

Client Alert



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New Presidential Regulation to Accelerate Indonesian 35GW Power Generation Program

One of the key platforms of President Joko Widodo's run for presidential office in 2014 was his promise to accelerate Indonesia's movement up the curve in terms of its domestic infrastructure capacity, to enable Indonesia to compete with other ASEAN nations in the face of the upcoming ASEAN Economic Community reforms. A key pillar of this infrastructure plan was the President's desire to develop 35GW of new power generation projects. However, the announcement by the Indonesian Government of aspirational power generation development programs was not a new phenomenon – the "First Fast Track" program of 10,000MW of new power generation was announced in 2006, and the "Second Fast Track" program of 10,000MW, coming largely from renewable energy projects, was announced in 2010. To date, the realization of the targets of both of these programs has been average-to-poor, and industry has cited the myriad Indonesian laws and regulations, and matrix of Indonesian Governmental institutions, that all need to be in sync for these large capital intensive infrastructure projects to materialize.

Given the above, it was understandable that the announcement by the President in 2014 of the 35GW program met with some cynicism. But this time the President promised action, saying that his administration would look critically at the bottlenecks holding back power generation projects in Indonesia, and see that they were addressed.

That de-bottlenecking process has resulted in the recent issue of Presidential Regulation No. 4 of 2016 on Acceleration of Power Infrastructure Development (**PR 4/2016**).

What's New?

PR 4/2016 touches on a very broad range of issues affecting power project development in Indonesia. However, there are two main features of PR 4/2016 that should accelerate development of power projects in Indonesia if the remaining regulatory mechanics to implement them are put in place in short order. Those two features are:

- introduction of a new government guarantee for development of power projects, which would cover both projects developed by the State-owned utility company, PLN, and those projects developed by PLN in cooperation with independent power producers (IPPs) or their subsidiaries; and
- a shorter time period to obtain necessary permits for development of power generation projects.

Government Guarantees

The inability to obtain a government guarantee to back-stop PLN's payment obligations under its Power Purchase Agreements (**PPAs**) with IPPs has often been cited as the single biggest obstacle for the government achieving its new power generation build-out ambitions. Before the issue of PR 4/2016, there were only two types of government guarantee available for IPPs:

- if the relevant IPP project was listed as a "Second Fast Track" program project, the business viability guarantee issued by the Minister of Finance (**MOF**); and
- if the relevant IPP project was listed as a public private partnership (PPP) project, a package of two guarantees provided by the Indonesia Infrastructure Guarantee Fund and the MOF.

There are a large number of IPP projects which are not on either of these two lists, and accordingly before the issue of PR 4/2016, no avenue for obtaining a government guarantee was available. Developers of those projects were then left with the task of convincing bank credit committees to take a credit risk on PLN.

PR 4/2016 now creates a third program under which an IPP can receive a guarantee from the MOF. Under this regulation, in principle, any IPP project which is listed in PLN's Long Term Electricity Generation Plan (**RUPTL**) should be eligible for the guarantee. However PR 4/2016 states that for an IPP project to obtain a guarantee, PLN has to submit a proposal for the granting of the guarantee to the MOF before the procurement process for the IPP award begins. This gives rise to two issues:

- How will PLN determine which of the projects on the RUPTL should be put forward for guarantees? PR 4/2016 does not set out any criteria for the projects which PLN must propose to the MOF to obtain the government guarantee (e.g. large scale? Underdeveloped regions in Indonesia? Renewables in priority to thermal?). Leaving this discretion with PLN may result in PLN again being unwilling to make any decision as to which IPP should be put forward for guarantee, for fear of allegations being levelled against PLN based on a lack of transparency or giving preferential treatment to certain developers over other developers.
- As a reference to the guarantee must be made in the PLN procurement documents, any IPP projects which have already commenced their procurement processes will not be eligible to take up the guarantee.

The guarantee under PR 4/2016 is a business viability guarantee for PLN's financial obligations under the PPA and the scheme appears to be similar to the business viability guarantee under the Second Fast Track Program.

