

PROCUREMENT POLICIES IN INDONESIA*

This paper discusses the general framework of the procurement process in Indonesia as established by Presidential Decree No. 29 of 1984 and the effect of that law on international tendering and contracts.

I. INTRODUCTION

MANY developing nations throughout the world have adopted laws that regulate the use of state funds for procurement and direct that use towards the accomplishment of specific social objectives.

In April 1984 Indonesia enacted a thorough and detailed law that governs the implementation of the state budget. This is Presidential Decree No. 29 of 1984, known more familiarly as Keppres 29 (abbreviated from "Keputusan Presiden"). Keppres 29 regulates the tendering and contracting for services and supplies for those bodies, agencies and enterprises that are funded or financed by the state budget.¹

This paper seeks to relate the body of Indonesian law that governs the implementation of the state budget to certain practical requirements of international tendering and contracting in Indonesia. It describes the outstanding concepts and general principles of Keppres 29 to assist in understanding the general framework of the procurement process in Indonesia and its international impact. Indonesian counsel should be consulted for interpretation of this complex legislation to determine its application in any given case.

The discussion that follows of procurement policies in Indonesia stresses large-sized procurement contracts and competitive bidding requirements. It does not consider World Bank Procurement Guidelines² or the procurement policies of other financial institutions providing financing for projects in Indonesia, although these policies may apply in given cases.

Most major projects in Indonesia fall within the ambit of Keppres 29 since government funds constitute the largest source of available capital for development projects, since the capital of the private sector is still limited and since government institutions are principally respon-

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¹ Delma Juzar, "Current Development for the Services Companies of the Oil Industry in Indonesia" (1985) (unpublished paper) 15. Keppres 29 has not prevented the development of procurement guidelines within the agencies and enterprises themselves. See for example, Decision of the Board of Directors of the Telecommunication Public Company No.: K.D. 15/HK 006/UTA-00/1987, dated February 27, 1987, concerning Guidelines and Procedures for Consultation Services Procurement within PERUMTEL.

² World Bank, *Guidelines For Procurement Under IBRD Loans and IDA Credits* (1984). See Also David M. Sassoon, "Procurement by Developing Countries" in *A Lawyer's Guide to International Business Transactions* (2nd ed. 1980), Part IV, 7.

sible for guiding the development of Indonesia. Government procurement is therefore a crucial element of doing business in Indonesia. For this reason Keppres 29 has acquired considerable and increasing importance. It provides the blueprint for government procurement in Indonesia. Having had the force of law for more than three years, it is appropriate to pay Keppres 29 the attention that it deserves.

II. THE BACKGROUND, APPLICATION AND FUNCTIONS OF KEPPRES 29

An attempt to gain a firm grasp of the principles and purposes of Keppres 29 faces numerous difficulties on first encounter. First, the sheer length, some 150 pages, and the breadth of its provisions, from the mechanics of internal governmental approval procedures to the minute details of tender document requirements, present an initial obstacle and discourage quick interpretations. (To ease access to this law, an index has been prepared and is attached as an Appendix).

Second, only one English translation is available and it is not entirely satisfactory.³ Third, the various aims of Keppres 29, such as the efficient use of state funds and the promotion of domestic products, are intertwined and create at least a superficial complexity.

Fourth, certain of the critical provisions, for example, those relating to collaboration with local contractors⁴ and the use of domestic products and services,⁵ are not and indeed could not be addressed in specific terms.

Fifth, Keppres 29 allows for considerable additional rule-making both by the Minister of Finance and the Control Team for the Procurement of Government Goods,⁶ so that supplementary interpretations that are not readily available may have expanded or varied its terms.

A. Legislative History

Reference may therefore be made to the history of this legislation. By its terms Keppres 29 repeals earlier Decrees No. 14A. of 1980 and No. 19 of 1981, which themselves found earlier expression in Keppres No. 14 of 1979 and Keppres No. 12 of 1977. These five decrees can be seen as a progressive evolution toward the objective of maximizing the benefit of the use of state funds and, in particular, increasing Indonesian involvement in the use of those funds in order to achieve Indonesian development goals.

Prior to those decrees, procurement practices were marked by uneven contract terms that were applied inconsistently. It was observed in 1973 by Sanitiosa, Moertedjo and Dr. Sumitro L. S. Danuredjo that "practice to date has shown that procurement contracts are based on general conditions usually developed by foreign suppliers adapted to Indonesian monetary and financial regulations."⁷ These authors conclude prophetically:

³ English translation of Keppres 29 of 1984 issued by Warta Cafi Economic Bulletin. Copies may be purchased from the offices of Warta Cafi at Jl. Probolinggo No. 5, Jakarta Pusat.

⁴ Article 20 (10).

⁵ Attachment II of Keppres 29.

⁶ Article 94 and Attachment I, No. V, 3.

⁷ *The Legal Framework for Government Procurement in Indonesia* (1973) (unpublished paper) 7. For this citation as well as a number of kind suggestions for improvement of this paper I am grateful to Mr. Gregory Churchill.

