

Legal Liability of Regional Apparatus Officials due to Irregularities in Goods and Services Procurement

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Abstract

Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods/Services states that the method of selecting a Goods Provider/Construction Work or Other Services consists of: a. E-purchasing; b. Direct Procurement; c. Direct appointment; d. Fast Tender; and e. Tender. E-purchasing as intended, according to this presidential regulation, is carried out for Other Goods/Construction/Service Works that have been listed in the electronic catalog. Whereas Direct Procurement as intended is carried out for Other Construction/Service Goods/Works which have a maximum value of IDR. 200,000,000. Direct Appointment as intended for other Goods/Construction/Service Works under certain circumstances. The Fast Tender as intended is carried out regarding a. Specifications and volume of work can be determined in detail; and b. The business actor has been qualified in the Provider Performance Information System, and the Tender as referred to is implemented if he cannot use the Provider selection method as referred to in certain circumstances. Procurement of goods and services must be applied to general principles, both principles that have long been recognized in the management of state finance, such as the annual principle, the principle of universality, the principle of unity, and the principle of speciality and new principles as a reflection of the application of good rules in managing state finances.

Keywords: Legal liability, officials, irregularities, goods and services.

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INTRODUCTION

The government makes much effort to improve the quality of human resources, one of which is by procuring government goods and services by government agencies [1]. Indonesia is a developing country, which is currently actively developing all fields. Development is an effort to create prosperity and prosperity for the people [2]. Therefore, the results of development must be enjoyed by all people as an increase in science and technology has encouraged changes and progress in all fields of activity, including the procurement of goods and services. In carrying out national life, the government is required to promote social justice for all Indonesians. To realize this, the government is obliged to provide people's needs in various forms in the form of goods, services, and infrastructure development [3]. Also, the government in the implementation also requires goods and services. Therefore it is necessary to procure goods and services. In the government's efforts to regulate the procurement policies for goods and services, the government issued regulations.

Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services which has been amended several times, the latest by Presidential Regulation Number 4 of 2015 there are still shortcomings and have not accommodated the development of Government needs regarding regulation of proper Procurement of Goods/Services, the government considers the need to stipulate Presidential Regulation regarding Procurement of Goods for Government Services.

Based on these considerations, on March 16, 2018, President Joko Widodo has signed Presidential Regulation Number 16 of 2018 concerning Procurement of Goods/ Services. The method of selecting a Goods Provider/ Construction Work or Other Services consists of a. E-purchasing; b. Direct Procurement; c. Direct appointment; d. Fast Tender; and e. Tender. E-purchasing as intended, according to this presidential regulation, is carried out for Other Goods/Construction/Service Works that have been listed in the electronic catalog. While the Direct Procurement referred to is carried out for Other Construction/Service Goods/Works which are worth a

maximum of IDR. 200,000,000.00. Direct Appointment as intended for other Goods/Construction/Service Work in certain circumstances.

The fast tenders as intended are carried out regarding a. Specifications and volume of work can be determined in detail; and b. The business actor has been qualified in the Provider Performance Information System, and the Tender as referred to is implemented if he cannot use the Provider selection method as referred to in certain circumstances [4].

"The method of evaluating the supply of goods suppliers/other construction/service works is carried out by a. Value System; b. Cost Assessment During Economic Age; or c. Lowest Price "(Article 39)

The method for selecting Consultant Service Providers, according to this presidential regulation, consists of a. Selection; b. Direct Procurement; and c. Direct appointment. Selection as intended, according to this presidential regulation, is carried out for Consultancy Services with a value of at least IDR. 100,000,000 whereas Direct Procurement, as intended, is carried out for Consultancy Services that are valued at up to a maximum of IDR. 100,000,000 and Direct Appointment as intended for Consultancy Services in certain circumstances.

"In the event that Direct Appointment is made for the Consultant Service Provider as referred to, the maximum limit shall be given twice" (Article 41 paragraph 6). The method of evaluating the offer of Consultancy Service Providers, according to this presidential regulation, is carried out by a. Quality and Cost; b. Quality; c. Budget ceiling; d. Lowest Cost.

