



# APEC Procurement Transparency Standards in Indonesia

A Work in Progress



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TRANSPARENCY  
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 Indonesia  
the global coalition against corruption



Transparency International-USA (TI-USA) is a non-profit, non-partisan organization founded in 1993 to combat corruption in government and international business and development. TI-USA promotes systemic reform through collaboration with a global network of local chapters in almost 100 countries, high level collective action with government, private sector and international organizations, and extensive expertise in developing tools and approaches to combating corruption. [www.transparency-usa.org](http://www.transparency-usa.org).



The Center for International Private Enterprise (CIPE) strengthens democracy around the globe through private enterprise and market-oriented reform. CIPE is one of the four core institutes of the National Endowment for Democracy and an affiliate of the U.S. Chamber of Commerce. Since 1983, CIPE has worked with business leaders, policymakers, and journalists to build the civic institutions vital to a democratic society in more than 100 countries. CIPE's key program areas include anti-corruption, advocacy, business associations, corporate governance, democratic governance, access to information, the informal sector and property rights, and women and youth. [www.cipe.org](http://www.cipe.org).



Transparency International Indonesia (TII) is a national chapter of Transparency International based in Jakarta with regional offices throughout Indonesia. As part of global efforts to eliminate corruption, TII has the objective to encourage transparency and accountability in governance and business activities in Indonesia. Among the organization's strategic priorities and activities are promoting transparency and accountability in the management of public funds, promoting the integrity of Indonesia's democratic system and various government agencies, increasing public awareness about the negative consequences of corruption, and promoting good corporate governance. [www.ti.or.id](http://www.ti.or.id).

## Acknowledgements

This report has been written by Transparency International Indonesia in cooperation with Transparency International-USA (TI-USA) and the Center for International Private Enterprise (CIPE). We would like to thank all the individuals who contributed to all stages of the research and the preparation of the report. Particular thanks go to Laurie Sherman, Senior Legal Advisor at TI-USA, for the numerous hours devoted to helping produce this and the other country reports.

TI-USA, CIPE, and Transparency International Indonesia are particularly grateful to the Indonesia Business Links (IBL) for assistance in organizing the private sector consultation in Jakarta as a part of this project. Our special thanks go to Yanti Koestor, IBL's Executive Director.

We would also like to thank the company representatives who gave generously of their time to participate in the consultation and share their insights on the state of public procurement transparency in Indonesia.

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## Abbreviations and acronyms

<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>APEC Standards</b>	APEC Transparency Standards on Government Procurement
<b>CIPE</b>	Center for International Private Enterprise
<b>GBA</b>	General Budget Allocation
<b>GDP</b>	Gross Domestic Product
<b>KADIN</b>	Indonesia Chambers of Commerce and Industry
<b>KPK</b>	Corruption Eradication Commission ( <i>Komisi Pemberantasan Korupsi</i> )
<b>LPSE</b>	Electronic Procurement Service ( <i>Layanan Pengadaan Secara Elektronik</i> )
<b>NPPO or LKPP</b>	National Public Procurement Office ( <i>Lembaga Kebijakan Pengadaan Barang dan Jasa Pemerintah</i> )
<b>PA/KPA</b>	Budget Authority/Proxy of Budget Authority ( <i>Pengguna Anggaran/ Kuasa Pengguna Anggaran</i> )
<b>PPK</b>	Commitment-Making Officer ( <i>Pejabat Pembuat Komitmen</i> )
<b>Presidential Regulation</b>	Presidential Regulation 54/2010
<b>SOE</b>	State-owned enterprise
<b>TII</b>	Transparency International Indonesia
<b>TI-USA</b>	Transparency International-USA
<b>ULP</b>	Procurement Services Unit ( <i>Unit Layanan Pengadaan</i> )

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## Executive summary

Corruption damages economic development, hinders the growth of fair market structures, and impedes the ability of developing countries to attract scarce foreign investment. Nowhere is the cost of corruption more evident than in public procurement. Indonesia spent about 31 percent of the national budget on procurement in 2007 and 60 percent of the money available from development assistance is being used for procurement. At the same time, Indonesia ranks poorly on all major corruption indices so transparency and integrity in public procurement is especially important.

Indonesia has endorsed the United Nations Convention against Corruption as part of its strategies for combating or preventing corruption, as well as for strengthening integrity in numerous government activities. In addition, as a member of the Asia Pacific Economic Cooperation (“APEC”), Indonesia agreed to implement the Transparency Standards on Government Procurement (“APEC Standards”) adopted by APEC in 2004. Transparency International-USA (“TI-USA”), the Center for International Private Enterprise (“CIPE”), and Transparency International Indonesia (“TII”) cooperated on a project to analyze Indonesia’s legal and practical implementation of the APEC Standards and whether the implementation has an impact on reducing corruption. The project reviewed Indonesia’s legal framework for public procurement and also carried out consultations with the private sector on whether those laws and regulations are implemented in practice.

Although the recent Presidential Regulation 54/2010 improved public procurement procedures, the Indonesian framework does not include all of the APEC standards, such as an opportunity to comment on procurement-related regulations and proposed tenders, notification to losing bidders and a description of why they lost, and an independent review mechanism. In addition, there is no requirement to notify bidders when an objection has been filed or give them a right to participate in a bid protest proceeding. However, the most serious problem has to do not with the content of the Presidential Regulation but its jurisdiction. The Regulation does not have the status of a national procurement law with clear legal superiority over other existing laws. This leads to questions on a number of topics, for example, what procurement rules govern construction services, which are also covered by a separate law.



As a result of this review, the following recommendations emerged:

- The government should make every effort to enact a national procurement law that would govern procurement at every level of government and by SOEs.
- The government should fill the gaps in implementation of the APEC Standards.
- The government should create an independent auditor of procurement with the jurisdiction to review the procurement process and the power to enforce its decisions.
- The government should formalize a mechanism by which civil society can participate as observers in public procurement.
- The private sector should adopt and implement codes of ethics and anti-corruption initiatives (for instance, the TI Business Principles for Countering Bribery and the APEC Anti-Corruption Code of Conduct for Business).<sup>1</sup>
- Companies should strive to become better informed about their rights and obligations in the procurement process and demand equal access to procurement information.
- Civil society should work with business organizations to encourage their member companies to adopt codes of conduct and internal anti-corruption measures.
- Civil society should seek funding and training to monitor specific procurements for adherence to the legal framework.

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1. The TI Principles are available at [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles). The APEC Principles are available at [http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~/\\_media/Files/Groups/ACT/07\\_act\\_codebrochure.ashx](http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~/_media/Files/Groups/ACT/07_act_codebrochure.ashx).

## Introduction

Government procurement typically accounts for the largest share of public expenditures aside from government salaries and social benefits. Government procurement is generally between 14 to 20 percent of a country's GDP, which on a global basis would be between \$8.16 trillion and \$11.65 trillion annually.<sup>2</sup> This massive spending goes, in large part, to essential public services such as clean water, education, healthcare and infrastructure. With estimates that corruption can add 10-25 percent to the cost of public procurement, and in some cases even 40 to 50 percent, the potential financial and social costs are staggering.<sup>3</sup>

Therefore, Transparency International ("TI") chapters around the world have made the reduction of corruption in government procurement a high priority objective. TI has published a *Handbook for Curbing Corruption in Public Procurement* and developed innovative approaches to enhance transparency and integrity in government and the private sector and to engage civil society in oversight.<sup>4</sup>

TI has promoted domestic and multilateral approaches that encourage transparent procurement rules and procedures as a crucial step toward reducing corruption. Greater access to information on public procurements increases predictability for the private sector, permits public oversight, and provides greater assurance of the effective use of public resources. It also leads to greater government accountability, enhancing public trust.

The Asia-Pacific Economic Cooperation ("APEC") Transparency Standards on Government Procurement ("APEC Standards"), agreed upon in 2004 by the APEC member economies, represent an important government commitment with the potential to improve the integrity of public procurement and reduce corruption. Their impact on raising the transparency of procurement, however, depends on implementation and application in practice.