Government procurement is in fact an extremely vital problem, as it covers a big slice of the budget. Policies and procedures laid down in Government regulations, past as well as current, have to date failed to provide for an effective and smooth procurement system. A standard operating procedure of general validity is absent. An agency in charge of implementing procurement policies is also nonexistent, so that coordination is incapable of application

A thorough review should be made of Government procurement which involves straightening up of its policies, its systems and procedures as well as its mechanism. It is recommended that a central agency be established for the purpose of attending to Government procurement. This agency should have a special status in that it shall not be placed under any Department, but preferably directly under the office of the President⁸

B. National Development

A clue to understanding Keppres 29 is provided by the Elucidation which states: "The State Budget constitutes the annual implementation of the Repelita (Five Year Development Plan). In order to ensure that the goal and the aim, as already planned, can be achieved, it is deemed necessary to determine the implementation of the State Budget."⁹ If we look to the three fundamental objectives (the "Trilogy of Development") laid down by the Third Five Year Development Plan (from 1979 to 1984), we will note that these were the equitable distribution of development gains, economic growth and the maintenance of political and economic stability. In the words of President Soeharto: "Our problem is a problem of social justice and how to equalize the results of development efforts." In the Address of State in 1978 the President described "eight main paths" of equity to achieve social and economic justice. One of the paths was the creation of equitable business opportunities and he explained:

The principle of equity must... be reflected in the development of business. Equitable business opportunities will, for instance, be stepped up through programmes giving greater opportunities to small business people and to the economically weak group to expand their business. The economically weak group will continue to be helped, guided and have their capabilities enlarged.¹⁰

The implementation of equity was a major objective of the Third Five Year Development Plan during which, in 1984, Keppres 29 was enacted. Thus the connection between the goals of national development and the terms of Keppres 29 indicates that the state budget is now recognized and employed as a strategic means to achieve these goals.

C. Application

Keppres 29 by its terms regulates the use of the state budget and as such applies specifically to ministries and state institutions." Perta-

⁸ *Ibid.*, at p. 16.

⁹ Elucidation to Keppres 29, General Introduction.

¹⁰ Address of State by His Excellency the President of the Republic of Indonesia Soeharto, *Warta Cafi Economic Bulletin* No. 200 (28 August 1978) 2163 at 2186 (address before the House of the People's Representatives on the occasion of the 33rd Independence Day, 17 August 1978).

¹¹ Article 4(1).

mina and other state-owned companies are subject to it.¹² The decree is understood to apply to projects financed by foreign aid since repayment obligations engage the state budget. Its application has been extended even to oil contractors operating under production sharing contracts where exploration and development are pre-financed by the contractors themselves and funding is repaid from oil production.¹³

D. Purposes

One aim of Keppres 29 is simply to establish standard procedures for the most effective and efficient use of the state budget,¹⁴ and in this regard, certain provisions deal with economical purchasing, tendering procedures, contract provisions, etc.

A further aim is to ensure that the state budget is consistent with the plans and functions of the various governmental entities,¹⁵ and for this purpose internal governmental procedures are stipulated.

Another aim, to quote from Article 14, is the "obligatory use of domestic production and capability to the maximum extent,"¹⁶ and in this regard we see provisions dealing with the required purchase of Indonesian goods and services, the ineligibility of foreign bidders for smaller procurement contracts and the preference for certain Indonesian groups in some cases.

Most broadly viewed, Keppres 29 may be seen as part of a larger endeavour to create a unified and rational organization of the state apparatus. In standardizing the procedures for budgeting and the use of state funds, and extending these procedures to all agencies of the Government, the New Order Government has carried out an ambitious portion of its reform efforts.

Thus, we can understand how it is that Keppres 29 has come to mean many things to many people, although perhaps most often it is referred to in the light of the aim of Indonesianization. Keppres 29 may be distinguished from its predecessors by the emphasis that it places upon the participation of small Indonesian companies in the use of state funds. What will be emphasized here, however, are the specific effects of Keppres 29 on tendering and contracting for large-scale projects involving foreign entities.

III. OUTLINE OF KEPPRES 29 OF 1984

A. The Basic Parts

Keppres 29 has four basic parts: first, the body of the Decree itself, containing 96 articles; second, the "Elucidation" of Keppres 29, an explanatory part commenting on many of these articles; third,

¹² Presidential Decree No. 42 of 1980, clarifying Presidential Decree No. 10 of 1980 and applying the rules of Presidential Decree No. 14A of 1980 (the predecessor legislation to Keppres 29) to state-owned companies.

¹³ Juzar, *supra*, note 1, at p.15. This is evidently based on the theory that the oil production that Pertamina would otherwise be entitled to, 85% of total production and a significant source of revenue for the state budget, is reduced by the extent of costs incurred in exploration and development.

¹⁴ Recitals to Keppres 29; and Article 14 (a).