According to this presidential regulation, the implementation of Swakelola type I is carried out with the following provisions: a. PA (Anggara Users)/KPA (Budget User Proxies can use employees of Ministries/Institutions/Other Regional Devices and experts; b. The use of experts may not exceed 50% (fifty percent) of the total Implementation Team; and c. If a Goods/Services Procurement is needed through a Provider, it is carried out by the provisions of this presidential regulation for the implementation of type II Swakelola carried out with the provisions: a. PA/KPA carries out a cooperation agreement with other Ministries/Institutions/Regional Devices implementing Swakelola; and b. PPK signs a Contract with the Chairperson of the Self Management Team by the cooperation agreement as.

The implementation of type III Swakelola, according to this presidential regulation, is carried out based on the PPK Contract (Commitment Making Officer) with the leaders of the CSOs (Community Organization). Moreover, for the implementation of type IV Swakelola based on the KDP Contract with the

Community Group leaders. Self-management payments are carried out by the provisions of the legislation, "read Article 48 of this Presidential Regulation.

According to this presidential regulation, the implementation of elections through Tender/Selection includes a. Qualification Implementation; b. Announcement and Invitation; c. Registration and Collection of Bidding Documents; d. Briefing; e. Submission of Bid Documents; f. Bid Document Evaluation; g. Determination and Announcement of Winners; and h. Sanggah In addition to the provisions referred to in the implementation of the construction work selection, the Appeals Disclaimer stage is added, "read Article 50 paragraph (2) of this Presidential Regulation. The implementation of the election referred to, according to the presidential regulation in, for the Construction Services Selection clarification and negotiation is carried out on technical offers and fees after the objection period has been completed. The election through a Fast Tender is carried out provided that a. Participants have been qualified in the Provider Performance Information System; b. Participants only enter price quotes; c. Evaluation of price quotes is done through the application; and D. determination of winners based on the lowest bid.

For direct procurement: a. Purchase/ payment directly to the Provider for the Procurement of Other Goods/Services using proof of purchase or receipt; or b. Bidding requests accompanied by clarification and technical negotiations and prices to Business Actors for direct procurement [5]. "Elections can be made after the RUP is announced," read Article 50 paragraph (9) of this presidential regulation. For goods/services whose contract must be signed at the beginning of the year, according to this presidential regulation, the election can be carried out after a. determination of the Budget ceiling for K/L; or b. Approval of Regional Equipment RKA by statutory provisions. The presidential regulation also emphasizes that the provisions in this Presidential Regulation guide the procurement of goods/services carried out abroad. If the provisions referred to cannot be implemented, the implementation of the procurement of goods/services conforms to the provisions of the procurement of goods/services in the local country. "This Presidential Regulation comes into force on the date of promulgation," read Article 94 of the Presidential Regulation Number 16 of 2018, which was promulgated by the Minister of Law and Human Rights Yasonna H. Laoly on March 22, 2018.

The implementation of good governance is the ideals and hopes of the Indonesian people. One form of implementing e-government to achieve good governance is the procurement of government goods and services electronically. It is a manifestation of changes made because of the many problems that occur in the procurement of government goods and services conventionally. The many modes of corruption that

occur in the conventional procurement of goods and services show that the government still has a system of transparency and accountability, as well as an ineffective prevention system to minimize the occurrence of corruption [6]. Therefore, in 2018 the implementation of government procurement of goods and services is required to be carried out electronically, or e-procurement, such as the Provincial, Regency/City Governments are required to procure goods and services electronically (e-procurement).

Procurement of goods and services starts from the direct purchase/sale of goods in the market (cash), then develops towards the payment of time-period purchases, by making accountability documents (buyers and sellers), and finally through the auction process. In the process, the procurement of goods and services involves several related parties so that there is a need for ethics, norms, and principles for the procurement of goods and services to be able to regulate or become the basis for the determination of goods and services procurement policies. Procurement of goods and services is essentially the effort of the user to obtain or realize the goods and services he wants by using certain methods and processes in order to reach agreement on price, time and other agreements. For the essence or essence of the procurement of goods and services to be carried out as well as possible, the two parties, such as the user and provider must always refer to the philosophy of procurement of goods and services, subject to the ethics and norms of procurement of goods and services, following the principles, methods and processes for the procurement of standard goods and services [6].