PR 4/2016 provides that the Ministry of Finance must give its approval of PLN's request for a guarantee within 25 business days after the MOF receives a complete submission from PLN; however, PR 4/2016 also mandates the issuance of an implementing regulation to further implement the guarantee application and grant mechanics. This seems to suggest that despite the issuance of PR 4/2016, this guarantee may not be available in practice until the MOF issues that implementing regulation.

Aside from IPPs, PR 4/2016 also will make MOF guarantees available for loans obtained by PLN in relation to development of power infrastructure projects. This scheme seems to be similar to the guarantee provided to PLN's lenders under the First Fast Track Program. Recently, by the issuance of Presidential Regulation No. 82 of 2015 on Central Government Guarantee for Infrastructure Financing through Direct Loans from International Financial Institutions to State-Owned Enterprises (**PR 82/2015**), a government guarantee can also be issued to international development financial institutions with respect to loans which are (i) made by those institutions to "Eligible Borrowers" (i.e., BUMNs that fulfill certain criteria), and (ii) made to fund "Qualified Infrastructure Projects". Please click [here](#) for our previous client alert on PR 82/2015.

Accelerated Licensing

PR 4/2016 seeks to expedite the processing time for licenses and non-licenses for power projects and streamline the process at the one-stop services (**PTSP**) at the Investment Coordinating Board (**BKPM**) as well as the provincial and regency/city PTSP through the following approaches:

- One stop services to apply for licenses required to start a project

PLN, subsidiaries of PLN and IPPs can now submit applications for five types of licenses and non-licenses which are required to start the implementation of a power project as follows to BKPM:

- a) electricity supply business license (IUPTL)
- b) stipulation of location;
- c) environmental license;
- d) borrow-to-use permit of forest area (pinjam pakai permit); and
- e) building construction permit (IMB).

For some of the above licenses, e.g., the IUPTL and the pinjam pakai permit, the relevant ministers have already previously delegated the authority for the issuance of the licenses to BKPM (so in that respect, PR 4/2016 merely re-states what is already in existence). For the remaining licenses listed above, the authority to issue the licenses may lie with the local government. For example, under Law No. 32 of 2009 on the Environment and its implementing regulations, the Governor has the authority to issue the environmental license for a power project that is located within one province. For these licenses, PR 4/2016 now provides that applications will be submitted to BKPM, and BKPM is responsible to submit the applications to the relevant governor or regent/mayor through the local PTSP. Hence, the applicant only needs to deal with BKPM to obtain these five main licenses.

- Shorter processing timelines

PR 4/2016 provides a much-accelerated time limit on BKPM for issuance of licenses as follows:

Name of License	PR 4/2016	Normal Processing Time
IUPTL	3 working days*	30 working days (under Minister of Energy and Mineral Resources Regulation No. 35 of 2013 on Licensing Procedures for Electricity Business)
Stipulation of Location	5 working days	Depends on the relevant local regulation.
Environmental License	60 working days*	75 working days (only for the assessment of AMDAL documents). (under Government Regulation No. 27 of 2012 on Environmental License).
Borrow-to-Use Permit of Forest Area (<i>pinjam pakai</i> permit)	30 working days*	Approximately 165 days (under Minister of Forestry Regulation No. P.16/Menhut-II/2014). In practice, the process may take over one year.
Building Construction Permit (IMB)	5 working days	In practice, 14 days, which may differ from region to region.
Tax Facilities for Income Tax and/or Value Added Tax	28 working days*	25 working days for the issuance of receipt until the issuance of proposal to MOF by Head of BKPM, plus the period for issuance of the approval by the MOF- which may varies in practice as the period is not specifically regulated. (under Head of BKPM Regulation No. 13 of 2015 on Procedures for Application for Corporate Income Tax Reduction Facilities as amended by Regulation No. 19 of 2015).

*: The authority to issue these licenses and non-license have been delegated to BKPM.

