

Highlights of the New Implementing Regulation of the Construction Service Law

The government of Indonesia issued Government Regulation No. 22 of 2020 concerning Implementing Regulation of the Construction Law (“GR 22/2020”) on 21 April 2020. This awaited follow-up to Law No. 2 of 2017 concerning Construction Services (“Construction Law”) may have a significant impact on business activities related to construction services, specifically the technical provisions related to construction services.

In principle, the Construction Law’s provisions relate to construction services for government projects, private business entities, state owned companies (*Badan Usaha Milik Negara* (BUMN)), and individuals. GR 22/2020 emphasizes that its scope applies to the Central Government, Regional Governments, and the private sector (business entities, and individual persons with business purposes).

In this Article, we will look at practical and legal issues that are necessary for construction service businesses as contemplated in GR 22/2020.

The Construction Services Community (*Masyarakat Jasa Konstruksi*)

As the implementation of Construction Law (section II, part two), GR 22/2020 provides that the implementation of the Central Government’s responsibilities and authorities involving the Construction Services Community (*Masyarakat Jasa Konstruksi*) will be carried out through 1 (one) institution formed by the Ministry of Public Works and Public Housing of the Republic of Indonesia (“Ministry”). The activities covered for this purpose are, *inter alia*, registration of Construction Services business entities, accreditation for Construction Services business entity associations and related associations in the Construction Services supply chain, registration of business entity experience, registration of Expert Appraisers, determining the registered Expert Appraiser in the event of a building failure, accreditation for professional associations and licensing processes for institutions of professional certification, labor registration, registration of professional manpower experience as well as training and education institutions in the field of Construction, recognition of equivalent foreign workers, establishing a professional certification institution if it has not been done by a professional association/ training and education institution, and licensing of the business entity certification institution.

It is our understanding that one of the purposes of this institution is to strengthen the collaboration between the government and private sector in this industry.



However, to the best of our knowledge to date, no information on the status of the establishment of this institution.

Foreign Construction Market

We also note that this GR 22/2020 encourages domestic construction businesses to penetrate the international market and to that end mandates the Central Government to coordinate with the Foreign Affairs Ministry in order to support the interests of and provide legal assistance with formalities for domestic construction businesses entering the international market. Such support includes how to access the construction services international market, developing partnership schemes between international and domestic construction service markets, and providing legal protections for domestic construction service companies in accessing the international market.

Our view is that this could be one step towards Indonesian companies becoming involved in the international market, with the proviso that the Ministry and relevant institutions should intensively coordinate with one another and with the private sector before issuing any policies related to this matter.

Business Services

GR 22/2020 also contains provisions on the types, classification, and services of construction industry, changes to the classification and services in the industry, as well as expanding the scope to cover construction resource supply chain businesses, all of which is in general in line with the provisions of the Construction Law. It is also similar to the provisions related to the market segmentation of construction services, the provisions in Article 34 of GR 22/2020 being a little more detailed with regard to several criteria: risk, technology, and cost. Risk is determined based on the scope of work, location of work, and workforce needs. Technology is determined based on material, equipment, experts, and implementation methods and the cost is defined as the amount of money required to complete the work.

GR 22/2020 divides Construction Services into Construction Consultancy Services, Construction Work, and Integrated Construction Work. Of those 3 (three) services, only Construction Consultancy Services cannot be accompanied by other businesses activities, while for Construction Work, and Integrated Construction Work can accompany each other. However, GR 22/2020 does not provide any elucidation or explanation as to whether Construction Work and Integrated Construction Work can be accompanied by any types of business other than Construction Services e.g. transportation or manufacture.

Article 60 of GR 22/2020 provides that service providers to be paid using sources of financing from state finances must be selected with a qualification assessment and tender evaluation system in accordance with several principles stated. Service users (the owner or employer who uses the construction services) using sources of financing from state finances must select service providers by tender, direct appointment, direct procurement, or procurement through an electronic catalog. Procurement through an e-catalog is a new method of selecting service providers, in which part or all of the process is carried out using information systems.

Business Entity Certificates (Sertifikat Badan Usaha)

Article 41 of GR 22/2020 clearly states that every business entity that works in Construction Services must have a Business Entity Certificate (*Sertifikat Badan Usaha* or "SBU"), which is proof of recognition of the classification and qualification of a Construction Service business entity's ability, including the equivalent abilities of a foreign Construction Service business entity. The SBU is issued by the Ministry through a certification and registration process and is valid for 3 (three) years, which period is extendable. The aforementioned certificates may in practice be obtained through certification processes that are organized by a certification agency established by an accredited construction business association. We have not received any news or updates related to this institution.

Experts

This regulation also re-affirmed the selection of construction consultancy service providers who use construction workers with the rank of experts must pay minimum remuneration standards. If a construction consultancy service providers use construction workers with the rank of experts, then in financial planning, of the service user must calculate the amount of expert remuneration as higher than the minimum remuneration standard.

Construction Work Contracts

Discussing Construction Work Contracts, GR 22/2020 provides that any arrangement of the working relationship between service users and service providers must be stated in the construction work contract, which will be subject to prevailing laws in Indonesia. In this context, it is our conservative view that any construction work contracts must be governed by Indonesian law.

We are aware that there are several well-known template contracts used as references for international construction work contracts such as *Fédération Internationale Des Ingénieurs-Conseils* (FIDIC) or Japan International Cooperation Agency (JICA). Our view is that this regulation does not restrict the parties with regard to this issue. Therefore, any parties involved in any construction work in Indonesia may use any (international) references to start the discussion and negotiation of the contract provided that such reference is in line with the prevailing laws and regulations of Indonesia.

