen and Jan in *Public-Private Partnership in Infrastructure Development: Case Studies from Asia and Europe* (Alfen; 2009) clearly stated that there was no standard method in implementing PPP in every country. Each country had its own way to implement PPP depend on its own politic, culture, economy and legal system. However it is essential that there is a common understanding for all involved parties on the main principles and key issues of PPP from either public and private point of view. According to ADB *Public-Private Partnership Handbook* (n.d.), *“the term ‘public-private partnership’ describes a range of possible relationships among public and private entities in the context of infrastructure and other services.”*

It was further explained in ADB *Public-Private Partnership Handbook* (n.d), that PPP allocates the duties, obligations, and risks to both the public and private partners. Partners from public sector can be the State Government, Local Government, Municipalities, Ministry, Government Bodies, Government Institutions, State Owned Enterprises, Local Government Owned Enterprises. Meanwhile the partners from private sector can be local business, foreign (international) investors, multinationals, or joint venture enterprises between local and international partners. In some countries PPP involved nongovernment organizations (NGOs) and/or community-based organizations (CBOs) who represent the stakeholders directly affected by the PPP's project.

According to A *Guidebook On Public-Private Partnership In Infrastructure* (UNESCAP; 2011), PPP must be built based on clear allocation of resources, risks, responsibilities and rewards from either public or private partners. Each partners must come up with its own expertise to support the PPP in an optimal way. Public's contribution can take many forms, either in forms of capital, tax advantages, transfer of assets, and other in-kind contributions or event commitments that will support the PPP, such as social responsibility, environmental awareness, advantaged in local knowledge, and an ability to mobilize political support. Private's role can take form in capital, expertise, technical knowledges and assistance, business method, management, operations, innovations and patents, and many other forms of knowledge that public's sectors was lack off. The PPP's structure shall be able to allocate risks to the partner who has more ability to manage and minimize the PPP's risk and therefore will increase the profit for the PPP, as well for all partners involved in the PPP (ADB; n.d.).

Based on the European Commission Green Book, published by the Commission of European Communities (2004), PPP is a form of cooperation between public and private sectors made for the

purpose of ensuring the financing, building, construction, operating and maintenance of a particular infrastructure or provision of services. The objective to sign the PPP contract was to provide the private sector with the certainty that it will obtain incentives from the government (public sector) for supporting the economy and economic growth and enhancing the development of infrastructure and public services to satisfy the public needs. The main characteristics of PPP shall consist of (Rakia and Rađenovia; 2011):

- (a) A long-term contractual cooperation, between 25 to 30 years;
- (b) PPP's contract shall define the integration of all phases of PPP's project, sharing of contributions, investments, responsibilities and credits for as long as the contract is valid;
- (c) PPP's contract shall define the required performances and output specifications as the final result to be achieved;
- (d) The public partner will be the one to define the purpose of the PPP for the public interest and set out the required terms for the construction, maintenance and service to achieve the quality standards;
- (e) The private partner took the risk, that would otherwise be taken by the public sector, although risk sharing may differ in each individual case;
- (f) The public partner may pay "fee" to the private partner for the construction and operation of the PPP's project and undertakes the obligation that it can be used according to the contract-envisaged purpose;
- (g) After the expiration of the contractual period, the ownership of the assets of the projects should be delivered to the public partner.

## **II.2. Public-Private Partnership (PPP) in Infrastructure**

Public-Private Partnerships (PPP) in infrastructure sector required private sector with the ability to design, construct, finance and operate a certain public utility infrastructure, including to conduct maintenance service. There were many infrastructures had been developed through PPP models worldwide. Germany, United Kingdom in Europe and China and India in Asia were some among industrialized countries that have used PPP to build their infrastructures. The intensive and huge amount of capital required to build the ever-increasing demand of good infrastructure had made government to seek for alternatives. The national budget would not be sufficient enough to finance the construction of the infrastructures, and therefore private enterprises were invited to assist the government in form of PPP (Alfen; 2009).

