

# Public Private Partnership in Indonesia

## *under Presidential Regulation No. 38/2015*

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ASSEGAF HAMZAH & PARTNERS

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## Overview

- General Introduction
- Parties in PPP Project
- Procedure in PPP Project
- PPP Agreement
- Benefit of PPP Project
- Land Procurement
- Return of Investment in PPP Project
- Conclusion

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## General Introduction

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- Public-Private Partnership (“**PPP**”) in Indonesia used to be governed under Presidential Regulation No. 67 of 2005 as amended by Presidential Regulation No. 13 of 2010, Presidential Regulation No. 56 of 2011 and Presidential Regulation No. 66 of 2013 (collectively, “**Old Regulation**”)
- The Old Regulation is now revoked by Presidential Regulation No. 38 of 2015 regarding Cooperation between Government and Business Entities in the Provision of Infrastructure (“**PR 38/2015**”).

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## General Introduction

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### *Difference between Old Regulation vs. PR 38/2015*

Difference	Old Regulation	PR 38/2015
Definition	<i>“a written agreement between the private sector and government entity to increase the development of infrastructure”</i>	<i>“cooperation between the government and private sector to increase the development of infrastructure both project and social services, in which most or all of the resources are furnished by the private sector and the risk management will be allocated to both parties”</i>
Types of PPP Project	8 sectors (transportation, road, irrigation, drinking water, wastewater, telecommunications and informatics, electricity and natural oil and gas infrastructure)	19 sectors (8 sectors in the Old Regulation and several new sectors: water resources, waste management, renewable energy, energy conservation, city facilities, education facilities, sports and arts facilities, industrial estate, tourism, health, prison and community housing infrastructure)

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## General Introduction

### *Difference between Old Regulation vs. PR 38/2015*

Difference	Old Regulation	PR 38/2015
Method of Appointment	<ul style="list-style-type: none"> <li>• Tender</li> <li>• If prequalification process only results in 1 participant, direct appointment</li> </ul>	<ul style="list-style-type: none"> <li>• Tender</li> <li>• Limited to certain circumstances, direct appointment</li> </ul>
Payment Mechanism or Return of Investment	Tariffs	<ul style="list-style-type: none"> <li>• Tariffs</li> <li>• Availability Payment (<i>Pembayaran Ketersediaan Layanan</i>)</li> <li>• Any other form which is not in contrary with the prevailing laws and regulations</li> </ul>
Forms of Cooperation	<ul style="list-style-type: none"> <li>• Cooperation Agreement</li> <li>• Undertaking License (<i>Izin Pengusahaan</i>)</li> </ul>	Cooperation Agreement
Government Support	<ul style="list-style-type: none"> <li>• Tax Incentives</li> <li>• Government Guarantee</li> </ul>	<ul style="list-style-type: none"> <li>• Tax Incentives</li> <li>• Viability Support (<i>Dukungan Kelayakan</i>)</li> <li>• Government Guarantee</li> </ul>

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## Parties in PPP Project

### ➤ WHO is qualified to participate in PPP Project?

- PPP Project Manager (Government Entity)
  1. Minister/Head of the Government Institution
  2. Head of Region
  3. State-owned company (BUMN)
  4. Regional-owned company (BUMD)
- Private Sector
  1. State-owned company (BUMN)
  2. Regional-owned company
  3. Indonesian limited liability company
  4. Foreign company
  5. *Koperasi*

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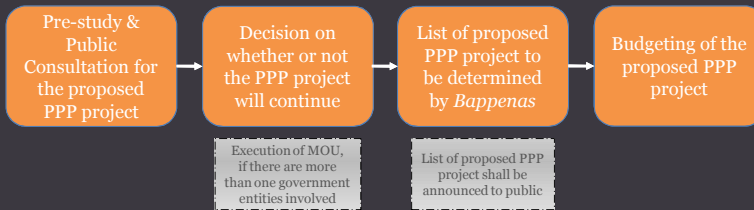
## Procedure in PPP Project