¹⁵ Article 14 (b).

¹⁶ Article 14 (c).

Attachment I containing procedures for tenders, procurement and direct assignment; and fourth. Attachment II containing provisions for the utilization of domestic goods and services. Much of the body of Keppres 29 contains mechanical provisions that one would expect to find in any comparable legislation, such as the manner of collecting revenues, of accounting and reporting, but these need not concern us here.

B. Monitoring Functions

Viewed in a broader sense, Keppres 29 cannot be dissociated from the governmental bodies given authority to monitor, interpret and apply it. In this regard careful attention must be paid to the mandate of the Control Team for the Procurement of Government Goods. This body, responsible to the President, was established by Keputusan Presiden No. 10 of 1980, and is sometimes referred to by the short-term description "Team 10". Its members occupy many of the highest positions in the Government and its task is to control and coordinate the procurement of goods as well as contracted work having a value above Rp. 500 million.¹⁷

Specifically, Team 10 has the following functions:

- (a) to review and determine the kind, number, specifications, prices, as well as procurement procedures for goods and contracted work needed by governmental entities;
- (b) to evaluate the technical features and quality of goods and contracted work in order that the best possible result can be achieved based on the lowest price and the greatest use of local products;
- (c) to control and coordinate the implementation of procurement procedures; and
- (d) to manage the administration and documentation of procurement.¹⁸

It has been explained that:

[Team 10's] daily tasks are carried out by an operational executive directly chaired by the Junior Minister of Development of Domestic Products. This operational team is responsible for examining and evaluating the implementation of each tender including the bidding price and local content value of goods or equipment offered by the tender winner recommended by the technical departments concerned or tender committee. Criteria used for evaluating the bids are lowest price and fulfillment of technical term's. The team may, if deemed necessary, negotiate to reduce the offered price, jointly with the staff of the technical ministries concerned or the committee of the tender.

Results of such evaluation shall be reported to the Control Team, which holds weekly meetings. In case the goods and/or services need to be imported, the team shall instruct the tender winner to

¹⁷ Presidential Decree No. 17 of 1983, supplementing Presidential Decrees Nos. 42 of 1980 and 10 of 1980. This has been further modified by Presidential Decree No. 40 of 1985. See also D. Gingericj, "Tendering in Indonesia: The Legal Framework, (1982) (November) East Asian Executive Reports 7.

¹⁸ Presidential Decree No. 17 of 1983, Article I substituting Art. 4 (3).

implement [the] counter-purchase system at the value of 100% of the value of components to be imported.¹⁹

A similar function is performed by control team established at the departmental level and at the provincial level involving purchases of lesser value.²⁰

C. The Procurement Scheme

The heart of Keppres 29 lies in the means of procurement that it recognizes. First, procurement may be achieved through open tender conducted by public notice allowing for the full participation of the business community. Second, a limited or restricted tender may occur among prequalified contractors listed on the "List of Qualified Suppliers" (or "DRM").²¹ Tenders must generally be held where the contract value exceeds Rp. 20 million, although it is not specified when these are to be conducted through public or restricted tender.²² Exceptions to these tender requirements may be stipulated in certain cases by Team 10 or by regional control teams.²³ A third method of procurement is direct assignment, by which is meant the designation of a contractor from a list of three "applicants" registered on the List of Qualified Suppliers, and this applies for contracts having a value between Rp. 5 million and Rp. 20 million. And the fourth procurement method, or "direct procurement," is used for contracts having a value under Rp. 5 million.²⁴

The means of procurement are directed towards different categories of suppliers. Keppres 29 provides that the third and fourth procurement methods (*i.e.*, for contracts having a value of up to Rp. 20 million) shall apply only for the benefit of local (and by "local" is meant regional²⁵) economically weak group contractors.²⁶ Further, contracts having a value between Rp. 20 million and Rp. 50 million, though required to be carried out by tender, may be awarded only to local economically weak group contractors. Contracts having a value between Rp. 50 million and Rp. 100 million shall be conducted by tender among local contractors only, giving a 10% preference to economically weak group contractors whose bids meet the requirements of the tender. Tenders for contracts having a value between Rp. 100 million and Rp. 200 million shall be held among local contractors.²⁷

Foreign contractors do not appear to be eligible for procurement contracts unless the amount involved is greater than Rp. 200 million. Some foreign contractors have established limited liability Indonesian

¹⁹ Achmad Az, "Key Issues in Government Procurement" (1984) (unpublished paper) 18.

²⁰ Presidential Decree No. 30 of 1984, Article I substituting Article 4(3); Instruction of the Minister Of Domestic Affairs No. 35 of 1980.

²¹ Decrees of State Secretariat No. 912/TPPBPP/VIII/1984 and No. 3547/TPPBPP/XII/1985. These Decrees contain detailed provisions for the prequalification of prospective Indonesian bidders for government contracts.

²² Some indication may lie in Attachment I, No. I, 2.

