

When power purchase deal isn't a done deal

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In November 2017, the Directorate General of Electricity of the Energy and Mineral Resources Ministry issued a letter concerning the review of the Power Purchase Agreement (PPA), addressed to the president director of state electricity company PLN.

The directorate general's letter has met with controversy from independent power producers (IPP), electricity business observers in Indonesia, the Office of the Coordinating Maritime Affairs Minister and the World Bank. They are concerned that renegotiating the signed PPA may create confusion among investors, and this would not be good for the investment climate in Indonesia, which is pursuing an electricity generation target of 35,000 megawatts (MW).

Responding to these concerns, PLN should consider several matters and the legal impact of this renegotiation plan.

The government has used every possible method to accelerate the development of electricity infrastructure and reach its

target of constructing power stations with a combined capacity of 35,000 MW, one of which was to assign PLN to implement such development in accordance with the presidential regulation on the acceleration of power infrastructure development.

This presidential regulation stipulates that PLN can cooperate with IPPs in electricity infrastructure development, especially in projects requiring large-scale funding, those with very high construction risks, projects in new locations that need to go through land acquisition processes, projects with an uncertain supply of fuel or an existing uncertainty in gas supply and/or its infrastructure, new and renewable energy power stations, expansion of existing IPP power plants, and/or if several IPPs are developing power plants in a particular area.

In addition to providing a guarantee to the IPP on the viability of PLN's business for its financial obligations under the PPA, the government has assigned PLN to make every effort to complete the construction of electricity infrastructure and has obliged PLN to solve obstacles and issues to accelerate the im-

plementation of the infrastructure development in accordance with its authority. It includes efforts to resolve the implementation of the contract.

When the signed PPA is being evaluated, PLN will not only impede the implementation of electricity infrastructure development, but also will not perform the duties and obligations mandated by the President. Additionally, it will give an impression of intervention by the Energy and Mineral Resources Ministry in a business to business (B2B) agreement between the IPP and PLN. It will affect the investment climate in Indonesia.

In accordance with the presidential regulation, one of the steps that PLN should take for the construction of a project that has not yet been implemented (due to the need for additional funding, for example) is to request that the Finance and Development Supervisory Agency calculate the amount of additional fees required and adjust it to the PPA, so that the obstacles and problems faced by IPPs can be resolved. This is better than re-evaluating the selling price of electricity, which will ultimately add burden to IPPs.

Furthermore, the directorate general's letter has the potential to have a negative impact on the public, because the infrastructure development will be delayed, meaning that the public will not be able to benefit from the supply of electricity any time soon. Pursuant to the president regulation, members of the public who feel they have been inconvenienced may make a report or complaint to the Energy and Mineral Resources Minister or the State-Owned Enterprises Minister, and the relevant ministers will be obliged to immediately resolve the issue within two months.

As such reports and complaints are anticipated, which will affect the image of PLN and related ministries, it is recommended that PLN does not implement the directorate general's letter.

The letter contradicts Article 15 of Ministerial Regulation No. 19 of 2017, whereby it is clearly stated that the purchase and price of electricity must refer to the regulations applicable prior to Ministerial regulation above coming into effect (Feb. 17, 2017), since it is not mentioned that the price of electricity can be evaluated after the signing of the PPA.

It also contradicts the Principles of Good Corporate Governance. Every provision including the price of electricity agreed by PLN as contained in the PPA should have been made through PLN's internal corporate evaluation, which should have considered various aspects before any decisions were made, including the applicable laws and regulations.

Evaluating their own decisions will raise questions about the company's internal processes that have been previously implemented.

If there is a discrepancy, the internal parties of PLN who participated in the decision-making process must be held responsible for the decisions implemented, including each shareholder of PLN, which includes the government as the main shareholder.

In the event of any detriment happens to the financial condition of the state, the Supreme Audit Agency (BPK) and the Corruption Eradication Commission (KPK) could participate in the inspection of PLN.

In the context of civil law, a PPA that has been signed is valid as a law for the party making

it. This is in accordance with the Indonesian Civil Code, which explains that the agreement cannot be withdrawn other than by agreement between the parties making it.

Therefore, what has been agreed upon in the PPA should act like a law for the authors, the parties in it must submit to and honor the agreement, and the price of electricity already agreed cannot be changed in the absence of an agreement between the parties.

If any matter is to be changed, the mechanism to be applied according to civil law in Indonesia must be in accordance with the agreement of the parties in their contract (i.e. through an addendum).

Despite the directorate general's advice to carry out an evaluation, PLN cannot unilaterally amend, among other things, the agreed purchase price of electricity in a PPA without the approval of the relevant IPP.

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