

*CORRUPTION
AND
INFRASTRUCTURE:*

*Preliminary Study on Corruption Risks
in Infrastructure Sector*



**german
cooperation**

DEUTSCHE ZUSAMMENARBEIT

Implemented by

giz Deutsche Gesellschaft
für Internationale
Zusammenarbeit (GIZ) GmbH



Abstract

Infrastructure development is a crucial driver of economic growth and social progress, and the allocation of significant government funds to infrastructure projects underscores their importance. However, the infrastructure sector is also highly vulnerable to corruption due to the large amounts of money involved and the complexity of licensing processes.

Corruption in this sector not only negatively impacts society but can also have a far-reaching impact on the environment. It is therefore essential to mitigate corruption risks in infrastructure projects. The Alliance for Integrity recognizes the critical importance of tackling corruption in infrastructure development and works to promote Collective Action approaches that bring together stakeholders to combat corruption. In Indonesia, where infrastructure development has been prioritized, there is a pressing need to address corruption risks to ensure that infrastructure projects contribute to the country's sustainable economic and social development.

This preliminary study on corruption risks in infrastructure sector provides an overview of the current legal framework and corruption risks in the infrastructure sector in Indonesia, and offers recommendations for addressing these risks, with a focus on Collective Action as a potential solution.

Disclaimer

While this text provides a comprehensive overview of the legal framework and corruption risks in Indonesia's infrastructure sector, it is important to note that this study has certain limitations. First and foremost, this study is preliminary in nature and cannot provide an exhaustive analysis of all corruption risks in the infrastructure sector in Indonesia. Additionally, the study does not examine the implementation of existing laws and regulations, nor does it provide a detailed evaluation of ongoing infrastructure projects in Indonesia. Moreover, the recommendations provided in this text are preliminary and should be viewed as suggestions for further action, rather than definitive solutions. The study is intended to serve as a starting point for further research and dialogue on addressing corruption risks in Indonesia's infrastructure sector. It is therefore crucial to consult additional sources and experts before making decisions or taking action based solely on the findings of this text.

The use of information from this publication concerning proprietary products for publicity or advertising is not permitted. Reproduction and dissemination of material in this publication for education or other non-commercial purposes are authorized without prior written permission from the copyright holders provided the source is fully acknowledged. Reproduction of material in this information product for sale or other commercial purposes, including publicity and advertising, is prohibited without permission of the copyright holders.

Editorial

Author Lakso Anindito

Editors Dr. Simon Gaus

Dina Yusuf

Copyright Alliance for Integrity c/o Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH Menara BCA, Lantai 46, Jl.MH. Thamrin No 1 Jakarta 10310, Indonesia © 2023 Alliance for Integrity.

List of Abbreviation

AGO	Attorney General's Office
APBD	Anggaran Pendapatan dan Belanja Daerah (Regional Budget)
APBN	Anggaran Pendapatan dan Belanja Negara (National Budget)
BPK	Badan Pemeriksa Keuangan (the National Audit Agency)
CCL	Corporate Criminal Liability
COI	Conflict of Interest
DUKU	Dari Usaha ke Usaha (From Business to Business)
FCPA	Foreign Corrupt Practices Act
FLLAJ	Forum Lalu Lintas Angkutan Jalan (Road Travel and Transport Forum)
GDP	Gross Domestic Product
GIZ	Gesellschaft für Internationale Zusammenarbeit
HLRM	High Level Reporting Mechanism
KPK	Komisi Pemberantasan Korupsi
KPPIP	Komite Percepatan Penyediaan Infrastruktur Prioritas (Acceleration of Priority Infrastructure Delivery)
KPPU	Komisi Pengawas Persaingan Usaha (the Competition Authority)
LKPP	Lembaga Kebijakan Pengadaan Barang dan Jasa Pemerintah (the National Public Procurement Agency)
LPSE	Layanan Pengadaan Secara Elektronik (Online Procurement Service)
MRT	Jakarta Mass Rapid Transit
NGO	Non-Governmental Organization
NSP	National Strategic Projects
OECD	Organization for Economic Cooperation and Development
PPP	Public-Private Partnership

PROFIT	Professional and Integrity Program
SMAP	Sistem Manajemen Anti-Penyuapan (Anti-Bribery Management System)
SOE	State-Owned Enterprises
SOP	Standard Operating Procedure
SPSE	Sistem Pengadaan Secara Elektronik (Online Procurement System)
Stranas PK	Strategi Nasional Pencegahan Korupsi (National Corruption Prevention Strategy)
UKACF	United Kingdom Anti-Corruption Forum
UKBA	United Kingdom Bribery Act
UNCAC	United Nations Convention Against Corruption

CORRUPTION AND INFRASTRUCTURE:

Preliminary Study on Corruption Risks in Infrastructure Sector

Introduction

The infrastructure sector is one of the sectors most vulnerable to corruption¹ due to the large sums of money and the often-complex licensing processes involved. For instance, China allocated 5.8% of its GDP to inland infrastructure² when the United States spent \$211.8 billion on transportation and infrastructure.³ Corruption in the infrastructure sector not only has a serious adverse impact on society as a whole but can also have a potentially serious impact on the environment at the global level. For this reason, mitigating corruption risks in the infrastructure arena needs to be prioritized, particularly in the wake of economic fallout resulting from the Covid 19 pandemic.⁴

In Indonesia, infrastructure development has been a national priority program of President Joko Widodo since 2015, which has led to the Government formulating a series of core policies, including an enhanced legal framework and vastly increased government funding.⁵ In 2021, around Rp 417.8 trillion was allocated

¹ Benjamin A. Olken and Rohini Pande, 'Corruption In Developing Countries' in Working Paper 17398 of National Bureau of Economic Research (2011, NBER)

² ITF-OECD (ITF-OECD, 2023) "Infrastructure Investment Data Reveal Contrasts Between Countries" <<https://www.itf-oecd.org/infrastructure-investment-data-reveal-contrasts-between-countries>> accessed on 3 February 2023

³ USAFacts, (USAFacts, 2022) "What does America spend on transportation and infrastructure? Is infrastructure improving?" <<https://usafacts.org/state-of-the-union/transportation-infrastructure/>> accessed on 30 January 2023

⁴ Ian Hawkesworth, 'As countries sit on shaky foundations, tackling corruption in infrastructure is key' (World Bank Blog, 2020) <<https://blogs.worldbank.org/governance/countries-sit-shaky-foundations-tackling-corruption-infrastructure-key>> accessed on 10 August 2022.