This report is one in a series initiated by TI-USA to assess and promote implementation by APEC economies of the APEC Standards. It includes an analysis of the legal framework carried out by Transparency International Indonesia ("TII") and TI-USA and the results of a business consultation on their practical impact conducted by TII, TI-USA, and the Center for International Private Enterprise ("CIPE") in Jakarta,

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2. The World Bank estimates global GDP as US\$58.26 trillion in 2009. See <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>. The figure of 14-20 percent comes from the other country reports in this series.

3. The World Bank estimates that corruption can add 20 percent or more to the cost of public procurement. See <http://go.worldbank.org/VAT2EY5A00>. TI estimates that damage from corruption represents on average 10 to 25 per cent of a contract's value. See TI's *Handbook for Curbing Corruption in Public Procurement* (2006) at 13, available at [http://www.transparency.org/publications/publications/other/procurement\\_handbook](http://www.transparency.org/publications/publications/other/procurement_handbook).

4. TI has developed an Integrity Pact, a tool aimed at preventing corruption in public procurement. See [http://www.transparency.org/global\\_priorities/public\\_contracting/integrity\\_pacts](http://www.transparency.org/global_priorities/public_contracting/integrity_pacts). It has also produced "Business Principles for Countering Bribery" in cooperation with Social Accountability International and support of a Steering Committee drawn from international business, academia, trade unions, and other non-governmental bodies including CIPE. These principles provide a framework for ethical business practices. Available at [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles).

Indonesia. Section 1 outlines the background of the APEC Standards. Section 2 presents information on Indonesia's economic situation and the context for public procurement. Section 3 includes an overview of the government procurement system. Section 4 details the key results of analysis of the legal framework in Indonesia governing public procurement. Section 5 focuses on the consultation held in Jakarta to gauge the business community's views on Indonesia's implementation of the APEC Standards and private sector participation in strengthening the integrity of public procurement. Finally, Section 6 presents the conclusions and recommendations for strengthening the transparency of public procurement in general and Indonesia's implementation of the APEC Standards in particular.

This report will provide useful guidance to: (i) the government of Indonesia on gaps in the legal framework and implementation; (ii) the business community on how the procurement process works and its vulnerabilities; and (iii) civil society on areas for potential reform.

# 1. Development of the APEC Transparency Standards on Government Procurement

APEC was formed in 1989 by 12 Asia-Pacific economies with the aim of becoming the region's leading economic forum. APEC has since grown to 21 members: Australia, Brunei, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Taiwan, Thailand, the United States, and Vietnam. Anti-corruption efforts in various areas have been a crucial part of APEC's mission to support sustainable economic growth and prosperity in the Asia-Pacific region. One area of focus is government procurement where systemic corruption commonly undermines competition, wastes public resources, and ultimately hampers economic growth and development.

In order to improve the efficiency of government procurement through sharing experiences and best practices, APEC economies established a Government Procurement Experts Group in 1995. In August 1999, the Experts Group completed the development of a set of Non-Binding Principles on Government Procurement ("NBPs") for adoption by APEC economies on a voluntary basis.<sup>5</sup> The NBPs focused on transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. At the same time, other working groups in APEC negotiated general transparency principles applicable to a variety of sectors, such as customs, trade, and investment.<sup>6</sup> In 2004, APEC members incorporated transparency NBPs into the area-specific Transparency Standards on Government Procurement.<sup>7</sup> The complete text is set forth in Annex 1.

The APEC Standards cover key aspects of public procurement:

- publication of, and access to, regulations governing public tender procedures;
- publication of draft regulations and opportunities to submit comments;
- access to invitations to public tenders;
- equitable treatment of bidders;
- requirements for publication of information concerning evaluation criteria and contract award decisions; and
- availability of review mechanisms for decisions involving tenders and prompt and impartial resolution of disputes.

The APEC Standards represent a political commitment by APEC members to transparency and integrity in government procurement. Implementation is crucial for spurring economic growth, facilitating financial stability, and promoting confidence in government actions. In principle, the availability of, and easy access to, public procurement information are key to conducting successful tenders and developing and strengthening sound economies that maximize the use of public resources. Availability and access to information also reduce the opportunity for discretionary action by government officials and therefore the potential for corruption.

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5. APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement, available at [http://www.apec.org/en/Meeting-Papers/Leaders-Declarations/2002/2002\\_aelm/statement\\_to\\_implement1.aspx](http://www.apec.org/en/Meeting-Papers/Leaders-Declarations/2002/2002_aelm/statement_to_implement1.aspx).

6. Leaders' Statement to Implement APEC Transparency Standards (Oct. 27, 2002), available at <http://www.america.gov/st/washfile-english/2002/October/20021028114159gomez@pd.state.gov0.1174127.html>.

7. 2004 16th APEC Ministerial Meeting (Nov. 17-18, 2004), available at [http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2004/2004\\_amm.aspx](http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2004/2004_amm.aspx).

At the 2007 APEC Ministerial Meeting in Sydney, Australia, member economies submitted reports on the assessment of implementation of the APEC Transparency Standards in various areas, including government procurement, and pledged to close the remaining implementation gaps. These reports showed general progress in implementation of the APEC Standards. However, they did not provide a full picture since they were written by the respective APEC economies without involving non-governmental stakeholders. Moreover, the reports focused on the harmonization of national laws and regulations with the APEC Standards rather than the examination of how those laws and regulations are implemented in practice and their impact on improving integrity in procurement.

The goal of this joint report is to provide private sector and civil society input into the degree to which the APEC Standards have been implemented in both law and practice in Indonesia, and to produce recommendations on ways to improve implementation. Adding this new perspective widens the discussion on the implementation of the APEC Standards from an inter-governmental exercise to a broader multi-stakeholder effort that promotes concrete anti-corruption reforms. TI-USA, CIPE, and local TI affiliates conducted such evaluations of the implementation of the APEC Standards in three other APEC countries – Mexico, Peru, and Vietnam – in order to compare the levels of implementation and determine whether there are common issues that can be addressed through additional action in APEC or other international fora. TI-USA also carried out a similar project in the Philippines as part of this series.

## 2. Indonesia's Economic and Governance Context

### Country Profile

With more than 242 million people, Indonesia is the fourth most populous country in the world after China, India, and the United States. It is the 18th largest economy in the world with a GDP of over US\$540 billion.<sup>8</sup> Throughout the 2008-2009 global financial crisis, Indonesia's economy continued to expand. It recorded a six percent plus growth rate in 2007 and 2008 and 4.5 percent in 2009. In 2010, Indonesia's GDP growth rate rebounded back to six percent and GDP per capita rose to US\$4,300, up from US\$4,100 the year before.<sup>9</sup>

### Decentralization

In 1999, Indonesia undertook a dramatic change in governance, enacting two laws that significantly decentralized government power and established regional autonomy. Under Law No. 22/1999 on Regional Governance<sup>10</sup> and Law No. 25/1999 on Fiscal Balance between the Center and the Regions,<sup>11</sup> effective January 1, 2001, a wide range of functions was transferred to districts and municipalities.<sup>12</sup>

Indonesia consists of 33 provinces (five with special status, including the Jakarta Special Capital Region), each with its own legislative body and governor. The provinces are subdivided into regencies and cities, further subdivided into districts, and then into village groupings. Following the decentralization reforms, the regencies and cities became key administrative units responsible for providing government services and thus the bulk of public procurement.<sup>13</sup> Government services that were devolved to 508 districts and municipal governments include public works, health, education and culture, agriculture, transportation, industry and trade, capital investment, the environment, cooperatives, and manpower.<sup>14</sup> Two and a half million civil servants were transferred to district and municipal governments at the time of devolution.<sup>15</sup>

As a result of decentralization, the central government has an obligation to share revenues from natural resources and taxes with the districts and municipalities, which equals about 25 percent of the total revenue from natural resources and taxes. In addition, the central government distributes a budget allocation annually, referred to as the General Budget Allocation, equal to 26 percent of all central

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8. World Development Indicators database (October 15, 2010), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

9. "Indonesia Economy 2011," available at [http://www.theodora.com/wfbcurrent/indonesia/indonesia\\_economy.html](http://www.theodora.com/wfbcurrent/indonesia/indonesia_economy.html).

