

Bappenas Regulation 7/2023: Transforming The Game with Enhanced Public-Private Partnership Rules for Infrastructure Development in Indonesia

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On September 22, 2023, the Ministry of National Development Planning/National Development Planning Agency of Indonesia (“**BAPPENAS**”) enacted Bappenas Regulation 7/2023. This regulation is designed to enhance the quality and efficiency of infrastructure provision in Indonesia through the implementation of Public-Private Partnership (“**PPP**”) schemes. It comprehensively outlines guidelines for the entire lifecycle of PPP projects, covering aspects such as planning, preparation, procurement, and management.

By creating an environment conducive to PPP projects, the regulation aims to actively contribute to the realization of national development goals and priorities. Simultaneously, it enhances Indonesia's competitiveness and attractiveness as an investment destination. The anticipated impact includes a heightened engagement of private investors in the development of Indonesia's pivotal infrastructure, which is paramount for the country's economic growth and societal well-being.

Below are the notable provisions of Bappenas Regulation 7/2023:

1. TYPE OF INFRASTRUCTURE

Compared to the provisions in Bappenas Regulation 4/2015, in conjunction with Bappenas Regulation 2/2020, Article 3 of Bappenas Regulation 7/2023 modifies and expands the types of infrastructure and their specifications that can be collaborated on.

PPP may involve the provision of infrastructure, combining two or more types of infrastructure.

2. GOVERNMENT CONTRACTING AGENCY (“GCA”) AUTHORITY

In implementing the PPP, the minister/head of institution/regional head acts as the Government Contracting Agency (“**GCA**”). Directors of State-Owned Enterprises (“**SOE**”) may act as GCA as long as it is provided for in statutory regulations.

Bappenas Regulation 7/2023 outlines more comprehensive regulations regarding the delegation and/or transfer of GCA authority.

Article 8 of Bappenas Regulation 7/2023 provides that: (i) the Minister of Education, Culture, Research and Technology or the Minister of Religion has the authority to delegate its authority as GCA to the state university legal entities; or (ii) the Minister of Communications and Informatics has the authority to delegate its authority as the GCA to the head of a public broadcasting institution.

The delegation mentioned above also transfers the responsibilities of the delegating minister to the head of the state university legal entities or the head of the public broadcasting institution to whom the GCA authority was delegated.

3. ASSIGNMENT OF REGIONAL-OWNED-ENTERPRISE AS GCA

The Board of Directors of a Regional-Owned Enterprise (“**ROE**”) may act as GCA as long as it is specified in sectoral regulations. The Board of Directors of the ROE may represent the regional head following an assignment from the head of region, as outlined in the provisions of the Minister of Home Affairs regulations that govern cooperation between regional governments and business entities.

The assignment of the Board of Directors of the ROE by the head of region does not transfer the responsibility of the head of region. The Board of Directors of the ROE must coordinate with the head of region in carrying out their assignment as GCA.

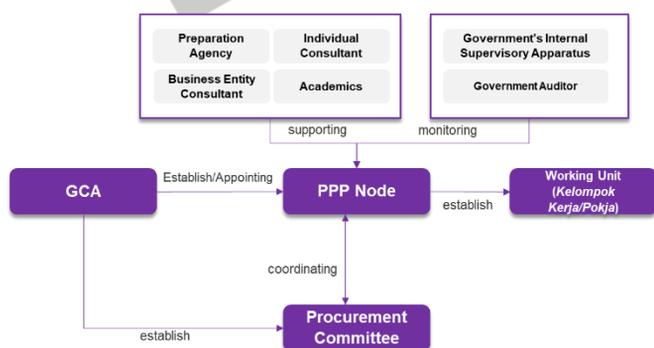
4. GCA INSTITUTIONAL ORGANIZATION

Article 13 of Bappenas Regulation 7/2023 outlines that ministers, heads of institutions, regional heads, and SOE directors have the authority to appoint existing work units/organizational units within ministries, institutions, regional governments, and SOE as PPP nodes. If necessary, they can establish new work units/organizational units in ministries, institutions, regional governments, and SOE as PPP nodes in line with statutory regulations. The appointment or establishment of a PPP node must be decided in accordance with the authority vested in the minister, head of institution, regional head, or SOE director.

In fulfilling its responsibilities, the PPP node may receive support from: (i) the preparation agency; (ii) business entity consultants; (iii) individual consultants; and/or (iv) academics. Moreover, PPP nodes may engage or establish working groups originating from organizational units/work units within ministries, institutions, regional governments, SOE, and ROE. The implementation of PPP node tasks is overseen by the Government's Internal Supervisory Apparatus and/or government internal auditor institutions.

Furthermore, during the IBE procurement process, the GCA establishes a Procurement Committee in accordance with LKPP regulations.