Grimsey and Lewis (2004) quoted Pierson and McBride (1996) mentioned that PPP in infrastructure can take some or all of the following features:

- (a) There is transfer of land or property or facilities from government or public to private sector for a certain period and with specific terms and conditions, either with or without payment;
- (b) The private sector will build infrastructure above the government's land and/ or facilities, with or without the right to manage and operate the infrastructure;
- (c) The private sector will start gaining return after the fulfillment of the completion of the infrastcuture, either by way of receiving payment from end user (if the private sector is managing

the infrastructure or government (if the private sector is not managing the infrastructure) for a certain period;

- (d) The private sector will transfer the infrastructure to the government or public with or without payment at the end of the determined period.

The infrastructures build by the private can be distinguished into 'economic' and 'social'. Economic infrastructures relate to business and its main function is to enhance productivity. Social infrastructures play important role in improving quality of life and welfare in the community, such as hospitals, education, water storage, treatment facilities and prisons. This means that the types of infrastructure projects that can be modeled in PPP are as follows (Grimsey and Lewis; 2004):

- (a) transport (road, rail, ports, airports)
- (b) fixed links (bridges, tunnels)
- (c) water resources (filtration plants, irrigation, sewage treatment, pipelines)
- (d) tourism (facility development)
- (e) health (hospitals and specialized health services)
- (f) specialized accommodation facilities (courts, police stations)
- (g) educational facilities (schools, museums, libraries)
- (h) correctional services (prisons, remand and detention centres)
- (i) arts, sport and recreational facilities
- (j) convention centres
- (k) government office accommodation
- (l) social housing.

UNESCAP (2011) mentioned about several elements that must exist in contract document. It should include at least the following:

- (a) Risk allocations and responsibilities of each party;
- (b) Financial terms (including revenue sharing, if any);
- (c) Performance standards, target dates, deliverables;
- (d) Options for terminating the contract;
- (e) Contract management procedures and mechanisms; and
- (f) Dispute resolution approach and mechanisms.

These elements shall be broken down into more details terms and conditions. In view of the infrastructure to be constructed, private sector shall be given enough information. This information shall become an integral part of the contract itself. Such information shall consist of:

- (a) Technical conditions of the infrastructure;
- (b) The use of the infrastructure;

- (c) Relevant legal, technical, financial information;
- (d) Level and amount of the service to be delivered;
- (e) Output standards/specifications;
- (f) Auxiliary tasks that may also be needed to be undertaken;
- (g) Safety/security standards;
- (h) Terms of the indicative contract including service specifications, standard specifications, payment mechanism and penalty regime, and legal/regulatory requirements;
- (i) Bid formalities, bid evaluation criteria and their relative weights;
- (j) Whether any first round evaluation would be done;
- (k) Contents of the tender proposal with specified requirements to be met; and
- (l) Other relevant requirements.

### **III. RESEARCH METHOD**

#### **III.1. Scope of Research**

The scope of this research is to explain the implementation of Public-Private Partnership (PPP) concept based on the prevailing regulation in Indonesia.

#### **III.2. Types and Source of Data**

Data used in this research are secondary data, which include primary legal sources, secondary legal sources, tertiary legal sources and others. Data was obtained through literature review.

#### **III.3. Method of Analysis**

This research is a normative legal research. Comprehensive legal study was conducted in order to understand the key concept of PPP. This research will focus on the concept and implementation of Public-Private Partnership (PPP) in Indonesia.

#### **III.4. Operational Definitions**

All operational definitions used in this research will follow the definition given by laws and regulations currently enforced in Indonesia.

### **IV. RESEARCH RESULTS**

As mentioned above the implementation of Public-Private Partnership (PPP) in Indonesia can be found in Presidential Regulation No.38 Year 2015 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR38/2015). The PR38/2015 replaced Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR67/2005), Presidential Regulation No.13 Year 2010 regarding Amendment to the

Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR13/2010), Presidential Regulation No.56 Year 2011 regarding Second Amendment to the Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR56/2011) and Presidential Regulation No.66 Year 2013 regarding Third Amendment to the Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR66/2013).