⁵ Interview with Lukijanto, Sekretaris Deputy Bidang Koordinasi Infrastruktur dan Transportasi, Kementerian Koordinator Bidang Kemaritiman dan Investasi Republik Indonesia on 18 July 2022; Binsar H. Simanjuntak, Staf

to infrastructure, the highest figure in the six years up to then, compared e.g. with a decline in the national health budget on the previous year.⁶ For 2022, the Government and Parliament appropriated Rp 365.8 trillion for infrastructure in the National Budget (APBN).⁷ At the international level, Indonesia is predicted to become a global leader in public and private infrastructure investment, with a total of 4.1 % of gross domestic product (GDP) expected to be invested in infrastructure by 2040, compared e.g. with estimates of 5.1 %, 3.6 %, 2.2 % and 1.3 % for China, India, Argentina and Mexico, respectively.⁸ However, referring to the projected ability of the 2020-2024 State Budget, it is estimated that the government will only be able to meet 30 % of the total budgets required for infrastructure provision of IDR 2,058 trillion (USD 130 Billion).⁹

Loan financing opportunities are also being used to fund major projects, such as the Jakarta Mass Rapid Transit (MRT) project, which is expected to cost around USD 1.7 billion.¹⁰ The Government has also moved to overhaul Indonesia's legislative and regulatory framework to accelerate the development of infrastructure projects, as the Government planned to realize 208 projects and 10 NSP programs for 2020- 2024, with total financing of all projects reaching IDR 5.698.5 trillion (USD 250 Billion).¹¹ The Committee or the Acceleration of Priority Infrastructure Delivery (KPPIP) targets 29 National Strategic Projects (NSP) to be completed by 2022.¹² These efforts include measures such as the enactment of the Job Creation Act¹³ and the issuance of a Government Regulation on Land Procurement for Public Infrastructure Projects.¹⁴

Khusus Menteri PUPR, on 16 September 2022 in Side Event B20: A Public-Private Dialogue on Fostering Integrity and Good Governance in Infrastructure at Hotel Pullman, Bandung

⁶ Cindy Mutia Annur, 'Terbesar dalam Enam Tahun, Anggaran Infrastruktur Capai Rp 417,4 Triliun pada 2021' (Katadata, 2021) <<https://databoks.katadata.co.id/datapublish/2021/08/16/terbesar-dalam-enam-tahun-anggaran-infrastruktur-capai-rp-4174-triliun-pada-2021>> accessed on 10 August 2022

⁷ Tim Kementerian Keuangan, *Melanjutkan Dukungan Pemulihan Ekonomi dan Reformasi Struktural Apbn 2022* (Kemenkeu 2022) 29

⁸ Marsh McLennan Team, 'How Does US Infrastructure Spending Compare Internationally?' (MarshMcLennan,2021) <<https://www.brinknews.com/quick-take/how-does-us-infrastructure-compare-internationally/>> accessed on 10 August 2022

⁹ Jay (PU, 2022) "*Tingkatkan Konektivitas, Kementerian PUPR Kembangkan Berbagai Inovasi Skema Pembiayaan*" <<https://pu.go.id/berita/tingkatkan-konektivitas-kementerian-pupr-kembangkan-berbagai-inovasi-skema-pembiayaan>> accessed on 15 February 2023

¹⁰ Indonesia Investment Team 'Mass Rapid Transit (MRT) Jakarta' (Indonesia Investment, 2022) <https://www.indonesia-investments.com/projects/public-projects/mass-rapid-transit-mrt-jakarta/item5198>> accessed on 10 August 2022

¹¹ Peraturan Menteri Koordinator Perekonomian Nomor 7 Tahun 2021 tentang Perubahan Daftar Proyek Strategis Nasional (The Regulation of the coordinating minister for Economic Affairs of the Republic of

However, despite significant progress, corruption continues to plague the infrastructure sector, as shown by data from the Corruption Eradication Commission (KPK) which reveals that the KPK investigated 36 cases related to infrastructure in 2020, and 107 cases in 2021.¹⁵ Moreover, these recorded cases are likely to be only the tip of the iceberg: According to estimates by the KPK, only some 50% of budgetary funding for infrastructure projects was actually used for the purposes for which it had been allocated as contractors frequently had no option but to give bribes a series of parties during the planning, development, and evaluation processes.¹⁶

Corruption does not only involve private undertakings but also, crucially, the state-owned enterprises (SOEs) that play a major role in public infrastructure projects. In 2019, for example, the KPK investigated 26 cases of suspected corruption in the infrastructure sector involving state-owned construction companies, the Ministry of Public Works and Housing, and local-government public-work departments around the country.¹⁷

Indonesia Number 7 of 2021 concerning Changes in the List of National Strategic Project), hereinafter referred as the “National Strategic Project Ministerial Regulation.”

¹²
National Strategic Project Ministerial Regulation

¹³
UU Nomor 11 Tahun 2020 tentang Cipta Kerja (Law No. 11/2020 on Job Creation), hereinafter referred as the “Job Creation Act.”

¹⁴
PP Nomor 19 tahun 2021 tentang Penyelenggaraan Pengadaan Tanah bagi Pembangunan untuk Kepentingan Umum (Government Regulation No 19/2021 on Land Procurement for Development in the Public Interest), hereinafter referred as the “Land Procurement Regulation.”

¹⁵
KPK, ‘Graph TPK Berdasarkan Jenis Perkara’ (KPK, 2022) <<https://www.kpk.go.id/id/statistik/penindakan/tpk-berdasarkan-jenis-perkara>> accessed on 13 August 2022; Media Indonesia, ‘Infrastruktur di Indonesia Cepat Rusak? KPK: Nilai Riilnya Kurang dari 50%’ (Media Indonesia, 2021) <<https://mediaindonesia.com/politik-dan-hukum/438093/infrastruktur-di-indonesia-cepat-rusak-kpk-nilai-riilnya-kurang-dari-50>> accessed on 13 August 2022

¹⁶
Ibid

¹⁷
Corruption risk to Indonesia’s infrastructure push: Experts’ (Jakarta Post) <https://www.thejakartapost.com/news/2020/07/27/corruption-risk-to-indonesias-infrastructure-push-experts.html>.

This preliminary study will describe the current legal framework, the potential and actual corruption risks at each phase of an infrastructure project and provide initial recommendations on how the issues that have been identified may be addressed. The study will put a particular focus on the potential for Collective Action approaches.

Legal Framework

In this section, we will describe the relevant aspects of the legal and regulatory framework relating to corruption and the infrastructure sector.

Anti-Corruption Legislation

In Indonesia, corruption is targeted by two principal statutes: (a) the Anti-Corruption Act,¹⁸ and (b) Anti-Bribery Act¹⁹. The Anti-Corruption Act governs the majority of corruption offences, including bribery (passive and active), mark-up in the procurement process, unlawful acts to secure illicit benefits or gratuities, and conflicts of interest in the procurement process. In general, Indonesia lacks specific legislation to tackle bribery in the private sector (business-to-business bribery). However, if a case of bribery exhibits a public interest dimension, the law enforcement agencies can investigate using the Anti-Bribery Act. Given the lack of specific legislation on business-to-business bribery, it has been difficult to tackle private-sector bribery to date unless a public interest aspect is involved. Consequently, the law enforcement agencies focus the bulk of their attention on public-sector corruption.²⁰

The Anti-Corruption Act and the Anti-Bribery Act establish a number of offences that are particularly relevant to corruption in the infrastructure sector:

TYPE OF OFFENCE	RELEVANT STATUTORY PROVISION	EXAMPLES
-----------------	------------------------------	----------

¹⁸ Law No. 31 of 1999 on Corruption Eradication, as amended by Law No. 20 of 2001, hereinafter referred as the Anti-Corruption Act.

¹⁹ *UU Nomor 11 Tahun 1980 tentang Tindak Pidana Suap* (Law No. 11/1980), hereinafter referred as the “Anti-Bribery Act.”

²⁰ Kevin R. Feldis, Laode M. Syarif, Rasamala Aritonang, and Lakso Anindito ‘Indonesia’ in T. Markus Funk and Andrew S. Boutros (eds), *From Baksheesh to Bribery: Understanding the Global Fight Against Corruption and Graft* (Oxford University Press 2019) 283-285.