PR 4/2016 also requires ministers/heads of institutions, governors and/or regents to issue the recommendations which are required for the issuance of licenses and non-licenses as specified above within five business days after receiving all the required documents. Previously, the timeline for issuance of recommendations depended heavily on unwritten policies of the relevant institutions, and the availability of the officials.

PR 4/2016 also clarifies that the extension process of a license or non-license must not affect the development of a project. BKPM and the local PTSP should issue permit extensions within five business days after receiving a complete and correct application. If they do not do so, then the extension is deemed to have been granted. The substantial lessening of the risk of non-renewal also has benefit for PLN, which is typically required to take responsibility under the terms of the PPAs for delays or failure of the government in issuing permits.

- Non-material licenses in the form of checklist

PR 4/2016 allows some licenses and non-licenses to be stipulated in the form of a checklist. The checklist includes a list of technical requirements that must be fulfilled independently by the applicant, and the applicant's commitment to fulfill those requirements. The commitment is then submitted and registered at BKPM or the local PTSP and the registration is deemed as an approval.

This checklist can be used for licenses and non-licenses concerning matters which do not have material impact to the environment, which include building construction permits, nuisance permits, and technical approvals of building construction plans.

It is still not entirely clear how this checklist mechanism will be implemented in practice, and how this new mechanism can be made to fit within the myriad existing laws and regulations on licensing procedures. PR 4/2016 requires ministers/heads of institutions, governors and regents/mayors to issue implementing regulations or technical guidelines on this matter within 30 days after the enactment of PR 4/2016.

- Central government may take over the issuance of licenses and non-licenses from local government

Where an application for a licence/non-licence is complete, and the regent/mayor fails to issue the licence/non-licence within the stipulated deadline, BKPM may convey this issue to the relevant governor for the imposition of administrative sanctions. If there is still no action from the regent/mayor after this sanction, the governor may take over the issuance of the license/non-license.

A similar avenue exists for a governor's failure to issue the licenses/non-licenses within the stipulated deadline. In such situations, BKPM may convey this issue to the Minister of Home Affairs for the imposition of administrative sanctions. If there is still no action from the governor after this sanction, the Minister for Home Affairs may take over the issuance of the license/non-license.

- Delegation of authority to BKPM and Local PTSP

PR 4/2016 also requires ministers/heads of institutions, governors and regents/mayors to delegate their authority for the issuance of licenses related to power projects to BKPM and the local PTSP, except for licenses that cannot be delegated due to legal or technical considerations. If the licenses cannot be delegated, the relevant authorities must stipulate detailed procedures, criteria and time periods for the processing of those licenses/non-licenses (and the

maximum processing period allowed is 30 business days).

Licenses/non-licenses the issuance of which has been delegated to BKPM and the local PTSP must be processed within three business days after receipt of a complete and correct application.

Land Acquisition Reforms

All IPP projects must utilize the Land Acquisition Law

PR 4/2016 states that the land procurement for electricity infrastructure projects must be carried out in accordance with the Land Acquisition Law.

The passing of the Land Acquisition Law in 2012 was heralded as a major step forward for the development of infrastructure projects as prior to this law, there were no compulsory land acquisition powers given to Government to facilitate public infrastructure projects. However, because of complicated procedures and a long land acquisition time period (which originally may take of up to 546 working days at its extreme) under the Land Acquisition Law, it may end up being faster for developers to negotiate mutual land settlement arrangements with private landowners, rather than invoking the procedures under the Land Acquisition Law.

So on first glance, the requirement under PR 4/2016 which compels all parties to use the Land Acquisition Law for power projects, may be viewed as a step backwards. But as discussed below, the expansion by the government over time of the ways in which the Land Acquisition Law can be used does give power project developers significant flexibility in how land is acquired for IPP projects.