²³ Article 24 (7).

²⁴ Article 19(1); Attachment I.

²⁵ Article 21 (3).

²⁶ Those trading and service companies having total capital and net assets worth less than Rp. 25 million and those industrial and construction companies having total capital and net assets worth less than Rp. 100 million. Elucidation to Keppres 29, "Article 19 (5). See also Delma Juzar, "Outline of Bidding Procedures in the Oil and Gas Industry" (1985) (unpublished paper) 3-4.

²⁷ Article 2(1).

corporations in an attempt to qualify for these smaller contracts, but generally the low threshold amount does not attract interest from foreign contractors in any event. Where they are eligible for procurement contracts, however, foreign contractors are required if awarded a tender to cooperate with local economically weak group contractors through subcontracting and other arrangements.²⁸

IV. THE TENDER PROCESS FOR PUBLIC AND RESTRICTED TENDERS

The formalization of relatively uniform tender procedures is one of the accomplishments of Keppres 29, providing guidance to the many agencies of Government in the manner of conducting diverse forms of procurement.

A. *Tender Committee*

Keppres 29 contemplates the formation of a tender committee for each public tender. This tender committee is charged with preparing the work programme and conditions of contract, the procedure for evaluation of the tender and the conditions of participation. It is responsible for conducting the formal aspects of the tender and making an evaluation of the prospective awardee. The committee must have at least five members including persons responsible for design, finance and logistics.²⁹

B. *Tender Documents*

Tender documents must at least include information about the agency conducting the tender and the designer of the work, the conditions of eligibility of tenderers, the form of tender and the procedure for submitting the tender bid. They must also include certain specific terms such as the period for completion of the work, the schedule of work, the terms of payment, penalties for late completion and the amounts of the tender and performance bonds. The technical conditions should specify that priority shall be given to national standards and domestic products.³⁰ The cost of preparing the tender documents is divided among the tender participants as a tender fee.³¹

C. *Timing for Tenders*

Keppres 29 provides a specific schedule for conducting public tenders. Between the date of announcement of the tender and the date of registration of participants there must be at least three days. (The meaning of "registration" is not explained in Keppres 29). Between the date of registration and the date of obtaining tender documents there must be between three and five working days. Between the date of obtaining tender documents and the date of pre-bid meeting there must be between three and four working days. And between the date of the pre-bid conference and the submission of tender bids, at least seven working days must be allowed.³² The overall time period should however be sufficient to enable tenderers to prepare proper tender bids.³³

²⁸ Article 20 (10).

²⁹ Attachment I, No. II, 2.

³⁰ Attachment I, No. II, 3.

³¹ Attachment I, No. II, 3 (c).

³² Attachment I, No. II, 5 (b).

³³ Article 19(10) (c).

D. Terms and Conditions of the Tender Bid

Tenders submitted must be accompanied by each of the following documents:

- (a) the tenderer's latest balance sheet;
- (b) disclosure of tenderer's share ownership;
- (c) description of tenderer's management structure;
- (d) articles of association, as amended;
- (e) licence to do business in the relevant sector;
- (f) evidence of business experience;
- (g) evidence of source of supply;
- (h) copy of the decree of the Tax Payer Identification Number;
- (i) bank reference by a bank acceptable to Bank Indonesia (if a foreign bank); and
- (j) tender bond.³⁴

The amount of the tender bond is to be stipulated in the tender documents but must be between one and three percent of the estimated bidding price. For foreign tenderers this bond should be issued by a foreign bank approved by Bank Indonesia or by a foreign exchange bank in Indonesia counter-guaranteed by a foreign bank approved by Bank Indonesia.³⁵ The tender bond should be returned immediately to unsuccessful bidders, but will be forfeited if the bidder withdraws from the bid or refuses to accept appointment as the successful awardee for unacceptable reasons.³⁶

The tender bid must meet the following requirements:

- (i) it must be provided with adequate stamp duty, dated, signed and submitted in a sealed envelope bearing the address of the office and the words "Bid for Tender (kind, day, date and time of opening)" (and if submitted by mail, two envelopes must be used);
- (ii) price quotations must be indicated in figures and in writing;
- (iii) it must be submitted within the prescribed time period; and
- (iv) tender bids may not be sent to an official or a member of the Tender Committee.

A failure to meet these conditions may invalidate the tender bid.³⁷

E. Opening of Tender Bids

At the predetermined time, the Tender Committee announces the closing of the tender and opens the tender bids in the presence of the

³⁴ Attachment I, No. II, 4 (a) and (b).

³⁵ Attachment I, No. II, 4(b); Bank Indonesia Circular Letters No. SE 6/42/ULN (9 July 1973), No. SE 6/55/ULN (7 August 1973), No. SE 10/26/ULN (9 November 1977), No. SE 11/17/ULN (8 June 1978), No. SE 11/18/ULN (9 June 1978), No. SE 11/11/UPPB (28 March 1979), No. 11/110/Kep/Dir/UPPB (28 March 1979) and No. SE 12/75/ULN (6 November 1979).