LAWYERS WHO KNOW ASIA

### ➤ HOW to create a PPP Project?

#### 1. Government's Initiative

##### Planning Stage



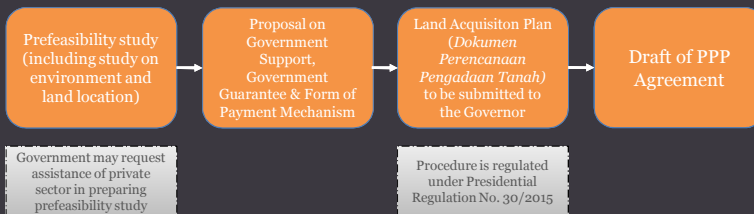
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## Procedure in PPP Project

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#### 1. Government's Initiative

##### Preparation Stage



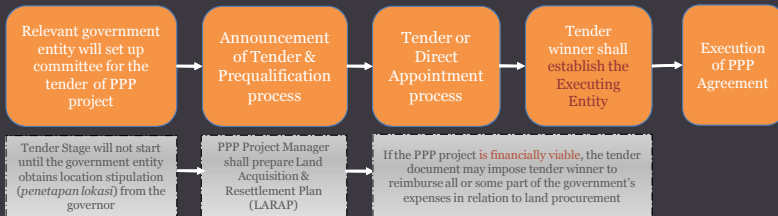
Any expenses incurred in relation to pre-feasibility study, transaction expenses, success fee of the government's assistant and other valid expenses will be borne by tender winner

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# Procedure in PPP Project

## 1. Government's Initiative

### Tender Stage



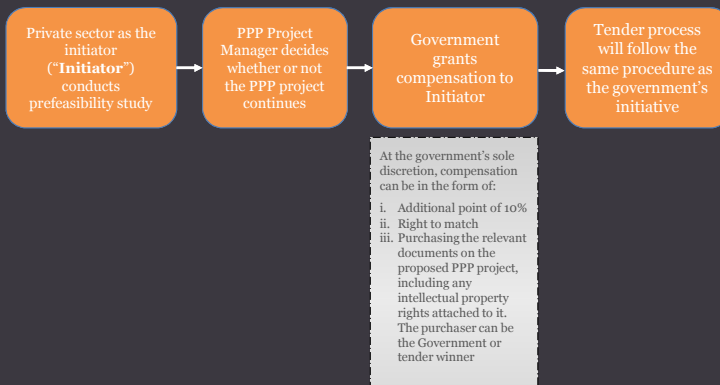
Direct appointment may be an option, only if:

- Executing Entity has previously developed and/or operated the PPP project;
- The PPP project requires new technology and such participant is the sole operator of such new technology;
- Executing Entity has obtained most or all of the lands required to conduct PPP project; or
- Prequalification process results in only one qualified participant

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# Procedure in PPP Project

## 2. Private Sector's Initiative



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## Procedure in PPP Project

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### Financial Close

- ❖ 12 months after execution of PPP Agreement
- ❖ May be extended from time to time with a maximum period of 6 months, if the failure is not caused by the negligence of Executing Entity
- ❖ Financing deemed to be completed if:
  - i. Loan Agreement has been executed; and
  - ii. Some of the amount is available to be disburse to start the construction work
- ❖ If the period (and its extension) to obtain financing has lapsed, PPP Agreement will automatically be terminated and performance bond will be forfeited to the government

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## Issues in the Procedures

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### Establishment of Executing Entity

- ❖ By definition, 'Executing Entity' or *Badan Usaha Pelaksana* shall mean:
 

*“an Indonesian limited liability company (perseroan terbatas or PT) established by the tender winner (either through tender or direct appointment”*
- ❖ The definition suggests that the tender winner should establish a new Indonesian limited liability company that will specifically run the PPP Project
- ❖ Reason → ring fence the project revenues and debt liabilities
- ❖ Different approach compared to Old Regulation since the obligation to establish a new PT is only if the tender winner is a non-Indonesian entity

