

“Imperfect Achievement” in Contract of the Government Goods and Service Procurement

Merry Tjoanda

Faculty of Law, University of Pattimura
Jl. Ir. M. Putuhena - Kampus Poka, Ambon, Maluku 97233, Indonesia

Abstract

Contract of Government Goods and Services Procurement is a commercial contract that special characterized because it involves the Government. It is known as ambivalent, because it comes in both private- and public laws. In the implementation of contract has been agreed and signed, given consequence that the parties should be subject to the terms of contract through a clause in the contract. The results showed that the contract cannot be denied in the government goods and service procurement, be valid principles and legal norms of private and public are adjoined applicable. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. The legal consequence of tort by goods and services supplier in the form/model of imperfect achievement was the Government suffered a loss categorized as *State Loss*. The legal consequences for suppliers who do “imperfect achievement” are not just indemnity, but also subject to criminal sanctions even pay a fine for classified as corruption.

Keywords: Contract, Imperfect Achievement, Goods and Service, Government, Procurement

1. Introduction

In the concept of welfare state,¹ the Government has an obligation to provide people’s needs in various forms of goods and services as well as infrastructure development. It is set in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia (hereinafter as ‘The 1945 Constitution’) that the Republic of Indonesia aims to protect the whole Indonesian nation and the entire homeland of Indonesia, promote the general welfare, educating the nation. This formulation is in accordance with the objectives expected by the concept of welfare state.

Based on this, the Government should work with the private sector that able to build in accordance with Government need through a contractual relationship. Collin Turpin argues that: “*In the mixed economy that is said to characterize our services which frequently only the private sector can supply*”.² Related with this, there is relationship between the Government as user with the private sector as provider that is prepared in the form of contract and usually so-called contract of goods and service procurement and it is a commercial contract.

Although the contract of goods and service procurement in the private law is cannot be denied that the contract come in the public law because it involves the government as a party. Therefore, the contract is not only supported by the provisions of civil but also public law such as Act No. 17 of 2003 on State Finance and Act No. 1 of 2004 on State Treasury.

The understanding of term “goods and service procurement” is defined in the Regulation of the President of the Republic of Indonesia No. 4 of 2015 On the Fourth Amendment to the Presidential Regulation No. 54 of 2010 on the Government Goods and Service Procurement, that “Goods and Service Procurement, hereinafter referred to as the Goods and Service Procurement are activities to obtain goods/services by the Ministry/Agency/Regional Work Units/Institutions which process starting from planning until completion of all activities to obtain goods/services.”³

In the implementation of contract has been agreed and signed with the parties, brings the consequence that the parties should be subject to the terms of the contract, through clauses in the contract. However, there is a possibility that one of the parties doing tort especially for goods/services providers.

There are several forms of tort: does not meet the achievement, late for an accomplishment achievement and meet achievement imperfectly, to do something should not be done according to the agreement. According to Article 1243 of the Civil Code of tort, the debtor must pay compensation (indemnity). Furthermore, there are also legal consequences of tort as Article 1266 and 1267 that, creditor can seek cancellation of the agreement by the court and creditors can request the fulfillment of the agreement or the fulfillment of the agreements, accompanied by compensation.

One example is the case of District Court Decision No. 287/Pid.B/2010/PN. AB dated 19 December

¹ Busyra Azheri. (2016). Corporate Social Responsibility in the Rule of Law and Welfare State Concept. *Hasanuddin Law Review*, 1(2), 277-278

² Collin Turpin. (1972). *Government Contract*. UK: Penguin Books Ltd., p. 9.

³ See article (1) the Presidential Decree of the Republic of Indonesia No. 4 of 2015 on fourth amendment for No. 54 of 2010 concerning the Government Goods/Service Procurement

2011 that confirmed by PT decision No. 07/PID/2012/PT MAL on the procurement of 3 generators by University of Pattimura, Maluku, Indonesia which involving Pattimura University as Goods User (as Jobs Giver) and PT. Nindya Karya as Provider which have provided generator does not accord with specified in the contract, that is the generator engines are reconditioned. Thus, the provider has been in tort in the form of imperfect achievement.

