

ΔCTIO

ISSUE NO.3 / DECEMBER 2016

Constitutional Court's Decision on Electricity Law

Building Failure:

Determinant in Alleged Crime and Corruption in Construction Service?

5 Successful Tips for Winning State Enterprise Project Bids



9 772528 280004



We, Akasa Cipta Tama (ACT), was established in April 2015 as a response to the demand of highly qualified translators for business, legal, technical, and general documents; as well as interpreters and note takers for meetings, seminars, and conference. Our translators, interpreters and note takers have extensive experiences in their respective fields.

With a comprehensive database of qualified human resources, ACT works to ensure the best results in every project we run. Some of our top personnel have worked for various international events and some of our clients include the Office of the President of the Republic of Indonesia, People's Consultative Assembly, The United Nations, The World Bank, AusAID, USAID, and some prominent law firms in Indonesia.



Please do not hesitate to contact us if you have any question at marketing.akasa@gmail.com.
Looking forward to hearing from you.

CONTENTS

FOREWORD	3
INFO	4
ANALYSIS: Building Failure: Determinant in Alleged Crime and Corruption in Construction Service?.....	5
ANALYSIS: Constitutional Court Decision in Electricity Law: Will It Change the Implementation in Practice?	6
QUESTION & ANSWER.....	8
IN-DEPTH LOOK: Presidential Regulation Number 3 of 2016: Ease for Private Companies in Strategic National Projects	9
OPINION: The Enigma of Inquiries into Crimes in Strategic National Projects	10
TIPS: Interested in Joining State Enterprise Bids? Note These 5 Points	11

ACTIO

Editors:

Advisors:

Setyawati Fitri Anggraeni, S.H., LL.M., FCI Arb.

Editor in Chief:

Agus Dwi Prasetyo, S.H.

Managing Editor:

Tanya Widjaja Kusumah, S.H.

Writers:

Agus Dwi Prasetyo, S.H.

Tanya Widjaja Kusumah, S.H.

Sufi Mufarrid Fadhly, S.H.

Elida Damaiyanti Napitupulu, S.H.

Manuel Simbolon, S.H., M.H.

Tubagus Syaqief Harizansyah, S.H.

Contributors:

Media Consultant:

Fifi Juliana Jelita

Copy Editor:

Wahyu Hardjanto

Visual Layout Designer:

Riesma Pawestri

Illustration: **freepik.com**

Axio Magazine is published every four months,
made and distributed by:



Disclaimer:

Any analysis, opinion or information in Actio is a personal contribution of the partners and/or associates of Anggraeni and Partners law firm and is a common knowledge of law. Such analysis, opinion or information in Actio is not intended to serve as the legal opinion or view of Anggraeni and Partners law firm about a certain legal issue.

The analysis, opinion or information in Actio cannot be construed as an indication or suggestion for a future circumstance. The analysis, opinion or information in Actio is not offered as legal opinion or legal advice for any certain matter. No reader may consider that they have to act or refrain from acting or choose to act in regard of a certain issue based on the analysis, opinion or information in Actio without first seeking consultation from professionals at law in accordance with the specific facts and circumstances encountered.



Valued readers,

Time truly flies, and we have arrived at the end of 2016. In a few days, we will be entering the first day of 2017. Every one of us certainly needs to reflect on our achievements and improvements in 2016 for a better year ahead.

In this third issue, Actio highlights the theme of law development in Indonesia's infrastructure. As one of the government's targets, the implementation of infrastructure development in 2016 was replete with problems. To overcome these problems, measures were taken by the government, one of which was by issuing a presidential regulation.

In this edition, Actio also covers the 4th Anniversary of Anggraeni and Partners (AP) Law Firm. In our 4th Anniversary, we expressed our gratitude for the immense support from all of our clients and colleagues. We appreciate the continuous prayers and strong collaboration from our colleagues to support us in achieving greater excellence in the future.

Finally, let us welcome the new year 2017 together. May God continue to always bless us all. Amen.

Regards,

Anggraeni & Partners

NUPTIAL AGREEMENTS CAN BE MADE POST NUPTIAL

Herman is an entrepreneur in the garment industry who has been successful for the past 3 months. However, due to the less favorable economic condition recently, his business which he set up with his wife, took a direct hit and went bankrupt.

To make matters worse, Herman still has obligations to the bank, his employees, and the tax office. In such situation, Herman's family's financial condition is also disrupted because his assets and his wife's are considered joint assets. As a result, Herman's debt obligations are also his wife's.

This type of story could have been avoided if Herman and his wife had drawn up a prenuptial agreement. Under Law Number 1 of 1974 on Marriages has been establishing provisions that separation of assets can be arranged prior to a marriage.