³⁶ Attachment I, No. II, 4 (b) and 11 (2) (b).

³⁷ Attachment I, No. II, 6.

tender participants. All bids should be read to all participants and each participant should be given the opportunity to see all bids submitted. The Tender Committee then determines which tender bids are disqualified, noting all deviations and shortcomings. This information is drawn up by the Tender committee in a "Minutes on the Opening of the Bids" to be signed by two representatives of the participants.³⁸

F. Evaluation and Determination of Awardee

Within seven days after the opening of the tender bids the Tender Committee evaluates tenders first by undertaking a technical verification to ensure compliance of each tender bid with the specifications of the tender documents. If the technical requirements of the tender have been satisfied, the Tender Committee then undertakes a price evaluation considering the tender prices against a reasonable predetermined price. The Tender Committee then selects the three lowest bidders from the pool of tenders for which technical and price elements are satisfactory. If two or more bidders have submitted identical price quotations, a selection is made based on the tenderer possessing the greater skill and ability. Finally the Tender Committee selects a prospective awardee.³⁹

G. Announcement and Appointment of Awardee

The result of the Tender Committee's evaluation is submitted in the form of a report, in the case of tenders over Rp. 500 million, to Team 10 for its decision on the appointment of the awardee.⁴⁰ After receipt of the Tender Committee's report, Team 10 finalizes the appointment and so informs the Tender Committee, which then has two working days after receipt of the decision to announce the decision to the participants at a meeting arranged for this purpose. Unsuccessful participants may file a written protest within four working days, but this protest must be directed against the procedure for the conduct of the tender.⁴¹ In the absence of any protest, the selected tenderer is appointed.⁴¹ If the contract value is over Rp. 50 million, the bid bond of the appointed awardee is returned only upon receipt of a performance bond that must be received prior to signing that contract.⁴²

H. Contract Basis

The basis for the contract is established by the following:

- (a) the tender documents;
- (b) the letter deciding the winner of the tender;
- (c) the Minutes of the Result of Tender;
- (d) the Minutes of the Opening of Bids; and
- (e) the Minutes of the Pre-bid Meeting.⁴³

³⁸ Attachment I, No. II, 7.

³⁹ Attachment I, No. II, 8.

⁴⁰ Attachment I, No. II, 8 and 9.

⁴¹ Attachment I, No. II, 9 and 10.

⁴² Attachment I, No. II, 4 (b) and 11 (2) (i).

⁴³ Attachment I, No. II, 11 (2)(g).

This has not been applied, however, to require that each of these documents form part of the contract. Rather, contract provisions included with the tender documents should be finalized to reflect all terms established by the documents listed above. Nevertheless, given that either the tender bond or the performance bond must be in place prior to signing the contract, the awardee has less flexibility to renegotiate any basic provision of the tender.

I. Repeat Tender

A tender may be declared void if less than three tenderers submit bids meeting the tender conditions; if price quotations are excessive or considered unreasonable; if a protest turns out to be correct; or if a decision is impossible in a given case. A repeat tender may be then held.⁴⁴

J. Restricted Tenders

Restricted tenders, we have seen, are those arranged among those tenderers listed on the List of Qualified Suppliers and the public tender provisions apply accordingly.⁴⁵

K. Direct Assignment

Although direct assignment is generally applicable only for contracts having a value less than Rp. 20 million and for the benefit of local economically weak group contractors, certain exceptions do exist. These include instances when only certain contractors are able to perform the work or supply the goods, or when, in the opinion of the appropriate agency, continuity in the implementation of a project should be maintained and a standard price exists for the work. Similarly, work which is a continuation of existing work and which cannot be technically separated may be the subject of a direct assignment, and the same applies for change orders not exceeding 10% of the contract price and Rp. 200 million. In each case, if the value of the direct assignment exceeds Rp. 200 million, the approval of Team 10 is required.⁴⁶

L. Authority of Team 10

It will be appreciated that, especially for large-scale and unique tenders for major development projects, flexibility in the tendering procedure must be accommodated. Matters not sufficiently addressed in Keppres 29 may be further stipulated by Team 10.⁴⁷ Tendering may be waived in certain instances for contracts having a value greater than Rp. 200 million.⁴⁸ Further, tender procedures for projects involving foreign aid are separately arranged by Team 10.⁴⁹ This allows for accommodation of certain stipulations often attached to the use of foreign financing, but the principles of Keppres 29 are nevertheless applied to the extent practicable.

⁴⁴ Attachment I. No. II, 12.

⁴⁵ Attachment I, No. III.

⁴⁶ Attachment I. No. IV, 4.

⁴⁷ Attachment I. No. V, 3.

⁴⁸ Article 24 (7) (c).

⁴⁹ Attachment I, No. V. 1.

V. CONTRACTUAL TERMS

This section describes the impact of Keppres 29 on international contracts for the procurement of goods and services in Indonesia.