According to PP38/2015, PPP in Indonesia is called Cooperation Between Government And Business Entities (Kerjasama Pemerintah dan Badan Usaha) abbreviated as KPBU. The word Government in the PP38/2015 shall be read as Ministry, government body, local government, state owned enterprises or local government owned enterprises. KPBU itself is defined as the cooperation between Government and Business Entities in the Provision of Infrastructure for public interest with reference to the specifications established by the Ministry/Head of Institution/Head of Local Government/State Owned Enterprises/Local Government Owned Enterprises, which part or whole using the resources of the Business Entities by taking consideration the division of risk among the parties. The chief or head of this public initiator become Project Cooperation Person In Charge (Penanggung Jawab Proyek Kerjasama) abbreviated as PJPK. KPBU for infrastructure should be initiated by government, either Ministry, Government Body or local government. However in some event, enterprises such as state owned or local government owned enterprises that have related function with certain kind of infrastructure can start to initiate a KPBU infrastructure project. Business entity shall mean the private entity that will cooperate with government to construct the infrastructure.

Infrastructure is defined as technical, physical facility, system, hardware and software needed to provide public services to community and support structural networking so that the economic and social community growth can run well. The Provision of Infrastructure itself is activities which include construction work to build or to increase infrastructure ability and/or infrastructure management activity and/or infrastructure maintenance in order to increase the utilization of infrastructure. This means that KPBU can also involve private entity who constructs the infrastructure to manage, conduct maintenance service to the infrastructure.

Based on PP38/2015, KPBU must be conducted based on 6 principles, i.e.:

- (a) Partnership means KPBU must be conducted in accordance with law and the parties interest;
- (b) Benefit means KPBU shall provide social and economic benefit for society;
- (c) Competitive means the procurement of KPBU was conducted through fair, open and transparent selection by taking consideration the fair competition principle.
- (d) Risk Control and Management means that the Provision of Infrastructure cooperation was conducted with valuing risk, managing strategic development and risk mitigation;
- (e) Effective means the Provision of Infrastructure can enhance development as well as to increase the service management quality and maintenance of the infrastructure; and
- (f) Efficient means the cooperation of the Provision of Infrastructure may suffice the sustain funding requirement in the Provision of Infrastructure through funding support from private.

The principles will ensure that private sector will not suffer lost by cooperating with government/ the public sector. The risks that may arise from the KPBU will be well distributed and the most important part is the government will make sure that the private entity as partner will get back its investment (cost of capital and operational cost), including profit by the end of period of the cooperation.

The return of investment for private partner will be determined by PPJK. The return shall include cost of capital, operational cost and the profit for the private entity. Payment of the return can be taken from the following sources:

- (a) payment from end user of the infrastructure in form of “tariff” payable to the private entity for the utilization of the infrastructure managed by the private entity. In the event the tariff payment is not sufficient, subject to certain conditons, government will provide Support Facility, which is part of Government Support in form of fical contribution;
- (b) Availability Payment from government, in which the government will pay in periodical term to private entity of the availibility of the Infrastructure that fulfil the quality and criterias as determined in the PPP Agreement. Availability Payment will only be paid to the private entity only in the event that the infrastructure is completely built and ready for operation and has fulfil all the service indicators as stipulated in the PPP Agreement; and/ or
- (c) Other method of payment, as long as it does not violate the existing laws and regulations.

PP38/2015 regulated that the apointment of private entity as partner for KPBU shall be conducted by way of fair, open, transparant and competitive selection. It can be done through public auction by involving as many private entities as possible to bid; or by direct appointment with negotiation with only one potential private entity.

The infrastructures that can be cooperated with private sector is limitedly determined to include only economic infrastructures and social infrastructures as follows:

- (a) Transportation infrastructure;
- (b) road infrastructure;
- (c) water resources and irigation infrastructure;
- (d) Drinking water infrastructure;
- (e) Centralised waste water management system infrastructure;
- (f) Local waste water management system infrastructure;
- (g) Dumster management system infrastructure
- (h) Telecommunication and information infrastructure;
- (i) Electricity infrastructure;
- (j) Oil and gas and sustainable energy infrastructure;
- (k) Energy consevation infrastructure;
- (l) Town facility infrastructure;



- (m) Education facility infrastructure;
- (n) Sports and art infrastructure;
- (o) Regional infrastructure;
- (p) Tourism infrastructure;
- (q) Health infrastructure;
- (r) Penitentiary infrastructure; and
- (s) Public housing infrastructure.