Bribery	<ul style="list-style-type: none"> Article 5 Anti-Corruption Act (active bribery) Article 12 a and b Anti-Corruption Act (passive bribery) 	A contractor or intermediary offers, promises or gives something (a financial or other advantages) to a public official (including an SOE director or officer) for the purpose of influencing the public official to prioritize a particular infrastructure project or to allocate funding for the infrastructure project during a procurement process.
Gratuity	Article 12B Anti-Corruption Act	A public official (including an SOE director or officer) receives something (a financial or other advantage) from a contractor or intermediary and does not report the gift to the Corruption Eradication Commission (KPK). A key difference between this and bribery is that the prosecution does not need to prove intention on the part of the bribe giver.
Mark-up and fraud	Article 7 Anti-Corruption Act	Contractor engages in fraud when developing and/or overseeing the development of an infrastructure project, particularly where public safety or a defense-related project in a time of war is involved.
Illegal act to obtain benefit that inflicts loss on the state.	Article 2 Anti-Corruption Act	An unlawful act committed by an individual during the decision-making process in order to enrich himself or another person or a corporation, where such act inflicts financial losses on the state.
Conflict of Interest in the Procurement Process	Article 12 (i) Anti-Corruption Act	A public official with responsibility for a procurement process participates directly in the procurement process through his own company or indirectly through an affiliated company.

The issues of facilitation payments, hospitality and promotional expenditure are not clearly addressed in Indonesia's legal framework.²¹ Consequently, the KPK prefers to use the gratuity approach to handle potential facilitation payments. For example, the KPK has issued a circular letter that provides guidance as to the scope of gratuities and relevant thresholds, such as the maximum amount that a public official may accept without requirement to report to the Gratification Control Unit at the KPK.²²

Enforcement powers in the anti-corruption arena are vested in the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi/KPK*), the Attorney General's Office (*Kejaksaan Agung/AGO*) and the Police (*Kepolisian*). All three institutions have the power to investigate suspected corruption cases, but only the KPK and AGO have investigative and prosecutorial powers.²³ Besides the KPK, the AGO and the Police, the National Public Procurement Agency (*Lembaga Kebijakan Pengadaan Barang dan Jasa Pemerintah/LKPP*) and the Competition Authority (*Komisi Pengawas Persaingan Usaha/KPPU*) are also relevant when discussing corruption in the infrastructure sector. The LKPP is a single national authority that is responsible for developing public procurement policies,²⁴ while the KPPU is Indonesia's competition watchdog,²⁵ and has a crucial role to play in preventing corruption that involves anti competitive behavior.

Corporate Criminal Liability and Corporate Compliance

The KPK's key strategy for changing the behavior of corporations is to ensure that errant corporations are held to account through the application of corporate criminal liability (CCL). This approach tries to balance between reform in internal the government sector and encourage corporation to prevent corrupt behavior even in difficult condition. In this condition, the CCL gives serious sanction for corporations if

²¹ Kevin R. Feldis, Laode M. Syarif, Rasamala Aritonang, and Lakso Anindito (n16)

²² *Peraturan KPK Nomor 2 Tahun 2019 tentang Pelaporan Gratifikasi* (KPK Regulation No. 2/2019 on Reporting of Gratuities), hereafter referred to as the "KPK Gratuities Regulation"

²³ *UU Nomor 2 Tahun 2002 tentang Kepolisian Negara Republik Indonesia* (Law No. 2/2002 on the National Police), hereinafter referred to as the "Police Act"; *UU Nomor 30 Tahun 2002 tentang KPK sebagaimana diperbaharui dengan UU Nomor 19 Tahun 2019* (Law No. 19/2019 on KPK), hereinafter referred to as the "KPK Act".

²⁴ *Peraturan Presiden Nomor 106 Tahun 2007 Tentang Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah* (Presidential Regulation No. 106/2017 on the National Public Procurement Agency, hereinafter referred to as the "Presidential Regulation on the National Public Procurement Agency."

²⁵ *UU Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat* (Law No. 5/1999 on Competition Law), hereinafter referred as the "Competition Act."

they chose to pay bribery when the public official asks. The CCL has been applied since the enactment of the Anti- Corruption Law in 1999, even before Indonesia ratified the United Nations Convention against Corruption (UNCAC) in 2006.²⁶ Similar to the Foreign Corrupt Practices Act (FCPA) in the United States,²⁷ the Anti- Corruption Law uses the vicarious liability model to provide the theoretical basis for imposing liability on legal persons so that corporations may be held accountable for corruption offences, provided that the following three cumulative conditions are fulfilled:

- The violation is categorized as a corruption offence that can be prosecuted using the corporate criminal liability approach.
- This violation has been committed by an individual who is an employee of the corporation or representative of the corporation, including an intermediary, irrespective of his or her position in the corporation; and
- The violation relates to the core business of the corporation.²⁸

Notwithstanding this, enforcement efforts proved ineffective until the Supreme Court issued a 2016 regulation setting out guidelines for the prosecution of cases involving corporations.²⁹ Since then, the KPK has brought seven cases involving corporate criminal liability to court, having not prosecuted any cases at all prior to the issuance of the 2016 regulation.³⁰ Besides providing guidelines on the relevant procedure, the regulation also assists judges in identifying the fault element in corporate offences, which may be summarized as:

- The purpose of the violation was to benefit the core business of the corporation;
- The corporation failed to stop the violation when it occurred; or

²⁶ Article 20 the Anti-Corruption Law.

²⁷ Fredrik Eriksson, Monica Kirya and Mats Stridsman, *The OECD Public Consultation Process on Legal Person Liability* (OECD-U4, 2016)

²⁸ Lakso Anindito, *Lingkup Tindak Pidana Korupsi dan Pembuktian Kesalahan dalam Sistem Pertanggungjawaban Pidana Korporasi di Indonesia, Inggris, dan Prancis* in *Jurnal Integritas Anti Korupsi* No. 1, March 2017 (KPK, 2017)

²⁹ *Peraturan Mahkamah Agung Nomor 13 Tahun 2016 Tentang Cara Penanganan Perkara Tindak Pidana oleh Korporasi* (Supreme Court Regulation No. 13/2016 on Guidelines for the Tmt1 of Corporate Criminal Liability Cases), hereinafter referred as the "SC Corporate Criminal Liability Regulation"; KPK, '*Graph TPK Berdasarkan Jenis Jabatan*' (KPK, 2022) < <https://www.kpk.go.id/id/statistik/penindakan/tpk-berdasarkan-profesi-jabatan> > accessed on 13 August 2022;

³⁰ Ibid

- The corporation did not have a compliance system in place to prevent corruption.³¹

Indonesian law does not offer companies an explicit defense of corporate compliance, unlike e.g., the “adequate procedure” defense under the United Kingdom’s Bribery Act 2010 (“UKBA 2010”).³² However, under the regulation, corporate compliance may be accepted as a quasi-defense as it should be taken into consideration by the judges when arriving at their decisions. To support corporations in preventing corruption through internal measures, the KPK has published a set of anti-corruption compliance guidelines for corporations (*Panduan Cegah Korupsi / CEK*).³³

Multilayer Enforcement

Where cross-border business is involved, multilayer enforcement is needed as the corporation must comply with the anti-corruption legislation in the country where it operates and with the legislation in its home country. Under foreign legislation, such as the FCPA in the United States and the UKBA in the United Kingdom, a corporation may be prosecuted in its home country for bribery that is perpetrated abroad.³⁴

The enactment of such extraterritorial legislation is a positive development as it helps to level the anti-corruption playing field in respect of transnational companies.³⁵ While, in theory, multilayer enforcement may have the potential to result in double jeopardy and multiple parallel prosecution³⁶, this kind of situation has not arisen in Indonesia as the law enforcement agencies here prefer to prosecute the local representatives of foreign corporations and errant public officials, while the holding companies may be prosecuted in their home countries.