Gradual broadening of Land Acquisition Law scope

Since the issuance of the Land Acquisition Law, the government has made a series of amendments in an attempt to make the land acquisition processes as efficient as possible, whilst respecting landowner rights. Under the original concept of the Land Acquisition Law:

- Only government institutions and state-owned companies (BUMNs) that have received a "special assignment" from the government could utilize the Land Acquisition Law (i.e. IPP developers could not avail themselves of the powers).
- If a plot of land was acquired under this law, the land must then be owned in the name of the government or BUMN (i.e., the land could not be owned in the name of the IPP).
- A sole method of land procurement was provided for - namely land acquisition where the value of the land is determined by an independent appraiser after a number of preliminary steps and checks and balances have been completed. Accordingly, even where the land owner and the government/BUMN were willing to reach a fast mutual agreement over compensation, the full processes of the Land Acquisition Law had to be followed, and the final price was determined based on the appraised value.

In May last year, the President issued Presidential Regulation No. 30 of 2015 (**PR 30/2015**) - the third amendment of Presidential Regulation No. 71 of 2012 (**PR 71/2012**) - which allowed private developers to also use the Land Acquisition Law as a proxy for the relevant government agency/BUMN, and if

land acquisition was carried out by these private developers as proxies, the developer could be granted a right to build (*hak guna bangunan*) or right to use (*hak pakai*) land title to sit on top of the government's/BUMN's right to manage (*hak pengelolaan*) land title. However, despite this flexibility, the problem remained that in order to acquire the land (even where you had a willing landowner ready to sell), the full processes of the Land Acquisition Law needed to be completed. Please click [here](#) for our previous client alert on PR 30/2015.

At the end of last year, the President issued Presidential Regulation No. 148 of 2015 (**PR 148/2015**) - the fourth amendment to PR 71/2012 which is an implementing regulation of the Land Acquisition Law. This regulation stipulates that if the acquisition of land for public interest (for projects other than national defense and security projects) is carried out by a private developer, it can be done by way of sale and purchase, exchange, or any other way agreed by the landowners and the private developers. Thus, PR 148/2015 suggests that a private entity can acquire land for infrastructure projects (regardless of the total area of the land) without having to comply with the land acquisition procedures under the Land Acquisition Law.

The result of these reforms is that despite PR 4/2016 mandating that the Land Acquisition Law must be used to acquire land for any power project development, there remain two methods open to IPP developers to secure such land:

- IPP developers procure the land as a proxy of PLN using procedures and power under the Land Acquisition Law, PLN receives right to manage (*hak pengelolaan*) land title, and the IPP developer receives right to build (*hak guna bangunan*) sitting on top of PLN's title; or
- IPP developers procure the land through private direct agreements with land owners through among other things sale and purchase by direct agreement, land exchange, lease, land utilization agreement or any other agreed methods (i.e., the way land was acquired prior to the issue of the Land Acquisition Law).

Unfortunately, in our discussion with the National Land Office, it is still unclear whether private developers can freely acquire the land through direct agreements with landowners considering that the Land Acquisition Law itself only allows land acquisition methods where the land price is subject to valuation from an independent appraisal. So there are concerns that there may be inherent conflicts between PR 148/2015 (which allows for privately negotiated settlement arrangements) and the Land Acquisition Law (which states that public appraisal is required).

Land issues in forest area

For projects to be developed in forest area, PR 4/2016 places the onus on the National Land Agency to advise developers whether any traditional land ownership rights exist in the forest area. If the National Land Agency advises that no such land rights exist, then the developer can simply proceed to acquire the necessary forestry approval (*pinjam pakai*) from BKPM to commence the development activities. Despite this onus being placed on the National Land Agency, in practice, we would expect that in practice the onus will remain on the IPP developer to ensure that local landowners have been consulted with (and most likely compensated) before development activities can be carried out.

Construction of transmission lines in conservation forest

PR 4/2016 allows construction of transmission lines within conservation forest (*Kawasan Suaka Alam and Kawasan Pelestarian Alam*). Further revisions to the existing forestry regulations will be required to effectively implement this provision.