Procurement that uses providers of goods and services both as business entities and individuals is done through the selection of providers of goods and services. Procurement of government goods and services by direct procurement is carried out by procurement officials by buying goods or paying services directly to providers of goods and services, without going through an auction or selection process. Direct procurement is essentially a buying and selling where providers who have goods and services to sell and procurement officials who need goods and services have an agreement to carry out buying and selling transactions of goods and services at a certain price [7-9].

In realizing legal certainty which is one of the objectives of the law on law enforcement against irregularities that occur in the procurement of government goods and services that have the potential to harm state finances which lead to legal uncertainty in the application of criminal sanctions or administrative sanctions imposed. To create a public order in a shared life needs to be created an orderly atmosphere. So the need for order is a basic requirement for the existence of organized human society [10]. The rapid

development, of course, must be balanced with the role of the government in providing various forms of goods, services and infrastructure development.

In practice, these parties are often seen as responsible parties in the event of a deviation from the process of procurement of goods and services. The parties were directly prosecuted, the parties which turned out to be proven to violate the provisions and procedures for the procurement of goods and services, so: 1) subject to administrative sanctions; 2) being sued for compensation/sued civilly, and 3) reported for criminal proceedings. The scope of the legal territory for the procurement of government goods and services is the provisions of applicable laws and regulations and directly regulates the implementation of the procurement of goods and services. In the procurement of goods and services there are three legal fields that regulate them, such as: 1) State Administrative Law or State Administrative Law, regulating the legal relationship between users and users of the preparation process with the issuance of letters of stipulation of goods and services providers; 2) Civil Law, regulates the relationship between the provider and the user since the signing of the contract until the expiration of the contract.

In practice, there are many deviations from the provisions for the procurement of goods and services. It indicates the number of corruption cases related to the procurement of government goods and services. Deviations that occur in Government Goods/Services Provision are in each of the Procurement of Goods/Services processes, such as in the budget planning process, planning of Government Procurement of Goods/Services, implementation of Government Goods/Services Procurement, the handover of payments and in the process of supervision and accountability. Deviations in Government Goods/Services Procurement from year to year have increased in each type; this can be seen from the attached table.

METHODOLOGY

This type of research is normative juridical research with library legal research methods. The approach used in this study is used to build legal arguments in order to solve problems that concern the research, the approach used is the statute approach carried out by examining laws and regulations relating to legal issues that were studied. Moreover, the legal approach is carried out to see how the PPK is responsible for the procurement of government goods/services in the event of a State loss. In collecting legal materials, researchers use how to collect, study and review legal materials such as legislation, documents in the form of certificates and court decisions that have relevance to the problem under study.

RESULT AND DISCUSSION

Legal Aspects of Procurement of Government Goods and Services in Overcoming Deviations in the Procurement of Goods and Services

The legal system is formed by the interaction between the seven elements above, so that if one element does not meet the requirements, then the entire legal system will not work as it should, or if one element changes, then the whole system or other elements will or must change. In other words, changes to the law alone will not bring improvement, if not accompanied by direct changes in the fields of justice, legal recruitment and education, bureaucratic reorganization, alignment of work processes and mechanisms, and modernization of facilities and infrastructure as well as the development of legal culture and behavior people who recognize law as something that is indispensable for society and life in a society that is peaceful, orderly and prosperous.

Special national legislation regulating the implementation of procurement of goods and services that are now in effect is Presidential Regulation No. 16 of 2018. In the context of legal development, government goods/services procurement activities viewed from the perspective of Indonesian law, have significant meaning with the following arguments: First, the procurement of government goods and services has a strategic meaning in protection and preference for domestic business actors. Second, the procurement of government goods and services is a significant sector in the effort of economic growth. Third, the system of procurement of government goods and services that can apply the principles of good governance will encourage efficiency and effectiveness of public expenditure while at the same time conditioning the behavior of three pillars, such as the government, the private sector and the community in the implementation of good governance. Fourth, that the scope of procurement of government goods and services covers various sectors in various aspects of national development.

