Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.80, 2018

Law Enforcement to the Abuse of Power in the Procurement of Government Goods and Services

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Abstract

Procurement contracts involving the government as a party in it (state as a buyer) have consequences on the legal character of the contract. It does not always talk about private law, but with government involvement. The type of research is normative-juridical, it intended to examine legal concepts related to the procurement of government goods and services. It uses statute, conceptual and case approaches. In this research, legal material is divided into 2 (two) parts, namely primary and secondary legal materials. The outcomes of the research indicate that the procurement of government goods and services can be divided into several types, namely: (a) procurement of goods, (b) procurement of construction/ non-construction services and (c) procurement of consulting services. It is not only regulated in a single regulation. It because the procurement of goods and services is a long process, starting from the process of procuring goods by arrangement, the process of budget management, the process of procuring goods with planned budget, and accountability of the results of procurement of goods and services administratively and technically.

Keywords: *Goods and Services, Government Procurement; Local Government*

1. Introduction

In a state life, the government is always expected to promote public welfare. To bring this obligation, the government has the obligation to provide the needs of the people in various forms includes goods, services and infrastructure development. On the other hand, the government also needs the goods and services in government activities. Meeting the needs of goods and services is an important part of the governance. In relation to meet a demand of this need, it becomes routine practice.[1] Therefore, the implementation of commercial transactions by the central- and local government is a common practice.[2]

The procurement of government goods and services (*government procurement*) is classified as the first type, while the second type includes various types of contracts, including exchange, leasing, sale of state assets (shares), bond issuance or loan agreement. It was performed by the government in conducting State administration functions. In this regard, the government involves itself in a contractual relationship with the private sector by binding themselves to a contract for the procurement of goods and services. The relation of contractual as established by the government is also related to its obligation to provide, build and maintain public utilities.[3] Basically, the established contract is a commercial contract even though it contains elements of public law.[4] On the one hand, the legal relationship emerges by the contract, but on the other hand the contents are full of rules for the providers of goods and services.

In countries with the systems of *common law*, this contract is commonly called a *government contract*, whereas in Francis it is called *administrative contracts*.[5] *Government contracts* are often interpreted as the

[1] Hugh Collins, 1999, *Regulating Contracts*, Oxford University Press, London, p. 3.
[2] Charles Tiefer, et.al., 1999, *Government Contract Law*, Carolina Academic Press, North Carolina, h. ix. Compatred to Michael T. Molan, 2003, *Administrative Law*, Old Bailey Press, London, p. 243.
[3] Colin Turpin, 1972, *Government Contracts*, Penguin Books, Harmonds, p. 9.
[4] Term *commercial contracts* is used to distinguish with the *consumer contracts*. 1994, Periksa *Principles of International Commercial Contracts*, UNIDROIT, Rome, p. 2.
[5] See Georges Langrod, 1955, "*Administrative Contracts (A Comparative Study)", The American Journal of Comparative Law*, Vol. IV, Summer, Number III, h. 325. A conclusion of a law comparison research about the domain of contract between England and France Laws as conducted by Bernard Rudden and Camifie Jauffret-Spinosi is *administrative contract* in which known in France is do not known in England. See, Camille Jauffret- Spinosi, "*The Domain of Contract (French Report)"*, in Donald Harris, et.al. (ed)., op. cit., p. 149.

procurement of government goods and services (*government procurement*)[1] because in many ways the substance is indeed so. Thus, the type of contract is different from the policy agreement (*beleidsovereenkomst*) which is a legal act by a State administration agency or official that makes public policy an object of agreement.[2]

However, it is unfortunate that the reality in Indonesia shows that there are many irregularities in the procurement of government goods and services. Many examples about this. For example, a case of Sukhoi, which had emerged and even led to the formation of a working committee by the Parliament, but then the solution was unclear, due to the absence of clear legal rules regarding the mechanisms and procedures for procuring goods by the government that involving collaboration between departments.

Procurement contracts involving the government as a party in it (*state as a buyer*) have consequences on the legal character of the contract. It does not always talk about private law, but with government involvement that results in the purchase of State money in it, it will automatically involve public law. As a public actor, a State administration agency or official has special rights and authority to use and exercise public authority (*openbaar gezag*). Based on the use of the concerned public power, the State administration agency or official can unilaterally stipulate various regulations and decisions (*beschikkingen*) that bind citizens (together with civil legal entities) and lay down certain rights and obligations and therefore cause legal consequences for them.