Procurement, Land Acquisition and Funding

Funding for infrastructure plans and projects is allocated every year in the National Budget (APBN) at the central level, and Regional Budgets (APBD) at the local level, both of which budgets need to be

³¹ Article 4 the SC Corporate Criminal Liability Regulation.

³² Section 7 the United Kingdom Bribery Act 2010 (the UKBA).

³³ KPK, *Panduan Pencegahan Korupsi untuk Dunia Usaha* (KPK, 2018)

³⁴ Kevin E. Davis, *Between Impunity and Imperialism : The Regulation of Transnational Bribery* (Oxford University Press 2019) 34

³⁵ Ibid; Interview with Rimawan Pradiptyo, Department of Economics, Gadjah Mada University, on 29 May 2022

³⁶ Andrew S. Boutros and T. Markus Funk, “Carbon- Copy Prosecutions”: A Multi- Dimensional Enforcement Paradigm that is Here to Stay’ in T. Markus Funk and Andrew S. Boutros (eds), *From Baksheesh to Bribery: Understanding the Global Fight Against Corruption and Graft* (Oxford University Press 2019) 497-498

approved by the relevant legislature (national or local, as the case may be).³⁷ After being approved, the next stage is to use the allocated public funds to procure the envisaged public goods, which process is governed by the Presidential Procurement Regulation.³⁸ This regulation sets out the technical processes for procurement planning, implementation and monitoring, including the circumstances in which procurements must be conducted by public tender or may be carried out by means of direct appointment.³⁹ Every ministry, state institution and local government agency is required to establish a dedicated team to conduct procurements based on the regulation. Moreover, the majority of procurements must be publicly announced on the Online Procurement Service (*Layanan Pengadaan Secara Elektronik / LPSE*) system, using the standards formulated by the National Public Procurement Agency (*Lembaga Kebijakan Pengadaan Barang dan Jasa Pemerintah/LKPP*), so that the public can monitor and oversee the conduct of procurement processes.⁴⁰

In addition to these public sector-based funding approaches, the Government is increasingly eager to harness private-sector involvement through public-private partnership (PPP) schemes in order to overcome funding gaps that often constrain infrastructure development in Indonesia.⁴¹

Land acquisition is often one of the most intractable obstacles to developing infrastructure projects in Indonesia as land has important social and environmental implications. A dedicated Land Acquisition Act⁴²

³⁷ Article 23 *Undang-Undang Dasar 1945* (Constitution of the Republic Indonesia 1945)

³⁸ *Peraturan Presiden Nomor 12 Tahun 2021 tentang Perubahan atas UU Nomor 12/2021 tentang Pengadaan Barang dan Jasa Pemerintah* (Presidential Regulation Number 12/2021 on the Revision of Presidential Regulation Number 16/2018 on Government Procurements of Goods and Services), hereinafter referred to as the “Presidential Procurement Regulation”.

³⁹ Ibid

⁴⁰ Article 73 *Peraturan Pemerintah Nomor 16 Tahun 2018 tentang Pengadaan Barang/Jasa Pemerintah* (Government Regulation No. 16/2018 on Public Procurements of Goods and Services), hereinafter referred to as the “Government Procurement Regulation”; *Peraturan Lembaga LKPP Nomor 14 Tahun 2018 tentang Layanan Pengadaan Secara Elektronik* (LKPP Regulation No. 14/2018 on the Online Procurement Process), hereinafter referred to as the “Online Procurement Process.”

⁴¹ *Peraturan Presiden No. 67 Tahun 2005 tentang Kerjasama Pemerintah dengan Badan Usaha dalam Penyediaan Infrastruktur sebagaimana direvisi oleh Peraturan Presiden No. 38 Tahun 2015* (Presidential Regulation No.67/2005, as amended by Presidential Regulation No.38/2015, on Public Private Partnerships in the Infrastructure Sector)

⁴² *UU Nomor 2 Tahun 2012 tentang Pengadaan Tanah Bagi Pembangunan untuk Kepentingan Umum* (Law No. 2/2012 on the Procurement of Land in the Public Interest), hereinafter referred to herein as the Land Acquisition Act.

has been enacted and a Land Acquisition Government Regulation has been issued as part of the government's endeavors to overcome the various problems related to land acquisition.

At the implementation level, the Construction Services Act governs the technical aspects of construction projects in the infrastructure sector with administrative sanction for a violation related to infrastructure process.⁴³ Further, forestry sector legislation and regulations also need to be taken into account when forest land is required for infrastructure projects.

Corruption Typologies in Infrastructure Sector

The infrastructure development process may be differentiated into three phases, consisting of (i) planning and procurement, (ii) implementation, and (iii) evaluation.

The planning and procurement stage covers the allocation of funding, project planning and tendering.

Funds are allocated by the legislature and executive at the national and regional levels, as the case may be.

At the national level, funding allocations are discussed by the national legislature and government representatives in relation to specific national infrastructure projects and supporting regional projects, while the executive and legislature at the provincial level determine the funding for provincial projects and supporting district/municipal projects. Further, local bodies at the district/municipal level allocate funding for infrastructure developments at the district/municipal level. The allocation of funding for a particular project is then followed by the holding of a procurement process that is directed by a procurement committee using the procurement standards developed by the LKPP.

The implementation stage involves the physical development of the project by the contractor that successfully won the tender competition, and is followed by the final stage, evaluation, which occurs after the contractor delivers the completed project to the government and it is evaluated by the audit team at the end of the year.

In relation to each of these stages, the most common corruption typologies may be categorized as follows:

	PLANNING AND PROCUREMENT	IMPLEMENTATION	EVALUATION
TYPOLOGY	<ul style="list-style-type: none"> Bribing of decision makers when allocating funding 	<ul style="list-style-type: none"> Procuring substandard materials that fail 	<ul style="list-style-type: none"> Bribing of public official responsible for supervision

⁴³ UU Nomor 2 Tahun 2017 tentang Jasa Konstruksi (Law No. 2/2017 on Construction Services, referred to herein as the Construction Services Act

	<ul style="list-style-type: none"> • Bribery related to the procurement process • Conflict of interest in the procurement process • Mark-up 	<p>to meet the specifications and requirements</p> <ul style="list-style-type: none"> • Poor quality of construction work so that the work will likely need to be repeated / repaired, thus creating opportunities for further corruption 	<ul style="list-style-type: none"> • Bribing of public official responsible for supervision • Bribing of public official responsible for signing hand-over documents • Bribing of auditor
<p>Potential Offences by Private Sector Actors under Anti-Corruption Legislation</p>	<p>Article 5 and Article 12(i) Anti-Corruption Act</p>	<p>Article 2 and Article 7 Anti-Corruption Act</p>	<p>Article 2 Anti-Corruption Act</p>