According to Luhmann, modern law facilitates business, economic and other activities through the creation of a measurable structure of expectations so that the law is able to play a "conditional programming" which can be said normatively that if certain conditions are met, certain consequences will follow and create a conditional programming that must meet the requirements, as follows:

- The law must be clearly known and reasonable so that the actors will know the consequences, besides that the law must be clear enough to inform the message on the intelligence people, either by themselves or with the help of a lawyer about what is required by law.
- There must be free and fair access to information so as to create transparency, and third, decision makers in this case the government must obey the rules and enforce them.

The regulation of procurement of goods and government services requires clear legal arrangements that can meet market developments so that the principle of legal certainty is obtained by the parties involved in the procurement process. Procurement of government goods and services based on both national law and international law must be based on fair competition, transparency, efficiency, and non-discrimination. In this regard, the law is something that must be and applies to society. A community that is not bound by law will result in irregularities. Because, as it is known that humans are social beings which means humans are creatures who always want to gather, associate and interact with each other in order to meet their needs. The legal fields related to the procurement of government goods and services are:

State Administrative Law

In finding a good understanding of state administrative law, it must first be established that state administrative law is part of public law, such as the law governing government actions and regulating relations between government and citizens or relations between government organs. HAN contains all the rules relating to the way in which government organs carry out their duties. So state administrative law contains rules of the game relating to the functions of government organs. About the preceding, state administrative law includes:

- Actions of the government (central and regional) in the public sector.
- Authority of the government (in carrying out actions in the public sector).
- Legal consequences born of actions or use of government authority.
- Law enforcement and application of sanctions in the field of government.

The decision of the goods user is the decision of the state/regional officials, if there is a state administrative dispute, the aggrieved party (provider of goods and services or society) as a result of the TUN Decision if no resolution is found, can object to the agency that issued the decision. Legal subjects, both individuals and subjects of civil law, can file a written cancellation claim through the Administrative Court with or without a claim for compensation or rehabilitation, as stipulated in Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning Judiciary State Administration.

Civil Law

Civil law can be defined as a law that regulates the relationship between legal subjects and other legal subjects in the field of civilization. Civilization is intended to be legitimate traffic that relates between individuals and other individuals, such as legal relations with families, agreements between legal subjects, including legal relations in the field of inheritance. Civil law regulates the legal relationship between the User and the Provider of Goods and services from the

signing of the contract until the end/completion of the contract by the contents of the contract. The legal relationship between the user and provider occurs in the process of signing the contract for the procurement of goods and services until the completion of the contract is a relationship between civil law, especially contractual/agreement relations.

In the process of procurement of goods and services, based on delegation of authority represented by procurement officials, such as:

- PA/KPA
- Commitment Making Officials (PPK)
- Procurement Service Unit Working Group/Procurement Officer (PPK/PP), and Work Receiving Committee/ Officials (PPPHP).

While Providers of goods and services can be individuals or legal entities (private). Procurement officials in carrying out legal relations in the field of agreements act individually/privately. That is, if there is a state loss then personally compensate the state, as determined in Article 18 paragraph 3 of Law No. 1 of 2004 concerning Treasury, states: "Officials who sign and/or ratify documents relating to proof documents that form the basis of expenditure at the expense of the APBN/APBD are responsible for material truths and consequences arising from the use of the said evidence letter". Based on Article 55 paragraph (1) Presidential Regulation No. 54 of 2010, that proof of agreement consists of (a) proof of purchase, (b) receipts, (c) Work Order (SPK), and (d) agreement letter.

In the Civil Code (KUH Perdata), book III concerning Engagement, it is stated that the engagement can be born due to law or agreement. The engagement that was born because of the agreement of Article 1338 of the Civil Code states that "All agreements made must fulfill the conditions specified by the law have legal force as a law for those who make it." That is, all agreements binding those who are involved for those who make it, have the rights that the agreement was given to him and are obliged to do the things specified in the agreement. Agreement in the procurement of goods and services is an agreement with which one party carries out a job for another party by accepting a certain price. The agreement is the basis for carrying out activities.

