

Impact of Changes in Mining Regulations on the Concept of Public-Private Partnership in Indonesia

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Abstract. Investment regulation in Indonesia, especially in mining, often changes, such as the last time it happened with the enactment of Law No. 3 of 2020 and changes in investment provisions with the existence of Law No. 11 of 2020 on Job Creation. Changes in investment regulations, especially in the mining sector, will impact the implementation of mining business activities. This article focuses on identifying public-private partnership issues between the government and investors due to regulatory changes. In the end, the effect of regulatory changes on the concept of public-private partnership in the perspective of public contracts no longer applies to mineral and coal mining because the implementation of investments in mining, including contract extension, has been converted into the concept of business licenses. All licensing processes, including mining, must go through OSS-RBA integrated with the Ministry of Energy and Mineral Resources.

Keywords: Investment; Mining Regulation; Public-Private Partnership; Public Contract; Business Licences

1. Introduction

Mining is one of the investment sectors that contributes significantly to the income of the country in general and the region in particular.[1] The state carries out the management of mining business activities in Indonesia with a business license scheme and a contractual scheme depending on the type of mining. The implementation is not easy because many rules are not yet in sync and overlap in mining.

Changes in regulations on mining have an impact on the process of implementing mining business activities. With the absence of regulatory provisions of the implementation of the Mining Law 2020, there is no legal certainty related to implementing the Act. The conditions most visible as a result of changes in mining provisions are related to licensing. The permit, which previously also involved local governments, has now switched entirely to the central government. Not being finished with the laws that still need improvement will affect the public-private partnership scheme implemented in Indonesia. There is still a contractual system in place in public mining and allows continued with the contractual approach. It is necessary to understand the differences and similarities of the implementation of public contracts in public mining and other types of mining such as oil and gas, whose upstream business activities are consistent using the contract system.[2]

Another change is government cooperation with contractors, who once could still extend Coal Contract of Work/ Perjanjian Karya Pengusahaan Pertambangan Batubara (To be further referred to as PKP2B) or the other types of contracts. Before, an investor can extend that contract as a public-private partnership with some conditions even though mining business activities are implemented with a business license.

The implementation of mining business activities is no longer extended using contract terms, but all in business licenses. Not yet completed with changes specifically in mining, the following changes also to the applicable licensing system. In particular, the difference is related to licensing procedures resulting from the enactment of the Law on copyright work. Investment in Indonesia can be made based on consideration of the scale of risk, including the field of mining business. This change then again impacts the licensing process in Indonesia, namely with an electronic system that was previously with Online Single Submission (from now on referred to as OSS) into an online single submission risk-based approach (from now on referred to as OSS RBA).

This research focuses on the implementation of contractual in mining, especially from the perspective of investment law, to identify the problem of the rules, their performance, to the solution in implementing the management of mining business activities in Indonesia.

2. Method

The research method used is normative research type because legal research is about analyzing how norms can reach and organize society by staying focused on finding legal materials from where they come. What will be real will be returned to what should be based on the Rule of Law and the philosophy of implementation based on the principle of investment law. The search for legal materials is structured, where interviews and observations are directed to support legal materials and see what is confirmed by preparing the research instrument in advance. The collection of primary legal materials accompanied by secondary legal materials in the form of field data to be returned analyzed based on the legal perspective has been carried out under the applicable provisions or not.

3. Result And Discussion

Mining business activities have often changed in terms of implementation rules. Now the problem is the change in the implementation system of business activities that previously also used this type of contract. All without exception must follow the provisions to conduct mining business activities with a business license system. In addition, the regulatory changes also affect the business licensing process. Therefore, analysis is carried out related to the use of mining investment schemes that no longer use the contract system and licensing procedures.

3.1 Investment in Mining Sector (Business License vs Contractual)

Law no. 25 of 2007 concerning investment regulates domestic and foreign investors investments in Indonesia. There are various investment sectors, and one of them is the mining sector. The mining business activity is not just one, but general mining, oil and gas mining, and geothermal. But in this case, what the researchers will point out is related to public mining or minerals and coal and oil and gas mining. The reason is that until now, although the provisions of mineral and coal mining have changed several times until the last is Law No. 3 of 2020 on Amendments to Law No. 4 of 2009 on Mineral and Coal Mining which confirms that general mining activities are carried out with a business license. Therefore, there will be no longer a contract system in implementing mining business activities as cooperation between the government and investors in the future. Still, everything will be consistently replaced with a business license. Oil and gas, because this type of mining is still consistent and still uses the contract system with gross split production sharing contract[3], oil and gas mining has two business activities upstream and downstream with different management schemes. Upstream is compatible with the contract system, while downstream using business licenses. It should be understood that the oil and gas cooperation contract system or known explicitly as production sharing contract, is in the realm of upstream business activities in the scope of exploration and exploitation. At the same time, the management of downstream oil and gas business activities is not implemented with a contract system but uses a business license system. Remember that contracts and permits are in two different domains because pure contracts are in the private domain while keys are in the administrative realm or specifically categorized under public Law.