Other reforms under PR 4/2016*Support for new and renewable energy projects*

PR 4/2016 provides certain forms of fiscal support for new and renewable energy projects, in order to facilitate the government achieving its energy policy target of 25% of its power generation from new and renewable energy sources by 2025. While PR 4/2016 does restate a number of the government incentives already available under existing regulations for renewable energy projects (e.g., fiscal incentives such as import duty relief), some of the new forms of government support introduced include:

- establishment of a new entity to procure electricity from renewable energy sources, and on-supply that power to PLN (i.e. a renewable aggregator); and
- the provision of subsidies specifically for renewable energy projects.

There have been recent press reports indicating the government is considering establishing a new PLN subsidiary to take over all existing (and sign all future) renewable energy PPAs, which will then in turn re-sell the power to PLN.

In addition, PR 4/2016 clarifies that hydropower, geothermal or wind projects can be developed in high-conservation forest areas (e.g. national parks).

Decriminalization of PLN actions

Whilst corruption reforms over the past decade have clearly been a step in the right direction for Indonesia's investment climate, those reforms have led to the "decision freeze" phenomenon within state-owned institutions, where directors of state-owned companies have been unwilling to take decisions on a vast array of matters that are part of the normal "business as usual" governance and management of companies. PR 4/2016 attempts to prevent any criminalization of the management of PLN and its subsidiaries in relation to the implementation of PR 4/2016 by suggesting that any legal problems related to the management of PLN and its subsidiaries must be resolved based on the use of the Indonesian Company Law, instead of an immediate resort to Indonesia's criminal law. The Minister of Energy and Mineral Resources and the Minister of State-Owned Enterprises also will have more concrete functions as PR 4/2016 instructs the ministers to respond to public reports and conduct investigations related to legal problems in the development of power infrastructure. The investigation results will determine whether such cases must be brought to prosecutors or the police. So it is expected that having the two ministers involved as "gate keepers" between PLN management and prosecutors and the police might facilitate PLN's decision making processes.

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Spatial planning re-alignment

Power plant developments have always had to comply with the spatial planning requirements of the particular regency in which the project is being developed. Where a proposed power project does not comply with the spatial plan, PR 4/2016 requires the relevant government institutions to look at amending the spatial plan to accommodate the project.

Offshore loan reporting obligations reduced

Under Presidential Regulation No. 39 of 1991, any offshore borrowings by PLN or IPP companies related to financing of power projects require approval of the Offshore Loans Coordinating Management Team (*Tim PKLN*). A number of project-financed IPPs have experienced months of delay in obtaining Tim PKLN approval.

PR 4/2016 removes the need for PLN to obtain Tim PKLN approval for PLN offshore borrowings, but unfortunately approval for IPP borrowings is still needed.

Closing

PR 4/2016 is yet another sign from the government that it is serious in trying to remove bottlenecks slowing down infrastructure development in Indonesia. There are many good things that come out of this recent regulation and the President should be commended for his continuing efforts to promote private sector investment in the power sector. As always, the key will be whether these Presidential aspirations will translate into effective implementation throughout the various levels of bureaucracy within the Indonesian Government.

Further, there are elements of some of the reforms in PR 4/2016 that will need further detail and implementation before they have any meaningful effect on power project developments. For example, what criteria will apply to determining which IPP projects receive guarantees, and which ones will not?

Outside of the PR 4/2016 reforms, there remain other areas that have been identified by industry stakeholders as unnecessarily slowing down power sector development. These areas include:

- further clarity on implementation of minimum local content requirements for power project developments;
- mandatory tender requirements under the construction laws and regulations (which conflict with PLN's philosophy of ensuring an experienced power plant construction contractor is part of the bidding consortium for new IPP projects);
- liberalizing the ability of experienced foreign construction contractors to participate with Indonesian construction companies in construction of the full gambit of power projects on offer (noting the current requirement that construction of power plants below a certain MW capacity can only be carried out by Indonesian contractors; and
- the ongoing need for Tim PKLN approval for IPP projects, and the time it takes to obtain that approval.