

Report on the Analysis of Central Information Commission Decision

Implementing Open Contracting in Public Procurement in Indonesia

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INTRODUCTION

Indonesia already has a Law on Public Information Disclosure Number 14 of 2008 which provides everyone the right to access information managed by the government. This law also requires the government to be transparent and to publish their information.

Unfortunately, after nearly 10 years of its implementation, the government agencies still have different views and opinions regarding public information disclosure, including in public procurement sector. Many public bodies assume that procurement information, especially contract documents, are exempt information and not for public to access. As a result, it is difficult for people to monitor all government projects because

there is no access to any procurement information. Therefore, it is not surprising that procurement sector is prone to corruption. Based on data compiled by Indonesia Corruption Watch (ICW), an average of 40 percent of corruption cases handled by law enforcement in 2010 to 2017 are related to government's procurement projects. Even though there are many factors that may cause corruption to occur, it is worsen by the lack of public participation in overseeing government's procurement project due to lack of information access.

According to the Law on Public Information Disclosure, information on government's agreements with third parties is public

information. Therefore, it is only natural that the government disclose procurement contract information to the citizens. Thus, the available information should be accessible and be used to provide input and monitor government's projects. In addition, disclosure of contract documents can also result in better quality procurement and encourage budget efficiency.

The idea of open contracting in public procurement is in line with the 2018-2020 Open Government of Indonesia action plan, particularly to increase transparency of the procurement process. The goal is to publish all procurement documents in the form of open data. In order to achieving it, there

are at least four indicators: 1) the availability of updated decree of the National Public Procurement Agency (NPPA) related to their internal List of Public Information for procurement documents; 2) the availability of recommendations for the implementation of the List of Public Information Decree on government goods and services by the NPPA; 3) the implementation of public consultations related to List of Public Information regulations on procurement in central government by the Central Information Commission; and 4) the Information Commission Regulations issuance related to the List of Public Information in public procurement as well as civil society capacity building in overseeing public procurement.

Penandatanganan Nota Kesepahaman

PENGUATAN AKUNTABILITAS PENGADAAN BARANG DAN JASA PEMERINTAH

Jumat, 28 Juni 2019

To maintain the continuity of civil society participation and realize the corruption-free public procurement, ICW and the NPPA extended their cooperation by the signing of a Memorandum of Understanding on 28 June 2019. The Head of the NPPA Roni Dwi Susanto (second from left) and Central Information Commission Commissioner M. Syahan (third from left) who were present also participated as speakers in the discussion session. Photo: Indonesia Corruption Watch.





PROBLEM STATEMENT

The status of the procurement contract document is still on discussion, whether it is open or exempt information. Law on Public Information Disclosure and Central Information Commission Regulation Number 1 of 2010 concerning Public Information Service Standards state that the government's agreements with third parties and data on procurement information are public material. Different views on the status of the procurement contract and other documents occur allegedly because there are no details and/or specifications mentioned on which procurement information public can access.

OBJECTIVE

This study aims to encourage the clarity of the procurement contract documents status and stimulate the implementation of open contracting in clearer rules.

Public Information Disclosure Law and Open Contracting in Public Procurement

Since 2008, Indonesia has had regulations regarding information disclosure as stated in Law Number 14 of 2008 concerning public information disclosure. This law is the foundation for the people to request information belonging to public bodies. On the other hand, this law also requires public bodies to publish information that is categorized into three types of information: (1) must be available at all times, (2) provided and published periodically, and (3) must be published immediately.

According to the law, procurement information is open for public and must be available at all times. This has been regulated in Article 11 of the law which clearly states that "Public Bodies must provide information to public at all times, including:

1. List of all public information under its authority, not including the exempted ones;
- 2. The decision result of public bodies and the consideration [of making a decision];**
3. All existing policies and supporting documents;
- 4. Project work plans including the estimates of public bodies annual spending;**
- 5. Public bodies agreements with third parties;**

6. Information and policies submitted by public officials in open meetings;
7. Public bodies' employee working procedures related to community service; and/or
8. Report on access to public information services as regulated in this law."