A. *Contract Price*

The key element in any major contract is the nature of the payment to be made to the contractor. Perhaps the two most common payment types consist in "lump sum" or "fixed price" contracts, on the one hand, and "cost plus fee" contracts on the other. The Elucidation to Keppres 29 explains that a cost plus fee "is a contract sum not fixed in advance but the amount to be paid will be determined later on by calculating the costs (expenses) and adding a fee (profit)."⁵⁰ Contracts having "cost plus fee" payment terms are specifically prohibited by Keppres 29.⁵¹ The Elucidation goes on to state that in the contract "the exact amount needed must be inserted." This appears to reflect concern over the problems of cost overruns and delays. Fixed price contracts are naturally associated with competitive bidding.⁵²

B. *Payment*

An important principle established by Keppres 29 is that the amount of payment under any contract shall not exceed the value of actual performance of work.⁵³ This means that careful attention must be given to establishing payment schedules that accurately reflect and are tied to the value of the work performed. Fixed payment schedules measured only by time are not acceptable. The calculation of payment is to be based on verification and evaluation of the value of the usefulness of the work performed.⁵⁴

C. *Advance Payment*

Advance payments may not exceed 20% of the contract value, and may be made only after the contractor has submitted an advance payment guarantee having a value not less than the amount of the advance payment.⁵⁵ Similarly, advance payment under a letter of credit requires such a guarantee.⁵⁶ The use of the advance payment must be directed entirely toward project implementation.⁵⁷ Accounting for the advance payment can be achieved by even reductions in the payment schedule under the contract provided that the advance payment shall have been fully settled by the latest when the work has been fully performed.⁵⁸

D. *Performance Bond*

A performance bond in the amount of not less than 5% of the contract value is required to be submitted prior to signing the contract.⁵⁹ This

⁵⁰ Elucidation to Keppres 29, Article 20 (8).

⁵¹ Article 20 (8).

⁵² Similarly, most public work in the United State is competitively bid and performed under fixed price construction contracts. 10 U.S.C. Sections 2304 and 2306, and 41 U.S.C. Sections 252 and 254.

⁵³ Article 19 (12) and (13).

⁵⁴ Attachment I, No. II, 11 (2) (1).

⁵⁵ Article 20 (5).

⁵⁶ Article 20 (7).

⁵⁷ Article 20 (5).

⁵⁸ Article 20 (6). The Elucidation to Keppres 29, Article 20 (6) provides an illustration.

⁵⁹ Attachment I, No. II, 11 (2) (i) and No. IV. 5.

bond is forfeited if the contractor withdraws after signing the contract or fails to perform the contract work within the schedule of work. It may be returned to the contractor only after the work has been performed in accordance with the contract.⁶⁰

E. Issuance of Guarantees

A question that arises frequently is which banks may issue the bank guarantees required under Keppres 29 (*i.e.*, advance payment and performance guarantees). Keppres 29 provides that such guarantees shall be issued by Indonesian state-owned banks or other banks or financial institutions stipulated by the Minister of Finance.⁶¹ In a subsequent decree issued by the Minister of Finance, Keputusan Menteri Keuangan 205/KMK. 013 of 1988, a list of such Indonesian banks capable of providing guarantees in the context of Keppres 29 has been established. It is usually revised by decree each year. Further, foreign exchange guarantees must be counter-guaranteed by a foreign bank acceptable to Bank Indonesia.⁶²

F. Sanctions

No contract may contain provisions imposing a sanction on or requirement for restitution from the Indonesian Government.⁶³ This is understood to prevent any provision for late payment interest. On the other hand, sanctions for failure to meet contractual obligations under the contract shall be imposed on the contractor, and a figure of 0.1% per day is suggested.⁶⁴

G. Use of Domestic Products

The contract must contain clear provisions on the use of domestic goods and services.⁶⁵ This is discussed in the next section.

H. Use of Economically Weak Group Contractors

A central provision in Keppres 29 is the requirement that contractors cooperate with Indonesian contractors from the local economically weak group through subcontracting and procurement, and reports must be filed demonstrating compliance.⁶⁶

I. Stamp Duty

Stamp duty must be paid on the contract in accordance with applicable regulations and the terms of the contract.⁶⁷ The stamp duty law has been revised since the enactment of Keppres 29 and the amount of applicable stamp duty is now minimal.⁶⁸

⁶⁰ Attachment I, No. II, 11 (2) (k), (l) and (m).

⁶¹ Attachment I, No. II, 11 (2) (i).

⁶² *Supra*, note 35.

⁶³ Article 20 (4).

⁶⁴ Article 20 (2) (o) and the Elucidation thereof. The Elucidation also contains the requirement that for building construction the contractor be subject to the warranty provisions of Article 1609 of the Civil Code.

⁶⁵ Articles 20 (2) (j) and 22.

⁶⁶ Article 20 (10) (a) and (d).