The use of contract schemes that still apply to upstream oil and gas business activities impacts the existence of public-private partnerships that occur between the government and investors so that it is under private Law and Public Law. For mineral and coal mining is different from the concept of public-private partnership because it has purely used the realm of public Law. A business license is undoubtedly separate from a contract because business licenses are in the domain of public Law. Therefore, now the concept of public-private partnership in the perspective of public contracts no longer exists in mineral and coal mining due to changes in mining law regulations in Indonesia.

3.2 Impact of Changes in Investment Regulations in Mining on The Concept of Public-Private Partnership

Contracts in the private realm and the public domain involving elements of government in it can also be referred to as public-private partnerships. In public-private partnership schemes, government and private sectors can share responsibilities and risks[4]. The government will plan the construction of public infrastructure. Meanwhile, the role of private parties is to provide and manage public infrastructure for a certain period that has been agreed upon. That is, connected with this paper. There is a cooperative relationship between the government and investors in conducting investment activities in Indonesia using a contractual system. Tiefer & Shock stated that government contracting law presents a unique opportunity, situated at the complex & ambiguous boundary zone between public law[5]. That means a government contract results in the parties submission to private and public Law.

Previously, in Indonesia, mining business activities, oil and gas and minerals and coal were implemented with a contractual scheme. Along with its development, there is a change in regulation until the surviving use of the contract system is oil and gas with a production sharing contract system.[6] In contrast, minerals and coal have used a business license system. However, some mining investors conduct mining business activities in Indonesia using a contract system, for example, PT Adaro Indonesia, which still uses the PKP2B scheme, not a business license.[7]

Contracts in the mining sector are influenced by the private and public domains because there is a destructive element of the provisions of the Law that the parties must implement. This causes the contract that should be in the private realm to be no longer pure. Contracts in the private and public domains also recognize the term public-private partnership for a concept of cooperation that cooperation of some durability between public and private actors in which they jointly develop products and services and share risk, cost, and resources that are connected with these products[8]. This term provides an understanding of sharing, so dividing everything related to what might happen to the contract includes risks under the agreement.

Mining regulations change the licensing scheme, not the concept of a public-private partnership, but still affect the implementation. That's because automatically if using a business license scheme, the contract scheme, in this case, public contracts, will also not be used. Public-Private Partnership is the concept of cooperation between the government and investors or private parties to meet the community's needs[9]. Public, private partnership on mining investment in the perspective of public contracts is a form of agreement between the government in the public sector and investors in the private sector consisting of several provisions that have been determined. In this case, it is not to harm the state because of the negotiation with natural resources.

The change of contracts to business licenses affects the legal relationship between the government and contractors in its development. With the enactment of the business license concept[10], there is no longer a public, private partnership concept from the perspective of public contracts. Changing contracts to business licenses does not mean eliminating the contractual concept in mining business activities, but only removing the idea of the mining investment process that can now only be done with a business license, no longer with a contract.

3.3 Impact of changes in laws and regulations on licensing procedures in the mining sector

Mineral and coal mining business activities in Indonesia have an essential role in providing national economic growth and sustainable regional development[11]. However, in reality, the implementation of mining investment is still constrained by several problems, such as authority issues between the Central Government and Local Government. Several mining investment implementation problems often arise because of central and regional bureaucratic matters ranging from licensing issues, protected communities, mining data and information, supervision, and sanctions. Because of those matters, implementing mineral and coal mining is less effective and has not provided optimal added value to overcome these problems. The government takes the rarity by changing the mining provisions previously regulated in Law No. 4 of 2009 on Mineral and Coal Mining with Law No. 3 of 2020 on Amendments to Law No. 4 of 2009 on Mineral and Coal Mining.

Meanwhile, based on the provisions of Article 35 paragraph (1), it is regulated that mining businesses are carried out based on the Attempted Licensing of the Central Government. In addition, it is further stipulated in Article 35 paragraph (4) that the central government can delegate the authority to grant Attempted Licensing as referred to in paragraph (2) to the Provincial Government following the provisions of the laws and regulations. Thus, with the enactment of the new requirements in the Mineral and Coal Law, there are also changes related to mining business licenses. Now, the procedure of determining permits becomes the central or provincial government's authority and is no longer on the local authority.

The problem then is related to the authority of the local government, so it is essential to be further regulated regarding the involvement of the Provincial Region in the management of minerals and coal. The transfer of authority has normatively revoked the relevant provisions in Law No. 23 of 2014 on Local Government. However, in principle, Law No. 3 of 2020 does not entirely ignore the role of the regional/provincial government. Like the statement before, the Central Government can delegate its authority according to the regulations to the local government.