10. Available at [http://aps.indonesia-ottawa.org/current\\_issues/autonomy/docs/Law22\\_99\\_n\\_eluc.pdf](http://aps.indonesia-ottawa.org/current_issues/autonomy/docs/Law22_99_n_eluc.pdf).

11. Available at [http://aps.indonesia-ottawa.org/current\\_issues/autonomy/docs/Law25\\_99\\_n\\_eluc.pdf](http://aps.indonesia-ottawa.org/current_issues/autonomy/docs/Law25_99_n_eluc.pdf).

12. Mark Turner and Owen Podger, *Decentralisation in Indonesia*, Asia Pacific Press, Australian National University (2003) at 23-4. The regencies and municipalities are one governmental level below the provinces.

13. "Snapshot Assessment Of Indonesia's Public Procurement System," (June 2007) at 2 ("Snapshot Assessment"), available at [www.unpcdc.org/media/14358/indonesia%20pilot%20country.pdf](http://www.unpcdc.org/media/14358/indonesia%20pilot%20country.pdf).

14. Taufik Rinaldi, Marini Purnomo and Dewi Damayanti, "Fighting Corruption in Decentralised Indonesia" ("Fighting Corruption") at 28, citing Article 11(2) of the Law No. 22/1999, available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/FightingCorruptioninDecentralizedIndonesia.pdf>.

15. Jón R. Blöndal, Ian Hawkesworth and Hyun-Deok Choi, "Budgeting in Indonesia," *OECD Journal on Budgeting – Volume 2009/2* (2009) at 8, available at <http://www.oecd.org/dataoecd/58/20/45362389.pdf>.

government revenue (after revenue sharing).<sup>16</sup> In 2010, the central government distributed around 173.2 trillion rupiahs (US\$18 billion) to districts and municipalities and around 19.2 trillion rupiahs (US\$2 billion) to Indonesia's 33 provinces.<sup>17</sup> As of 2006, Indonesia's provinces and districts spent 40 percent of total public funds.<sup>18</sup>

## Economic Importance of Public Procurement

In 2007, from the total national budget of 763 trillion rupiahs, 240 trillion rupiahs (about US\$26.6 billion) was used for public procurement, approximately 31 percent of the national budget. On average, throughout Indonesia, 60 percent of the money available from development assistance is being used for procurement.<sup>19</sup> The National Planning and Development Ministry has targeted infrastructure development as a top priority, with a target public/private investment in infrastructure equal to five percent of GDP,<sup>20</sup> so procurement will continue to be vigorous.

## Prevalence of Corruption

Although Indonesia has made significant efforts to attack corruption, it ranks 121 of the 183 countries surveyed by the World Bank for its annual *Doing Business 2011*, a drop from 115 in 2010.<sup>21</sup> In two of the categories that are prone to corruption, Indonesia ranks in the lowest 25th percentile – 155 out of 183 for starting a business and 154 out of 183 for enforcing contracts. Similarly, in most of the governance indicators created by the World Bank, including control of corruption, Indonesia ranks in the 25th to 50th percentile.<sup>22</sup> This means, for example, that half of the 213 countries surveyed are better at controlling corruption than Indonesia.

This is borne out by the latest Transparency International Corruption Perception Index, which ranks Indonesia 110 out of the 178 countries reviewed, a tiny increase from 2009 when Indonesia ranked 111, in both cases ranking 2.8 on a scale of ten. Freedom House's latest *Freedom in the World* report notes that "corruption is endemic" in Indonesia.<sup>23</sup> According to a survey conducted by Indonesia's

16. Id. at 9.

17. See <http://www.depkeu.go.id/Eng/>.

18. "Snapshot Assessment" at 3.

19. Ministry of Finance of the Republic of Indonesia. National Budget data 2005 – 2010, available at [www.depkeu.go.id/Eng/](http://www.depkeu.go.id/Eng/).

20. Kepala Bappenas: Indonesia Prioritaskan Pengembangan Infrastruktur sumber: Antara 24/Nov/2010, available at [http://www.seputarforex.com/berita/berita\\_ekonomi\\_view.php?nid=37847&title=kepala\\_bappenas\\_indonesia\\_prioritaskan\\_pengembangan\\_infrastruktur](http://www.seputarforex.com/berita/berita_ekonomi_view.php?nid=37847&title=kepala_bappenas_indonesia_prioritaskan_pengembangan_infrastruktur). The US\$ figures are calculated on the basis of the exchange rate on January 1, 2011 of US\$1 = 9,700 rupiah and are approximate.

21. The International Bank for Reconstruction and Development/The World Bank, *Doing Business 2011* at 4, available at <http://www.doingbusiness.org/reports/doing-business/doing-business-2011>.

22. Kaufmann D., A. Kraay, and M. Mastruzzi 2009: Governance Matters VIII: Governance Indicators for 1996-2008, World Bank Research Working Paper 4978 (June 2009), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2009/06/29/000158349\\_20090629095443/Rendered/PDF/WPS4978.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2009/06/29/000158349_20090629095443/Rendered/PDF/WPS4978.pdf).

23. Indonesia Country Report, 2010 edition, *Freedom in the World*, available at <http://www.freedomhouse.org/template.cfm?page=363&year=2010&country=7841>.



Procurement Watch in 2010, 89 percent of companies said they need to bribe public officials to get a contract.<sup>24</sup> The government estimates that corruption in Indonesia's public procurement is responsible for US\$4 billion in losses every year.<sup>25</sup>

While in principle decentralization of public procurement was supposed to introduce greater local ownership of the process, in practice it created conflicting local rules and regulations and increased the discretion of local officials. Those factors magnify opportunities for corruption. In fact, decentralization has led to widespread dissemination of corruption at the regional and local level. According to a study on decentralization and corruption, in 2006, there were 265 corruption cases involving local legislative bodies with almost 1,000 suspects handled by prosecutorial offices across Indonesia. In the same year, the same offices had 46 corruption cases implicating 61 provincial governors or district heads.<sup>26</sup>

## Role of Civil Society

Civil society organizations are still weak in their role as government watchdogs. A contributing factor is that although Indonesia has introduced a Law on Public Information Transparency, citizens by and large still lack effective access to public information. In addition to the lack of information, there is a practical problem arising from weak organizational and technical capacities to monitor and assess activities and to advocate for transparency and accountability in government.

In a country with a population of almost 230 million, there are only a few organizations at the national level that are involved in public procurement, with a combined staff of no more than 70 people. The largest are Indonesia Corruption Watch ("ICW"),<sup>27</sup> TII, Indonesia's Procurement Watch<sup>28</sup> and PATTIRO.<sup>29</sup> ICW is not specifically focused on procurement but becomes engaged after it receives a complaint either from the community or disaffected businesses. Currently, they are working on developing a tool for detecting corruption problems in procurement actions related to health and education.

Since 2003, TII has been engaged in conducting surveys and studies on governance and corruption, organizing anti-corruption campaigns, and promoting integrity pacts in procurement activities. TII has worked with more than 20 local governments on the use of integrity pacts but realizes that government officials are not necessarily committed to anti-corruption efforts even when they sign an integrity pact.

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24. Indonesia Procurement Watch, "Jejak Suap dalam Pengadaan Barang/Jasa Pemerintah" available at <http://www.iprocwatch.org/berita/utama/173-hasil-survei-ipw-qjejak-suap-dalam-pengadaan-barangjasa-pemerintahq.html>.

25. Indonesia Country Profile: Public procurement and contracting, available at <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/indonesia/corruption-levels/public-procurement-and-contracting/>

26. *Fighting Corruption* at 17.

27. <http://www.antikorupsi.org/>.

28. <http://www.iprocwatch.org/>.

29. <http://www.pattiro.org/>.



PATTIRO was established in 1999 as a non-governmental organization to promote good governance by focusing on the delivery of public services at the local level. PATTIRO currently works in 20 districts, through its representatives or coalitions with other local organizations. Most of PATTIRO's work has been oriented towards budget transparency at the local level, although it has begun to focus on procurement.