Likewise, with regard to the case of the procurement of furniture is the procurement of lecture seat as many as 2500 between Manado State University and director of CV. Karya Nikita through the District Court Decision No 12/Pid.Sus/2012/PN.Mdo that CV. Karya Nikita provides lecture seat does not accord with specified in the contract, No. 1137/a/H41/10.06.01/2010 dated 31 May 2010. As a result of supplier in this case CV. Karya Nikita in the form of performing achievement does not accord with the contract, imperfect achievement, and the state experienced loss.

As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. As described above, the purpose of this study was to determine how the legal consequences if the supplier do tort in the form of imperfect achievements in the contract of Government goods/services procurement.

2. Method of Research

The type of research used in this paper is normative research¹, reviewing the government goods and service procurement in legal perspective. The data being used include secondary data consisting of primary law materials in the form of laws and regulations, tertiary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as tertiary law materials in the form of language dictionaries, scientific law dictionary, and Black's Law Dictionary.

The analysis method applied in this paper starts with the abstraction of primary law materials, secondary law materials and tertiary law materials, leading to an understanding of the essence of the government goods and service procurement as well as private law theories, analyzing the weaknesses, followed by systematization and synchronization, and finally, drawing conclusions.

3. Tort According to the Indonesian Civil Code

The term of "tort (*wanprestasi*)" is derived from the Dutch word "*wanprestatie*" which means poor achievement. Thus, tort as defined as "an act in which a person does not fulfill or fails to perform the obligations as determined in the agreement made between the creditor and the debtor."²

The negligence according to R. Subekti³ can happen in 4 (four) kinds of conditions, namely: 1) do not do what is affordable to be done; 2) doing what promised, but not as promised; 3) doing what promised but too late; and 4) doing something that accord with the agreement should not be done. Furthermore, Ahmadi Miru⁴ noted that tort can be: 1) absolutely not meet achievement; 2) imperfect achievements; 3) late to meet achievement; and 4) doing what is in the agreement is forbidden to do.

Related to the tort that conducted by PT. Nidya Karya and CV. Karya Nikita, the authors categorize as doing what promised, but not as promised, as presented by R Subekti or Ahmadi Miru as imperfect achievements. Not met promises can occur due to either intentional or unintentional. Unintentional parties, this tort can occur because it is not able to meet these achievements as well as forced for not to do the achievement.⁵

As a consequence of tort by the debtor, the creditors suffer losses so that the logical consequence is the cancellation of contract, or also in the form of the fulfillment of the contract, along with compensation. Therefore, according to Ahmadi Miru, tort can give two possibilities; the cancellation of contract or the fulfillment of contract, which can be described as follows:⁶

1. Just the cancellation of contract;
2. The cancellation of contract and compensation;
3. Just the fulfillment of contract;
4. The fulfillment of contract and compensation

As a legal consequence of tort:⁷ 1) the debtor is required to pay compensation (Article 1243 of the Civil Code); 2) the creditor may request for a cancellation of the agreement through the courts (Article 1266 of the Civil Code); 3) the creditor may request the fulfillment of agreement, or the fulfillment of agreements with

¹ Peter Mahmud Marzuki. (2009). *Penelitian Hukum*. 5th Edition. Jakarta: Kencana, p. 26

² Abdul R. Saliman. (2004). *Esensi Hukum Bisnis Indonesia*. Jakarta: Kencana, p.15

³ Subekti. (2002). *Hukum Perjanjian*. 19th Edition. Jakarta: Intermasa, p. 45

⁴ *Ibid*

⁵ Ahmadi Miru. (2008). *Hukum Kontrak Perancangan Kontrak*. Jakarta: PT. Raja Grafindo Persada, p. 74

⁶ *Ibid.*, p. 75

⁷ Djaya S. Meliala. (2007). *Perkembangan Hukum Perdata tentang Benda dan Hukum Perikatan*. Bandung: Nuansa Aulia, p. 101

compensation and the cancellation of agreement with compensation (Article 1267 of the Civil Code).