Planning and Procurement Stage

During the budgetary-funding allocation phase, bribing of decision-makers is the most common mode of corruption in Indonesia, with 791 cases of bribery prosecuted by the KPK since 2004, the majority of which relate to licensing and procurement.⁴⁴ For example, in 2018 the KPK uncovered a bribery case involving a deputy speaker of Indonesia’s National Legislature, who accepted a bribe from a mayor to ensure that his city received a bigger share of national funds for local infrastructure projects.⁴⁵ The following year, a senior officer in the Provincial Planning Agency Jawa Timur was found to have accepted bribes to allocate more infrastructure funds to Tulung Agung District.⁴⁶ In the same year, the

⁴⁴

KPK, ‘Graph TPK Berdasarkan Jenis Perkara’ (KPK, 2022)

<<https://www.kpk.go.id/id/statistik/penindakan/tpk-berdasarkan-jenis-perkara>> accessed on 13 August 2022;

⁴⁵

Republik Indonesia v. Taufik Kurniawan, Putusan PN SEMARANG Nomor 24/Pid.Sus-TPK/2019/PN Smg (Semarang Anti-Corruption Special Court Judgment No.24/Pid.Sus-TPK/2019/PN Smg)

speaker of district legislature in Kebumen was arrested for accepting bribes from contractors in return for infrastructure contracts.⁴⁷

From a corruption risk perspective, the procurement process is the most susceptible in an infrastructure project.⁴⁸ Existing research and interviews conducted in the course of this study suggest that contractors typically attempt to bribe public officials at two different stages. Firstly, before the formal procurement process commences so as to ensure that funding is provided for a particular project. Bribes at this stage (which may be seen as akin to ‘down payments’ or “Ijon Proyek” to decision makers) is around 5% to 10%, are often proffered by the local construction industry association, representing construction companies operating in the area.⁴⁹ Secondly, during the procurement process, when contractors strive to ensure that they win the contracts. For this second phase, significant safeguards against corruption have been put in place, most notably the LKPP’s Online Procurement System (*Sistem Pengadaan Secara Elektronik / SPSE*), which publishes relevant data and is intended to allow the public to monitor what is happening throughout the procurement cycle.⁵⁰ Nonetheless, these safeguards struggle to combat often sophisticated combinations of private sector collusion, corruption and bribery to public officials.

Here is a concrete example of how things work in practice: in a particular province the members of the local contractors’ association enter into an unwritten arrangement to divide up development projects among themselves, with each member contributing to a bribery fund in proportion to the number of

⁴⁶

Syahri Mulyo and others v. Republic of Indonesia, Putusan Pengadilan Tipikor No. 164/Pid.Sus-TPK/ 2018/ PN. Sby tanggal 14 Februari 2019 (Special Corruption Court Decision No. 164/Pid.Sus-TPK/ 2018/ PN. Sby) and Pengadilan Tinggi Surabaya 16/PID.SUS-TPK/2019/PT SBY tanggal 7 Mei 2019 (Appeal Decision No. 16/PID.SUS-TPK/2019/PT SBY)

⁴⁷

Penulis Dylan Aprialdo Rachman, ‘Pengembangan Kasus Kebumen, KPK Tetapkan Ketua DPRD sebagai Tersangka’ (Kompas, 2018) <https://nasional.kompas.com/read/2018/10/30/16152411/pengembangan-kasus-kebumen-kpk-tetapkan-ketua-dprd-sebagai-tersangka> accessed on 10 August 2022

⁴⁸

UNODC, Public Procurement Reform in Indonesia (UNODC, 8 December 2020) <<https://www.unodc.org/southeastasiaandpacific/en/what-we-do/anti-corruption/topics/2020/public-procurement-reform-indonesia.html>> Accessed on 4 August 2022

⁴⁹

KPK, ‘Graph TPK Berdasarkan Jenis Perkara’ (KPK, 2022) <<https://www.kpk.go.id/id/statistik/penindakan/tpk-berdasarkan-jenis-perkara>> accessed on 13 August 2022

⁵⁰

Peraturan LKPP Nomor 9 Tahun 2018 Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Melalui Penyedia (LKPP Regulation No. 9/2018 on Improving Services on Public Procurement), hereinafter referred as “LKPP Regulation No.9/2018”); LKPP, *Tentang E-Procurement* 07 Januari 2013 <<http://www.lkpp.go.id/v3/#/read/799>> Accessed on 8 March 2021

projects to be allocated to it.⁵¹ After receiving the go-ahead from the decision-makers, the association then assigns each of the participating contractors a role in each procurement process.⁵² Thus, in Project A, one of the participating contractor acts as a 'shadow' competitor, while in Project B, the roles are reversed, meaning that there is actually no competition at all during the two procurement processes.⁵³ Even if a real competitor does participate, this can be overcome by bribing officials to thwart their bid, such as by shutting down the online system before the competitor can upload their bid, thus ensuring that the bribe-giving contractor wins the tender. In other cases, public officials participate directly by using their own affiliated companies to secure projects. In early 2018, the KPK investigated a mayor after he allocated around Rp 40 million from the municipal infrastructure budget to companies that were acting in collusion with a company owned by the mayor. By law, the mayor's company was prohibited from participating due to the obvious conflict of interest. After series of investigations, the mayor was convicted of corruption offenses and the company of money laundering offences.⁵⁴

Marking up is another common mode of corruption. This is where the contractor collaborates with a procurement official to ensure that the contract price is higher than it should be, and that the contractor ultimately secures the work. In this form of corruption, the element of fault does not relate to the price itself, as profit cannot be criminalized, but rather how the benefit provided influences the public official to determine a price that is not based on value for money and the public interest. In 2014, the local prosecutor's office in Kutai Timur uncovered significant mark-ups in the Kutai Timur Power Plan Project that involved public officials conspiring with the contractor to inflate the project price with the potential lost around 50 million Rupiah.⁵⁵

⁵¹ Susilo Prabowo v. Republic of Indonesia, Putusan Pengadilan Tipikor Nomor 134/Pid.Sus/TPK/2018/PN.Sby tanggal 1 November 2018 (the Special Corruption Court Decision No. 134/Pid.Sus/TPK/2018/PN.Sby), 15

⁵² Interview with Setyabudi Yulianto, Deputy Bidang Penegakan Hukum KPPU; Gopprera Panggabean, Direktur Investigasi KPPU; Aru Armando, Direktur Meger dan Akusasis KPPU, on 25 May 2022; Adnan Topan Husodo, ICW Coordinator on 12 May 2022; Hayie Muhammad, Direktur Program Indonesia Procurement Watch, on 11 May 2022

⁵³ Interview with Setya Budi Arijanta, Deputy Bidang Hukum dan Penyelesaian Sanggah LKPP, on 19 May 2022

⁵⁴ Republic Indonesia v. Yahya Fuad, Putusan PN SEMARANG Nomor 54/Pid.Sus-TPK/2018/PN Smg Tanggal 22 Oktober 2018 (Special Corruption Court No. 54/Pid.Sus-TPK/2018/PN Smg); Republik Indonesia v. Taufik Kurniawan (n 43); Republic Indonesia v. PT Putra Ramadhan Putusan Nomor 47/PIDSUS-TPK/2019/PN SMG pada tanggal 4 September 2019 (Special Corruption Court No. 47/PIDSUS-TPK/2019/PN SMG);

⁵⁵ Zakarias Demon Daton, 'Praktik "Mark Up" Proyek Pembangkit Listrik Tenaga Surya di Kutai Timur Terungkap, Negara Rugi Rp 53,6 Milliar' (Kompas 2022)

Implementation Stage

Corruption and the diversion of funds to corrupt officials during the procurement process have serious implications for successful outcomes during the construction stage. One of the most common consequences is a reduction in the standard of the materials used or work carried out, particularly where the standard is difficult to evaluate. An example of this might be a deliberate reduction in the number of reinforcing bars used in concrete constructions. This is something that is difficult to subsequently check without damaging the integrity of the building.