Indonesia Procurement Watch ("IPW") was established in 2003 by former public officials and young activists to combat corruption in procurement by educating people about the procurement process, providing technical assistance to government officials, and monitoring selected procurement activities in the country, particularly in infrastructure, education, and health. IPW requests information from the procuring agency using the Access to Information Law. Given that official information is almost always absent or incomplete, however, they also obtain information from bidders who lost the award, as well as from the community and from whistleblowers. When IPW finds corrupt cases, they send their reports to the Corruption Eradication Commission ("KPK"). Although as a result of their investigations some government officials have been prosecuted, most of these cases involve lower level officials and none of the cases are related to major infrastructure projects.

### 3. Legal Framework for Public Procurement

Public procurement in Indonesia is regulated through presidential decrees, ministerial directives, letters of information, as well as through other decrees and instructions by provincial governors, mayors in cities, and heads of district governments. Indonesia has made a number of changes to its procurement system since a World Bank Assessment in 2001.<sup>30</sup> That assessment found that the procurement process was highly vulnerable to corruption; it was not market driven; and it lacked transparency.<sup>31</sup>

Based on recommendations in the 2001 Assessment, a National Public Procurement Office (“NPPO” also known as “LKPP” in Bahasa) was established by Presidential Decree 80/2003, with a mandate to (i) develop public procurement strategy, policy, and regulation; (ii) conduct monitoring and evaluation; (iii) implement e-procurement; (iv) strengthen the skills of procurement officials; and (v) provide advice, recommendations, and complaint resolution. Presidential Decree 80/2003 also set a national framework for public procurement, including procurement by provincial and local governments.

In 2008, the Government of Indonesia conducted a “Self-Assessment Snapshot” of its procurement system.<sup>32</sup> The Snapshot showed many weaknesses in the procurement system, including confusion over the absence of an overarching procurement law, ensuing inconsistencies in procurement practices at the regional and local levels, a lack of e-procurement, a lack of standardized bidding documents, and much more. The Assessment stated that the risks of overlapping jurisdictions resulted in “potential segmentation of both the procurement market and the procurement legal framework. Such conflicts, inconsistencies, and overlapping jurisdictions could enable both local governments and individual persons to manipulate these to their advantage.”<sup>33</sup>

#### Presidential Regulation 54/2010

In August 2010, Indonesia adopted significant changes to the public procurement system through Presidential Regulation 54/2010 (“Presidential Regulation”). The Presidential Regulation came into effect on January 1, 2011, replacing Presidential Decree 80/2003. It includes key changes:<sup>34</sup>

- Broadens the scope of procurement by including procurement funded not only from the state budget, but also from foreign donors and international development loans.
- Increases the limit for direct award (sole sourcing) from 50 million to 100 million rupiahs (US\$5,550 to US\$11,000).
- Drops the requirement for a bid security deposit in certain circumstances.
- Requires the disclosure of the estimated price of a tender.
- Makes e-procurement of all goods and services mandatory as of 2012.
- Introduces direct procurement for goods and services that have a well-known price list, such as rental cars, hotel prices, and office rents.

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30. World Bank, *Indonesia Country Procurement Assessment Report* (Report No. 21823-IND) (2001), available at [http://siteresources.worldbank.org/INTINDONESIA/Resources/Procurement\\_Assessment.pdf](http://siteresources.worldbank.org/INTINDONESIA/Resources/Procurement_Assessment.pdf).

31. *Ibid.* at 1.

32. *Snapshot Assessment*.

33. *Ibid.* at 9.

34. “Presidential Regulation No. 54 of 2010 Revises Government Procurement Policy,” November 2010, available at <http://www.legal500.com/c/indonesia/developments/12093>.

The Presidential Regulation also changes the administration of procurement. It divides the duties of procurement officials into three separate units: the first is charged with planning and carrying out procurements (the “Budget Authority”); the second is charged with determining the implementation of individual procurements, such as defining tender specifications, evaluating bids and awarding contracts, and monitoring the implementation of contracts (the “Procurement Services Unit” or “PPK”); and the third is the Project Result Receiver Committee in charge of evaluating contracted outcomes (“Panitia Penerima Hasil Pekerjaan”).<sup>35</sup>

According to the Presidential Regulation, the new rules govern procurements:

- by ministries, institutes, regional units, and other institutions funded from federal or regional government budgets
- by state-owned enterprises
- funded in part or entirely from domestic loans or grants received by the government
- financed in part or entirely from international loans or grants (unless the rules of the loan or granting organization are different, in which case the parties can agree on the procurement method).

The Regulation, however, does not address a number of problems in Indonesia’s procurement system. It does not apply to all state-owned companies, particularly national oil and mining companies. The interaction between the Presidential Regulation and other existing laws applicable to procurement, such as the Construction Services Law (Act No. 18/1999) and the Law on State-Owned Enterprises, is not clear since both these laws also have provisions governing procurement. While the Presidential Regulation allows bidders to file a protest, there is no clear protest handling mechanism and no clear sanctions for violation of the procurement procedures.

The Regulation also does not contain provisions specifically authorizing civil society monitoring of procurements. While it requires the signing of an “integrity pact” by bidders and relevant government officials, the scope of that pact consists only of a “vow to prevent and not to engage in collusion, corruption and nepotism in the procurement of goods/services.”<sup>36</sup>

Most importantly, the Presidential Regulation does not have a sufficiently high legal status to truly standardize the public procurement system throughout Indonesia. Indonesia has never had a procurement law, in the true sense of the word. Rather, it has had a “plethora of decrees, regulations, and instructions” ranging from Ministers and provincial governors to district officials and municipal mayors “that contain conflicts and inconsistencies.”<sup>37</sup> The Presidential Regulation continues this practice. Efforts have been underway for many years to develop a comprehensive National Law on Public Procurement, but so far without success.

35. Presidential Regulation, Articles 8 and 11.

36. *Ibid.*, Article 1(13).

37. See *Snapshot Assessment* at 8-9, recommending that Indonesia adopt “an overarching consolidated and comprehensive national public sector procurement law at the highest level.”

## Public Tender Procedures

There are different methods of procurement for goods and services stipulated by the Presidential Regulation:<sup>38</sup>

- Public Tender, which is open to all qualified providers
- Direct Appointment of one provider, which applies in emergencies, national defense, and instances where the prices are open and accessible to the public, such as motor vehicles and hotel accommodations
- Direct Procurement, which applies to procurement with a maximum value of 100 million rupiahs (US\$10,300)

Public tender is the standard method of procurement. In all public tenders, information is published on the procuring entity's website, the formal notice boards and, increasingly, the Electronic Procurement Service ("LPSE") portals. The key steps are:

1. Announcement of the pre-qualification process, if applicable
2. Announcement of the request for proposal (the notice is published at least seven days before proposals are due)
3. Tender clarification session to answer bidders' questions
4. Submission of proposals by bidders
5. Opening and evaluation of technical proposals
6. Opening and evaluation of financial proposals
7. Announcement of the winner
8. Period for objection
9. Award of contract and publication of the awardee's name and minutes from the evaluation process

Simplified procedures apply to procurements with a maximum value of 200 million rupiahs (US\$20,600). In these cases, the time frames for publication and response are shorter and the evaluation of technical and financial proposals occurs simultaneously.

The procedure for and criteria of evaluation must be stated clearly in the requests for proposals. There are different valuation methods, but the most widely used gives price a weight of between 70 and 90 percent of the total evaluation and requires that the other elements have a quantitative character. The Procurement Services Unit, which carries out the evaluation, is separate from the unit that established the evaluation criteria. The Unit's organizational structure is determined according to the needs of a particular tender but it always consists of at least a chairperson, secretary, supporting staff, and working group. The Unit's decision is subject to review by a Project Result Receiver Committee or Official verifying the results of contracted work.

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38. There are additional procurement methods for construction-related services.

Foreign companies are allowed to bid only in cooperation with a national company (unless no national company has the ability to provide the goods or services requested) and only on bids that exceed a certain threshold: 100 billion rupiahs (US\$10,300,000) for construction services and 20 billion rupiahs (US\$2,100,000) for goods and services.<sup>39</sup>

## Adoption of E-Procurement

E-procurement in particular is meant to serve as an important efficiency and transparency enhancing measure. The LPSE Electronic Procurement Services is a decentralized system with each government entity (national ministries, provinces, cities, districts, public universities, stated-owned companies, etc.) having their own LPSE installations. It is supposed to be in place for all procurement information by 2012. In fact, it is gradually being introduced with 124 LPSE systems already in place and the target of 500 by 2012.<sup>40</sup> Government sources indicate that there is no standard information technology platform adopted yet; only 190 (out of 560) local governments have adopted the electronic procurement system; and not all national ministries have adopted the systems.<sup>41</sup>

The following chart shows that the number and amount of tenders conducted electronically have been increasing in recent years, but they still account for a small portion of Indonesia's overall public procurement of 240 trillion rupiahs.