According to Nieuwenhuis¹, compensation as a result of tort, it is conducted if the requirement of negligent statement there should be advance by the creditor.² Sometimes, in certain circumstances to prove the tort, the debtor does not needed negligent statement for example: (i) for the fulfillment of achievement is applicable fatal deadlines (*fatale termijn*), (ii) the debtor refuses compliance, (iii) the debtor admitted negligence, (iv) fulfillment of impossible achievement (excluding *over macht*), (v) the fulfillment is no longer means (*zinloos*), and (vi) the debtor did achievement as not in appropriate.”

If one party is unable to meet its obligations, it can request cancellation of the agreement through the courts.³ It is said that, those who feel loosed as a result of tort that do, can impose contract fulfillment to those who are in tort or cancellation of the contract can also demand the cancellation of contract and compensation.⁴

4. The Implementation of Contracts the Government Goods and Service Procurement

The establishment of contract the government goods/services procurement requires requirements such as; at the stage of pre-contract, bypassing the bidding process towards the establishment of a contract based on the determination of the winner, then towards the establishment must be signed by the parties in this case the supplier and users of goods/services, so that it binds the parties based on the principle *pacta sun servanda*. After signing, the contract raises rights and obligations of the parties specified in the contract.

The validity of contract the goods/services procurement must comply with Article 1320 of the Civil Code. Article 1320 of the Civil Code explains that, for this occur in valid, need to be fulfilled 4 (four) conditions, as follows: *Firstly*, agreement for them bind themselves; *Secondly*, ability to make an engagement; *Thirdly*, particular subject matter; *Fourthly*, a reason that is not prohibited.

For the procurement contract, on the one hand the principles and rules are applicable to private contracts in general, the general principles and rules of Engagement Law contained in Chapter I to Chapter IV of Book III BW applicable to the procurement contract in addition to the rules contained in jurisprudence. Therefore, the conditions required by BW for the establishment of contract as contained in Article 1320 BW is also applies to procurement contracts.⁵

On the other hand, the government is law subject representing two institutions, emerge with “*twee petten*”⁶, then it will give legal action of public and private. Therefore, the government as the contract party for goods/services procurement in conduct action both in private- or public laws must meet the validity of government action that includes: the validity of procedural as stipulated technically in the Presidential Decree 54 of 2010 and its amendments, the validity of substantial, and the validity of authority through the source of authority. Thus “the contract made by the Government is multi-faceted and has a distinctive character”.⁷

If the contract has been signed by the parties, rights and obligations that must be implemented by both parties for goods and services contracts are *obligatoir*. The implementation of contract is the realization of binding force principle, since the contract was signed and the implementation of contract must be executed by both parties under the terms of contract that has been agreed. In this case, PT. Nindya Karya is obliged to supply 3 (three) units of generators from Japan as stipulated in the agreement works, and has a right to payment in accordance with the contract.

Meanwhile, the party of Pattimura University has a right to 3 (three) units of generators from Japan, and obligated to make payments in accordance with the contract. And also CV. Karya Nikita is obliged to deliver 2500 lecture seat with wood type as specified in the contract and be eligible for payment while the Manado State University has a right to obtain 2500 seat lecture and is obligated to make payments according to the amount specified in the contract.

Sometimes, the contract cannot be work properly. There are obstacles in the implementation of contract resulted in the debtor cannot doing the achievement on time as promised in the contract, even fulfilling achievement does not accord what was promised through contracts with the achievement and usually called imperfect achievement. This was caused by 2 (two) elements, namely mistake and omissions by the parties in this case the debtor and the usually is called in the civil law as tort.

¹ Agus Yudha Hernoko. (2008). *Hukum Perjanjian, Azas Proporsionalitas Dalam Kontrak Komersial*. Yogyakarta: Laksbang Mediatama, p. 234

² J.H. Nieuwenhuis. (1985). *Pokok-Pokok Hukum Perikatan*. Pokok-Pokok Hukum Perikatan. (Translated: Djasadin Saragih). Surabaya: Airlangga University, p, 68

³ See article 1266 of Civil Code.

⁴ See article 1267 of Civil Code.