Also, the Constitutional Court has only recently passed a decision that a nuptial agreement can be arranged after the wedding. Decision Number 69_PUU-XIII_2015 was passed after Mrs. Ike Farida, an Indonesian citizen from East Jakarta, filed a petition for material review on Article 29 paragraphs (1), (3) and (4) as well as Article 35 paragraphs (1) of Law Number 1 of 1974 on Marriages.



With such decision passed, every nuptial agreement drawn up after a husband and a wife are united in marriage, is binding as from the date on which the nuptial agreement takes effect. This agreement does not only apply to married couples entering into the nuptial agreement, but also to any third party entering into the nuptial agreement.



INTERNAL MOCK TRIAL COMPETITION MARKS THE ANNIVERSARY OF ANGGRAENI AND PARTNERS

In celebrating the 4th Anniversary of Anggraeni and Partner (AP) law firm, the AP Anniversary Committee held an Internal Mock Trial Competition. The competition

was participated by all AP employees, advocates and staffs. Despite being a mock trial, the participants demonstrated high commitment and dedication to

perform their part and hold a trial as similarly as possible to an actual court trial. The mock trial competition which was held on 22 October 2016 was aimed at improving the court procedural skills of AP advocates as well as promoting collaborative spirit among AP staffs. In addition to the mock trial competition, AP's 4th Anniversary was also marked with a photograph session of AP Management and the entire staffs and advocates.

The series of AP Anniversary celebration events were concluded on Monday, 24 October 2016, with a luncheon and winner announcement by Ms. Setyawati Fitri A., S.H., LL.M., FCIArb., as the Managing Partner. **(SMF)**

BUILDING FAILURE: A DETERMINANT FACTOR IN ALLEGED CRIME AND CORRUPTION IN CONSTRUCTION SERVICE

In a construction service contract between the government and the service provider (contractor), there are often issues particularly related to building failure and its connection to the criminal law, both the criminal act of corruption and criminal acts in construction service.

The definition of building failure under Law Number 18 of 1999 on Construction Service (Construction Service Law) is a state where a building which has been transferred by the service provider to the service user fails to function entire entirely or partially and/or not in compliance with the requirements provided for in the construction work contract, or the use of which deviates from its intended purpose due to the fault of the service provider and/or the service user.

In order to determine the building failure, there are certain stages to go through. First, the construction work must be fully completed and transferred. Second, audit needs to be performed by auditors, both internal and external, which in due course will determine whether there has been any deviation.

If there is any deviation, the measure sought would be a

settlement effort based on the applicable contractual clause or legal provisions on construction service. Furthermore, if the audit finds that the service user/ the government suffers loss due to the building failure, the government has the right to file a civil lawsuit against the service provider/contractor as regulated in Articles 25 and 26 of the Construction Service Law.

Article 43 of the Construction Service Law provides the criminal sanction of imprisonment for a maximum of 5 (five) years and 5%-10% penalty of the contractual value against any occurrence of construction failure or building failure due to any of the following:

1. construction work planning which fails to fulfill technical requirements;
2. conduct of work which is against or not in accordance with technical requirements;
3. supervisor of the construction work deliberately giving another party the opportunity to carry out the construction work and deviate from technical requirements.

All of the aforesaid elements must be a result of a "fault" due to any action which is not in accordance

with technical requirements. In addition, building failure must fulfill the following criteria:

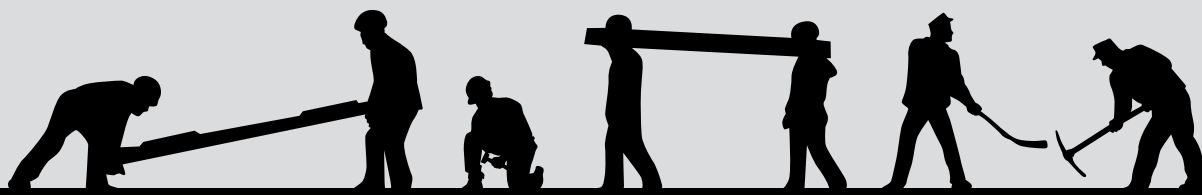
1. failing to function either partially or entirely; or
2. not meeting the requirements provided for in the contract;
3. there is deviation in its use.

In the law regarding other special crimes, the element of building failure can also be categorized as an indication of criminal act of corruption, if the following criteria are met:

1. state loss,
2. building failure,
3. strong allegation of deliberate intent on the part of service provider/contractor or strong allegation of unlawful act on the part of contractor, namely gratuity, misuse of authority, or other unlawful acts.