The provincial government in Law No. 3 of 2020 normatively is the local government as an autonomous region. But it needs to be clarified from the election of delegate terminology that the government intended to avoid differences in perception. However, delegation can be interpreted as a delegation of authority from the Agency. Higher Government Officials to the Lower Government Agency and Officials with responsibilities and responsibilities shifted entirely to the recipient of the delegation.[12] The delegation can

only be given to the Provincial Government through the mechanism of assistance duties. Another mechanism is the Governor as a Representative of the Central Government through the Deconcentration mechanism. It's just that the understanding of the duties of assistance and deconcentration stipulated in Law No. 23 of 2014 on Local Government is not 'symmetrical' with the knowledge of delegates as specified in the Legal Basis of Law No. 30 of 2014 on Government Administration. In the task of assistance and deconcentration, the defendant's responsibility remains on the giver's part, not the recipient. This understanding still provides a debate opportunity because the provincial government as the recipient of the delegation is not a 'subordinate' of the Central Government.

Therefore, regarding the implementation of delegation norms to provincial governments under Law No. 3 of 2020, it is necessary to discuss further whether delegation is meant to be the authority submission to the local region as an autonomous region through a decentralization mechanism. It should also be considered that the meaning is certainly taking into account the provisions of Article 18 paragraph (2) of the 1945 Constitution, that the autonomous region in organizing its government regulates and manages its governmental affairs according to the principle of autonomy and assistance duties. The arrangement and procedures for the implementation of local government are held in Law. In the end, the effect of regulatory changes impacts investors and local governments, so it needs consistency of socialization and assistance from the central government related to new regulations to maintain the stability of investment activities in the mining sector.

In addition to implementing mining business activities, that is turned into business licenses and licensing procedures focused on the central government. Related to licensing mechanisms have also changed. All licensing processes, including mining, must go through OSS-RBA integrated with the Ministry of Energy and Mineral Resources. OSS RBA implements Peraturan Pemerintah Nomor 5 Peraturan Pemerintah Nomor 5 Tahun 2021 tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko (after this referred to as PP OSS-RBA), which is a derivative rule of Law No. 11 of 2020 on Job Creation (after this referred to as the Job Creation).

The implementation of this system is to make it easier for investors to invest in Indonesia by cutting bureaucracy so that the performance of licensing is more accessible by using electronic systems. Risk-based OSS also applies to mining business activities, so investors must also use it to obtain a business license. The actual risk-based OSS can only come into use in August 2021[13]. Risk-based OSS still does not provide a significant picture of implementing the existing licensing process in the mining field. Still, its existence needs to get attention so that it can be adequately understood. The use of risk-based OSS systems will be beneficial for protecting natural resources that will be managed in the mining sector. However, the existence of the Work Copyright Law, the presence of Risk-Based OSS, to the reality of mining laws that have to negate regional authority and have switched to a centre related to licensing, of course, must be in sync.

Based on the provisions on the enactment of risk-based OSS in the mining sector, the Ministry of Energy and Mineral Resources must bestow several mineral and coal mining permit processes on risk-based OSS systems. The types of permits transferred from the Ministry of Energy and Mineral Resources to risk-based OSS include Mining Business License (IUP) and its extension, Special Mining Business License (IUPK) and its extension, Special Mining Business License (IUPK) as a Continuation of Contract/ Agreement Operations and its extension, as well as Transportation and Sales Permit and extension. In addition, it will also be through Risk-Based OSS is a Mining Business License for Sales, People's Mining Business License (IPR) and its extension, Mining Services Business License and its extension. The Rock Mining License (SIPB) and its attachment will also go through risk-based OSS when viewed by its nature. However, it cannot be implemented with consideration. They were still waiting for RPP related to the implementation regulation of Law No. 3 of 2020 on Changes to Law No. 4 of 2009 on Mineral and Coal Mining. In the end, companies that are taking care of licensing efforts in mining can enter their applications through risk-based OSS and no longer just through the Ministry of Energy and Mineral Resources. But the regulation and procedure must match between OSS-RBA and the Ministry of Energy and Mineral Resources.

4. Conclusion

Provisions on the scheme of implementing investment in the mining sector have undergone several changes until the contract scheme or agreement changed into a business license with Law No. 4 of 2009 on Mineral and Coal Mining. However, some mining companies running can still extend the contract and not switch to a business license by meeting the requirements set by the government. Mineral and coal mining regulations changed with the enactment of Law No. 3 of 2020 that all mining activities now use the business license system, no longer with contracts/agreements. The extension will change the scheme into a special mining business license. After completing the Contract of Works or Coal Mining Employment Agreement,

a special mining business license is granted to continue the contract/agreement operation. Therefore, the concept of government cooperation with contractors has changed. In this case, zero is different from the idea of public contracts in public-private partnership schemes. In the end, in mineral and coal mining, upstream and downstream business activities using the concept of business license, meaning there has been a more significant change than before that can still consider the existence of investment with contracts/agreements. In addition, the Law also stipulates that mining businesses are carried out based on the licensing of firms from the central government. That is, this rule confirms that the central government has withdrawn mining permits from the local government. So that, the effect of regulatory changes impacts not only investors but also local governments. It needs consistency of socialization and assistance from the central government related to new regulations to maintain the stability of investment activities in the mining sector. In the end, in addition to the implementation of mining business activities that turned into business licenses and licensing procedures focused on the central government. Related to licensing mechanisms have also changed. All licensing processes, including mining, must go through OSS-RBA integrated with the Ministry of Energy and Mineral Resources.

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