⁵ Y. Sogar Simamora. (2013). *Hukum Kontrak, Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia*. Surabaya: Kantor Hukum WINS & Partners, p. 165-166

⁶ Ridwan H.R. (2003). *Hukum Administrasi Negara*. Yogyakarta: UII Press, page. 85

⁷ Charles Tiefer. (1999). *Government Contract Law*. Durham: Caroline Academic Press, p. 3., as cited in Y. Sogar Simamora. *Op.Cit.*, p. 5

Tort bring consequences to the occurrence of the aggrieved party's right to prosecute the parties who are in tort to provide compensation, so that by law it is expected that no one party was aggrieved because tort. In addition, it is known as force situation that occurred in the implementation of contract, so that the debtor cannot perform timely achievement. According to Article 1245 of the Civil Code, in force majeure, the debtor cannot be justified, because these circumstances arise beyond the willingness and ability of the debtor.

Tort as a result of force situation can occur because engagement objects disappear and the will of the debtor for achieving is hindered. In terms of engagement objects destroyed, the engagement becomes lost (Article 1444 of the Civil Code). Issues that arise relating to the *overmacht*, is who should bear the risk.

According to Article 91 paragraph 4 of Presidential Decree No. 54 of 2010, in the force majeure, the supplier of goods/services informing about the occurrence of force majeure to the PPK in writing no later than 14 (fourteen) calendar days after the occurrence of force majeure, by including a copy of the statement force majeure issued by the party/authorized agency in accordance with laws and regulations.

Furthermore, according to Article 91 paragraph (6) Presidential Decree No. 54 of 2010, after the occurrence of force majeure, the parties can do a deal, as outlined in the contract change. The occurrence of force majeure in contract the procurement of goods/services according to the Government Regulation No. 54 of 2010 does not abolish but to delay time according to the agreement, both because the goods destroyed or not (blocked to perform achievement).

5. Legal Consequence of Imperfect Achievement Concerning Contract of the Government Goods and Services Procurement

The legal consequences of tort as stipulated in the Civil Code and according to the doctrine is "compensation" and termination (accompanied by compensation or not) as well as the fulfillment of contract (accompanied by compensation or not). Meanwhile, the legal consequences that arise when a tort made by suppliers in contract the government goods/services procurement is the termination of the contract, "if the goods need not be delayed beyond the limit expiration of the contract. While, based on PPK's research, the supplier will not be able to complete the entire job although given to 50 (fifty) calendar days after the expiration of the implementation of work to finish the job."¹

One standard clause that very important in procurement contracts is a clause concerning the failure of achievement by providers of goods/services. This clause is the basis for PPK to terminate the contract for their failure.²

Related to the termination of contract as a result of contractual breach (tort), must be based on reasonable reason and worth. As affirmed in Article 6:265 NBW, that the termination of contract should be based on a violation of a fundamental breach affects the whole or part of the contract."³

There is a possibility that the supplier of goods/services have carried out the achievements but there are enough reasons that led to the interest of goods/services supplier also must be protected. In the science of law, contract known the principle of balancing between the aggrieved parties in this case the government with the interests of the parties who are in tort, especially in the form of imperfect achievements then the supplier must pay compensation as a consequence of tort as Article 1243 of the Civil Code. The amount of compensation should be based on severity of mistake made by suppliers, so that based on the principle of proportional, worthy of compensation by the supplier.

Based on Article 1243 of the Civil Code as the consequence of tort, the debtor must pay compensation. If related to the Presidential Decree 54 of 2010 that arrange specifically on the tort only with delay models complete the work, resulting in termination of the contract by paying a late fee while models performing imperfect achievement, its sanctions based on the Civil Code are to pay compensation. However, in the contract for goods/services procurement, the creditor is the government and goods are the object of contract will be a state asset, it can be said that the State suffered losses.

Mistakes made by the debtor as a supplier of goods/services, may result in losses to the state. "The understanding of terminology and elements of "state loss" and "state financial losses" in the investigation and proving corruption is interpreted have in common sense, but they are different nature".⁴ The term "state loss" that is used is based on a formula that contained Act No. 1 of 2004 on State Treasury, Article 1 paragraph 22 which states: "The state losses is the lack of money, securities, and goods, real and definite amount as a result of

¹ H. Purwosusilo. (2014). *Op.Cit.* p. 305

² Compared to: W. Noel Keyes. (1990). *Government Contracts in A Nutsbell*. West Publishing Co., St. Paul, Minn, p. 474; Tiefer Charles and Shook, William A. (1999). *Government Contract Law*, Carolina Academic Press, Durham, North Carolina p. 428.