Another mode of corruption during the implementation stage is to deliberately construct the works in such a way that they will quickly have to be repaired or replaced, with the intention being to benefit from the repair or replacement contracts. As with the use of substandard materials, substandard construction work is also difficult to prove from the enforcement perspective as it might be argued that the deficient state of the work was due to poor planning. As an example of how this operates in practice, a contractor may decide to deliberately construct a road poorly by laying inadequate foundations in the expectation that they will secure a repair contract the following year.⁵⁶

Besides the above modes of corruption, contractors may attempt to maximize their profits by farming out the main work to a subcontractor, despite this being illegal in Indonesia under the Presidential Procurement Regulation.⁵⁷ A contractor may be tempted to illicitly subcontract for a variety of reasons, two of the most common being (i) the contractor just wants to enjoy the profit margin without doing any actual construction work, or (ii) the cost of bribing public officials during the procurement process may leave the contractor with insufficient funds to actually do the work itself, with the result that they feel they have no option but to transfer the job to a subcontractor. Thus, corruption in planning often creates commercial pressure towards corruption in the implementation stage – and, thereby, poor quality infrastructure.

<<https://regional.kompas.com/read/2022/07/22/180543278/praktik-mark-up-proyek-pembangkit-listrik-tenaga-surya-di-kutai-timur>> accessed on 27 August 2022

⁵⁶

Indra Wijaya, 'Infrastructure Projects Dominate Banten Corruption' (Tempo, 2013)

<<https://en.tempo.co/read/520160/infrastructure-projects-dominate-banten-corruption>> accessed on 1 September 2022.

⁵⁷

Article 87 (3)

Evaluation Stage

This negative loop continues into the evaluation stage. In the absence of bribery involving the officials responsible for evaluating and auditing the work, the corrupt behavior during the previous stages could well be uncovered by the auditors, e.g., by quality checks. Corruption during the evaluation stage frequently involves senior officials, such as heads of government agencies, governors and mayors. As the public officials responsible for supervising construction projects and signing off on their delivery are part of the government apparatus, it is relatively easy for corruption to become systemic.

All projects funded or partially funded by the National Budget are audited by the National Audit Agency (*Badan Pemeriksan Keuangan / BPK*), whose role makes it susceptible to corruption as errant contractors will be eager to ensure that BPK auditors do not faithfully report their findings of wrongdoing.

Consequently, in many cases, corrupt behavior is never revealed or investigated as the auditors have been

bribed to conceal it. As an example, in 2017 the KPK investigated a state auditor assigned to audit the Cipularang-Purbaleunyi road construction project in West Java. The auditor was bribed with a luxury motorcycle and entertainment facilities so as to persuade him to change his findings.⁵⁸ On the other hand, in PPP schemes and infrastructure projects financed by foreign loans, audits are generally conducted by independent auditors appointed by the foreign lender. In such cases, the fact that multilayer audits are conducted helps to reduce the potential for corruption.⁵⁹

Preventing Corruption in the Infrastructure Sector: Overview

If we analyze the various corruption typologies in the infrastructure sector, bribery is the principal problem, given that all the other modes of corruption are closely related to or involve bribery of one kind or another.⁶⁰ Preventative measures against bribery should include collaborative and collective action involving government and stakeholders in the private sector. The respective roles to be played by government and businesses in this regard may be elaborated in a number of interrelated strategies, as described below:

TYOLOGY	ACTIONS	POTENTIAL APPROACHES
<i>Planning and Procurement</i>		

⁵⁸ Sabir Lalulu, 'Suap Audit Jasa Marga, Auditor BPK Dituntut 9 Tahun Penjara' (Sindo, 2018) <<https://nasional.sindonews.com/berita/1305812/13/suap-audit-jasa-marga-auditor-bpk-dituntut-9-tahun-penjara>> accessed on 10 September 2022

⁵⁹ Olaf Goerke, Senior Portofolio Manager Green Infrastructure KFW, on 22 June 2022

⁶⁰ Interview with Amien Sunaryadi, commissioner of PT PLN and former commissioner of KPK, on 31 May 2022

Bribing of decision makers to influence budgetary infrastructure allocations	<ul style="list-style-type: none"> • Empower & incentivize the private sector & SOEs to resist requests for bribery / extortion. 	<ul style="list-style-type: none"> • Improving procurement system • Certification • Collective action • Effective reporting mechanisms • Upholding competition law
Bribery during procurement process	<ul style="list-style-type: none"> • Empower & incentivize the private sector & SOEs to resist requests for bribery / extortion • Ensure fair competition 	
Conflicts of interest during procurement process	<ul style="list-style-type: none"> • Enforce COI rules through the effective enforcement of codes of ethics and COI declarations • Ensure fair competition 	
Mark-ups	<ul style="list-style-type: none"> • Empower & incentivize private sector & SOEs to resist requests for bribery / extortion • Enforce COI rules 	
<i>Implementation</i>		
Use of substandard materials	<ul style="list-style-type: none"> • Ensure fair competition • Enforce COI rules 	<ul style="list-style-type: none"> • Improving monitoring system • Certification • Collective action • Upholding competition law
Substandard work to generate subsequent repair / renovation projects		
<i>Evaluation</i>		
Bribing of public officials responsible for supervision	<ul style="list-style-type: none"> • Eliminate incentives to proffer bribes • Enforce COI rules 	<ul style="list-style-type: none"> • Improving integrity of audit process • Second layer audits • Certification • Collective action • Effective reporting mechanisms
Bribing of public officials responsible for signing handover documents		

Bribing of auditors		• Upholding competition law
---------------------	--	-----------------------------

Across all stages, the prevention system by government agencies has a crucial role to play in encouraging compliance in infrastructure projects. Reforming the procurement system is one strategic example of how

corruption in the infrastructure sector can be prevented. Currently, the LKPP wants to strengthen its e-catalogue system, which provides a list of contractors and their specializations so government agencies can select qualified contractors without having to repeatedly conduct tender competitions. Moreover, the LKPP is endeavoring to separate construction services⁶¹ providers from building-materials suppliers to prevent mark-ups and manipulation by contractors. The Ministry of Public Works has also formulated nine steps to encourage reform of the procurement system, including overhauling the organizations that handle procurements, improving human-resources capacity and boosting the monitoring system.

The involvement of law enforcement agencies in preventing corruption has been spearheaded by the Attorney General's Office, which established a special task force to monitor infrastructure projects in 2015, in compliance⁶² with a presidential instruction. However, the task force was dissolved in 2020 for reasons of efficiency.

Ultimately, enhanced integrity in internal government agencies is the key to strengthening the government, state auditors and law enforcement agencies as regards the conducting of procurements, supervision of project implementation and project evaluation. This is because the problem is not the capacity of public officials to understand the process, SOP and legislation but lack of integrity because of personal interest or pressure from higher level positions.

