

**JWK Law Office**

# How Ready Is Indonesia To Join The TPP? “Focus on Government Procurement”

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# What is Government Procurement?

## Overview:

Worldwide, government is a big consumer of goods and services. The OECD estimates that government procurement typically represent 14-20% of GDP in most developed countries. Therefore, Government Procurement contributes a significant proportion of GDP.

However, due to its **sensitive nature**, government procurement was largely excluded from obligations under multilateral regulations



# WTO Government Procurement Agreement (GPA)

## **History:**

Government procurement is excluded from the national treatment obligations in both the General Agreement on Tariffs and Trade (GATT) and the WTO General Agreement on Trade in Services. . That means that parties to these multilateral agreements can favor their domestic suppliers, goods and services and discriminate against their foreign counterparts when they purchase goods and services.

However, beginning in 1981, a growing number of countries have opened their government procurement to foreign suppliers under plurilateral agreements, which are agreements that only apply to the countries or economies that join them. On April 15, 1994, the Agreement on Government Procurement (GPA) was signed in Marrakesh, Morocco, at the same time the Agreement Establishing the World Trade Organization (WTO Agreement) was signed



# WTO Government Procurement Agreement (GPA)

## Overview:

The GPA is a WTO plurilateral agreement which opens government procurement markets between its member. The Agreement's main principles are transparency and non-discrimination. It regulates GPA members to offer other members suppliers condition '*no less favourable*' than domestic suppliers. In addition the GPA provides for domestic review procedures to enable aggrieved firms to seek a review of procurement decisions.

On 6 April 2014, a **revised GPA** entered into force. The revised GPA better reflects the needs and realities of modern procurement process. First major element of revision is the use of *electronic procurement*, in order to increase the efficiency of GP practice. A second major element is the *expansion* of the procurement covered by the U.S and the other GPA member.



# WTO Government Procurement Agreement (GPA)

## Current GPA Membership:

The GPA has 19 Parties, comprising 47 WTO Members: Armenia, Canada, the European Union and its 28 member states (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom), Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei (Taiwan), United States, Montenegro and New Zealand.

In 2016, Ukraine and Republic of Moldova, were approved for membership in the GPA. Each will become a GPA Party 30 days after it submits its instrument of accession with the WTO Director-General.



# WTO Government Procurement Agreement (GPA)

## Why Indonesia did not join GPA?

Not many developing country accedes to GPA, because the accession to GPA is voluntary (plurilateral status). Furthermore, discrimination of many developing countries against foreign suppliers to be rigid international trade barrier. Most developing countries, such as Indonesia still place restriction on GP of both goods and service for various reason, such as the promotion of domestic industries and suppliers. ***In other word, most of developing countries still want to favor its domestic industries and suppliers.***



# WTO Government Procurement Agreement (GPA)

## **Indonesia as observers in the GPA Committee**

Members of the World Trade Organization which are not Parties to the Agreement may follow the proceedings of the Committee on Government Procurement in an observer capacity.

Any WTO member or observer may submit a written request tot the Government Procurement Committee to participate in the Committee as an observer, and may be accorded observer status.

*Indonesia acceptance by Committee as observers was on 31 October 2012*



# FTA

## Overview:

Indonesia has been quite active in concluding free trade agreement (FTA). In 2016, Indonesia already had nine FTAs in effect, ***seven regional*** and ***two bilateral***:

- AFTA, ASEAN-Australia and New Zealand, ASEAN-China, ASEAN-India, ASEAN-Japan, ASEAN-Korea and Preferential Tariff Arrangement-Group of Eight Developing Countries (regional)
- Indonesia - Japan EPA and Indonesia – Pakistan FTA (bilateral)

For Ongoing trade deal, Indonesia involves in **seven FTAs** (not include TPP):