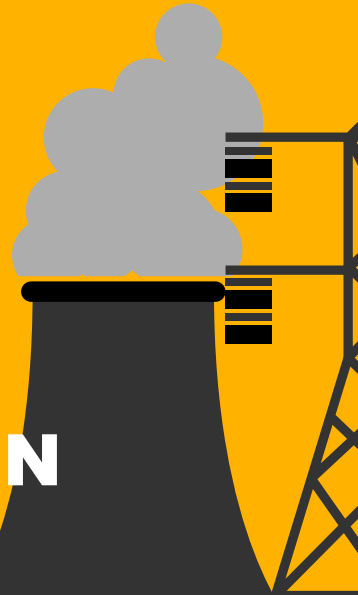
Therefore, Article 2 paragraph (1) of Law on Criminal Acts of Corruption may be applied in the said building failure occurrence.

Based on the foregoing discussion, the element of building failure is a determinant factor in any inquiry into an alleged criminal act in construction service or corruption **(TSH)**



CONSTITUTIONAL COURT DECISION ON ELECTRICITY LAW:

WILL IT CHANGE THE IMPLEMENTATION IN PRACTICE?



The Indonesian government has passed a series of laws, namely respectively, Law Number 15 of 1985, Law Number 20 of 2002 and Law Number 30 of 2009 regarding Electricity. Law Number 20 of 2002, however, was annulled by the Constitutional Court (CC) on 21 December 2004 through Decision Number 001-021-022/PUU-I/2003 dated 21 December 2004 because the unbundling system arrangement in the Electricity Law Number 20 of 2002 regarding Electricity was in contradiction to Article 33 of the 1945 Constitution paragraphs (1), (2), (3) and (4) along with its elucidation stating that the

state has the right to control land, water and any resources therein, including electricity, in order to meet the needs of the greater people.

On 14 December 2016, the Constitutional Court passed another Decision Number 111/PUU-XIII/2015 dated 16 June 2016 which partially granted the petition of Workers' Union (SP) of PT PLN (Persero) together with the Indonesian Association of Employees (PPI) in electricity, in relation to material review on the provisions of Article 10 paragraph (2) as well as Article 11 paragraph (1) of Law Number 30 of 2009 regarding Electricity which was filed by the Workers'

Union of State Electricity Company (PT PLN).

The SP of PT PLN considered that the provisions in the Electricity Law have caused the need of the greater people to be controlled by national private companies, multinational companies and private individuals, and have deprived the state of any power over electricity control.

Considering the arguments of the petitioners, the Constitutional Court deemed that Article 10 paragraph (2) of the Electricity Law opens up a possibility that the electricity provision business be con-



ducted separately (by way of unbundling). Article 10 paragraph (2) contains an explanation that PLN can have an integrated business ranging from electricity generation, transmission, distribution up to electricity sale.

Moreover, other than PLN, other parties such as private companies, local state companies (BUMD) and cooperatives are allowed to do an integrated business ranging from electricity generation up to electricity sale, insofar as based on the principle of electricity being “controlled by the state”. Meanwhile, Article 11 paragraph (1) was deemed

by the Constitutional Court as being able to open up a potential loss of principle of state control in terms of providing electricity for the people.

Based on the foregoing considerations, the Constitutional Court did not annul the two articles in full, and only limited their interpretation insofar as the principle of “controlled by the state” is not violated. This implies that the business areas which are allowed to be explored by private investors will be determined through the government, electricity permits will be given by the government, and the electricity rate charged on the

people will also be controlled by the government. Hence, the government remains in control of the business areas, licensing and rates.

Basically, during the past 7 years since the Electricity Law’s enactment, the government actually has never fully given private investors the control to run the electricity business. Thus, the Constitutional Court’s decision actually affirmed the interpretation of Article 10 paragraph (2) and Article 11 paragraph (1) of the Electricity Law which should have been read together and not be separately interpreted. **(TWK)**



What is the basis for option to settle a dispute through arbitration?

Answer:

Arbitration is one of the avenues to settle civil issues outside the public court. The basis for arbitration is an arbitration agreement drawn up in writing by the disputing parties. This means that the arbitration agreement can either be included as one of the clauses in the main agreement between the parties or made into a separate arbitration agreement by the parties after a dispute arises.

Basis: Law Number 30 of 1999 regarding Arbitration and Alternatives to Dispute Settlement.

What is an example of an arbitration clause in an agreement?