Moreover, infrastructure development is not just about providing materials, but also requires appropriate human resources and systems to ensure that proper safeguards are in place. Without such safeguards, corruption will continue to thrive.

⁶¹ Interview with Setya Budi Arijanta (n50)

⁶² Interview with Binsar H. Simanjuntak (n3)

⁶³ Devina Halim, 'Resmi Dibubarkan, Ini Perjalanan TP4 Warisan Eks Jaksa Agung Prasetyo' (Kompas, 2019) <<https://nasional.kompas.com/read/2019/12/05/10200561/resmi-dibubarkan-ini-perjalanan-tp4-warisan-eks-jaksa-agung-prasetyo>> accessed on 15 August 2022

⁶⁴ Interview with Rimawan Pradiptyo (n32); Adnan Topan Husodo (n 45)

Preventing Corruption in Infrastructure Sector: Opportunities for Collective Action

In a polycentric legal order, “law” is developed not just by the state but also by non-state actors, such as businesses. For example, when two businesses sign a contract, they are in effect creating law between themselves.⁶⁵ For this reason, collective action by businesses is key to initiating and inculcating a culture of integrity in the procurement process. In what follows, a range of potentially promising approaches to Collective Action for preventing corruption in the infrastructure sector are identified. Note that many of the collective action approaches identified here are not mutually exclusive but could rather be integrated into a multi-pronged collective action strategy. The first measure in particular, the establishment of an integrity forum, can be viewed as a basis for further actions.

a. Establishment of Integrity Forum

Contractors that are committed to upholding integrity should develop a forum to share information on the importance of integrity, find the best solutions for issues that tend to undermine integrity, develop common standards and engage in advocacy to promote integrity. From a commercial perspective, membership of this forum could also be used by contractors to promote their businesses vis-à-vis other businesses and customers. Crucially, such forums should always involve trusted civil society organizations to provide expertise and support with safeguarding against collusion competition distorting impacts. At the international level, the Alliance for Integrity is an example of collective action involving the private and public sectors for the purpose of strengthening integrity around the world. This association’s unique approach involves collaboration between businesses and NGOs to advocate for anti-corruption goals by developing peer-to-peer learning, public private dialogue, awareness raising, exchange of knowledge, and compliance training.⁶⁶ Another example is the United Nations Global Compact, which brings together like-minded organizations that are committed to 10 principles, including anti-corruption. Currently, it counts more than 16,786 organizations among its members, consisting of corporations and non-business entities in 160 countries.⁶⁷ A similar initiative should be developed by businesses in Indonesia to mainstream integrity in the construction sector. One template that could be used is the Professional and Integrity Program

⁶⁵

Gunther Teubner, ‘The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination’ in Rainer Nickel (ed), *Conflict Of Laws And Laws Of Conflict In Europe And Beyond: Patterns Of Supranational And Transnational Juridification* (Hart, 2009), 205.

⁶⁶

Alliance for Integrity < <https://www.allianceforintegrity.org/en/alliance-for-integrity/about-us/>> Accessed on 3 September 2022

⁶⁷

UN Global Compact < <https://www.unglobalcompact.org/>> accessed on 3 September 2022

(PROFIT) that was established by the KPK in 2016 in order to facilitate businesses that are committed to upholding integrity. It would be a significant step forward if construction companies in Indonesia were to initiate a similar forum so as to promote integrity in the infrastructure sector. The UK Anti-Corruption Forum (UKACF) is another example of collective action as an informal alliance of UK business associations, professional institutions, civil society organizations, companies and individuals that could also potentially develop in Indonesia. This association is not trade association but pure stakeholders that have interest in developing common norms on anti- corruption.

b. Involvement of Industry Associations in Boosting Integrity

Construction industry associations should encourage their members to develop common standards and represent their members' interests in integrity forums. This is because these associations have a strategic bargaining role, particularly at the regional level. The associations enjoy close relations with decision-makers and are in a position to influence the conduct of their members.⁶⁸To achieve this and ensure industry associations act as a champion against corruption, rather than a forum for collusion, they should be a focus in corruption prevention capacity building, and involvement should likely be contingent on adherence to defined common standards (see below).

c. Developing Common Standards & Certification

Strong Compliance Management Systems are a key tool for preventing corruption. Once in place, such systems place major constraints not only on lower-level employees in at-risk department, but – given sufficient standing and resources – even leadership. However, implementing such systems requires problem-awareness, often industry-specific know-how, and significant commitment from the top.

Developing common standards for compliance management systems in infrastructure sectors can be a major tool for overcoming these challenges. By pooling knowledge and expertise, good practices can be identified and adopted. By specifying exactly what a strong compliance management system entails, companies' commitments likewise become specific and verifiable. And, crucially, the adoption of strong common standards by a vanguard of well-regarded and commercially strong companies is likely to create pressure towards adoption by other market participants as well.

⁶⁸ Ibid; Mohammad Hasan Ansori, Direktur The Habibi Center on 30 May 2022

Moreover, based on the interviews that have been conducted, it is apparent that there are gaps in compliance standards in Indonesia as between multinational companies, state-owned companies and private companies.⁶⁹ For foreign companies, the multilayer nature of the enforcement processes that they are subject to encourages them to adopt internal corporate compliance policies and measures.⁷⁰ The reason for this is that if they are found lacking, they will face serious sanctions not only from Indonesia's law enforcement agencies but also from their home-country authorities. However, gaps are also apparent between those jurisdictions that are serious about tackling corruption and those that are not, even if they have an appropriate legal framework for doing so in place.⁷¹

One way to strengthen common standards is certification. Since 2018, the Indonesian government has encouraged state-owned enterprises (SOEs) to obtain ISO 37001 certification (known in Indonesia as the "Anti-Bribery Management System" / *Sistem Manajemen Anti-Penyuapan* (SMAP)). Indeed, the promotion of SMAP certification was seen as being so important that it was initially incorporated as an action plan in the SOE National Corruption Prevention Strategy (*Strategi Nasional Pencegahan Korupsi / Stranas PK*), before ISO 37001 certification was finally made mandatory by an SOE Ministry Circular.⁷²

Rules have also been tightened up for private sector construction companies, which since 2021 have been required to obtain certification so as to demonstrate that they fulfill the minimum standards for operating in Indonesia, as mandated by a decree of the Director General of Construction Development and various official circular letters.⁷³ These rules also apply to foreign

⁶⁹

Desiderius Viby Indrayana, Ketua Komite Tetap Bidang Pembinaan dan Pengembang Konstruksi Kamar Dagang Indonesia (KADIN) on 12 June 2022; Gunawan, Head of Compliance - PT. Siemens Indonesia on 7 June 2022; Subkhan, Direktur HCM, SCM, and QHSE PT Waskita Beton Precast on 14 June 2022; Firman Yosafat Siregar, Astra Infra on 2 September 2022; Asep Chandra, Wakil Ketua Gapensi Jawa Barat, on 26 August 2022

⁷⁰

Olaf Goerke (n 56)

⁷¹

Wawan Heru Suyatmiko, Deputy Secretary General TII; Alvin Nicola, Democratic and Participation Governance Manager on 2 June 2022; Gunawan, Head of Compliance - PT. Siemens Indonesia on 7 June 2022

⁷²

Surat Menteri BUMN No. S-35/MBU/01/2020 and Surat Sekjend No. S-17/S.MBU/02/2020;

⁷³

Minister of Public Works and Housing Circular No. 21/SE/M/2021 on Procedures for Fulfilling Business Licensing Requirements, Implementation of Construction Work Competency Certification, and Enforcement of Business Entity Certificates and Construction Work Competency Certificates; Construction Services Development Institute Circular No. 17/SE/LPJK/2021 on Technical Guidelines for Certification of Construction Services Business Entities through Business Entity Certification Agencies; and Decree of the Director-General of Construction Development, Ministry of Public Works and Public Housing No. 89/KPTS/DK/2021 concerning Standards for the Certification Scheme of Construction Services Business Entities

companies and their affiliates that bid for or work on infrastructure projects in Indonesia. As part of this certification process, one of the requirements is to also obtain ISO 37001 certification.