³ Agus Yudha Hernoko, *Op.Cit.*, p. 267

⁴ Hermold Ferry Makawimbang. (2014). *Kerugian Keuangan Negara, Dalam Tindak Pidana Korupsi, Suatu Pendekatan Hukum Progresif*. Yogyakarta: Thafa Media, p. 19

an unlawful act, either intentional or unintentional”.¹

In practice (*in concreto*) in the corruption court, the use of term “state loss” is interpreted or analogized to “state financial loss” as referred to in Article 2 and Article 3 of Act No. 31/1999. Though, the area of arrangement “state loss” contained in Article 1 paragraph 22 of Act No. 1 of 2004 is a different realm of administrative law to the arrangement of “state financial loss” as the realm of criminal law”.²

Thus, if suppliers fulfill achievement but not perfectly, then the state suffered losses and usually called as state losses. The concept of state loss is not regulated in the Civil Code and Presidential Decree 54 of 2010 and its amendments, but regulated in Act No. 1 of 2004. This was due to the contract of goods/services procurement are ambivalent, in the realm of private law based on the contractual relationship and in the realm of public law because it involves government as a party.

A common explanation of Act No. 1 of 2004, item 6 governing the settlement of state losses by the compensation set by the Supreme Audit Agency. The problems arise that a tort based on the contractual relationship in the realm of private law, and as a legal consequence of the tort especially in the form of imperfect achievement, the creditors suffered losses and those losses is the Government so that the categories of losses are state losses as set in the realm of public law, such as Act No. 1 of 2004. The consequence based on public law is the supplier of goods can be categorized with corruption. In fact, if settled under the provisions of the civil law, then the supplier must pay compensation of tort that has been done.

As above, in 2009 conducted a contract for generator engine procurement by Pattimura University of Ambon with PT. Nindya Karya. In contrast, the generator engine is a reconditioned or second-hand so it impacted on the performance or capabilities of the generator engine even mal-function so that the students of faculty of Agriculture, Mathematics and Engineering cannot use the laboratory effectively.

Through the District Court Decision No. 287/Pid.B/2010/PN.AB and confirmed by PT Decision No. 07/PID/2012/PT.MAL, that the Director of PT. Nindya Karya is defined as a defendant. Director of PT. Nindya Karya has corrupted by confinement as sanction, indemnity as the calculation of state losses by the Supreme Audit Agency and fines with the consideration under articles 2 and 3 of Act No. 39 of 1999 on corruption, as well as subject to Article 55 paragraph (1) Criminal Code on inclusion.

Considering Article 55 paragraph (1) of Criminal Code stated, “Punished as perpetrators of acts that can be punished those who did, ordering committing or participating in. And also, the judges consider Article 2 (1) of Act No. 31 of 1999 on corruption, as amended and supplemented by Act No. 20 of 2001 that there were elements as follows: each person, unlawfully, deeds enrich themselves or another person or corporation, which can be detrimental to state finance or economy.

And also in the case of procurement of furniture based on the District Court Decision of Manado, No. 12/Pid.Sus/2012/PN.Mdo, consideration of the judge under articles 2 and 3 of Act No. 39 of 1999 that the act of Director CV. Karya Nikita included in the corruption and also considering Article 55 paragraph (1) of Criminal Code on inclusion. Consideration by judge also related to Article 18 paragraph (1) letter *b* of Act No. 31 of 1999 on Corruption, as amended and supplemented by Act No. 20 of 2001 on amendment to Act No. 31 of 1999 determined that the payment of compensation which amounts is same with property derived from corruption.

Thus, the Director of PT. Nindya Karya and the Director of CV. Karya Nikita has made imperfect achievements related to the object of contract based on the contractual relationship and is one form of tort which is known in the law of treaties and regulated in the Civil Code for causing losses to the other party in this case the government, so the government suffered a loss. The loss is categorized as state losses. Should not be treated articles in the Civil Code that governs the loss but subject to the principles and norms of public law such as Act No. 1 of 2004 governing the state financial losses, and Act No. 39 of 1999 concerning Corruption Eradication.