GCA Institutional Organization



Source: Bappenas Sosialisasi, 2023

5. SIMPLIFICATION OF PPP STAGES

Bappenas Regulation 7/2023 introduces a simplification of the PPP stages for both government initiatives and business entity initiatives. PPP initiated by the government follows these stages: (i) PPP planning; (ii) PPP preparation; (iii) PPP transactions; and (iv) PPP management. Conversely, PPPs initiated by business entities progress through the stages of: (i) PPP preparation; (ii) PPP transactions; and (iii) PPP management.

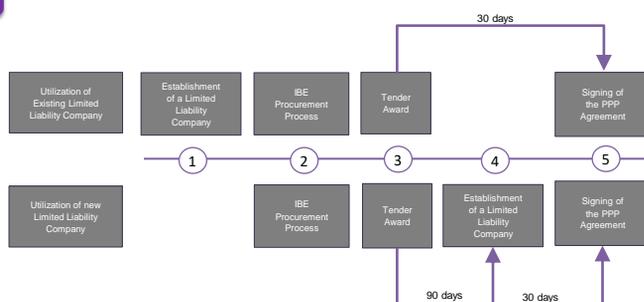
Bappenas Regulation 7/2023 eliminates the need for the two stages of preparing a pre-feasibility study for government-initiated PPPs (Outline Business Case and Final Business Case). Instead, it mandates the preparation of a pre-feasibility study with five content aspects, namely: (i) strategic study; (ii) economic studies; (iii) commercial studies; (iv) financial studies; and (v) management studies. Bappenas Regulation 7/2023 also streamlines the contents of feasibility studies for PPPs initiated by business entities, aligning them with the aforementioned pre-feasibility study contents.

6. ESTABLISHMENT OF IBE PRIOR TO THE PPP PROCUREMENT PROCESS

One of the newly regulated arrangements in Bappenas Regulation 7/2023 involves the IBE Procurement Tender Winner ("Tender Winner") having the option of establishing a limited liability company prior to the IBE Procurement by the GCA.

Article 48 of Bappenas Regulation 7/2023 specifies that the aforementioned limited liability company can be constituted by: (i) the Tender Winner's limited liability company; (ii) a limited liability company in which one of the members of the consortium of the Tender Winner is a participant; or (iii) a limited liability company affiliated with the Tender Winner.

Utilization of the Existing Business Entity or Establishing New Business Entity as an Implementing Business Entity in the PPP Project



IBE'S RETURN ON INVESTMENT

Bappenas Regulation 7/2023 also introduces flexibility concerning the form of investment returns attainable by an IBE. According to Article 23 of Bappenas Regulation 7/2023, the GCA determines the return on IBE investments, encompassing: (i) capital expenditure; (ii) operational costs; and (iii) profits. The return on an IBE investment may be realized through the following forms:

- a. Payment by users in the form of tariffs;
- b. Availability Payment; and/or
- c. Other forms, aligning with the statutory provisions.

The other forms of return on investment mentioned above may involve income not directly linked to services. The forms of return on investment may be combined, taking into account the risk allocation of the PPP project.

AMENDMENT TO THE PPP AGREEMENT

Bappenas Regulation 7/2023 establishes stringent regulations governing the criteria for amending the PPP Agreement post-signing. Article 53 of Bappenas Regulation 7/2023 provides that amendments to the PPP Agreement are conducted in accordance with the GCA and IBE agreement, subject to the following conditions: (i) the project structure remains unchanged; (ii) the financial feasibility of the project remains unaffected; (iii) the existing risk allocation is preserved; (iv) the bidding parameters previously established are retained; (v) services are not reduced; and (vi) any increase in the government's obligations as per the PPP Agreement is prevented.

The mentioned amendment to the contents of the PPP Agreement must be implemented on the assumption of maintaining the base position of the internal rate of return.

FINANCIAL CLOSE

Bappenas Regulation 7/2023 outlines rigorous guidelines pertaining to restrictions on financial closure. According to Article 54 of the regulation, an IBE is required to achieve financial closure within a maximum period of 12 (twelve) months from the signing of the PPP Agreement. There are options and procedures that need to be followed if such financial closure is delayed or fails to be achieved.

If the financing is provided in stages, the financing is considered fulfilled with the conditions:

- a. A loan agreement for financing one of the construction stages is signed or the IBE can provide confirmation on the availability of sufficient financing sources and a statement that the financing can be fully disbursed for the implementation of the construction; and

- b. A part of the loans or other sources has been disbursed to initiate construction work.