Criminal law regulates the legal relationship between providers and users from the preparation stage until the completion of the contract for the procurement of goods and services (handover). Starting from the preparatory stage until the handover of work/goods there has been a legal relationship, such as the relationship of criminal law. Criminal law (the criminal law), commonly referred to as criminal law, because the problem it regulates is regarding actions against crime and matters relating to crime in society. In connection with the procurement of goods and services, the scope

of actions carried out by both users of goods and services and providers are all acts or actions that are against the law. That is that actions in the procurement of goods and services are not by the laws and regulations starting from the preparatory stage to completion/ expiration of the contract. Because criminal law is a public law, there are direct state obligations to protect all rights and interests of users and providers of goods and services.

A review of criminal law in the process of procurement of goods and services is that criminal law is applied if there are criminal violations committed by parties, both users and providers of goods and services in the process of procurement of goods and services. It is by the criminal law principle "Green Straf Zonder Schuld," there is no penalty without error. Criminal acts in the procurement of government goods and services that are prone to irregularities occur at the procurement planning stage, such as indications of budget bubbles or mark-ups, implementation of directed procurement, engineering of unification and/or fragmentation with the aim of Collusion, Corruption and Nepotism which is detrimental to the state. In addition, this vulnerability can also occur at the stage of company qualification, the stage of procurement evaluation, the stage of contract signing, and the stage of delivery of goods that do not meet the low quality requirements that can cause state losses. Also, Providers of goods and services that are prone to criminal acts can occur in document falsification, break promises to carry out work (default) so that there is an element of violating the law which results in losses to the state.

Legal Aspects that Are More Prioritized in Procurement of Government Goods and Services to Deal with Deviations in the Procurement of Goods and Services

The basic rules used in the Implementation of Government Procurement of Goods/Services are included in the domain of State Administrative Law which regulates the administration of the government in carrying out its duties and authorities. Regulations regarding sanctions in the provision of government goods and services are regulated in Article 118 - Article 124 of the Presidential Regulation Number 54 of 2010 along with their amendments. The forms of sanctions that can be imposed on parties who commit irregularities in the procurement of government goods/services include:

Administrative Sanctions

The administration of administrative sanctions is carried out by the PPK/ULP Working Group/Procurement Officer to the provider by the administrative provisions imposed in the procurement regulations. The forms of administrative sanctions that can be imposed on providers include:

- Aborted bidding or cancellation of winners found any deviations in efforts to influence the ULP

Working Group/Procurement Officer to fulfill their wishes in line with the stipulated procedures, to conspire with other Goods/Services Providers to regulate bid prices outside the procedure, and to make and/or deliver documents and/or other information that is incorrect.

- Imposing fines late in completing work within the period specified. This sanction can also be applied in a civil context an agreement/contract.
- Disbursement of guarantees issued for violations committed, subsequently disbursed into the state/regional treasury.
- Submission of reports to parties authorized to issue licenses, against deviations made so that it is deemed necessary to revoke their licenses.
- Enforcement of administrative sanctions in the form of imposing financial sanctions for any discrepancies found in the use of domestic production goods/services.
- The obligation to compile a re-plan with its costs for a Planning Consultant that is not careful in planning and resulting in state losses. This sanction can also be applied in the civil context of an agreement or contract. If the offender is a PPK/ULP Working Group/Procurement Officer who has the status of a civil servant, if it is determined to have committed a violation then the sanctions stipulated in the staffing rules provided by the party have the authority to curb sanctions, such as reprimand, postponement of promotion, release from position and termination in accordance with employment regulations.