**e-Procurement Transactions in Indonesia, 2008-2011 (through April)<sup>42</sup>**

	2008	2009	2010	2011	Total
Numbers of Tenders Awarded	21	1,282	4,796	2,692	8,799
Amount of Contracts (in million rupiahs)	30,957	2,351,323	9,166,007	1,266,396	12,814,683

## Internal and External Controls

Transparency and integrity in the procurement system is sought in part through provisions requiring internal and external controls and audits, though most of the focus is on financial accountability. The Presidential Regulation sets up a complaint mechanism in each procuring entity. All participants in the bidding process have the right to submit a written objection after the list of qualified bidders is published and after the winning bidder is announced if they find a violation of the procedures, improper technical specifications, or abuse of authority by the Procurement Services Unit.

The objections are reviewed by the Procurement Services Unit, which must respond within five working days of receipt of the objection. If the complaining party is not satisfied with the response, it may appeal to

39. Presidential Regulation, Art. 104. Article 104 also says that foreign companies can bid on contracts worth more than 10 billion rupiahs (US\$1billion).

40. "Ministries/Institutions Need to Have LPSE," Nov. 18, 2010, [http://www.depkeu.go.id/Eng/Read/?type=ixNews&id=17782&thn=2010&name=Nw181110\\_04.htm](http://www.depkeu.go.id/Eng/Read/?type=ixNews&id=17782&thn=2010&name=Nw181110_04.htm).

41. Interview with LKPP staff, Jakarta, March 2011.

42. NPPO, LPSE Smart Report, available at <http://report-lpse.lkpp.go.id/PenyediaVer.aspx>.

the head of the procuring entity, but in that case it must provide a bond equal to two percent of the value of the contract or a maximum of 50 million rupiahs (US\$5,500).<sup>43</sup> The bond amount is only returned if the person wins the appeal. The NPPO can provide suggestions, opinions, and recommendations during the appeal process but the final decision rests with the procuring entity. As a result, there is no appeal to a body independent of the procuring entity.

Article 116 of the Presidential Regulation specifies that each central and local government and other procuring entities are obliged to monitor the work of the Budget Authority and Procurement Services Unit and carry out audits of their activities in accordance with applicable law. As with the appeals of procurement decisions, these internal offices, however, are not independent of the procuring entity in which they are located.

The Finance Control Board is a supreme national audit institution dedicated to safeguarding good governance by ensuring the transparency and accountability of the Indonesian public sector. The Board, created by Law No. 15/2006 as an independent body, has authority to provide the national House of Representatives, the Regional Representative Councils, and the provincial Houses of Representatives with the results of audits of state financial management. Its government-wide mandate covers central, provincial, and local governments; other state institutions; Bank Indonesia; state-owned enterprises and enterprises owned by provincial governments; public service agencies; and state-financed foundations and other state agencies. Its focus, however, is purely financial and it does not include the procurement process itself or the outcome.

There is no provision in the Presidential Regulation for civil society monitoring of procurements. At times, the government invites the participation of civil society in monitoring procurements. This happened, for instance, with procurements for the 2009 election. NPPO invited TII and a broader NGO coalition to monitor procurement by the Election Commission of election-related materials. TII and the NGO coalition participated in all phases of the procurements and its representatives were able to observe and report on companies that tried to bribe election officials.

## **Ethics and Anti-Corruption Measures**

The Presidential Regulation contains a number of provisions mandating ethical conduct and integrity in the procurement process. The provisions cover government officials involved in procurement as well as persons seeking to provide goods and services. Article 6 states that procurement officials at all government levels must meet the following ethical standards:

- Carry out the task in an orderly manner with full responsibility to achieve the target in an efficient and effective manner;
- Work professionally and independently and safeguard the confidentiality of the procurement documents, which by their nature should be kept secret, in order to prevent any abuse in the procurement process;

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43. Presidential Regulation, Art. 82.

- Do not exert influence on other procurement officials, either directly or indirectly, which may cause unfair competition;
- Accept and be responsible for all decisions stipulated in accordance with the written agreement of all the involved parties;
- Avoid and prevent any conflict of interest with any concerned parties both directly and indirectly during the procurement;
- Avoid and prevent any waste of the government budget in a procurement;
- Avoid and prevent any abuse and/or collusion for personal, group, or other parties' gain that directly or indirectly causes loss to the government; and
- Do not take, offer, or promise to give or take any gift, reward, commission, rebate/discount, or anything of value from anyone who is known or may be suspected of holding an interest in a procurement.

Article 19 prohibits a provider from participating in public procurement where such participation gives rise to a conflict of interest. It also prohibits any government officials (not just procurement officials) from participating as a provider in a public procurement, unless that official is on a leave of absence.

The Presidential Regulation requires the signing of integrity pacts – in a limited scope – as part of the procurement process. As noted above, the scope consists of a “vow to prevent and not to engage in collusion, corruption or nepotism” in the procurement process.<sup>44</sup> The Presidential Regulation stipulates that an integrity pact be signed on the government side by the PPK and the ULP official, as well as other procurement officials.<sup>45</sup> The providers of goods and services must sign and submit the integrity pact either as part of the pre-qualification process, if applicable, or when the bid document is submitted.<sup>46</sup>

As designed by Transparency International, the integrity pact also provides for a monitoring system that includes independent oversight by civil society. As noted above, however, the Presidential Regulation does not include any provisions authorizing independent monitoring. Furthermore, TII's experience has been that the signing of a pact in Indonesia is merely ceremonial and there has been no real implementation, monitoring, penalties, or incentives.<sup>47</sup>

44. Presidential Regulation, Article 1(13). Transparency International developed the integrity pact in the 1990s but it is much more robust than the “vow” contained in the Presidential Regulation. The TI Pact includes agreed-upon sanctions for failure to comply with the undertaking, a requirement to disclose all payments made to anyone as part of the procurement, and civil society monitoring of the procurement process. TII has been promoting the use of an integrity pact in Indonesia since 2004. See [http://www.transparency.org/global\\_priorities/public\\_contracting/integrity\\_pacts](http://www.transparency.org/global_priorities/public_contracting/integrity_pacts).

45. Presidential Regulation, Articles 4, 17, and 18.

46. *Ibid*, Article 19.

47. Statement of Rezki Wibowo, Nov. 12, 2010, 14th International Anti-Corruption Conference, available at [http://14iacc.org/wp-content/uploads/ws4.7AleksandrShkolnikov\\_LR.pdf](http://14iacc.org/wp-content/uploads/ws4.7AleksandrShkolnikov_LR.pdf).



## 4. Findings of the Legal Assessment

In order to evaluate the compliance of Indonesia's laws and regulations with the APEC Standards, TII conducted a legislative overview. In addition to the Presidential Regulation, there are a number of other laws and regulations that help create transparency and promote integrity in public procurement:

- Law No. 31/1999 on Anti-corruption, as amended by Law No. 20/2001
- Law No. 28/1999, Implementation of Country that is Clean and Free from Corruption, Collusion, and Nepotism
- Law No. 30/2002 on the Commission for the Eradication of Corruption
- Law No. 13/2006 on the Protection of Victims and Witnesses
- Law No. 14/2008 on Public Information Transparency
- Law No. 25/2009 on Public Services

Law No. 31/1999, as amended, criminalizes the taking and giving of bribes by government officials and judges, embezzlement by government officials, and other similar actions.<sup>48</sup> Law 25/2009 on Public Services is a major breakthrough in attempting to strengthen transparency and accountability in the delivery of public services. The law attempts to foster transparency and accountability by strengthening the legal framework regulating interaction between the government apparatus and the general public. The law aims at clearly defining the rights, responsibilities, and mandate of each party, and enforcing good governance principles, notably participation, professionalism, transparency, accountability, and procedural certainty.

