

Indonesia

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1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes.

The legal system in Indonesia provides specific procedures for the award of public or government contracts. Such procedures are provided in the Presidential Decree No. 80 of 2003 on Government Goods/Services Procurement Implementation Guidance, which has been amended 6 times and last amended by Presidential Regulation No. 85 of 2006 (collectively, "PD80").

2.Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?

PD 80 divides the types of goods or services to be procured into two general types, consisting of (i) goods and (general) services and (ii) consultancy services.

Goods and (general) services procurement shall be carried out in either one of the following procurement procedures, as provided under the PD80:

- (i) Public Tender;
- (ii) Limited Tender;
- (iii) Direct Selection; and
- (iv) Direct Appointment.

PD80 provides a separate procedure for the procurement of consultancy services as follows:

- (i) General Selection;
- (ii) Limited Selection;
- (iii) Direct Selection; and
- (iv) Direct Appointment.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?

Certain procurement procedures are subject to the value of the goods or services.

Direct Selection for goods/general services and consultancy services can be carried out in a procurement valued up to Rp. 100.000.000 (one hundred million Rupiah).

Direct Appointment can be carried out in procurement, having the specific criteria as determined in PD 80, among others, small scale work with maximum value up to Rp. 50.000.000 (fifty million Rupiah).

Those are exceptions to the general requirement that all procurement shall be conducted through a public tender (for goods and (general) services) or general selection (for consultancy services). However, in the case that the number of available competent suppliers for a certain procurement is limited, such procurement can be conducted through a limited tender (for goods and (general) services) or limited selection (for consultancy services).

4. In what way does the contracting authority have to inform the market about the intended procurement?

Article 4 of the PD80 determines that as a government public policy in goods and (general) services procurement, the contracting authority shall publicly announce goods and (general) services procurement activity through a nationally circulated and/or provincially circulated newspaper.

Confidential goods and (general) services procurement plan for Departments/Institutions/Commissions/Bank Indonesia/Regional Government/State Owned Legal Entity/State Owned Enterprise/Regional Owned Enterprise are obliged to be publicly announced as well, by way of announcing it on the national procurement website www.pengadaannasional-bappenas.go.id and/or at the website of the Departments/Institutions/Commissions/Bank Indonesia/Regional Government/State Owned Legal Entity/State Owned Enterprise/Regional Owned Enterprise, which is integrated to the national procurement website.

5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

PD80 does not determine or stipulate a specific legal form requirement for a potential bidder to submit a tender. However, Article 11 of the PD80 provides certain requirements for the goods and (general) services provider in commencing its procurement. One of the requirements is that the goods and (general) services provider must comply with the provisions of the law to carry out business/activities as a goods and (general) services provider.

Notwithstanding that, the tender form (which format is attached in the PD80) only recognizes the

following entities:

- (i) Limited Liability Company;
- (ii) Limited Partnership;
- (iii) General Partnership;
- (iv) Cooperatives; and
- (v) individuals.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Yes, both are possible. However, subcontracting is subject to certain limitations as governed under the PD80 (e.g., restrictions to subcontract the whole work).

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

PD80 does not expressly specify any requirements to have a registered office or branch office in Indonesia, but Article 11 Paragraph 1 of the PD80 specifically requires that the provider must comply with all prevailing regulations to carry out the businesses or activities as a goods and (general) services provider. In this regard, potential bidders may be required to have a registered office or branch office, whereby the relevant regulatory governing the type of business of such bidder requires so.

However, please note that it may be required to have a registered office or branch office during the performance of the contracts.

8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

Yes, pursuant to Article 42 Paragraph 1 of the PD80, foreign bidders may participate in goods and (general) services procurement, although subject to the following values of procurement:

- (i) for contract of works (pemborongan) above Rp. 50.000.000.000 (fifty billion Rupiah);
- (ii) for provision of other goods and (general) services above Rp. 10.000.000.000 (ten billion Rupiah);
- (iii) for consultancy services above Rp. 5.000.000.000 (five billion Rupiah).

Paragraph 2 also provides that foreign companies carrying out the aforementioned works must cooperate with the local companies in a form of a partnership, subcontract and others, if there are local companies having the capabilities in the relevant field.

The above provisions may be waived in the event of procurement specifically for defense materials and equipments for the Department of Defense/Indonesian Armed Forces which shall be determined by the Minister of Defense/Commander-in-chief of the Indonesian Armed Forces/Forces Chief Staff, as explained in Article 42 Paragraph 3 of the PD80.

9. Is a multinational bidding consortium allowed to submit a bid?

There are no restrictions for a multinational bidding consortium to submit a bid; however, such consortium must take into account of the minimum value of the works and special terms as stated in number (8) above.

10. In which language do the tenders have to/can be submitted and which form is required,

e.g., written form, fax, e-mail or digital?

Tenders can be submitted through either by (i) conventional/manual means or (ii) electronic means.

Conventional/manual means shall be carried out by submitting the tender documents in written form to the contracting authority. The standard format of the form is provided in Attachment II of the PD80.

Tenders submission by electronic means shall be submitted through the national procurement website, www.pengadaannasional-bappenas.go.id.

In general, submission process shall be carried out in Indonesian language. However, it may also be carried out in English language, provided that the procurement is an international procurement, whereby foreign entities are allowed and/or invited to submit tenders.

11.Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

Article 12 of PD80 provides that, the goods and (general) services user are obliged to allocate an “adequate” amount of time to publish the announcement, provide the opportunity to obtain the relevant documents, provide the opportunity to review the documents and prepare the bidding documents. PD80 does not provide the specific amount of time which needs to be allocated, but its Attachment I provides the minimal amount of time required for each step in each type of procedure. For instance, in a public tender with pre-qualification, the public announcement shall be published for at least 7 (seven) working days, the deadline for submission of the procurement documents shall be at least 3 (three) working days as of the end of the announcement. The period between announcement day and deadline of obtaining the procurement documents shall be at least 7 (seven) working days.