Of the eight points above, information on government's procurement contract documents is information related to the public bodies' decisions results and their considerations (point 2), project work plans including estimates of public body annual spending (point 4) and their agreements with third parties (point 5). This means that there is no reasons for the government not to publish or to refuse disclosing the information regarding public procurement contracts.

In a more detailed rule, the Regulation of the Information Commission Number 1 of 2010 concerning Public Information Service Standards article 11 paragraph 1 point (i), states that "every Public Body must periodically publish public information that **at least** consists of information about procurement process announcements in accordance to the relevant laws and regulations". This regulation makes it clear that all public procurement contract documents are open for public, even though this article does not provide detailed information that

needs to be published, only states **at least** the announcement of the procurement process.

It is undeniable that, since the implementation of Law on Public Information Disclosure, government has opened some information on procurement contracts. However, the government has not published a number of the other important information such as figures

on the specifications of goods and services procured by the government. This information can help the public to supervise the government projects.

If public procurement process is divided into three parts of planning, tender implementation, and post-tender, then public information can be categorized as follows:

Published procurement information¹

| Planning | Tender Implementation | Post-tendering |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • Source of funds • Budget ceiling • Line ministries and regional apparatuses • Work unit • Selection method • Evaluation method • Working period • Selection period • Procurement ID (including procurement general plan) | <ul style="list-style-type: none"> • Tender announcement • Source of funds • Budget ceiling • Owner estimate • Selection method • Evaluation method • Steps to submit bidding documents • Participants • Quotation price • Winner (name, address, tax identification number) • Procurement categories (goods, services, construction, other services). • Type of contract • Job location • Business qualifications (small/non-small/etc) • Requirement of qualifications (flexible) | <ul style="list-style-type: none"> • Date of the contract signing • Price after negotiation/on contract |

¹ Data on procurement general plan can be accessed here on <http://inaproc.id/rup> and for tender announcement can be accessed on <http://inaproc.id/>.

Based on the table above, at the planning phase, public can access information related to funds, budget ceilings, line ministries, local governments and their work units that procure goods and services, the methods used to select winners, work period, provider selection period, and procurement identity. They can see this information on <http://inaproc.id/>. At the implementation phase, people can find out more diverse information, from announcements to the bidding winner which can be accessed on the Electronic Procurement Service site of the line ministries and local government. However, after the contracting process took place, public can no longer access

any information except the time of the contract signing and the price after negotiations. If they want to know more about the government's procurement projects, they must ask the relevant work units themselves and follow the flow of requests for information. This process often takes a long time. Public must submit a dispute to the Panel of Central Information Commission Commissioner if the relevant parties are reluctant to provide the information requested. In reality, though the Commission has ordered the relevant agencies to open the procurement contract documents to the public, it is not uncommon for them to ignore and continue to close the information.

Several government institutions and regional governments have actually demonstrated their commitment to open the procurement contract information. At the national level, the Documentation and Information Management Officer has been quite advanced in implementing Public Information Disclosure Law according to the standard procurement information. In the list of public information, the NPPA has detailed the information that can be accessed by the public, namely the budget ceiling, owner estimate, terms of reference which consists of technical specifications and drawings if available, the draft of the contract, selection documents, qualification documents, and minutes of tendering results. These information is no longer confidential once the winner announced². At the regional

level, Bojonegoro Regency government has issued a Regent Regulation Number 1 of 2017 concerning the disclosure of contract documents within the Bojonegoro Regency Government. The article 32 of the regulation states that the local public procurement contract is an open document contains name of the activity, location, provider of goods and services, contract value, implementation period, as well as contact number of the commitment maker and the goods and services providers. However, although there are some rules that can be used as a basis for disclosing procurement contract information and examples of its application, both at national and regional levels, different views on the status of procurement contract information still occur to this day.