When the government acts in a civil field and subject to the rules of civil law, the government acts as a representative of a legal entity, not a representative of office. Therefore, the position of the government in the association of civil law is not different from that of a person or private legal entity, does not have a special position, and can be a party to civil disputes with the same position as someone or equality before the law in the court general.

2. Method of Research

The type of research is normative-juridical, it intended to examine legal concepts related to the procurement of government goods and services. It uses statute, conceptual and case approaches.[3] In this research, legal material is divided into 2 (two) parts, namely primary and secondary legal materials.

3. Legal Position of the Commitment-Making Officer for the Procurement of Goods and Services

In the literature of administrative law, it is explained that the term *authority* is often compared to the term *power*. In fact, the term *power* is not identical with the term *authority*. In the conception of the constitutional State, the government authority comes from the prevailing laws and regulations as stated by Huisman in Ridwan HR,[4] that the organs of government cannot assume that it has the authority of the government itself. Authority is only given by law. Legislators not only give government authority to the organs of government, but also to employees or specific entities. The same opinion was expressed by P. de Haan,[5] stating that the government authority did not fall from the sky, but it was determined by law (*overheidsbevoegdheden komen niet uit de lucht vallen, zij worden door het recht genormeerd*).

As described above, it has been described that in general authority is a power to carry out all acts of public law. In other words, Prajudi Atmosudirdjo[6] argues that basically the government authority could be translated into 2 (two) senses, namely as a right to carry out a government affair (in the strict sense) and as a right to be able to significantly influence decisions to be taken by other government agencies (in a broad sense).

Peter Leyland and Terry Woods[7] states that public authority has two main characteristics: *the first*, every decision made by a government official has a power to bind all members of the community, in the sense that all members of the community must obey, and *the second*, every decision made by government

[1] Henry Cambell Black, 1990, *Black's Law Dictionary*, 6th Ed., West Publishing Co., St. Paul Minn, p. 696.
[2] See Philipus M. Hadjon, et al., 2002, Pengantar Hukum Administrasi Indonesia, Gadjah Mada University Press, Yogyakarta, h. 172 (Philipus M. Hadjon I). See also, H.M. Laica Marzuki, "Perjanjian Kebijaksanaan (*Beleidovereenkomst*)", Yuridika. No. 2-3, Tahun VI, Maret-April-Mei-Juni 1991, p. 150.
[3] Peter Mahmud Marzuki, 2007, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, p. 93.
[4] Ridwan HR. 2006, *Hukum Administrasi Negara*, UII Press, Yogyakarta, p. 103.
[5] P. de Haan, at al. 1986, *Bestuursrecht in de sosiale Recht Staat*. Deel 1 and 2 Kluwer, Deventer, p. 42
[6] Pradjudi Admosudirodjo, 1988, *Perihal Kaidah Hukum*, Citra Aditya Bakti, Bandung, p. 76.
[7] Peter Leyland and Terry Woods. 1999, *Administrative law*, London Blackstone Press Limited, p. 157.

officials having public functions or carrying out public services.

Hence it can be concluded that the authority especially the government authority is a power that exists in the government to carry out its functions and duties based on legislation. In other words, authority is a power that has a basis for taking legal actions so that legal consequences do not arise, namely the realization of arbitrariness (*onwetmatig*). Authority is a legal power to carry out an action based on public law. In the concept of civil law, it is known as the right, i.e the ability of a person to perform an act or legal act as a supporter of rights and obligations.

A government can be interpreted as "function" and as "organization." As a function, the activity of government is carrying out the tasks of government, and the government as an organization, the government is burdened with the government duties. This function is a government task that is aimed at the public service and it is run by the government apparatus. Thus in general the function of government carries out all activities outside the functions carried out by the legislative body and the judicial body based on binding provisions and authorities.

Seeing from the work done by the government apparatus, the government function has a very broad scope, moreover in the concept of a welfare state. Within the welfare state, the basic concept of governance is directed to the realization of general welfare, because these functions of government include planning, regulatory, governance, service, empowerment and development, State entities operations by the official, State institutions and companies, and the function of organizing general welfare.