⁶⁷ Elucidation to Keppres 29, Article 19 (6) and Attachment I, No. II, 11 (2) (h).

⁶⁸ Law No. 13 of 1985.

J. Contract Work

Keppres 29 states that design, execution and supervision should be carried out as far as possible by independent contractors and that a contractor may not function at the same time as supervisor of his contract work.⁶⁹

K. General Provisions

Keppres 29 provides that the contract must include clear provisions on the following:

- (a) agreed subject matter with clear description of kinds and quantities;
- (b) fixed price and terms of payments;
- (c) clear and detailed technical conditions and specifications;
- (d) completion dates, accompanied by a completion schedule and terms and conditions for delivery;
- (e) technical and output guarantees for the work;
- (f) sanctions for contractor's failure to meet contractual obligations;
- (g) dispute settlement;
- (h) legal status of the parties;
- (i) rights and obligations of the parties; and
- (j) utilization of domestic goods and services clearly specified in an attachment to the contract.

Although Keppres 29 does not specifically require that construction contracts be of the "turnkey" variety, given the fixed price requirement and the responsibility that is borne by the contractor to deliver on an agreed-upon date completed facilities meeting the technical and output guarantees contained in the contract or face sanctions for failure to meet contractual obligations, the fundamental elements of turnkey construction contracts are contained in the Decree and, indeed, this type of contract is generally required in practice for development projects in Indonesia.

L. Contract Standards

Team 10 is given authority to establish standards and guidelines for contract terms.⁷¹

M. -Approval of Minister of Finance

A contract requiring the use of state funds for more than one year requires the additional approval of the Minister of Finance.⁷²

⁶⁹ Article 28(1).

⁷⁰ Article 20(2). See generally, Theodoor Bakker, "Legal Considerations in Evaluating Tender Invitations" (1986) (unpublished paper).

⁷¹ Article 20(3).

⁷² Article 29(1).

VI. USE OF INDONESIAN GOODS AND SERVICES

We have noted that one of the principal purposes of Keppres 29 is to encourage the use of Indonesian goods and services with the intention of increasing the entrepreneurial ability of Indonesian businesses. Aside from the specific tendering requirements established for this purpose, to which reference has already been made, this section will enumerate further provisions that must be considered by the potential foreign tenderer. These are generally contained in Attachment II of Keppres 29.

Each of the obligations enumerated in this section reflects an application of the underlying principle that procurement from foreign sources should be used only to the extent that goods and services are not or cannot be made available in Indonesia, and even then foreign procurement has as an important corollary purpose to increase Indonesian capabilities.

A. Domestic Goods and Services

It should be noted that governmental entities are themselves instructed to procure domestic products (meaning goods and services),⁷³ that procurement is to be carried out by observing Indonesian development efforts and by utilizing Indonesian products and services,⁷⁴ and further that tender documents and contract terms are required to contain obligatory provisions regarding the observance of national standards and the use of Indonesian goods and services.⁷⁵ Tender documents issued for public tender, however, may not always fully reflect these requirements, but of course contracts may not be approved by Team 10 if they are deficient in this regard. Further, if some goods must be imported, priority will be given to domestic goods having the fewest imported components and to procurement involving the least import and having the maximum installation, assembly and testing of foreign goods in Indonesia.⁷⁶

It is significant that the chairman of the operational executive of Team 10, responsible for controlling procurement for all goods and services having a value above Rp. 500 million, is the Junior Minister for the Promotion of Domestic Products. As noted earlier,⁷⁷ the critical aspects of the review conducted by Team 10 for each contract are the tender price - is the amount as low as it should be? - and the amount of local content - are sufficient Indonesian goods and services proposed to be procured by the winner tenderer? The tenderer's scope of work is usually scrutinized closely to determine, item by item, whether goods may be purchased, manufactured or assembled in Indonesia. If they can be, tenderers are typically required to procure these items in Indonesia rather than abroad.

Often the terms of an approval by Team 10 of an award of tender will contain a specific requirement that a certain percentage of the total contract value be allocated to the procurement of Indonesian goods and services, or that certain aspects of the total work (such as

⁷³ For a definition of domestic products, see Article 22 and Attachment II, No. 1.

⁷⁴ Article 22 and Attachment II, No. I, 5 and No. II, A, I.

⁷⁵ Article 22 (2) (a) and Attachment II, No. II, A, 3.

⁷⁶ Article 22 (2) (b) and (c), and Attachment II, No. I, 2 and No. II, A, 2 and 4.

⁷⁷ *Supra*, note 19.

civil works or erection) be performed by Indonesian contractors, either in a subcontract relationship with the successful tenderer or sometimes in a consortium arrangement. As a general matter contractors are expected to maximize the use of Indonesian materials and products, Indonesian skilled and unskilled labour and supervisory, professional and other personnel as well as Indonesian services and contractors, and often contractors enter into contractual commitments to this effect.