Procurement Documents are Public Information



Article 11 of Public Information Disclosure Law stated that public bodies should always provide three information related to public procurements.

What are they?

- Public bodies' decision and its considerations
- Project work plans including the estimates of public bodies annual spending
- Public bodies agreements with third parties



Source: Public Information Disclosure Law Number 14 of 2008

Analysis of the Central Information Commission Decisions

To learn more about the contract documents disclosure, the Indonesian Corruption Watch (ICW) examined the decisions of the Central Information Commission from 2010 to 2017 taken from its website on 24 September to 13 October 2018. ICW create three criteria for the decisions examined, including:

- The adjudication decisions made between 2010 and 2017. For the record, the decisions taken in 2018 were not yet available when ICW accessed the documents.
- The decisions of requests for information related to the procurement

process, especially the contract documents.

- ICW did not further analyze the submission of objections and decision on those objections.

ICW identifies that there were 259 adjudication decisions in 2010-2017, 44 of them were related to the requests for information on the procurement process and contract documents. Of the 44 decisions, most of them were made in 2013, 19 decisions; whilst other years only ranged from 1 to 5 decisions. Based on the information requesters, most came from the community groups (25

² Details on the list of public information of the NPPA is here: <https://ppid.lkpp.go.id/information/public/view/131>

decisions), then followed by individual requesters (11 decisions), and the rest were from other groups.

The reasons for individuals and community groups asking for procurement information and contract documents were varied. They believe that opening information can increase citizens participation in government programs. They also believe it is government's obligation and it shows government's transparency, as well as enables citizens to monitor government's procurement projects that are allegedly corrupt.

Of the 44 decisions, ICW then group them according to the type of decisions: ones that cannot be accepted, the interlocutory decisions, the rejected ones, the partially granted ones, and ones that are granted.

A decision cannot be accepted when the requester and/or his attorney does not present at the hearing twice without apparent reason so the application is declared void. This is explained in Article 30 of the Central Information Commission Regulation Number 1 of 2013 concerning Procedures for Settling Public Information Disputes.

The Central Information Commission makes an **interlocutory decision** if the request for information does not meet one of the requirements mentioned in the article 36 verse 1 of the Central Information Commission Regulation Number 1 of 2013 concerning Procedures for Settling Public Information Disputes such as:

1. The authority of the Information Commission;
2. The legal standing of the requestor

to submit a request for information dispute resolution;

3. The legal status of the defendant as public bodies in information disputes;
4. Deadline for submitting the information dispute resolution application.

When it comes to the interlocutory decision, the Panel of Information Commission can accept or reject the information request. If rejected, the Panel ignores the request for information and decides immediately to turn down the request since it does not meet the administrative requirements. Meanwhile, if accepted, the Panel will continue the request examining process and make a decision along with the final decision. Based on our analysis, the Panel made the 17 interlocutory decisions because they did not meet administrative requirements and immediately decided to reject the request.

Furthermore, the Panel would **reject** a decision when the request for information does not meet the requirements stated in the article 36 verse 1 above. Although it is not in line with the regulation, the Panel will not immediately issue an interlocutory decision, but continued to proceed the examination on requested information. Unfortunately, the Panel rejected the requests for procurement information and contract documents for administrative reasons. However, in the analysis of the decision, the Panel stated that the requested documents requested were public information that should have been disclosed.