Article 20 of the Law on Public Services, in particular, covers the obligation for government officials to develop, socialize, and implement minimum transparency and efficiency standards of public service delivery. The development of such standards involves civil society representatives and encompasses crucial aspects such as standard cost and duration of the service, complaint handling, and persons in charge.

Indonesia's Law on Public Information Transparency was ratified on April 3, 2008. This is the first comprehensive law regulating the public's right to information, and outlining the obligations for public agencies in terms of disclosure. The law regulates the kind of information to be disclosed and delineates what kind of information can be exempted and for how long. In addition, the law has institutionalized the Information Commission as an independent regulating institution mandated to handle disputes related to disclosure obligations of public agencies.

The Law on the Commission for the Eradication of Corruption, passed in December 2002, created the Corruption Eradication Commission (KPK), which was formally established in December 2003. The KPK's mandate is to coordinate with and supervise institutions authorized to eradicate corruption;

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48. Available at <http://assetrecovery.org/kc/node/bd152257-a342-11dc-bf1b-335d0754ba85.2>.



conduct investigations, indictments, and prosecutions against corrupt acts; conduct preventive actions against corrupt acts; and monitor state governance. During 2009, KPK handled 137 corruption cases, 28 of which – or over 20 percent – were related to public procurement.<sup>49</sup>

The same law also mandated the creation of the Special Court for Corruption Crimes (Tipikor). The KPK has been particularly effective in investigating and prosecuting corruption, with a 100 percent conviction rate at the Tipikor Court. Between 2004 and 2009, KPK prosecuted high profile public officials such as governors, numerous members of the House of Representatives, the Attorney General, ambassadors, mayors, judges, and the former Deputy Governor of the Central Bank.<sup>50</sup> In part due to such successes, the independence of KPK has come under political attacks and the existence of the Tipikor Court is endangered by judicial review and resistance within the House of Representatives.

Finally, in very general terms, civil society has the right to participate in and comment on government actions under Article 8 of the Law No. 28/1999.<sup>51</sup> Regulation No. 71/2000 implements Article 8, making provision for the public to seek, obtain, and provide information relating to possibly corrupt criminal acts, and to convey recommendations to law enforcement agencies and/or the KPK. There is no provision, however, in Law No. 28/1999 or the implementing regulation on civil society monitoring of public procurements and no established mechanism for such monitoring.

The application of the legal framework to the requirements set by the APEC Standards is analyzed below.

### 1. Prompt publication of all laws, regulations, and procedures pertaining to public procurement

Indonesia has designated the National Procurement Portal at [www.inaproc.lkpp.go.id](http://www.inaproc.lkpp.go.id) as an official journal. The Presidential Regulations and other legal instruments are posted there. As of 2012, all procurement-related information from the central, provincial, and local governments must also be available through LPSE (Electronic Procurement Services).<sup>52</sup>

### 2. Publication of either a positive or negative list of the procuring entities subject to its rules

Presidential Regulation 54/2010 applies to all public procurement at all levels of government. However, there is an inconsistency with other laws. Although Article 2(1) says that procurement by SOEs is also covered, procurement by Pertamina, the state-owned energy company, is governed by the Law on SOEs. Procurement of construction services is covered by the Law on Construction.

49. Annual Report, 2009, Corruption Eradication Commission.

50. Mochammad Jasin, "Gap Analyses of UNCAC: An Indonesia Experience" (Feb. 1, 2010), available at <http://regionalcentrebangkok.undp.or.th/practices/governance/documents/APIntact2010/Session05-MochammadJasin-IndonesiaUNCACGapAnalysisExperience.pdf>.

51. Available at <http://assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=b2963642-a342-11dc-bf1b-335d0754ba85>.

52. Presidential Regulation, Art. 2(1).

3. Publication in advance of any procurement rules the government proposes to adopt and provide a reasonable opportunity for the public to comment on such changes

There is no law or regulation requiring the publication of draft regulations prior to adoption and it is difficult to obtain drafts of the regulations from government officials. Although Law No. 28/1999 gives private citizens the right to participate in and comment on government actions, it does not provide a specific right to comment on laws and regulations. A draft Administrative Procedure Act, which would enhance citizen rights of access to government procedures and objection to proposed laws and regulations, was presented to Parliament in 2009 but it has not been enacted yet.<sup>53</sup>

4. Providing information and responding to questions about actual or proposed procurement rules

Article 25(2) of Presidential Regulation 54/2010 requires that procurement announcements contain the name and address of the procuring entity. Article 25(3) requires that the name and address of the procuring entity is published on its website and may be additionally made accessible for the public via government entity-formal announcement board, the National Procurement Portal, and via the government e-procurement service system for goods and services (LPSE). The Law on Public Information Transparency can be used to obtain information on procurement but only if a specific request is made for the information.

5. Notifying persons affected directly by administrative proceedings regarding public procurement

There is no requirement in the Presidential Regulation or other laws to provide notice of proceedings related to procurements to other bidders. There are no other laws of general application that guarantee notice.

6. Maintaining domestic procedures for prompt review and correction of final administrative actions

Article 117 of Presidential Regulation states that the bidder or a member of the public may file a complaint if they find any indication of procedural abuse in the public procurement process, or indication of unfair competition. Complaints must be made to the Procurement Services Unit in the procuring entity and the decisions of that Unit can be appealed to the head of the procuring entity. There is also a mechanism for arbitrating contract disputes but it does not apply to procurement decisions prior to contract award.<sup>54</sup> The Presidential Regulation, does not provide specific procedures to follow in reviewing bidder complaints.

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53. GTZ, "Increase Legal Certainty in Indonesia: Administrative Procedure Act," available at <http://www2.gtz.de/dokumente/bib-2010/gtz2010-0688en-legal-certainty-indonesia.pdf>.

54. Act number 30/1999 on Arbitration and Conflict Resolution Law.

More importantly, there is no independent review mechanism. The NPPO does not provide an effective complaint-handling mechanism that would allow bidders to report irregularities in public tenders for further independent investigation and arbitration. NPPO has not been granted the authority to handle complaints or impose penalties; it can only provide information and recommendations. While the National Ombudsman Office welcomes complaints, it can only issue recommendations or report cases to relevant authorities. Consequently, a bidder with a grievance often has few options to appeal public procurement decisions other than through the courts, which can be lengthy and costly.

#### 7. Publishing public procurement opportunities in a transparent manner accessible to all suppliers

Pursuant to the Presidential Regulation, all procuring entities are required to publish procurement plans and other information on national, provincial, district, or municipal announcement boards or in the local or national print media and, as of 2012, through the Electronic Procurement Service, referred to as LPSE, at <http://www.inaproc.lkpp.go.id>. But each procuring entity will have its own e-procurement site and there are no standards for those sites. Moreover, e-procurement has not yet been fully implemented by all central ministries and is available only for 190 of 500 local government entities. The Presidential Regulation stipulates that the budget authorities at all levels of government must publish their general public procurement plan on an annual basis once it has been approved by the national or local House of Representatives.<sup>55</sup>

Equal treatment of bidders is required (subject to set-aside requirements).<sup>56</sup> Article 5 of the Presidential Regulation sets out the principles for procurements, stating that procurement must be efficient, effective, transparent, open, competitive, fair/non-discriminatory, and accountable.

The Presidential Regulation does not seem to include provisions for pre-registering bidders but there are provisions regarding pre-qualification. The Presidential Regulation allows for early advice and adequate time for interested suppliers to respond to procurement notices.