B. Required Cooperation

We have already noted that successful foreign tenderers are required to utilize Indonesian weak economic group companies. Another very important requirement is that if foreign contracting or consulting services are required, opportunity must be given to Indonesian contractors or consultants to join the foreign contractor in a consortium arrangement.⁷⁸

C Procurement Involving Foreign Aid

Similar although slightly more relaxed provisions apply in the case of procurement involving foreign aid. International tenders in this connection shall "endeavor" to include Indonesian contractors, although tender documents should specifically require cooperation with Indonesian contractors as well as the transfer of know-how and skill.⁷⁹ The required use of Indonesian goods and services is generally determined on a case by case basis.

D. Transfer of Technology

A fundamental if implicit objective of Keppres 29 and of the work of Team 10 is the promotion of technology transfer in Indonesia. Technology transfer requirements take many forms: the most common is an obligation to provide training to Indonesian personnel. Either abroad or in Indonesia, training may be offered to impart managerial, supervisory or operational and maintenance skills. In addition, Indonesian personnel generally observe and participate in all phases of contract work. Also as part of the transfer of technology, foreign contractors are often required to subcontract to Indonesian contractors significant portions of the contract work, including project management, engineering, procurement and construction phases. Licensing agreements and similar arrangements are recognized as an important means for the effective transfer of technology.

E. Countertrade

Successful foreign tenderers are subject to Indonesia's countertrade policy if the tender involves the importing of foreign goods and the value is in excess of Rp. 500 million.⁸⁰

Introduced in 1982, Indonesia's countertrade policy seeks to increase Indonesia's non-oil and gas exports by requiring successful foreign tenderers to undertake to purchase certain Indonesian export commodities during the period of contract execution. Indonesia's

⁷⁸ Attachment II, No. II, B.

⁷⁹ Attachment II, No. III. See Az, *supra*, note 19. at pp. 11-12.

⁸⁰ Government Regulation No. 1 of 1982; see *e.g.*, Az, *supra*, note 19. at pp. 12-14 and Cathleen E. Maynard, "Indonesian Countertrade" (1986) (unpublished paper).

countertrade has been quite significant as a result. Countertrade undertakings for each tenderer are generally agreed with Team 10.

F. Civil Works and Erection

As noted above, efforts are made to encourage and require foreign contractors to procure Indonesian goods and services to the maximum extent possible. Generally it is expected that Indonesian companies, typically subcontracted by the successful foreign tenderer which remains responsible for successful completion, will perform civil works, erection and related work. The precise scope of subcontracted works will vary however in accordance with the requirements of each tender.

G. Shipping and Insurance

Although outside the scope of Keppres 29, reference should be made finally to the requirement in Presidential Decree No. 18 of 1982 that imports by Indonesian Government agencies be carried on Indonesian flag ships. The mandatory use of Indonesian insurers also applies to certain cases.⁸¹

VII. CONCLUSION

Keppres 29 offers a clear and strong statement of government policy regarding the availability of funds for government procurement in Indonesia. It has gone a long way toward rationalizing tender procedures and contract conditions.

A prospective tenderer for government procurement in Indonesia, whether foreign or local, should consult Keppres 29 both in preparing his tender and concluding a final contract. This will give a solid indication of what is expected from the tenderer and it may avoid subsequent difficulties.

Above all, a foreign tenderer should be willing to enter into the spirit of Indonesia's development aspirations. He cannot fail to recognize the emphasis placed upon the use of Indonesian skills, personnel and products. He must appreciate the need for coordination in the use of state funds to ensure consistency with development priorities and the most efficient use of those funds. Accepting these as goals rather than as obstacles will cast a favourable light on procurement opportunities in Indonesia.

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⁸¹ Presidential Decree No. 25 of 1969.

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APPENDIX I
INDEX TO
KEPPRES 29 OF 1984
CONCERNING
THE IMPLEMENTATION OF THE STATE BUDGET*
KEPPRES 29 OF 1984

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APPENDIX II

THE PROCUREMENT SCHEME

PROCUREMENT METHOD	CONTRACT VALUE	ELIGIBLE SUPPLIERS
I. OPEN TENDER	Above Rp. 20 million	Greater than Rp. 200 million: all contractors Rp. 100-200 million: local contractors only Rp. 50-100 million: local contractors only, with a 10% preference for economically weak group contractors
II. RESTRICTED TENDER	Above Rp. 20 million	Rp. 20-50 million: local economically weak group contractors only
III. DIRECT ASSIGNMENT (NO TENDER)	Rp. 5-20 million	Local economically weak group contractors only
IV. DIRECT PROCUREMENT (NO TENDER)	Under Rp. 5 million	Local economically weak group contractors only

Authority of Team 10: All procurement having a value greater than Rp. 500 million and direct assignment for contracts greater than Rp. 200 million.

Authority of Ministerial Steering Committees: Tender for amounts between Rp. 100 million and Rp. 500 million. Direct assignment having a value greater than Rp. 20 million and up to Rp. 200 million.