The **partially granted decision** means that the Panel of Information

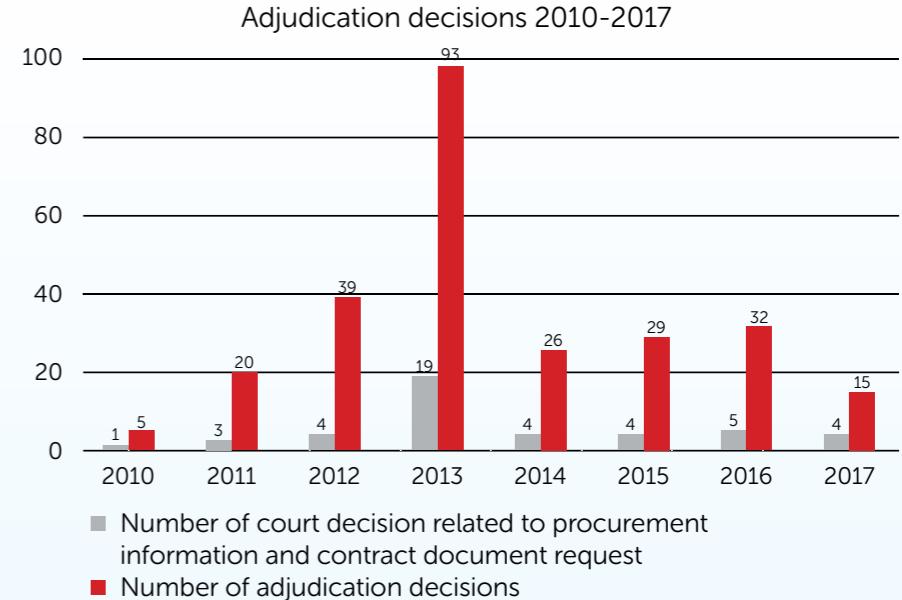


Procurement Information Requests, what has the Information Commission decided?

In 2010-2017, the Information Commission made 44 adjudication decisions regarding information requests related to public procurement process and contract documents.



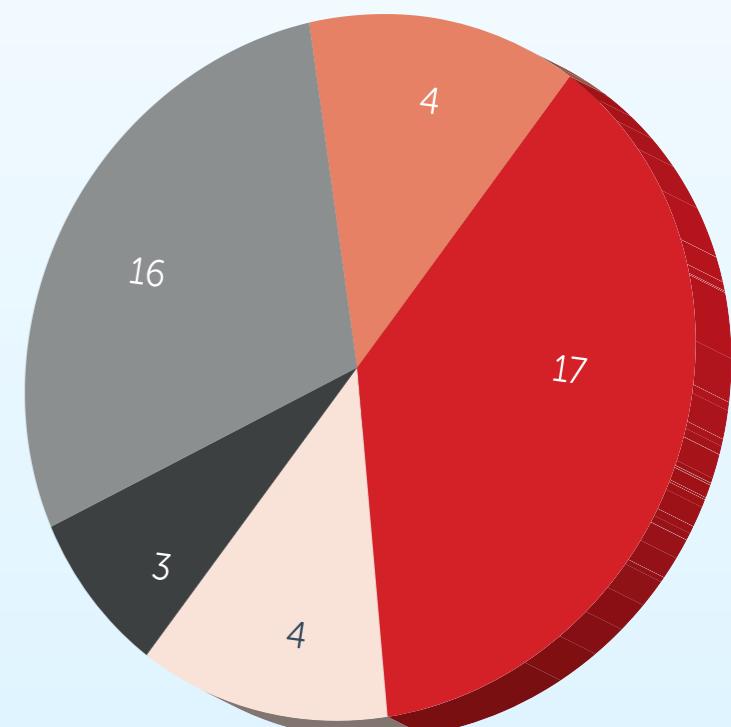
Number of adjudication decisions



How many procurement information and contract document requests were granted and rejected?

The Information Commission never stated that contract documents are closed to public. They rejected some of the requests due to administrative reasons

- Cannot be accepted
- Interlocutory Decision
- Rejected
- Partially granted
- Granted



Commission fulfilled only some parts of the information requested. In the adjudication dispute analyzed by ICW, the Panel did not provide any information related to the personal identity of the bidders. Yet, they decided that procurement information requested, including the contract documents, were open and must be given.