While such certification is not a silver bullet against corruption on its own, it can serve as a first step towards strengthening anti-corruption compliance because the main goal of certification, including ISO 37001, is developing the robust system to prevent corruption at every level decision making. The situation could then be further improved if businesses were to come together to develop common anti-corruption standards so as to promote a cleaner and fairer environment in the infrastructure sector.

Another approach that could be considered as a best practice is currently being piloted in West Lombok. Currently, FLLAJ (Forum Lalu Lintas Angkutan Jalan - or Road Travel and Transport Forum) which are legally required across Indonesia) in West Lombok become the pilot CoST programme in opening the infrastructure project.⁷⁴

d. Multiplier-based training and knowledge sharing

Training, guidelines, publication and communication measures can be used to spread knowledge and awareness of identified best practices with respect to anti-corruption measures in infrastructure. These training should be offered in particular to smaller enterprises with limited resources and often less mature compliance programs. To ensure wide coverage, a train-the-trainer approach can be used, where compliance officers and other experts from partnering companies are being empowered to offer training to the leadership of smaller enterprises, who in turn spread the knowledge inside their organizations. While the overall methodology and structure of such training can be based on existing general compliance training such as the Alliance for Integrity “From Companies for Companies” (“DUKU”) training, its content will need to be tailored to the specific circumstances of the infrastructure sector and, in some cases, even to specific subsectors.

e. Leaders with Integrity – incorporating integrity as a key hiring criterion.

The level of integrity of the person at the helm of a business or organization is crucial when it comes to determining the response to a bribe demand from a public official. Consequently, the positioning in key roles of persons with acknowledged anti-corruption credentials and track records is an important strategy that could make corrupt public officials think twice before

⁷⁴ Radianto Wijanarko (Kabupaten Lombok Barat, 2022) “Bupati Fauzan : Lombok Barat adalah satu-satunya Kabupaten di dunia yang menjadi anggota CoST” <<https://lombokbaratkab.go.id/bupati-fauzan-lombok-barat-adalah-satu-satunya-kabupaten-di-dunia-yang-menjadi-anggota-cost/>> accessed on 30 February 2023

demanding a bribe or suggesting some other form of corrupt behavior. A number of SOEs in Indonesia have been applying this strategy in order to deter corruption.⁷⁵ Defining integrity criteria for selecting and hiring employees and business leaders may also constitute a key element of common anti-corruption standards developed.

f. Incorporating Integrity Clauses in Commercial Agreements

A commercial contract provides the basis for collaboration between two or more companies. Anti-corruption clauses may be incorporated into commercial contracts to discourage potentially errant parties from engaging in corruption and to provide an escape valve for avoiding liability in the case of an innocent party. With such clauses, a potentially corrupt business partner will need to consider not only criminal sanctions from the law enforcement agencies but also economic sanctions or civil litigation from their counterparty under the contract. At the global level, transnational corporations employ several different ways of doing this, including setting out a general declaration of their anti-corruption commitment, incorporating specific, detailed anti-corruption clauses in the main body of the contract, linking to the Global Commitment, or even setting out their joint anti-corruption commitment in a separate contract.⁷⁶

g. Non-penal enforcement

Rather than leaving enforcement solely to the criminal law, the private sector could also use civil litigation and competition law as alternative means of supporting and encouraging the development of a clean business environment. This means, firstly, enforcing integrity clauses in all commercial agreement to the fullest extent (see above). It also means actively reporting to investigation authorities. For example, bid rigging is a common form of corruption during the procurement process. In such circumstances, an aggrieved contractor could report the matter to the KPPU so that an investigation can be conducted. A key advantage of the competition law approach is that the KPPU does not need to satisfy the criminal standard of proof in order to find a party guilty of anti-competitive behavior. In this situation, the KPPU could impose sanctions on errant companies to encourage fair competition and reduce bid-rigging.

⁷⁵ Interview with Adnan Pandu Praja, Komisararis PT MRT and former Commissioner of KPK on 10 May 2022

⁷⁶ Vibe Ulfbeck, Ole Hansen and Alexandra Andhov, 'Contractual Enforcement Of CSR Clauses And The Protection of Weak Parties In The Supply Chain' in Vibe Ulfbeck, Alexandra Andhov and Mitkidis, *Law and Responsible Supply Chain Management* (Routledge 2018) 47-48

Civil litigation could also be used to hold a corrupt competitor to account by suing him in tort. This approach is commonly used in other jurisdictions. By successfully suing a corrupt competitor, an aggrieved business will not only obtain a remedy for the losses it has suffered but will simultaneously encourage greater compliance on the part of other businesses.

h. Implementing effective reporting mechanisms

Some jurisdictions have pioneered the use of alternative mechanisms for dealing with corruption issues, in addition to the criminal-law approach. This is to ensure the public and stakeholders could actively participate to prevent corruption in an effective and efficient way. On the level of individual companies, such reporting mechanisms are an essential element of effective compliance management system. But beyond this, reporting mechanisms can also be implemented in multi-stakeholder collective actions. One potential option is to operate a cross-company reporting mechanism, for instance for companies in a specific sector. Another option is an approach that brings together government and the private sector in a collaborative way. The High-Level Reporting Mechanism (HLRM) is an example of such an approach. Developed by the OECD and the Basel Institute on Governance, it is intended to trigger 'a process of rapid analysis and pragmatic response on the part of a government,' with the goal of providing the best solution for stakeholders in order to 'restore the status quo before a reported problem escalates further.'

Conclusion

The development of Indonesian infrastructure has been a priority of President Joko Widodo from the outset of his first administration. However, each stage of an infrastructure project is susceptible to corruption. During the planning and procurement stage, bribery frequently plays a role in influencing decision-makers to make particular funding allocations and when selecting the winners of tender competitions, while fraud is more common during the implementation stage. Finally, in the absence of a high level of integrity on the part of supervisors and auditors, corruption during the first two stages may be concealed or ignored during the evaluation stage. Collective action by businesses, with support from the Government, is the key to eradicating corruption in the infrastructure sector. Interplay between the Government and the private sector have strong correlation in developing integrity condition in business. Without support from the Government, collective action is difficult to achieve the purpose due to the decision still depend on policy of the government to eradicate demand of corruption and *vice versa*.

⁷⁷
OECD Team, 'High Level Reporting Mechanism (HLRM) for preventing bribery'
<<https://www.oecd.org/corruption/hlrm.htm>> accessed on 10 September 2022