In a perspective of public law, a State is a position organization. Among these State positions, there are government positions, which are the object of State administrative law. There are several characteristics found in government positions or organs, namely:

1. Government organs carry out the authority on behalf and responsibility itself, which in a modern sense is placed as political and personnel responsibility or the responsibility of the government itself before the judge. Government organs are the care taker.
2. The authority in order to maintain administrative law norms, government organs can act as defendants in the judicial process, namely in the case of objections, appeals or resistance.
3. Aside from being the defendant, government organs can also appear to be dissatisfied parties, meaning as plaintiffs.
4. In principle, government organs do not have their own assets. Government organs are parts (tools) of legal entities according to private law with their assets. Regent or Mayor are organs of the general body of "Regency". Based on the rule of law, this general body that can own assets, not the organs of government.

Although the government position is attached to the rights and obligations or is authorized to take legal action, the position cannot act alone. Position can do legal actions, which are carried out through representatives, namely officials. Thus, the legal position of the government based on public law is the representative of government positions. Likewise, the legal position of the government in the public aspects of the contract for the procurement of goods and services is based on Presidential Regulation No. 54 of 2010.

The legal actions of government bodies are carried out by the government as humans and private legal entities are involved in legal relation. The government sells and buys, rents and leases, pawns, makes agreements, and has ownership rights. In its specific position, the government uses various private legal provisions in its association. Sometimes they are involved in civil relations in the same position as the private sector, without its specific position as a government and which protects the public interest in the event of a dispute.

When the government acts in a civil field and subject to the rules of civil law, the government acts as a representative of a legal entity, not a representative of office. Therefore, the position of the government in the relation of civil law is not different from that of a person or private legal entity, does not have a special position, and can be a party in civil disputes with the same position as a person or civil legal entity in the general court.

In the procurement of government goods and services based on the Presidential Regulation No. 172 of 2014, the government has committed legal actions not only from the public aspect but also from the civil aspects, namely the actions of legal subjects intended to cause legal consequences that are intentionally desired by legal subjects, on the basis of legal consequences is also determined by law. Elements of government legal

actions are intentions and statements of intent that are intentionally intended to cause legal consequences. Legal actions can be active or passive. Even though a person does not act, if the passive attitude can be interpreted as containing a statement of intention to cause legal consequences, then the passive act is a legal act. Actions become legal actions.

The government is a legal subject as a supporter of rights and obligations. Supporters of rights and obligations can be called people as well as the provider of contracting services, and in the legal sense "person" consists of personal and legal entities. Legal entities (including government agencies) are legal subjects in a juridical sense and have rights and obligations in the contract for the procurement of goods and services based on Presidential Regulation No. 172 of 2014.

In the contracting of the procurement of government goods and services based on Presidential Regulation No.172 of 2014, there are other legal subjects that by the law are related to legal consequences, regardless of whether the legal consequences are desired or not desired by the parties concerned. The legal consequences that arise do not depend on the will of the perpetrator. These other actions are permissible and some are illegal.

4. Law Enforcement to the Abuse of Power in the Procurement of Government Goods and Services

Criminal and criminal responsibility are two very broad terms in criminal law studies. Therefore, the author limits it only to find out the limits, when the person actions constitute a crime? Although, according to van Hattum,[1] between actions and people who commit such acts there is a close relationship and it is impossible to separate them.

The term *power*, *position* and *discretion by officials* is a term that is always associated with the State administration and commonly called government. Therefore, these terms are basically within the scope of State administrative law. In Article 3 of the Corruption Eradication Act, it regulates that the element of "*misusing authority*" as a *species delict* of "*unlawful acts*" as *genus delict* will always be related to the position of public official.[2] Meanwhile, the term State finances loss is precisely defined and regulated in detail in Act No. 1 of 2004 concerning the State Treasury and Act No. 15 of 2006 concerning the State Audit Board, both of which are also within the scope of State administrative law in the context of carrying out government function. State or Regional losses are shortages of money, securities and goods, which are real and definite in number as a result of unlawful acts both intentional or not."[3]

In this regard, Philip M. Hadjon[4] explains the function of the government in commit a public legal action. For the government, the basis for commit a public law is the existence of authority relating to the office or position (*ambt*). Position is obtained through 3 (three) sources, namely attribution, delegation and mandate will produce authority (*bevoegdhied*, *legal power*, *competence*). In addition, the government has the discretionary authority (*freis ermessen*! *pouvoir discreationnaire*).[5] Freis ermessen was given to the government in view of the functions of the government or State administration to organize general welfare, which is different from the function of the judiciary to resolve disputes between peoples. Government decisions prioritize the achievement of goals or objectives (*doelmatigheid*) rather than conformity with applicable law (*rechmatigheid*). Likewise, in the matter of State finances losses as a result of the authority in the field of State finance, committed through the delegation or mandates.[6] That is, this problems also becomes an inseparable part of the position in the administrative law doctrine as described.