Answer:

Arbitration can be carried out on an ad-hoc basis (independently) or through an arbitration institution. Should you decide to select the Indonesian National Board of Arbitration as your arbitration institution, the arbitration clause in your agreement can be worded as follows:

"All disputes arising from this agreement will be settled and decided upon by the Indonesian National Board of Arbitration (BANI) pursuant to the administrative and procedural rules of arbitration of BANI, the decision of which shall be binding to both parties in dispute as a decision of the first and final instance."

Basis: <http://www.baniarbitration.org/ina/procedures.php>

PRESIDENTIAL REGULATION NUMBER 3 OF 2016: EASE FOR PRIVATE COMPANIES IN STRATEGIC NATIONAL PROJECTS



Requirements which must be met by operators of strategic national projects have now been eased through Presidential Regulation Number 3 of 2016 regarding Acceleration of Strategic National Projects Implementation (Presidential Regulation 3/2016). A strategic national project is a project carried out by the government, a local government, and/or a business entity which is strategic in nature and has the objectives of promoting growth and ensuring equal development for the purpose of promoting people's welfare and regional development.

Actually, it is not uncommon for investors or a private fund to be involved in a governmental infrastructure development project.

However, sluggish licensing, encumbering bureaucracy and illegal fees in the form of unofficial imposts (pungli) have all been major deterrents for the private sector. Through the promulgation of Presidential Regulation 3/2016 on 8 January 2016, business entities are facilitated and even guaranteed to be able to smoothly arrange their licensing and non-licensing affairs, including fiscal, data and information facilities. Applications for licensing and non-licensing affairs can be submitted to the center for one-stop integrated service (PTPSP) at the Capital Market Coordinating Board (BKPM).

The most important point of Presidential Regulation 3/2016 is that the implementers of strategic national projects no longer have to be concerned

over potential crime of power abuse by certain individuals in strategic national projects. The Presidential Regulation 3/2016 among other provides that every report to the Attorney General's Office or the Indonesian Police concerning strategic national projects will be forwarded to relevant agencies for due internal process by the government's internal supervisory instrument by prioritizing administration process.

In addition, project operators, especially private business entities, will obtain a guarantee from the government for strategic national projects. The guarantee includes policies which are taken or not taken by the central government which hamper the strategic national projects. **(MSB)**

THE ENIGMA OF INQUIRY INTO CRIMES IN STRATEGIC NATIONAL PROJECTS

The promulgation of Presidential Regulation Number 3 of 2016 regarding Acceleration of Strategic National Projects Implementation (Presidential Regulation 3/2016) has the potential to create a conflict of authority between law enforcers and government institution. The regulation, which was enacted on 12 January 2016, was actually created to accelerate the implementation of strategic projects to fulfill basic needs of the people and promote people's welfare. In addition to easing the licensing process, Presidential Regulation 3/2016 also protects strategic projects from potential obstacles, one of which the allegation of a criminal act which requires a project to be placed as an object of a criminal investigation.

This policy can be found in Article 31 paragraph (1) of Presidential Regulation 3/2016 which basically provides that every settlement of alleged deviation or misuse of authority shall be carried out by prioritizing administration process. The government's "involvement" in an alleged deviation or misuse of authority in a strategic national project is clearly provided for in Article 31 paragraph (2) of Presidential Regulation 3/2016 which specifies the obligations of the police or public prosecutors to forward to the relevant ministry/institution, governor or regent/mayor, any report or complaint related to the implementation of any strategic national projects.

It is noted that the government intends to protect strategic national projects to minimize stalled projects due to investigation or inquiry by the police or public prosecutors

on any report. On the other hand, however, this presidential regulation is potentially contradictory to other laws, namely Law Number 16 of 2004 regarding Public Prosecution Service of the Republic of Indonesia (Public Prosecution Service Law) and Law Number 2 of 2002 regarding State Police of the Republic of Indonesia (State Police Law).

As acknowledged, the police and the public prosecution service have an authority for an alleged criminal act under the laws. The public prosecution service, as provided for in Article 30 paragraph (1) of the Public Prosecution Service Law is authorized to conduct inquiry into certain criminal acts, including corruption. Meanwhile, the police is authorized under Article 14 paragraph (1) of the State Police Law to conduct investigation and inquiry on all criminal acts.

In a hierarchy of laws, as provided for in Law Number 12 of 2011 regarding Formation of Laws and Regulations, particularly Article 7 paragraph (1), the position of presidential regulation is two levels below the Law. This raises a question, as when there is a contradiction between the provisions of a presidential regulation and those of a law, under the "lex superior derogat legi inferior" principle, a higher-degree regulation will supersede a lower-degree one. In this case, the

law should have superseded the presidential regulation.