6. Conclusion

Contract of goods and services procurement are ambivalent, in the realm of private law based on the contractual relationship and public law because it involves the government as a party, therefore, if the supplier of the goods/services to fulfill imperfect achievements, the result is the government suffered losses commonly known as “state loss”, and thus as a legal consequence of goods/services supplier perform tort in the form of imperfect achievements, the supplier of goods/services must pay compensation as result of state losses in the form of money that is defined by the Supreme Audit Agency, in addition to imprisonment and fines for supplier of goods has done Corruption as stipulated in Article 2 and 3 of Act No. 31 of 1999 concerning Corruption Eradication and partially amended by Act No. 20 of 2001.

State losses that occur as a result of supplier in a contractual relationship with the government does not fulfill the imperfect achievements; the Supreme Audit Agency has the authority to resolve based on its

¹ *Ibid.*

² Endi Arofa, Ahsan Yunus, Andi Sofyan, & Anwar Borahima. (2015). “Corporate Criminal Liability for Corruption Offences in Indonesian Criminal Justice System”. *International Journal of Advanced Research*, 3(8), 246-250.

calculations, so the supplier must pay to the pay office in accordance with the national and regional budget. If supplier have pay compensation set by the Supreme Audit Agency, it is not necessary given the confinement sanction. If compensation does not given, it is necessary administrative and criminal sanctions. However, based on the principle of *ultimum remedium* that criminal sanctions are final approach, if civil or administrative not met.

References

- Abdul R. Saliman. (2004). *Esensi Hukum Bisnis Indonesia*. Jakarta: Kencana.
- Agus Yudha Hernoko. (2008). *Hukum Perjanjian, Azas Proporsionalitas Dalam Kontrak Komersial*. Yogyakarta: Laksbang Mediatama.
- Ahmadi Miru. (2008). *Hukum Kontrak Perancangan Kontrak*. Jakarta: PT. Raja Grafindo Persada.
- Busyra Azheri. (2016). Corporate Social Responsibility in the Rule of Law and Welfare State Concept. *Hasanuddin Law Review*, 1(2), 277-278.
- Charles Tiefer. (1999). *Government Contract Law*. Durham: Caroline Academic Press.
- Collin Turpin. (1972). *Government Contract*. UK: Penguin Books Ltd.
- Djaya S. Meliala. (2007). *Perkembangan Hukum Perdata tentang Benda dan Hukum Perikatan*. Bandung: Nuansa Aulia.
- Endi Arofa, Ahsan Yunus, Andi Sofyan, & Anwar Borahima. (2015). "Corporate Criminal Liability for Corruption Offences in Indonesian Criminal Justice System". *International Journal of Advanced Research*, 3(8), 246-250.
- Hernold Ferry Makawimbang. (2014). *Kerugian Keuangan Negara, Dalam Tindak Pidana Korupsi, Suatu Pendekatan Hukum Progresif*. Yogyakarta: Thafa Media.
- J.H. Nieuwenhuis. (1985). *Pokok-Pokok Hukum Perikatan*. (Translated: Djasadin Saragih). Surabaya: Airlangga University.
- Peter Mahmud Marzuki. (2009). *Penelitian Hukum*. 5th Edition. Jakarta: Kencana.
- Presidential Decree of the Republic of Indonesia No. 4 of 2015 on fourth amendment for No. 54 of 2010 concerning the Government Goods/Service Procurement.
- Ridwan H.R. (2003). *Hukum Administrasi Negara*. Yogyakarta: UII Press.
- Subekti. (2002). *Hukum Perjanjian*. 19th Edition. Jakarta: Intermasa.
- Tiefer Charles and Shook, William A. (1999). *Government Contract Law*. Durham, North Carolina: Carolina Academic Press.
- W. Noel Keyes. (1990). *Government Contracts in A Nutshell*. West Publishing Co., St. Paul, Minn.
- Y. Sogar Simamora. (2013). *Hukum Kontrak, Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia*. Surabaya: Kantor Hukum WINS & Partners.