- Regional Comprehensive Economic Partnership (RCEP), Indonesia-European Free Trade Association Free Trade Agreement, Indonesia-Australia Comprehensive Economic Partnership Agreement, Indonesia-Chile FTA, ASEAN-Hong Kong, China FTA, India-Indonesia Comprehensive Economic Cooperation Arrangement, and Korea-Indonesia FTA





# FTA

For the existing FTA that already in effect, there is no government procurement chapter in the existing FTA. However, for the ongoing trade deal, there is a “possibility” government procurement will be regulated in FTA, such as:

- **Indonesia – Australia Comprehensive Economic Partnership Agreement (IA-CEPA)**

Government Procurement is one of the subject discussion in the IA-CEPA because GP did not feature under the AANZFTA. Therefore, IA-CEPA may prove an appropriate context in which to develop bilateral discipline in this area, especially principles of non-discrimination and their application.

- **Indonesia – Chile FTA**

The main element to be considered in GP chapter are: to ensure non discriminatory market access; transparency; procedural simplicity; due process; wide scope on procurement, with significant coverage in terms of entities, and threshold; and challenge procedure.



# TPP

## Overview:

The final version of the TPP that was completed on 6 October 2015 is the end result of a long negotiation that started with the negotiations among four original economies – Singapore, New Zealand, Chile and Brunei that wanted to improve trade within the Asia Pacific Economic Cooperation (APEC) umbrella. The final version of TPP includes 30 chapters covering trade and trade related issues, such as trade in goods, customs and trade facilitation, labour, environment, **government procurement**, intellectual property, etc.

Indonesia is one of the ASEAN countries that expressed the intention to join the TPP. Many other countries like South Korea, Thailand, Taiwan, Philippines and Laos have expressed their interest in joining the partnership as well.



# Government Procurement Chapter Under TPP

## Overview:

The Government Procurement is regulated under Chapter 15. In this chapter, TPP Members share their interest to access each other's large government procurement markets through transparent, predictable, and non-discriminatory rules to allow suppliers to participate fairly in procurement process.

This chapter will ensure that governments **do not discriminate against foreign suppliers** when assessing tenders and awarding contract. The governments must follow world-class procurement system that provides **high level of transparency** and greater certainty for businesses, either for big business and for small business. Another important point in this chapter is TPP Members will be required to establish a review mechanism so that suppliers (both foreign and domestic) can challenge government procurement that do not follow a proper process.



# Government Procurement Chapter Under TPP

## Summary of GP in the TPP:

- **General principle**

In this regard, TPP agreement has a lot similarity with WTO agreement. It covers national treatment and non-discrimination, procurement methods, rules of origin, provisions on offsets, and measures not specific to procurement. Specifically, it stipulates the use of electronic means, where members shall publish the procurement information, notices and tender documentation and ofr the receipt of tenders by the use of electronic means.

- **Exceptions**

There are 4 measures in this exceptions and are not applied in a manner constituting a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail. Following are the measures stipulated in this article:

- a. Necessary to protect public morals, order or safety;
- b. Necessary to protect human, animal or plant life or health, including environmental measures;
- c. Necessary to protect intellectual property; or
- d. Relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labour.



# Government Procurement Chapter Under TPP

- **Transitional Measures**

This article give allowance to developing country to adopt or maintain one or more transitional measures, such as a price preference programme, an offset and a threshold. Furthermore, members may agree to delay the application of this chapter other than general principles and negotiation is still open for developing countries in implementing this chapter.

- **Technical Specifications**

This chapter is not allowing procuring entity to create unnecessary obstacle under technical specifications between the members. However, this stipulation is not created to preclude a member or procuring entities from adopting or applying technical specifications required to protect sensitive government information, including specifications that may affect of limit the storage, hosting or processing of such information outside the territory of the member.