The inconsistency existing amongst the Public Prosecution Service Law and the State Police Law as well as Presidential Regulation 3/2016 is interesting to be further studied. First, the presidential regulation may be filed for material review to the Constitutional Court, to discover whether or not the provisions therein are contradictory to the laws, particularly the Public Prosecution Service Law and the State Police Law. The second possibility is for Presidential Regulation 3/2016 to be interpreted as not contradictory to the law above it, as Article 30 of Presidential Regulation 3/2016 does not eliminate the authority of a public prosecutor or a police officer to conduct investigation and inquiry.

Although Presidential Regulation 3/2016 is not considered contradictory to the State Police Law and the Public Prosecution Service Law, the writer is of the opinion that Article 30 of Presidential Regulation 3/2016 would create an enigma and lead to a conflict of authority between law enforcers and relevant institutions/ministries. On one hand, if the preliminary examination process is carried out administratively, the relevant ministry/institution does not have the authority to exercise coercive measures such as a seizure or a search. This might cause or give a chance for the perpetrator to eliminate evidence. On the other hand, there is no rule which imposes any consequence if a police or a public prosecutor refuses to forward the report/complaint on abuse or misuse of authority to the relevant institution/ministry. **(ADP)**

1**Fulfil the following principles:**

- a. Efficient;
- b. Effective;
- c. Competitive;
- d. Transparent;
- e. Equitable and Fair; and
- f. Accountable

2**Procurement of goods and services can be conducted by the following ways:**

- a. open bid or open selection for consulting services;
- b. direct selection for consulting service procurement;
- c. direct appointment; or
- d. direct purchase

3**Procurement of goods and services is carried out by:**

- a. a procurement committee or a procurement officer; or
- b. an eligible professional institution.

The organizer of goods and service procurement must sign a letter of undertaking for every procurement of goods and services.

INTERESTED IN JOINING STATE ENTERPRISE BIDS? NOTE THESE 5 (FIVE) POINTS

Procurement of goods and services for state enterprises (BUMN) is regulated in BUMN Ministerial Regulation Number Per-05/MBU/2008 regarding Procurement of Goods and Services for State Enterprises as amended with Per-05/MBU/2012. The Ministerial Regulation contains guidelines on matters requiring attention, as follows:

4**Specifically for projects requiring more than 1 (one) year to complete, the following criteria must be met:**

- a. Goods and service users tailored to the specific needs of the respective goods and service users insofar as the quality, price and purpose can be accounted for.
 - b. In terms of long-term goods and service procurement, goods and service users need to create a certain price adjustment formula, both in case of rise or drop in pricing, which is adjusted to the market conditions and the current best practice.

5

Right to protest. In order to guarantee transparency and equal treatment, 4 (four) business days from the announcement of bid winner, the losing providers of goods and services have the right to protest concerning whether the conduct of bid/selection has aligned with the bid/selection procedure.

In addition, the organizer of goods and service procurement must also deliver their decision on such protest within 14 calendar days at the latest, as from the date of receipt of such protest.

Those are the points which should be observed in joining state enterprise bids. Goods and service providers are expected to observe them prior to entering into any state enterprise bid.

(TWK)



Arbitration



Corporate Law



Commercial
Dispute



Criminal Law



Shipping Law

OUR VISION

Becoming a prominent Indonesian law firm applying international standards and capable in competing regionally, with an objective to contribute significantly for the development of the Indonesian legal system, having the progress of the nation in sight as well as consistently creating added values to all parties.

OUR MISSION

- ◆ **E**stablishing a sustainable law firm consisting of trusted and reliable attorneys, supported by a strong and qualified business management in accordance with the condition in Indonesia, as well as being committed in providing integrated and quality legal services to the clients and the communities;
- ◆ **C**onsistently establishing and developing the quality of human resources through scientific researches, trainings and innovations based on the organizational and cultural values of Indonesia;
- ◆ **M**aintaining the continuity of growth in legal services through consistent improvement of service.

OUR VALUE

“ **Dedication in service for a sustainable growth and partnership in order to create added values for the clients.** ”

WE ARE
WORTHY
— *Of Your* —
TRUST

OUR LATEST EXPERIENCE

2015

ACTING AS AN ATTORNEY for an Indonesian shipping company in its capacity as a respondent in a bankruptcy proceeding at the Commercial Court in the District Court of Central Jakarta;

2014

DRAFTING AND ANALYZING shipping contracts for a palm oil plantation company;

2013

REPRESENTING a Japanese private company as a foreign shareholder in a joint venture in the transfer of shares to a domestic shareholder, in a manpower outsourcing joint venture.