The bidding documents shall be available 1 (one) day as of issuance of the tender invitation up to 1 (one) day before submission of the bidding documents. The briefing shall be done in at least 7 (seven) days as of the announcement of the pre-qualification date. The bidding documents submission period shall be at least 7 (seven) working days as of the briefing.

Subject to the above, it would be mandatory for the contracting authority to provide the goods and (general) services provider no less than approximately 31 (thirty one) working days between the announcement for procurement and submission of bids, in public tender with pre-qualification.

12.Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?

In general, bidders may not claim reimbursements for the cost of submitting a bid.

13.Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

Article 11 Paragraph 1 of PD80 provides general requirements which shall be fulfilled by the goods and (general) services provider through the pre-qualification or post-qualification process by the contracting authority, as follows:

- (i) compliance with prevailing regulations in carrying out businesses/activities as goods and (general) services provider;
- (ii) owns the skill, experience, technical capabilities and managerial skill to provide the goods and (general) services;
- (iii) is not under a court supervision, not in bankruptcy, its business activity is not terminated

and/or the Board of Directors acting for and on behalf of the company is not currently undergoing a criminal sanction;

(iv) legally owns the capacity to execute contracts;

(v) as a taxpayer had fulfilled tax obligations of the preceding year, which shall be proven by submitting a copy of receipt for the Annual Return for the preceding year, and copy of the Article 29 income tax payment form;

(vi) within the last 4 (four) years had obtained assignments providing goods and (general) services either from the government or from a private sector including subcontract experience, except for goods and (general) services providers which have only been established for less than 3 (three) years;

(vii) owns the human resources, capital, equipments and other facilities required in goods and (general) services procurement;

(viii) not enlisted in the black list;

(ix) owns a permanent and clear address and within reach of mail;

(x) individual goods and (general) services provider shall fulfill the same requirements as stated above except for point (vi).

Article 11 Paragraph 2 of PD80 provides that, specialists which will be assigned in carrying out consultancy services must fulfill the following requirements:

(i) owns a Taxpayer Registration Number (Nomor Pokok Wajib Pajak or NPWP) and proof of settlement for tax obligations;

(ii) graduated from an accredited state or private university or graduated from state examination or foreign university, which diploma have been legalized/approved by a government authority, having the authority in higher education matters;

(iii) experienced in its relevant business sector.

The contracting authority may establish additional selection criteria and requirements for procurement, with the limitations that it shall be indiscriminative and objective, as governed under Article 16 Paragraph 3 of the PD80, which elucidation provides examples of criteria or requirements deemed indiscriminative and objective, such as:

(i) requirements that obstructs fulfillment of a healthy competition, e.g., requirements to become a member of a certain association;

(ii) requirements that obstruct participation of goods and (general) services provider from other regions, e.g., obligation to own a bank account in a local bank.

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

Yes, Article 27 of PD80 provides a primary legal protection against a bidders before the contract is awarded. The said primary legal protection is the right of a goods and (general) services provider to submit a protest letter to the goods and (general) services user, subject to the following:

(i) if there is a violation towards the provisions and procedures which have been determined in the documents for the goods and (general) services provider;

(ii) if there is certain conspiracy which implicates an unhealthy competition;

(iii) misuse of authorities by the contracting authority and/or other authorized official;

(iv) if there is an element of corruption, collusion and nepotism amongst the attendants of the goods and (general) services provider selection;

(v) if there is an element of corruption, collusion and nepotism amongst the member of the contracting authority and/or with other authorized official.

The goods and (general) services user must provide a response at the latest in 5 (five) working days as of the protest letter is received.

The protesting goods and (general) services provider may submit an appeal if the response is not satisfactory. Such appeal shall be submitted to the Minister/Commander-in-Chief of the Indonesian Armed Forces/Chief of the Police Force of the Republic of Indonesia/Head of the Institution/Governor/Regent/Mayor/Board of the Governor of the Bank Indonesia/Head of the State Owned Legal Entity/Board of Directors of the State Owned Enterprise/Region Owned Enterprise at the latest in 5 (five) working days as of the response over such protest had been received.

The Minister/Commander-in-Chief of the Indonesian Armed Forces/Chief of the Police Force of the Republic of Indonesia/Head of the Institution/Governor/Regent/Mayor/Board of the Governor of the Bank Indonesia/Head of the State Owned Legal Entity/Board of Directors of the State Owned Enterprise/Region Owned Enterprise must provide a response at the latest in 15 (fifteen) working days as of the appeal is received.

The goods and (general) services provider selection shall still proceed. If the appeal turns out to be true then the whole procurement process shall be re-evaluated or a re-selection process or contract cancellation shall be conducted. Each protest must be processed by the authority receiving the protest, in accordance with the prevailing laws.

15.If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

Kindly refer to No. 14.

16.If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

The procedure and conditions for the secondary legal protection are the same as the ones for the primary legal protection, and damage claims can always be submitted as a matter of civil law procedure.

17. Can your office

i.give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

ii.represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

iii.Please name a contact person within your office for questions of public procurement law!

Yes, our office has the competence to:

(i)provide legal advice and assist foreign clients in the procurement procedure in Indonesia;

(ii)represent foreign clients seeking primary and secondary legal protection before all public offices/courts in Indonesia;

(iii) Please contact Christian Teo or Dhanadyaksa Narendrasuta from our office for questions of public procurement law.