KPBU can take more than one infrastructure as described above as the Provision of Infrastructure to be cooperated. Since KPBU involved construction of a building, any land required for KPBU's infrastructure project must be conducted in according to Law No.2 Year 2012 regarding Land Acquisition for Public Interest. The Government of the Republic of Indonesia through the Ministry of National Development Planning has issues Book about Public Private Partnerships Infrastructure Project Plans in Indonesia 2017. This Book will provide a complete guide and information on KPBU's projects all over Indonesia.

KPBU Agreement shall at least contain the following matters:

- (a) Scope of work;
- (b) Term of the Agreement;
- (c) Performance guarantee maximum 5% of total KPBU investment;
- (d) Tariff and mechanism for adjustment;
- (e) Rights and obligations, including risks allocation;
- (f) Services performance standard;
- (g) Transfer of Shares prior to commercial operation of KPBU, subject to approval of the fulfilment of the criteria determined by PPJK;
- (h) Default and sanctions;
- (i) Termination and early termination of the Agreement;
- (j) Ownership of the assets;
- (k) Disputes settlement mechanism, from mediation to litigation/ arbitration;
- (l) Supervisory mechanism of performance of the private entity in procurement process;
- (m) Mechanism for adjustment of work and/ or service;
- (n) Mechanism for the acquisition of government or funders;
- (o) Utilization and ownership of infrastructure assets and/ or its management to PJPK;
- (p) Return of infrastructure asset and/ or management to PJPK;
- (q) Force Majeure;

- (r) Statement and warranty from all parties that PPP Agreement binds to the parties;
- (s) Bahasa Indonesia as the Choice of Language; or if required it can state that English will be used as official translation;
- (t) The Law of the Republic of Indonesia as the Choice of Law.

Point g with regards to the transfer of shares shall only applicable if that the private entity des not involve in the management and maintenance service of the infrastructure.

If the KPBU involves the delivery of the assets owned or under possession of PPJK, then in KPBU Agreement, the following must be included:

- (a) purpose of the utilization of the assets and prohibition to use the assets other then the agreement;
- (b) responsibility in operation and maintenance, including tax payment and other obligations arising from the utilization of the asstes;
- (c) rights and obligations of the party who possess the assets to supervise and maintain the performance of the assets during the utilization of the assets;
- (d) prohibition to the private partner to use the assets as security to any third party;
- (e) procedures to deliver and/or return the asset;
- (f) others as required by prevailing laws and regulations to be determined from time to time.

If KPBU requires the delivery of assets managed by the private entity after the end of KPBU period, the KPBU Agreement shall incorporate the following:

- (a) condition of the asset to be delivered;
- (b) procedures of transfer of the asset;
- (c) the assets must be free from any kind of collateral or encumbrances in any kind or form prior to the delivery;
- (d) the asstes must free of any third party claim; and
- (e) warranty that government will be free from any future claim after the delivery of the assets.

The terms and conditions of the KPBU Agreement shall provide sufficient equality and ballance to both government and private entity for legal certainty that no party shall suffer any harm because of the KPBU arrangement.

## **V. CONCLUSION AND RECOMMENDATION**

### **V.1. Conclusion**

From the above findings and analysis, Indonesia has its own type of PPP, which is called KPBU abreviation from Kerjasama Pemerintah Badan Usaha which means cooperation between government and legal entity. The KPBU as model of PPP can only be done for infrastructures only. Eventhough it is said infrastructure, the fields include 19 fields from transportation to public housing. Detail of the projects can be read in Book about Public Private Partnerships Infrastructure Project Plans in Indonesia 2017.

The main function of private sector is to build infrastructure with an additional work to operate and provide managerial services after the infrastructure was built accordingly. There is a guarantee that the private entity shall get back its investment with profit. Such terms and conditions shall be written down clearly in the KPBU Agreement.

It can be concluded that in principle KPBU does not vary from the basic concept of PPP. More over KPBU actually meets all the requirement for PPP as mentioned in Chapter II above. So it can be said the legal implementation of KPBU in Indonesia will not differ from implementation of PPP in other countries.

## **V.2. Recommendation**

There are two major things to be considered when private entity would like to conduct PPP arrangement with Indonesia. First is seek for official KPBU publication and discuss with authorised person who understanding and involve in the KBPU infrastructure projects. Second is to make sure that they have good KPBU Agreement, which shall be properly done by experienced and competent lawyer.

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