Lastly, the Panel will grant the information request if the requester manages to fulfil all administrative requirements as stated in the Public Information Disclosure Law.

Based on the analysis results of the 44 decisions made by the Central Information Commission, ICW concludes that although the Panel did not accept or reject, and made interlocutory decisions, it does not mean the procurement information and contract documents requested are not for the public to see and access. They made these decisions based solely on whether it had fulfilled administrative requirements, not because of the requested materials. ICW also finds that there were analysis of the decisions stating that procurement information and contract documents were public information that must be provided by every public body.

Of the 44 decisions, ICW then categorized the arguments often used by the public bodies to reject requests for procurement information and/or contract documents. ICW also outlined several rules to negate the rejection and require public bodies to open the requested documents.

1. According to the institution's internal regulations, the information requested is closed for public

This argument was used in a dispute between Muhith Afis as the information requester and the State Electricity Company in 2015. At that time. The information requester asked for an agreement document and information on the Asam-Asam power plant specification in South Kalimantan. The State Electricity Company refused to provide the information because it was exempt information as per the company internal regulations.

According to ICW, the determination of procurement information as an exempt information based on internal regulations of the institution may violate Public Information Disclosure Law, especially if there is no consequences test. The Central Information Commission in its decision explained that the exclusion of information must be based on a consequence test as mentioned in article 17 of the Law. Article 11 verse 1 point e of the Law also states that public bodies must provide information to everyone at any time, including agreements with third parties. Referring to the two provisions, the State Electricity Company should open their procurement information and data to the public.

2. The institution is not a public body, but a private one

The reason to refuse procurement information request by stating that the institution is not a public body but is a private one occurred in a dispute involving the Indonesia Football Association in 2014 with decision Number 199/VI/KIP-PS-A/2014. However, in its decision,

the Information Commission Panel decided that the Indonesia Football Association is not a private institution. According to the Panel of Commissioners, the football association of the country is an extension of the State to carry out its duties and functions in the football sector as the budget received by association came from the State. The Panel finally decided to grant all requests for information and ordered the Indonesia Football Association to provide the requested information which are the contract documents and the contract value between them and two national television stations, MNC and SCTV, for broadcasting rights of the U-19 National Team during the AFF U-19 Cup.

PT. Krakatau Tirta Industri also used the same argument in an information dispute in 2016, as stated in decision Number 040/VIII/KIP-PS-A/2016. The Panel said, even though the company was not a State-Owned Enterprise, some of their funding was indirectly sourced from the State Budget which was channeled to PT. Krakatua Steel, a State-Owned Enterprise which is the holding company of PT. Krakatau Tirta Industri. This statement is based on article 1 of Law Number 19 of 2003 concerning State-Owned Enterprises. The Panel also believed that the investment in shares of PT. Krakatau Steel became the basis for defining public institutions as stated in Article 1 no. 3 of the Law of Public Information Disclosure. Unfortunately, the Panel then decided to reject the information requests due to administrative incompleteness. But, the Panel did not order the company to close the information.

From two cases above, ICW concludes that the disclosure of contract documents also applies to public bodies such as State-Owned Enterprise and Indonesia Football Association.

3. Contract documents contain personal data

The Law on Public Information Disclosure does state that personal data such as date of birth, address, telephone number, and Identity Card number are exempted information. However, in the procurement process, names and expertise of the bidders become public information to prove their competence. Information regarding ID card number, date of birth, address, and personal telephone number remains exempted as stipulated in article 17 of the Law.