# Government Procurement Chapter Under TPP

- **Publication of Procurement Information**

Government procurement in this agreement requires each party to promptly publish any measure relating to covered procurement, including any change or addition to this information. Each member based on request shall respond to any inquiry regarding the needed information

- **Notice of Intended Procurement**

It regulates the procuring entity to publish a notice of intended procurement through appropriate paper or electronic means and shall remain accessible to the public until the expiration date or the deadline for submission of the tender. Beside that, this article suggested English language to be used as the publishing language of intended procurement



# Government Procurement Chapter Under TPP

- **Conditions for Participation**

Procuring entity shall ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to fulfil the requirements of that procurement. This procuring entity cannot impose a requirement such as condition that the supplier has previously been awarded or has prior work experience in the territory. Supplier can be excluded on grounds such as bankruptcy, false declaration, significant or persistent deficiencies in the performance and/or failure to pay taxes. These conditions are made to guarantee fairness in the procurement process.

- **Limited Tendering**

Member may use this provision but not for the purpose of avoiding competition between suppliers, or to protect domestic suppliers, or in a manner that discriminates against suppliers of any other members.



# Government Procurement Chapter Under TPP

- **Negotiations**

This can be done in the context of procuring entity has indicated intention to conduct negotiations of intended procurement and based on evaluation that no tender is obviously advantageous

- **Facilitation of Participation by SMEs**

TPP members shall recognise the importance of SMEs contribution in economic growth, thus facilitating SMEs in government procurement is urged to be maintained. The members are allowed to give preferential treatment for SMEs as long as they can ensure the measure is transparent, including the criteria for eligibility.

- **Domestic Review**

Another breakthrough created by this chapter is the establishment of at least one impartial administrative or judicial authority that is independent of its procuring entities to review in a non discriminatory, timely, transparent and effective manner. This was made to facilitate the right to challenge by a supplier if there has been a breach of this chapter or failure of procuring entity to comply with the member's measures implementing this chapter.





# Government Procurement Chapter Under TPP

- **Ensuring Integrity in Procurement Practice**

This agreement requires high degree of integrity to ensure the procurement process is properly conducted. Therefore, each party shall ensure that criminal or administrative measures exist to address corruption in the government procurement. Measures can be taken to render ineligible participant or suppliers that the member has determined to have engaged in fraudulent or other illegal actions. In addition, TPP members shall have the procedures and policies to eliminate to the extent possible or any potential conflict of interest on a procurement. These measures are important to prevent any illegal actions or corruption resulting unfair treatment to the suppliers or interested parties.

- **Treatment of Tenders and Awarding of Contracts**

Award shall be submitted in writing and comply with the essential requirements set out in the notices and tender documentation. The award shall be given to the most advantageous tender or if the price is the sole criterion, the lowest price.



# Indonesia's GP System

## Applicable Laws of Government Procurement in Indonesia:

- Presidential Regulation No. 54 of 2010 on Government Procurement of Goods/ Services (“**PR 54/2010**”);
- Presidential Regulation No. 35 of 2011 on Amendment to Presidential Regulation No. 54 of 2010 on Government Procurement of Goods/Services (“**PR 35/2011**”);
- Presidential Regulation No. 70 of 2012 on Second Amendment to Presidential Regulation No. 54 of 2010 on Government Procurement of Goods/Services (“**PR 70/2012**”);
- Presidential Regulation No. 172 of 2014 on Third Amendment to Presidential Regulation No. 54 of 2010 on Government Procurement of Goods/Services (“**PR 172/2014**”);
- Presidential Regulation No. 4 of 2015 on Fourth Amendment to Presidential Regulation No. 54 of 2010 on Government Procurement of Goods/Services (“**PR 4/2015**”).



# Indonesia's GP System

## Overview:

Indonesia's Government Procurement system is mainly regulated by the **Presidential Regulation No. 54/2010 ("PR 54/2010")**, which lastly amended by the **Presidential Regulation No. 4/2015 ("PR 4/2015")**. The Presidential Regulations have undergone several amendments since its first enactment in 2010 due to development acceleration throughout Indonesia conducted by the government.