Even so, the principle of responsibility and accountability is still attached together. The authority to government officials is implied in it about the accountability of the official concerned. In the concept of public law, it known the principle of *geen bevoegdheid* (*macht*) *zander veraantwoordelijkheid* (no authority or power without accountability).[7] Therefore, the responsibilities of officials in their functions are distinguished between position responsibilities and personal responsibilities.

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[1] Roeslan Saleh. 1983. *Perbuatan Pidana dan Pertanggung Jawaban Pidana.* Jakarta: Aksara Baru. p.23.
[2] Komariah S. Sapardjadja as cited in H. Abdul Latif. 2014. *Hukum Administrasi: Dalam Praktik Tindak Pidana Korupsi.* Jakarta: Prenada Media Group. p.4.
[3] See Article 1 figure 22 Act No. 1 of 2004 and Article 1 figure 15 Act No. 15 of 2006
[4] Philipus M. Hadjon, *et al*. 1993. *Pengantar Hukum Administrasi Indonesia.* Yogyakarta: Gadjah Mada University Press. p.139.
[5] Bahsan Mustafa. 1990. *Pokok-Pokok Hukum Administrasi Negara.* Bandung: Citra Aditya Bakti. p. 55.
[6] W. Riawan Tjandra. 2013. *Hukum Keuangan Negara.* Jakarta: Kompas Gramedia. p.29.
[7] Sri Soemantri. 1987. *Prosedur dan Sistem Perubahan Konstitusi.* Bandung. Alumni. p.7.

Position responsibilities regarding legality (validity) of governmental actions. In administrative law, the issue of governance legality is related to the approach to government power. Personal responsibility is related to the functionary or behavioral approach in administrative law. Personal responsibility regarding maladministration in the use of authority and public service. Position responsibilities in their functions are distinguished between position responsibilities and personal responsibilities. This distinction brings consequences related to criminal responsibility, civil liability and State administrative liability.[1]

Specifically, in the context of state administrative law, corruption is a personal responsibility of officials, with the main parameters are abuse of power and unreasonableness. In the case there is an element of abuse of power and unreasonableness, then there is an element of maladministration, and of course there are unlawful acts, and the act is the personal responsibility of the official who did it.[2]

The operation of the investigation sub-system is based on the authority as described, both in terms of forced effort or an authority in the real sense as stipulated in the Criminal Procedure Code, which has also been described. The authority is committed by investigating officials in the interest of the investigation and investigators in the interests of the investigation. According to Harahap,[3] there is almost no difference in meaning between inquiry and investigation. Even if there, it is gradual. Between inquiry and investigations are interrelated and mutually complementary in order to be able to resolve a criminal act. Furthermore, it explained that in conduct these special rights and authorities, must obey and subject to the principles of the right of due process. Every suspect has the right to be inquired and investigated in accordance with the procedural law.[4]

The right to *due process* in a law enforcement comes from the ideals of a constitutional State that upholds the law supremacy, which affirms that we are governed by law, not by men (*government of law and not of men*). The concept of *due process* is associated with the foundation of upholding the law supremacy in dealing with criminal acts: no one is located and places himself above the law, and the law must be applied to anyone based on the principle of treatment and in an honest manner. Essence of *due process* that every enforcement and application of criminal law must comply with constitutional requirements and must obey the law. Therefore, due process does not allow violations of a part of legal provisions with the pretext of enforcing other laws. Therefore, law enforcement officers in their implementation must guide and acknowledge, respect and protect, and guarantee the rights of a guaranteed person.[5]

Law enforcement efforts often pass defendants from legal because they are hampered by formal legal rules. Various attempts were made by the government and the legislature, among others, by revising legislative products, given these rules often become blocks and are often debated by lawyers or legal counsel in the interests of their clients.