TRANSITIONAL PROVISIONS ON THE STAGES IN IMPLEMENTATION OF THE PPP

Since the enactment of Bappenas Regulation 7/2023, GCA involved in ongoing PPP stages which were initiated prior to the new regulation coming into effect are required to conclude the existing stages and fulfill all PPP-related documentation in compliance with the provisions outlined in Bappenas Regulation 4/2015 in conjunction with Bappenas Regulation 2/2020.

For those GCA who have successfully completed one stage and met the documentation requirements, they are directed to progress to the subsequent stage following the PPP stages outlined in Bappenas Regulation 7/2023.

During the completion of each PPP stage, if there are specific prerequisites mandated by Bappenas Regulation 7/2023 for the transition to the next PPP stage, the minister, head of institution, regional head, and the Board of Directors of the SOE, or the initiating business entity is responsible for fulfilling these requirements in accordance with the regulations specified in Bappenas Regulation 7/2023.

KEY TAKEAWAYS:

1. Bappenas Regulation 7/2023 establishes clearer regulations, emphasizing that the transfer of GCA authority to the heads of organizational units within ministries/institutions does not exempt the authorizer from responsibility. Regarding the assignment to ROE as GCA, the regulation specifies that the region head is still obligated to: (i) sign the PPP Agreement; (ii) sign the recourse agreement; and/or (iii) sign other agreements falling within the authority of the regional head in implementing the PPP Project. These provisions may enhance confidence among potential investors, as ministers/heads of institutions/regional heads are directly accountable for project implementation. This framework also introduces new opportunities for structuring projects where a ROE acts as GCA, allowing the involvement of regional budgets for the source of return of investment to the IBE, given that the PPP Agreement is signed directly by the regional head.

2. Bappenas Regulation 7/2023 streamlines the institutional structure of the GCA, eliminating the PPP Team and the PPP Agreement Management Team. The roles performed by these teams at all stages are now consolidated under the PPP Node. In addition to the institutional restructuring, the simplification of PPP implementation stages, both for solicited and unsolicited projects, aims to expedite the PPP implementation process without compromising accountability and the quality of the infrastructure provided.
 3. Bappenas Regulation 7/2023 introduces an option to utilize existing limited liability companies. Beyond providing flexibility for prospective investors across the PPP stages, this provision aims to reduce the potential challenges associated with establishing a new Business Entity after the determination of the tender winner. Notably, the regulation sets a maximum time limit of 90 days for the formation of the new Business Entity subsequent to the determination of the tender winner.
 4. Bappenas Regulation 7/2023 has introduced more explicit regulations compared to those outlined in Bappenas Regulation 4/2015 in conjunction with Bappenas Regulation 2/2020, especially concerning the criteria for amending a PPP agreement. This clarity establishes a well-defined basis for the government to assess and approve proposed amendments to the PPP Agreement, including cases where a government auditor conducts an audit. This ensures a clear and transparent process while still guaranteeing the return on investment for the business entity.
 5. One significant difference in Bappenas Regulation 7/2023 compared to Bappenas Regulation 4/2015 in conjunction with Bappenas Regulation 2/2020 relates to IBE investment returns. In the new regulation, it is now possible for investment return sources to be combined, such as tariffs and availability payments, while considering the risk allocation of the PPP project.
- This arrangement offers benefits to both the government and the private sector. For instance, if investment returns are structured as a combination of tariff and availability payments, the government may achieve budgetary efficiency and adopt a more innovative project structure.
6. In terms of obligations to obtain the financing, Bappenas Regulation 7/2023 introduces regulations on the financial closure period that are more stringent compared to those in Bappenas Regulation 4/2015 in conjunction with Bappenas Regulation 2/2020. Specifically, Bappenas Regulation 7/2023 imposes limitations, allowing the extension of the term only a maximum of 2 (two) times, each for a duration of 6 months. This restriction is designed to offer assurance to the GCA regarding the financial closure and to ensure the sustainability of the PPP project. Furthermore, Bappenas Regulation 7/2023 also allows that the fulfillment of financing may come from other legitimate sources of financing. This provision can open up opportunities to structure PPP agreements that allow construction to be carried out without waiting for loan disbursement as long as IBE can confirm the availability of sufficient financing sources and provide a statement that the financing can be fully disbursed and part of the financing has been disbursed to: (i) initiate construction work; (ii) commence operation and care and maintenance if the project does not require construction activities; or (iii) other agreements agreed upon by IBE and GCA in the PPP Agreement
 7. Based on publicly available information, as a follow-up to the issuance of Bappenas Regulation 7/2023, the Indonesian government is currently in the process of preparing: (i) a Minister of Finance regulation concerning government support for creative financing and PPPs; (ii) LKPP regulations for the procurement of implementing business entities; and (iii) Minister of Home Affairs regulations regarding investment returns for PPP projects funded from regional budgets.

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The article above was prepared by Dentons HPRP's lawyers

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