Such regulation covers (i) the procurement of goods (mainly construction works) or services (consultancy and other services) for ministries, regional divisions, and other institutions that is financed partly or wholly by state budget or regional budget, and (ii) the procurement of goods/services for investment in Bank Indonesia, state-owned legal entities and state-owned companies/regional government-owned companies financed partly or wholly by APBN/APBD. The Government Procurement Policy Institute (**LKPP**) is the institution that has the obligation to develop and regulate the policy of government procurement.



# Indonesia's GP System

**The following are the goods/services procured by the Government:**

a. Goods

Procurements of goods including but not limited to raw materials, semi-finished goods, finished goods, and creatures

b. Construction works

Construction works are works related to (i) building construction, such as architecture, civil engineering, electricity and environment management, and other related matters, or (ii) other physical works other than building construction, such as ship, plane or other vehicle for construction, land preparation, assembling of fabricated components, demolition, and reforestation.

a. Consulting services

b. Other services

Other services including but not limited to import/export, catering, cleaning, labor, insurance, banking and financial services, health, education, human resources development, advertisement, printing, maintenance, packing and delivery of goods, garment, writing and translation, leasing, accommodation, and more related services.



# Indonesia's GP System

## Method of GP in Indonesia:

There are some ways of method to conducting government procurement in Indonesia based on the GP Presidential Regulation, depending on the object of procurement. Method of government procurement applied in Indonesia consist of ***Tender, Direct Appointment, Direct Procurement, Direct Election, General and Simple Election, Contest and Competition***. Each of methods is subjected to different purposes

1. GP for Other Goods and Services
2. GP for Construction Works
3. GP for Consultation Services



# Indonesia's GP System

## Method of GP in Indonesia: GP for Other Goods and Services

1. Tender
  - a. General Tender
  - b. Simple Tender
  - c. Limited Tender only for procurement of goods

## 2. Direct Appointment

Method of election by appointing one provider only

## 3. Direct Procurement

It is a procurement without tender/selection or direct appointment

## 4. Contest

A method to choose providers by making a competition for certain goods which have no market price and its unit price cannot be measured.



# Indonesia's GP System

## Method of GP in Indonesia: GP for Construction Works

1. Tender
  - a. General Tender
  - b. Limited Tender

## 2. Direct Election

It is a mechanism to elect providers of construction works amounted up to Rp 5.000.000.000.

## 3. Direct Appointment

## 4. Direct Procurement



# Indonesia's GP System

## Method of GP in Indonesia: GP for Construction Services

1. Selection
  - a. General Selection
  - b. Simple Selection
2. Direct Appointment
3. Direct Procurement
4. Contest/ Competition

Competition is a method to select providers of services by making a competition on original idea, creativity and innovation which the price cannot be measured in unit price





# Indonesia's GP System

## Foreign Government Procurement Provider:

### **Article 104 of Presidential Regulation No. 70/2012**

With regards to the foreign government procurement provider, Indonesia allows the involvement of foreign bidding through business cooperation with a national company. Foreign companies can join the bidding directly if it exceeds the thresholds i.e. IDR 100 billion for construction works, IDR 20 billion for goods and other services, and IDR 10 billion for consultancy services. However, in a case where the national companies are unable to provide goods or services below IDR 20 billion and/or consultancy services below IDR 10 billion, then government procurement would be conducted through international competitive bidding or selection.

In addition, it also mandates the suppliers to use of domestic products (local content requirements) with minimum 40%.



# Indonesia's GP System

## Current Situation:

According to the latest regulation PR 4/2015, Indonesian government has stipulated a rule on e-tendering and e-purchasing. It is a new method of electing providers and procuring goods and services through electronic catalogue. Main portal of this system is maintained by Government Procurement Policy Institute (“LKPP”) as established by Presidential Regulation No. 106 of 2007 concerning Government Procurement Policy Institute that has been ammended by Presidential Regulation No. 157 of 2014 concerning Ammendment of Presidential Regulation No. 106 of 2007 concerning Government Procurement Policy Institute.