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## Issues in the Procedures

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### Land Procurement Expenses

- ❖ Under PR 38/2015, the source of financing for land procurement in relation to PPP Project is either State Budget (APBN), Regional Budget (APBD) or BUMN/BUMD Work Budget.
- ❖ If the PPP project is **financially viable**, government may ask for reimbursement of all or some parts of the land procurement expenses in tender document
- ❖ Viability of the PPP project will be determined prior to the tender process
- ❖ **Who determines whether or not the PPP Project is financially viable?**
- ❖ If the PPP project is financially viable & Executing Entity reimburse the land procurement expenses, the reimbursement will be considered as non-tax revenue

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## PPP Agreement

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PPP Agreement shall at least consist of the followings:

- a) Scope of work;
- b) Term of Agreement;
- c) Performance Bond;**
- d) Tariff and adjustment mechanism;
- e) Rights and obligations, including risk allocation;
- f) Services performance standard;
- g) Transfer of shares prior to the project commercially operates;
- h) Penalty in the event of breach of terms under PPP Agreement;
- i) Termination of PPP Agreement;
- j) Assets ownership status;
- k) Dispute settlement mechanism** (amicable settlement, mediation and arbitration/court;
- l) Supervision mechanism on performance of Executing Entity in conducting procurement;
- m) Change of work and/or services mechanism;
- n) Mechanism for the right to acquire by government and lender;
- o) Utilization and ownership of infrastructure asset and/or its maintenance to PPP Project Manager
- p) Return of infrastructure and/or its maintenance to PPP Project Manager
- q) Force Majeure
- r) Representation and warranties that the PPP Agreement is valid and binding to all parties and it is in accordance with prevailing laws and regulation
- s) Language in the PPP Agreement is Bahasa Indonesia or, as may be required, may be made in Bahasa Indonesia and English version (as the official translation) and shall use Bahasa Indonesia in settlement of dispute within the jurisdiction of Indonesia**
- t) Governing law shall be the Indonesian law

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## Issues in PPP Agreement

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### ❖ Performance Bonds

- Old Regulations assess performance bonds based on the land procurement expenses
- Under PR 38/2015, Maximum amount → 5% from the investment value of PPP Project
- **Uncertain assessment since there is no definition on investment value**

### ❖ Dispute Settlement Mechanism

- Similar with the Old Regulations
- No particular restriction to choose other court/arbitration outside Indonesia's jurisdiction. In practice, some projects choose ICC as the forum to settle any dispute in relation to PPP Agreement

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## Issues in PPP Agreement

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### ❖ Governing Language

- Old Regulations did not impose obligation to use Bahasa Indonesia in any settlement of dispute within the jurisdiction of Indonesia.
- PR 38/2015 restricts that the use of English version of the PPP Agreement as an 'official translation' of the Bahasa Indonesia version
- PR 38/2015 also provides that Bahasa Indonesia language shall be used in any settlement of dispute in Indonesia jurisdiction
- **Uncertain terms on language. This can be interpreted in two different views:**
  1. Bahasa Indonesia language shall be the controlling language and therefore English version will only be an 'official translation'; or
  2. Bahasa Indonesia language will only be a controlling language in settlement of dispute in Indonesia jurisdiction

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## Benefits under PPP scheme

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### 1. Land Procurement conducted by the Government

- PR 38/2015 imposes obligation for the government to perform land procurement in a PPP project
- Land procurement in a PPP project will be pursuant to Presidential Regulation No. 30 of 2015 on the Acquisition of Land for the Development in the Interest of Public (“**PR No. 30/2015**”)
- Tender process shall not commence until the Government obtains location stipulation from the relevant governor. Therefore, the private sector will have more certainty in land procurement since location stipulation decision is a final stipulation that cannot be challenged, unless in relation to the amount of compensation

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## Benefits under PPP scheme

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### 2. Government Support

*Purpose: to increase the viability of PPP projects.*

#### ❖ Tax Incentives and/or Fiscal Contribution

If proposed by the Government Entity, private sector may enjoy the benefit of tax incentives for the PPP project. This will be included in the tender document.