4. Disclosing bidding and contract documents would create unfair business competition and violate the intellectual property protection

This reason is used by the Ministry of Public Works to reject the requests for procurement contract document of Medan flood control and coast safeguard project, as stated in the Commission Information's decision Number 361/X/KIP/PS-M-A/2011. In the trial, an expert from the Business Competition Supervisory Commission, Arnold Sihombing, explained that:

- The statement saying that the publication of contract documents after tendering process completed might disrupt fair business competition is irrelevant,
- There is no provision in Law Number 5 of 1999 concerning



Most-used arguments to decline contract document request:

Considered as an exempt information based on institution internal regulation

Contain personal data

Create unfair business competition and might violate intellectual property rights

Not 100 percent state/local budget = not a public body

Other arguments:

- Information management and documentation officer is not available
- Document cannot be found due to changes of officer
- Citizens would not understand and might misinterpret the information in the document

the Prohibition of Monopolistic Practices and Unfair Business Competition which explicitly states that contract documents are confidential,

- Disclosing contract documents help identify potential tender conspiracy practices, and
- Though some documents fall into their competitors, including the method of project implementation; the company should not worry. If their competitors do not have experience in carrying out a similar project, they will be disqualified automatically since having sufficient experience is the main qualification they need to fulfill.

According to the Law Number 5 of 1999, unfair business competition is a rivalry among business actors in carrying out dishonest production and/or marketing activities of goods and/or services, or against law, or disrupting business competition. ICW believes that disclosing procurement documents does not necessarily lead to the problem above. If the government disclose procurement information, bidders can supervise each other and prevent unfair business competition. In addition to that, Article 22 of the Law also states that business actors are prohibited from conspiring with other parties to arrange and/or determine the winner

of the tender. Although it can only be accessed after the tender process completed, the contract documents disclosure allows bidders to monitor if there are conspiracy indications in the procurement process.

Referring to explanation above, ICW agrees with Arnold Sembiring that the arguments used to reject the request is irrelevant.

5. Other reasons

ICW finds other reasons that are often used to reject requests for procurement information. They are:

1. The public bodies do not know the Documentation and Information Management Officer in charge.
2. The public bodies do not have any Documentation and Information Management Officer.
3. The defendant does not hold the information requested.
4. The public bodies cannot find the documents or information requested due to changes of officer.
5. The public bodies are concerned that public would misunderstand and misinterpret the information. This particular reason cannot be used as an argument to exempt any information because journalists and civil society groups need the information to monitor government's projects.

An elementary school in Manado, North Sulawesi, Indonesia is being renovated so it can be used as an evacuation shelter when a disaster hits the area. However, government officials are suspected of corrupting the school construction budget. Photo: Indonesia Corruption Watch.



CONCLUSION

From the results of the analysis of the Information Commission's decision related to the disclosure of procurement contract documents, ICW concludes that:

1. Procurement information is open information as mandated by the Public Information Disclosure Law Number 14 of 2008 and the Information Commission Regulation Number 1 of 2013 concerning Public Information Service Standards. Although these two regulations do not specify what procurement information are open to the public, they can be the basis for disclosing the procurement information.
2. Of the 44 decisions related to the disclosure of procurement contract documents, the Central Information Commission never stated that those documents are exempt information.
3. Although the Central Information Commission gave the cases a judgement of dismissal, interlocutory decision, and reject the information request, their decisions is not related to procurement documents as the main subject of the information request. The Central Information Commission made the decision based on whether or not the requester fulfilled the administrative requirements.
4. Public bodies' understanding regarding procurement information disclosure is varied. Some assume that the information is open for public while some others consider the opposite. However, eventually, Public Information Disclosure Law and other related regulations regulations can be used to fight back the rejection of information.

RECOMMENDATIONS

Based on the results mentioned above, ICW recommends two following points:

1. Central Information Commission must include a provision regarding the disclosure of procurement information into the Public Information Service Standards. This is important to avoid different interpretations of the disclosure of procurement information and contract document in line ministries and local governments. Line ministries and local governments can refer to the NPPA's List of Public
- and the Open Contracting Data Standard (OCDS) in determining what procurement information that need to be disclosed.
2. Line ministries and provincial governments must include more detailed procurement information into their Public Information List.



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