#### 8. Making available to all suppliers all the information required to prepare a responsive bid

The Presidential Regulation specifies that the announcement of an open public tender should contain: (a) name and address of the procuring entity, (b) description of goods to be provided or work to be implemented, (c) technical specifications or drawings, (d) draft contract, (e) time frame and location, and (f) estimated project value.<sup>57</sup>

55. Ibid., Article 8(1)(b); Article 17 (2)(d); Article 25(1), (2), (3); Article 36; Article 37; Article 43.

56. Ibid., Article 5.

57. Ibid, Article 64.

9. Maintaining transparent criteria for evaluating bids; evaluating bids and awarding contracts strictly in accordance with the criteria

Procuring entities must publish all evaluation criteria that will be applied in the notice of the procurement.<sup>58</sup> In performing the evaluation, the Procurement Services Unit is prohibited from altering, adding, and/or subtracting from the criteria and the procedure of evaluation after the deadline for submitting the bid documents. In addition, procuring entities must maintain, for a predetermined period, proper records sufficient to justify decisions taken in the procurement process.<sup>59</sup>

10. Awarding contracts in a transparent manner

The Presidential Regulation requires the procuring entity to publish the outcome of the tender, including the name of the successful bidder. A contract cannot be awarded until the period for objecting to the named bidder (usually five working days) has expired.

11. Treatment of confidential information

While there are no specific provisions allowing bidders to request non-disclosure of business confidential information, procurement officials have an ethical obligation to do so. Article 5(6)(b) of the Presidential Regulation requires procuring entities and procurement officials to safeguard the confidentiality of information in the procurement documents so as to prevent any abuse in the procurement. It is not clear how a government official decides what information should be treated as confidential.

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58. Ibid, Article 48.

59. Ibid, Article 11(1)(i); Article 17(2)(g)(4).

## 5. Results of the Private Sector Consultation

TII, TI-USA, and CIPE conducted a consultation with private sector companies in Jakarta to obtain the business community's perspective on whether the APEC Standards are implemented in practice and their impact on reducing corruption. The consultation also sought to gather recommendations from the private sector on what the Indonesian government and the companies themselves can do to improve compliance with the APEC Standards and integrity in public procurement. Representatives from domestic and foreign companies attended, as well as representatives of Pertamina, Indonesia's state-owned oil company, and a representative of NPPO. The participating companies came from diverse sectors: consulting, energy, manufacturing, logistics, and other services.

### Conclusions

Participants agreed that decentralization has made procurement much less transparent. They noted that many of the provinces and local governments have different procurement regulations, which are not consistently applied. Moreover, on the provincial and local level, responsibility and reporting duties are not very clear. The representative of NPPO noted two problems at the provincial and local level: 1) there are many different interpretations of the procurement rules and 2) there is political pressure to favor certain bidders. NPPO is drafting a national procurement law but it is not expected to become law until 2014 or 2015.

#### *Inconsistent procurement regulations*

The largest problem identified by the participants is the fact that decentralization has led to different procurement regulations at different government levels. Governors often issue their own regional rules that contradict national law. What is more, decentralization makes the implementation of the new Presidential Regulation a challenge since many local officials are not sufficiently familiar with its provisions to implement them, and generally avoid attempting enforcement. As one participant put it, "the private sector is happy to comply with whatever law is in place as long as it is consistent and clear, but that is not the case: the law is implemented selectively."

On the central government level, participants pointed out the inconsistent opportunities to comment on proposed laws and regulations. Participants stated that the general procedure is for business organizations such as the Indonesian Chamber of Commerce & Industry (KADIN) or the Association of Indonesian Employers (APINDO) to be invited to comment. However, the degree to which this happens in practice – and whether associations share the information about such consultations with their members – varies. None of the participants had been given an opportunity to comment on Presidential Regulation 54/2010.

## *Implementation of the legal framework*

Participants noted a number of implementation issues. The ability to comment on tender preparation varies and depends on the procuring entity. Information is available on procurements but only if a bidder knows where to look or has special access to procurement officials. Sometimes the rules are changed in the middle of the procurement; other times the deadline is shortened or extended. Winners are publicly announced but it is rare that procurement officials provide technical or economic reasons for the choice. What is more, following the Aceh tsunami disaster, the pressure to invest quickly in reconstruction has led to simplified implementation of some procurements, creating tension between the speed and quality of procurement.

All of the participants pointed to Pertamina as a “shining example” of a government procuring entity that has introduced greater transparency and integrity into its procurement system as a result of strong internal leadership. According to the Pertamina representative, the company is introducing a new corporate culture based on its Pertamina Clean program. It includes initiatives such as:

- a dedicated ethics office
- compulsory training at managerial levels on business ethics
- clear rules on punishment for corruption
- participation in integrity pacts
- a whistleblower program run by an outside entity
- internal controls for auditing
- an online system regarding conflicts of interest
- cooperation with KPK

Although the process is a slow one, Pertamina believes that its program is effective and can be an example for all Indonesian SOEs; other participants agreed.<sup>60</sup>

## *Advertisement of procurement opportunities*

Participants noted that most companies use NPPO’s website and printed media as a source of information about calls for tenders. Difficulties persist, however, since not all procuring entities make information available online. Awareness of the Internet as a source of information on procurement is improving, but not all companies use it since the availability of relevant information online and the quality of e-procurement systems varies; West Java, for instance, has a relatively robust e-procurement system compared to the rest of the country.

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60. The KPK is investigating allegations of corruption in Pertamina for the period from 2001 to 2006. See, Nivell Rayda, “KPK Begins Probe Into Pertamina Corruption Case,” *Jakarta Globe*, (April 2, 2010), available at <http://www.thejakartaglobe.com/indonesia/kpk-begins-probe-into-pertamina-corruption-case/367267>.

### *Open participation and fair competition*

The key problems with public procurement in Indonesia that the participants identified are “ghost costs” (pressure to pay public officials) and government intervention in the procurement process in favor of certain outcomes. Fair competition is also frequently undermined by the way bid requirements are structured. For instance, delivery periods for some bids are very short making it impossible for suppliers to deliver within required time frames unless they have prior knowledge of the bid and can build up their stocks. In other cases, local politicians exert pressure on the budget preparation so that funds are “earmarked” for projects and when those projects are awarded the winner uses some of the funds to pay their “dues” to the politicians. Bid rigging also happens, especially at the provincial level. One common scenario is when several companies applying for a given bid are owned by the same person.

### *Dispute resolution*

Problems exist because of the lack of procedures to contest a contract award if the losing bidders were so inclined. The main issue concerning dispute resolution is the lack of an independent authority adjudicating objections to bid outcomes. After contracts are awarded, another common problem is the implementation of those contracts. Winning bidders often deliver lower quality products than specified in the bid. On the other hand, providers are often not paid as promised by the government. NPPO’s powers are limited when it comes to resolving disputes and dealing with violators: the office can only give recommendations; it cannot investigate and punish.

### *Role of the private sector*

There are significant problems with the private sector’s role in procurement. First is the lack of private sector participation in public procurement. Participants believe that less than five percent of private sector suppliers participate in public sector procurement and their knowledge of the procurement rules is weak. Participants expressed a need to learn more about the new procurement rules instituted by the Presidential Regulation, which went into effect January 1, 2011.

The second problem relates to the integrity of the private sector. Views differed on the scope and effectiveness of anti-corruption and anti-bribery efforts by the private sector. The participants representing foreign-owned companies believed that their anti-corruption programs were effective. At the same time, all participants noted the need to convince more companies that it is in their economic interest to implement similar programs.

Participants had a number of recommendations for improving transparency and integrity in public procurement, including:

- publicize Presidential Regulation 54/2010 among businesses and business-support organizations and at the provincial and local level of government
- create an independent auditor of procurement
- clarify how to appeal procurement decisions
- encourage business campaigns to implement anti-corruption programs.



## 6. Conclusions and Recommendations

### The Legal Framework

Although the Presidential Regulation improved public procurement procedures on paper, the Indonesian framework does not include all of the APEC standards. The legal framework is missing standards such as an opportunity to comment on procurement-related regulations and proposed tenders, notification to losing bidders and a description of why they lost, and lack of an independent review mechanism. In addition, there is no requirement to notify bidders when an objection has been filed or give them a right to participate in the review process.

However, the most serious problem has to do not with the content of the Presidential Regulation but its jurisdiction. The Regulation does not have the status of a national procurement law with clear legal superiority over other existing laws. This legal ambiguity raises questions about the rules applicable to procurement of construction services and procurements by certain SOEs, which are covered by separate laws.

There are also discrepancies between the Presidential Regulation and provincial and local laws and their implementation in practice.