#### ❖ Partial Financing

PR 38/2015 introduces the possibility of partial financing by the Government in the construction work to build the new infrastructure and/or the operation and/or maintenance of the infrastructure to increase the benefit of such infrastructure

#### ❖ Viability Support (*Dukungan Kelayakan*)

- Only limited to PPP Project that has social interests & benefit
- Viability support can be in a form of fiscal policy or financial contribution
- PR 38/2015 leaves the mechanism of the funding to be further regulated by Ministry of Finance while the relevant regulation has not been enacted. Consequently, the mechanism is still uncertain

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## Benefits under PPP scheme

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### 3. Government Guarantee

*Purpose: to secure the obligations of Government under PPP Agreement.*

#### ❖ Guarantee on Political Risks or Sub-sovereign risk

The Government may provide guarantee on political and sub-sovereign risks, such as: (i) guarantee on the changes in government; or (ii) guarantee for the PPP project that is held by regional government, etc.

#### ❖ Indonesia Infrastructure Guarantee Fund (IIGF)

- Under Presidential Regulation No. 78/2010 (“**PR 78/2010**”) and Ministry of Finance Regulation No. 260/2010, the Government through PT Penjaminan Infrastruktur Indonesia may provide IIGF to PPP project that is economically, financially, technically and environmentally viable

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## Payment Mechanism in PPP Project

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Payment mechanism offered in PPP scheme:

### 1. Collecting Tariffs from service users

- PPP Project Manager will set the initial tariff of the relevant infrastructure. The tariff may be later adjusted based on the user’s purchasing power.
- If the tariff is adjusted based on the user’s purchasing power and it adversely affects the return of investment for the Executing Entity while the PPP project holds social interest and benefits, PPP Project Manager will provide Viability Support to secure the return of investment

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## Payment Mechanism in PPP Project

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2. Availability Payment (*Pembayaran Ketersediaan Layanan*)
  - Defined as periodical payment made by the government to the Executing Entity in relation to the developed infrastructure that meets quality and/or criteria under PPP Agreement
  - PPP Project Manager will create budgeting on the availability payment of the infrastructure developed by Executing Entity
  - PPP Project Manager will only start disbursing the availability payment if the infrastructure has been completely built and start operating commercially and if the government has indicated that such infrastructure has met the requirement of services under PPP Agreement
3. Any other form which is not in contrary with the prevailing laws and regulations

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## Conclusion

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- ❖ Compared to Old Regulations, PR 38/2015 reflects the development of PPP scheme in other countries which may be favorable for foreign private entities that have interests in the infrastructure development in Indonesia
- ❖ PR 38/2015 introduces several new concepts that give more benefits and incentives for private sectors through PPP scheme and therefore PR 38/2015 is expected to attract more private sectors to enter into PPP scheme
- ❖ However, beside IIGF, no implementing regulations for Government Support and Government Guarantee has been enacted by Ministry of Finance. Therefore, benefits offered under PR 38/2015 will remain in question in the implementation stage.

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## Compulsory Land Acquisition