In relation to the forms of abuse of power, as stipulated in Article 17 of Act No. 30 of 2014 concerning Government Administration, definitively identifies 3 (three) forms of abuse of power as follows:

(1) Agency and/or Government Officials are prohibited from misusing power.
(2) Prohibition of abuse of power as referred to in paragraph (1) includes:
   a. Prohibition beyond authority;
   b. Prohibition of confusing authority; and/or
   c. Prohibition of acting arbitrarily (unreasonableness).

Based on these legal construction, the jurisprudence of the Supreme Court in the verdict of Supreme Court No. 600/k/pid/1982 states in the cumulative indictment made by the Prosecutor if it was not clear the cumulation whether the *concursus idealist* or *concursus realist* and it was very difficult to understand in which actions the defendant was cumulated and in which action also the defendant stands alone, such indictment must be declared null and void. The form of the Prosecutor' indictment which was formed cumulatively by subsidization with the same article on the first, second, third indictments, for *primair* and *subsidiary* are wrong.

The defendant' action as charged by the Prosecutor in the cumulative indictment of subsidiarity with the

[1] Philipius M. Hadjon, *et al.* 2011. *Hukum Administrasi dan Tindak Pidana Korupsi: Kisi-Kisi Hukum Administrasi Dalam Konteks Tindak Pidana Korupsi.* Yogyakarta: Gadjah Mada University Press. p.16.
[2] Tatiek Sri Djatmiati, *et al.* 2011. *Hukum Administrasi dan Tindak Pidana Korupsi: PeIayanan Publik dan Tindak Pidana Korupsi.* Yogyakarta: Gadjah Mada University Press. p.49.
[3] M. Yahya Harahap. *Op.Cit.* p.109.
[4] *Ibid.* p.92
[5] *Ibid.* p.95

same article on the first, second, third indictments, for the primaries and subsidiary is a continuing action carried out by the defendant for one type of crime, thus the Prosecutor should formulate the indictment in the form of subsistence by placing continuing actions (Article 64 of the Criminal Code) as a prosecution in the criminal act committed by the defendant. The decision of judge to accept the exception of the lawyer was appropriate because the form of the indictment made by the Prosecutor was wrong so that the Prosecutor' indictment against the defendant Drs. David Agustein Hubi is not acceptable.

Regarding the decision stating the Prosecutor' indictment against the defendant Drs. David Agustein Hubi could not be accepted, the Panel of Judges had wrongly interpreted the jurisprudence of the Supreme Court in the decision of Supreme Court No. 1565 K/Pid/1991 which stated that the qualification of the indictment could not be accepted, so the verdict was "The indictment of the Prosecutor could not be accepted." It should be in accordance with Article 156 paragraph (1) of the Criminal Procedure Code if the objection of the lawyer is accepted, the decision is the court is not authorized to hear the case or the indictment cannot be accepted or the indictment must be canceled. Moreover, in this case the subject matter has not been examined.

The legal position of the Commitment-Maker Officials in the procurement of goods and services can be interpreted as "functions" and as "organizations." As a function the governing activities is carrying out the duties of government, and the government as an organization, the government is burdened with the implementation of governmental duties. This function of government as a whole consists of various kinds of government actions, decisions, general provisions, civil law actions and concrete actions.

In a specific position, the government uses various private legal provisions in its association. Sometimes they are involved in civil relation in the same position as the private sector, without its specific position as a government and which protects the public interest in the event of a dispute.

5. Conclusion

The essence of the procurement of government goods and services has been clearly regulated in Presidential Regulation No. 172 of 2014. The procurement of government goods and services can be divided into several types, namely: (a) procurement of goods, (b) procurement of construction/ non-construction services and (c) procurement of consulting services. It is not only regulated in a single regulation. It because the procurement of goods and services is a long process, starting from the process of procuring goods by arrangement, the process of budget management, the process of procuring goods with planned budget, and accountability of the results of procurement of goods and services administratively and technically.

Abuse of power in the procurement of government goods and services is a crime. It is evident in the form of abuse of power that exceeds the limits of authority and confuses authority, where criminal law enforcement is part of criminal politics as one part of the overall policy of crime prevention. Thus, in the procurement of government goods and services, there is no need to use a protective approach, because the approach creates opportunities for corruption, collusion and nepotism. Therefore, it is necessary to improve the quality of public services through good and clean governance, it needs to be supported by effective, efficient, transparent and accountable financial management.

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