# Indonesia's GP System

## E-Tendering:

E-Tendering is used to select providers of goods and services that is conducted transparently and every registered providers can participate in this electronic procurement system by submitting their offering proposals within stipulated time. E-Tendering covers three main activities, which are invitation, proposal submission and result announcement. Parties involved in this process are PPK, ULP and the providers. While E-Purchasing is way to purchase goods or services through e-catalogue. The differences between E-Purchasing and other conventional ways to purchase goods/services, such as direct appointment and direct procurement, are that e-purchasing has no limit on its value of procurement, the goods shall be listed in e-catalogue and election process must be done through electronic procurement system (“SPSE”).



# Indonesia's GP System

## Analysis:

It can be seen that Indonesia's government procurement **system indeed favors its domestic suppliers** and it can be seen in the PR 54/2010 and its amendments. Meanwhile TPP demands the TPP Members to treat foreign suppliers and domestic suppliers equally. This strategy unfortunately can be classified as restricted practice named offset under Chapter 15 of TPP. According to Article 15.4.6, no party including procuring entities shall seek, take account of, impose or enforce any offset at any stage of a procurement. This stipulation is justified under the general principles as mentioned in Article 15.4.

In addition, Indonesia's government procurement has been mostly provided by the major **State-owned (SOE) corporations**, such as PT Pembangunan Perumahan (Persero) Tbk, PT Adhi Karya (Persero) Tbk, and PT Wijaya Karya (Persero) Tbk. However, its SMEs participation are very limited.



# Cost and Benefit

## Cost and Benefit for Indonesia's Government Procurement Market:

With assumption that Indonesia joins the TPP and Indonesia agrees to open its government procurement market, there are some advantages and disadvantages:

- The provisions under Government Procurement might help to prevent/mitigate **corruption risks** in Indonesia.
- many public goods and services have a direct or indirect effect on economic performance and living standards—in particular, the living standards of the poor, who tend not to be able to afford private alternatives. **Effective national procurement** policies can help improve the execution of state infrastructure projects, yielding export and growth benefits
- TPP supports the existence of e- procurement in order to improve the **transparency**. Therefore, if Indonesia joins the TPP, it might help to **foster the development of e-procurement in Indonesia** and at the same time, makes Indonesian bureaucracy more effective and efficient.



# Cost and Benefit

## Cost and Benefit for Indonesia's Government Procurement Market:

- TPP encourages the contribution of SMEs (Small, Medium Enterprises), GP chapter offers facilitation of participation by SMEs. SMEs development could bring significant impact to Indonesia, considering the country has around 250 million people in population.
- By joining TPP, Indonesia has to be able to penetrate the global market and at the same time improving the internal work through support from the Indonesian government and all TPP member states. Otherwise, Indonesia would only be a **consumer and market provider**, but not a **producer and player**.



# Cost and Benefit

## Cost and Benefit for Indonesia's Government Procurement Market:

- Indonesia cannot ignore the fact that Indonesia should also open up its government procurement market to foreign suppliers. Indonesia has to ready if the next five or ten years that the government procurement market in Indonesia might be dominated by foreign suppliers if the domestic suppliers cannot compete with them.
- There is a small chance that domestic suppliers have the ability to compete with suppliers from other countries, in particular suppliers from developed countries in the international market.



# Conclusion

Indonesia has a huge potential especially in the government procurement market. However, it should be noted as well that Indonesia's government procurement system is not all in **compliance** with government procurement chapter in TPP because Indonesia's government procurement system indeed still favors its domestic suppliers while TPP demanding the same treatment between foreign suppliers and domestic suppliers. Another concern that might arise for Indonesia is whether Indonesia can **compete** or not in global government procurement market.





THANK YOU