*Ibrahim Assegaf*

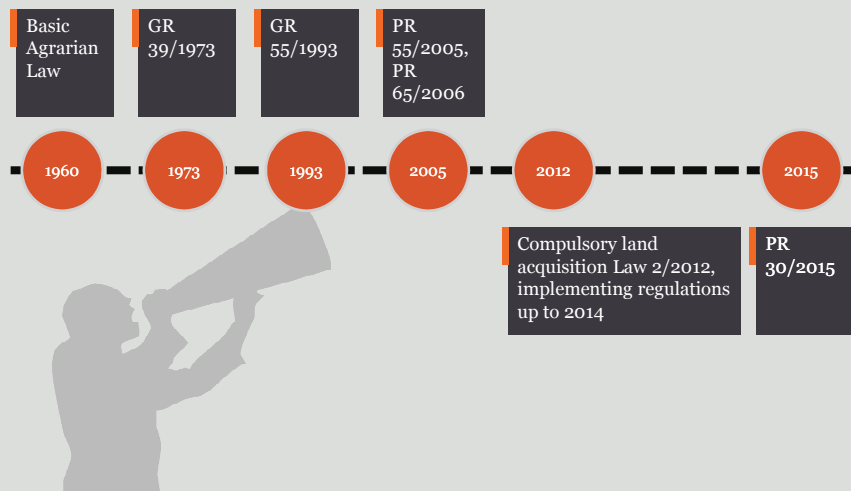
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**"A lot of investors, when they come to me, they always complain about land acquisition,"**



**President Joko Widodo,**  
*Asia-Pacific Economic Cooperation (APEC) summit, Beijing China, Nov 2014.*

## Compulsory Land Acquisition: A timeline



## Ordinary vs Compulsory Land Acquisition

**A balancing act between compulsory and voluntary**

<b>Process and timetable</b>	Clearer processes and time table (including court proceedings) for each process
<b>Compulsory vs voluntary</b>	Site stipulation subject to government and court appeals (if any). Final and binding once resolved.
<b>Valuation and compensation</b>	Referenced to market price by independent appraiser but subject to negotiation and court may impose 'immaterial damages'. 'Ganti untung', not 'ganti rugi'



## Features in the 2015 Regulation

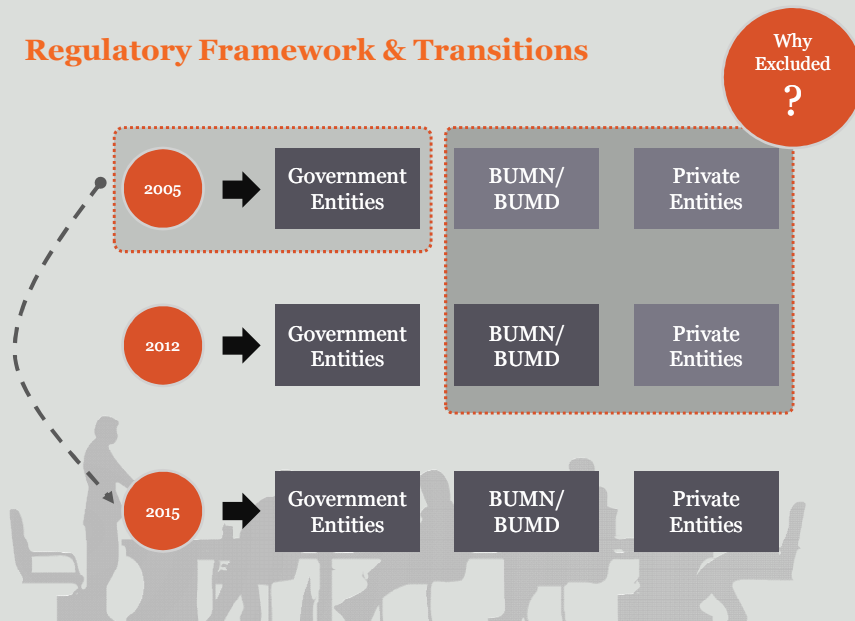
New eligible acquiring entity: 'authorized' private entities - what constitutes as *kuasa*/authority?

New financing structure: reimbursement once acquisition is completed; may be as investment returns

Dealing with incomplete acquisitions

- Applies only for government projects commencing prior to 2012, which by Dec 2014 is 75% completed. If less?, either use 2005 regulation or restart from site stipulation phase
- As of implementation phase (site plan is final and binding)
- Extension of 2 years but as of when? If site stipulation expires?

## Regulatory Framework & Transitions



**Thank You**

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