### Implementation of the Legal Framework

As a result of decentralization of government authority and budget allocations to provincial and local government, public procurement in Indonesia occurs through hundreds of entities. Decentralization has also resulted in more procurement being done through sole source, since the value of regional and local procurement often falls below the threshold, which was raised to about US\$11,000 last year.

In the absence of a national law that clearly supercedes provincial and local laws, there is a lack of consistency in procurement rules throughout Indonesia. Provincial and local procurement also suffers from poor implementation of the legal framework. As a result, there is a lack of transparency in public procurement and many opportunities for corruption. Oil-rich Papua and West Papua are prime examples of the impact that corruption in public procurement has on the local population. Although the governments of these two provinces, thanks to oil, should have ample resources to spend on procuring goods and services to benefit their people, Papua and West Papua are among the least developed areas in Indonesia.

Addressing the lack of consistent laws and poor implementation in order to create a level playing field in public procurement is a prime concern of the private sector. At the same time, the private sector itself lacks knowledge of the new procurement system introduced by the Presidential Regulation and many companies have weak or non-existent anti-corruption and ethics programs.

## Recommendations

Considering the results of the legal review and the business consultation, TII, TI-USA, and CIPE make the following recommendations to strengthen the transparency and integrity of public procurement procedures in general and the level of Indonesia's implementation to APEC Standards in particular.

### *Raising awareness*

In light of the recent adoption of the Presidential Regulation, the government should host a series of workshops for the private sector, public officials, and civil society on the new procurement system. The objective of these workshops would be to facilitate consistent application of the new procurement rules by government officials on the provincial and local levels and educate the private sector about how to participate in procurements. At the same time, civil society would become better aware of the new procurement rules so they can participate as independent monitors of public procurement. To have the most effect on provincial procurement, workshops should be held in Papua, because it is rich in oil and gas and has a weak civil society, as well as on Kalimantan Island and Sulawesi, which are among the least developed parts of Indonesia and have weak civil society organizations.

### *Other government actions*

The government should also:

- Make every effort to enact a national procurement law that would govern procurement at every level of government and by SOEs.
- Fill the gaps in implementation of the APEC Standards by adopting provisions (i) requiring notice and comment on laws and regulations, as well as on procurement opportunities, (ii) creating a mechanism for administrative review of procurement decisions in which all interested bidders may participate; (iii) providing notice to losing bidders with an explanation as to why they lost; and (iv) standardizing procurement procedures and minimum quality requirements so that there is less discretion, particularly at the regional and local levels.
- Create standard procedures for:
  - preparation of goods/service requirements
  - terms of reference for open bidding, public tenders, and direct awards
  - pre-qualification requirements
  - time frames and scheduling of the procurement process
  - audits
  - time frames for dispute settlement
- Create an independent auditor of procurement that has the jurisdiction to review implementation of the procurement process (and not just the financial aspect of procurement) and the power to enforce its decisions, not just make recommendations.
- Clarify how to appeal procurement decisions.

- Formalize a mechanism by which civil society can monitor procurements and develop a funding mechanism to ensure that monitoring is undertaken.
- Require bidders to have codes of conduct, ethics training programs, and internal controls.

### *Actions by the private sector*

- Companies should adopt and implement codes of ethics and anti-corruption initiatives, such as the TI Business Principles for Countering Bribery or the APEC Anti-Corruption Code of Conduct.
- Private sector organizations, such as trade associations and chambers of commerce, should organize training for small and medium-sized businesses on their rights and obligations under the Presidential Regulation.
- Companies should familiarize themselves with the LPSE Electronic Procurement Systems as they are being developed, and demand that all the information necessary to prepare a responsive bid be published online.

### *Actions by civil society*

- Civil society should work with business organizations to encourage their member companies to adopt codes of conducts and internal anti-corruption measures.
- Civil society should develop groups specializing in monitoring standards of transparency in public procurement.
- Civil society should become more strategic in its monitoring efforts by identifying what types of procurement to monitor; what types of processes to monitor; what to do in case the procurement agency does not respond to problems detected during the monitoring; and how to secure sustainable funding for monitoring.

# ANNEX 1 – APEC TRANSPARENCY STANDARDS ON GOVERNMENT PROCUREMENT

1. Consistent with paragraph 1 of the Leaders' Statement, each Economy will:
  - (a) ensure that its laws, regulations, and progressively judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set asides for certain categories of suppliers), procedures and practices (including procurement methods) related to government procurement (collectively referred to as "procurement rules") are promptly published or otherwise made available, for example, via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them;
  - (b) designate an official journal or journals and publish the procurement rules in such journals on a regular basis and make copies of the journals readily available to the public (e.g., via the Internet); and
  - (c) promote observance of the provisions of this paragraph by the regional and local governments and authorities within its customs territory.
2. Each economy will disseminate information on its procurement rules, for example, by:
  - (a) publishing either a positive or negative list of the procuring entities subject to its rules; and
  - (b) providing a description of its procurement rules on the APEC Government Procurement Experts Group Home Page and linking its government procurement Home Page, where available, with the APEC Government Procurement Experts Group Home Page.
3. Consistent with paragraph 2 of the Leaders' Statement, when possible each Economy will publish in advance any procurement rules that it proposes to adopt; and provide, where applicable, interested persons a reasonable opportunity to comment on such proposed procurement rules.
4. Consistent with paragraph 3 of the Leaders' Statement, each Economy will endeavor upon request from an interested person or another Economy to promptly provide information and respond to questions pertaining to any actual or proposed rules. Each Economy will also establish contact points for such inquiries.
5. Consistent with paragraph 4 of the Leaders' Statement, in administrative proceedings applying to any procurement rule, each Economy will ensure that:
  - (a) wherever possible, persons of another Economy that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
  - (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit; and
  - (c) its procedures are in accordance with domestic law.
6. Consistent with paragraph 5 of the Leaders' Statement, where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding matters covered by these Standards, that:
  - (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the matter;
  - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;

(c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and

(d) ensure, subject to appeal or further review under domestic law, that such decisions are implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

7. Each Economy will endeavour to maximize transparency in access to procurement opportunities. This should be accomplished where possible by:

(a) where open tendering is adopted, publishing procurement opportunities in a medium readily accessible to suppliers (e.g., on the Internet);

(b) making the same information on procurement opportunities available in a timely manner to all potential suppliers;

(c) publishing contact details of purchasers, and their product/ service purchase interests, for suppliers wishing to register their interest in being notified of bidding opportunities that may not be publicly advertised;

(d) making available early advice of complex high-value procurement needs through staged procedures such as public requests for information, requests for proposals and invitations for pre-qualification, and allowing adequate time for interested suppliers to prepare and submit a response;

(e) making publicly available requirements and procedures for pre-qualification of suppliers; and

(f) any time limits established for various stages of the procurement process.

8. Each Economy will make available for suppliers all the information required to prepare a responsive offer. This should include where possible:

(a) providing in procurement notices the following information: the nature of the product or service to be procured; specifications; quantity, where known; time frame for delivery; closing times and dates; where to obtain tender documentation, where to submit bids, and contact details from which further information can be obtained;

(b) providing any changes to participating suppliers; and

(c) providing tender documentation and other information to suppliers promptly on request.

9. Each Economy will maintain transparent criteria for evaluating bids and evaluate bids and award contracts strictly according to these criteria. This should be done where possible by:

(a) specifying in procurement notices or tender documentation all evaluation criteria, including any preferential arrangements; and

(b) maintaining, for a predetermined period proper records of decisions sufficient to justify decisions taken in the procurement process.

10. Each Economy will award contracts in a transparent manner. This should be accomplished where possible by:

(a) publishing the outcome of the tender including the name of the successful supplier and the value of the bid; and

(b) as a minimum promptly notifying unsuccessful suppliers of the outcome of their bids and where and when contract award information is published, and debriefing unsuccessful suppliers on request.

11. Consistent with paragraph 11 of the Leaders' Statement, an Economy does not need to disclose confidential information where such disclosure would impede law enforcement, the enactment of laws, or that would be contrary to the public or national interest, or compromise security of the economy concerned or that would prejudice the legitimate commercial interests of particular persons or enterprises. Each economy will keep commercially sensitive information secure and prevent its use for personal gain by procurement officials or to prejudice fair, open and effective competition





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