Inclusion on the Black List

Providing sanctions for inclusion in the Black List to Providers, carried out by PA/KPA after obtaining input from the PPK/ULP Working Group/Procurement Official by the provisions. At the stage of the process of selecting goods/services, Goods/Services Providers can be subject to blacklist sanctions if:

- Proven to carry out KKN, cheating, and fraud in the Procurement process decided by the competent authority.
- Affect ULP (Procurement Service Unit), Procurement Officer/PPK (Commitment Making Officer) or other authorized parties in any form and method, directly or indirectly in the preparation of Procurement Documents and HPS resulting in unfair competition. Affect ULP/Procurement Officials or authorized parties in any form and method, directly or indirectly in order to fulfill their wishes that are contrary to the provisions and procedures specified in the Contract Procurement Document and statutory provisions.
- Collaborate with other Goods/Services Providers to regulate the bid prices outside the procedures for the procurement of goods/services so that they reduce/inhibit/ minimize and eliminate fair competition and harm others.

- Make and submit documents and other information that is incorrect to fulfill the requirements for the procurement of goods/services specified in the Procurement Documents.
- Resign from the implementation of the contract for reasons that cannot be accounted for and cannot be accepted by the ULP/Procurement Officer.
- Resigning during the offer period is still valid for reasons that cannot be accepted by the ULP/Procurement Officer.
- Refuse to increase the value of the implementation guarantee for offers below 80% of the HPS.
- Falsify data about the Level of Domestic Components.
- Resigns to winners and reserve winners 1 (one) and 2 (two) at the time of the appointment of Goods/Services Providers for reasons that cannot be accepted by PPK.
- Resign from the implementation of the signing of an arbitrary contract that cannot be accounted for and cannot be accepted by first aid.

At the contract stage, a Goods/Services Provider who has been bound by a contract is subject to blacklist sanctions if:

- Proved to have conducted KKN, fraud, and forgery in the process of implementing contracts that were decided by the competent authority.
- b. Refuse to sign the Minutes of Job Handover.
- Affecting PPK in any form and method, directly or indirectly to fulfill his wishes that are contrary to the provisions procedures stipulated in the contract and statutory provisions.
- Falsifying documents relating to the implementation of contracts including financial liability.
- Conducting negligence/injury in carrying out obligations and not correcting negligence within a predetermined period so that PPK terminates a unilateral contract.
- Leave work as irresponsibly contracted.
- Decide the contract unilaterally because of the fault of the Goods/Services Provider.
- Do not follow up on the results of the audit recommendations of the competent authority which results in the loss of state finances.

Civil Suit

The claim is a submission submitted by the plaintiff to the Chair of the competent Court, which contains a claim for rights which contains a dispute and is also the basis of the examination of litigation and proof of truth. The lawsuit contains a dispute or conflict that must be resolved and decided by the court. In the context of Procurement of Goods/Services, the parties agreeing can take legal action in the event of a dispute in the implementation of the contract. It is as one of the principles in the agreement, such as "Pacta Sunt Servanda" principle. The principle states that the

agreement binds the parties who make it like the law. Judges or other parties in this matter must respect the substance of the contract made by the parties and may not intervene in the substance of the contract made by the parties.

Demand for Compensation

The application of compensation claims in the implementation of the procurement of goods/services can be imposed in the form of:

- Violations and fraud occurred in the process of Procurement of Goods/ Services by the ULP Working Group/ Official Procurement.
- The compensation paid by PPK for late payments is the amount of interest on the value of the bill that is late to be paid based on the current interest rate according to the provisions of Bank Indonesia or can be compensated by the provisions in the contract.

CONCLUSION

Legal Aspects of Procurement of Government Goods and Services in Overcoming Deviations in the Procurement of Goods and Services The legal aspects in the procurement of government goods and services are legal aspects of state administration, civil law, and criminal law. In the procurement of goods and services general principles, both principles that have long been recognized in the management of state finances, such as the annual principle, the principle of universality, the principle of unity, and the principles of specialty and new principles as a reflection of best practices in financial management country. Legal Aspects that Are More Prioritized in Procurement of Government Goods and Services to Deal with Deviations in the Procurement of Goods and Services the legal aspect that is more advanced in this case is State Administrative Law. It is because the State Administrative Law is governing the administration of the government in carrying out its duties and authorities. Sanctions given in overcoming safekeeping in the process of Procurement of Goods and Services include administrative sanctions, blacklisting, civil claims, and compensation.

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