Compensation and Incentive

Article 81 of GR 22/2020 provides the obligation to contemplate "compensation for late payment" in the construction work contracts. Expecting construction work contracts to recognise the equality of the parties in construction work contracts can certainly be considered progress.

GR 22/2020 also regulates the provision of incentives for service providers who can complete their work ahead of the specified time schedule, while maintaining the standards and conditions agreed in the contract. Providing incentives must apply the principles of transparency, accountability, responsiveness, and fairness.

Dispute Resolution on Construction Work Contracts

GR 22/2020 provides that dispute resolution in Construction Services must be fast, inexpensive, provide legal certainty, and maintain good relations, and cases cannot be open to the public, unless otherwise stipulated by the parties and / or courts. After a failure to reach consensus and resolution between the parties, the stages to resolve the dispute include mediation, conciliation, and arbitration.

In addition, GR 22/20 also stipulates that the parties can also appoint a Dispute Council to resolve disputes. The Dispute Council's authority to prevent and resolve disputes arises after the parties agree to use the Dispute Council in a Construction Work Contract clause and enter into a Tripartite Agreement, which is not separate from the Construction Work Contract signed by the parties and the Dispute Council.

The working period of the Dispute Council is for the Construction Work Contract period or until the Dispute Council is terminated pursuant to the provisions in the tripartite agreement. The funding related to the use of the Dispute Board is charged to the parties in an equal amount.

GR 22/20 regulates that the Dispute Council decision is final and binding on both parties if there is no objection within 28 (twenty eight) calendar days.

Sanctions

In relation to the procedures for the imposition of administrative sanctions, Article 151 of GR 22/2020 provides the sanctions are in the form of (a) written warning, (b) administrative fines, (c) temporary suspension of construction services activities, (d) blacklisting, (e) suspension of accreditation, (f) license suspension, (g) dismissal from duties/workplaces/work, (h) removal from the integrated list of expert assessors, (i) revocation of accreditation, (j) revocation of license, (k) suspension of permission granted to carry out the construction services certification process, and (l) revocation of permission granted to carry out the construction services certification process.

Sanctions in the form of administrative fines as aforementioned become non-tax revenue/regional income in accordance with statutory provisions. We note that the sanctions provided in GR 22/2020 are in accordance with the Construction Law but give more details of the sanctions, which provides more legal certainty for investors' comfort.

In addition, the Minister imposes written warning sanctions and administrative fines of 20% (twenty percent) of all contract values for foreign Construction Service business entities that do not form representative offices or Indonesian legal entities through cooperation in capital participation with domestic Construction Services business entities ("**Foreign Entity Obligation**"). Foreign Construction Service business entities are given a period of 5 (five) working days from the imposition of written warning sanctions and administrative fines to comply with the Foreign Entity Obligation. In the event that the period has lapsed but the foreign Construct Service business entity has not complied with the Foreign Entity Obligation, the foreign Construction Service business entity will be subject to further sanctions in the form of temporary suspension of Construction Service activities until the Foreign Entity Obligation is fulfilled.

Moreover, the Minister imposes written warning sanctions and administrative fines on representative offices of foreign Construction Services which do not fulfill the following obligations ("**Rep Office Obligations**"):

- a. being in the form of a business entity with large qualifications;

- b. having obtained a foreign representative license;
- c. having formed a joint operation with a large qualified domestic construction service business entity;
- d. appointing and employing more Indonesian workers to be leaders of the representative offices;
- e. prioritizing the use of domestic construction materials and technology;
- f. possessing high technology which is up to date, efficient, environmentally friendly, and paying attention to local culture; and
- g. implementing the technology transfer process.

Non-fulfillment of the Rep Office Obligations in points (a) - (c) will be subject to a fine of 20% (twenty percent) of all contract values, while points (d) - (g) will be subject to a fine of 10% (ten percent) of all contract values.

The representative offices of foreign Construction Services are given a period of 5 (five) working days from the imposition of written warning sanctions and administrative fines to comply with Rep Office Obligations (points (a), (d) - (h)). In the event that the period has lapsed but the representative office has not complied with Rep Office Obligations (points (a), (d) - (h)), the representative offices of foreign Construction Services will be subject to further sanctions in the form of temporary suspension of Construction Service activities until the the representative office of foreign Construction Services has complied.

The representative offices of foreign Construction Services are given a period of 5 (five) working days from the imposition of written warning sanctions and administrative fines to comply with Rep Office Obligations (point (c)). In the event that the period has lapsed but the representative office has not complied with the Rep Office Obligations (point (c)), the representative office of foreign Construction Services will be subject to further sanctions in the form of revocation of the foreign representative license.

The representative offices of foreign Construction Services are given a period of 5 (five) working days from the imposition of written warning sanctions and administrative fines to comply with Rep Office Obligations (point (b)). In the event that the period has lapsed but the representative office has not complied with the Rep Office Obligations (point (b)), the representative office of foreign Construction Services will be subject to further sanctions in the form of temporary suspension of Construction Services activities until the the representative office of foreign Construction Services has complied.

What's Next?

Finally, GR 22/2020 is expected to be a support or infrastructure for socio-economic activities to realize national development goals to provide construction services and to ensure legal certainty. GR 22/2020 also aims to serve as a guideline in the implementation of the construction services industry in the form of construction consultancy services, construction work, and integrated construction work and referrals in the context of construction services business activities as mentioned above.

GR 22/2020 is also expected to improve the community's economy and make the construction services industry a support for national development and encourage community participation. We can expect more detailed provisions in Ministry Regulations in the near future regarding construction services, including provisions related to remuneration standards for skilled workers (subprofessional), updating minimum remuneration standards, and institutions being established by the Ministry involved in construction services.

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