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Legal Protection For Provider in Provision of Government Goods/Services Contract in Justice Perspective

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ABSTRACT

A state has a role in giving welfare to society by providing every need of societies, in order to reach social welfare for all citizens. The role/intervention of a state in giving welfare and justice for citizens especially for provider of goods/ service in provision of government goods/services contract, in which a state has a duty to give or realize welfare for citizens by providing every need of societies and one of them is by applying contract of provision of government goods/services. It is because the main duty of state is that: giving calmness from all fear in every form for all nations and, a state should also convince and find a way for economic welfare for all people.

Government contract is aimed to protect public interest, but it is still commercial; it means that those are both sides namely provider of government goods/services and it is benefit-oriented by the arranged or implemented contract and it is certainly for provider of goods/services as partner which has an aim to get benefit. Therefore, in government contract needs to give protection for private side /provider properly.

Keywords : Legal Protection, Provider, Contract, Provision of Goods/Services, Government and Justice

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I. INTRODUCTION

1.1. Background

The aim of Indonesian, as written in Preamble of Constitution 1945, is to “advance public welfare¹ and educate life of nation which is based on principle of social welfare for all Indonesians”. In order to realize public welfare, government has a duty in providing need of societies in every form either goods/services or infrastructure development. Contract of provision of goods/services is a principal element in structure of good governance. *Governance* cannot be separated from basic principles of implementation of good governance, namely transparency, participation, and accountability as the main element.

Activity stipulation of provision of government goods/services is regulated in Presidential Regulation Number 54 Year 2010 on Provision of Government Goods/Services had been changed for several times and the last Presidential Regulation Number 4 Year 2015 on fourth amendment of Presidential Regulation No. 54 Year 2010, but because there is still a weakness and it has not accommodated development of government’s needs on regulation of provision of proper goods/services, thus the government establish the newest Presidential Regulation namely Presidential Regulation Number 16 Year 2018 on Provision of Government goods/ services.

Government contract is aimed to protect public interest, but it is still commercial, meaning that both sides namely provider of goods/services and it is benefit-oriented by the arranged or implemented contract and for provider of goods/services as partner it certainly has clear purpose to get benefit, thus in contract the government needs to give protection for private side/provider properly. Involvement of government in contract shows government’s act classified in civil government’s act². Relation of that law can be legal if it meets the stipulation of Article 1320 civil code stating that the requirement of legal agreement namely their agreement that bind themselves; proficiency to make a bond; a certain main problem; and an allowed cause. If this requirement is fulfilled, the Article 1338 civil code states that “all agreements which are arranged legally are applied as law for

¹ Istrilah kesejahteraan umum (*general welfare*), mempunyai pengertian yang luas, termasuk kesejahteraan sosial dan kesejahteraan secara material

² Berkenaan dengan tindakan hukum keperdataan dalam penyelenggaraan urusan pemerintahan, Philipus M. Hadjon sebagaimana dikutip Y. Sogar Simamora, menyatakan bahwa: “Sekalipun tindakan hukum keperdataan untuk urusan pemerintahan oleh badan atau pejabat tata usaha negara dimungkinkan, bukan tidak mungkin pelbagai ketentuan hukum publik (hukum tata usaha negara) akan menyusup dan mempengaruhi peraturan hukum perdata. Contohnya beberapa ketentuan peraturan perundang-undangan yang secara khusus mengatur tata cara atau prosedur tertentu yang harus ditempuh berkenaan upaya pembuatan hukum keperdataan yang dilakukan oleh badan atau pejabat tata usaha negara.

those who arrange it". By this explanation it means that dimension of law in agreement of provision of goods and services is dimension of civil law, thus position of law for parties in contract is position as parties in private law.

Presidential Regulation Number 16 Year 2018, in Article 6 determines principle of provision of goods/services namely Efficient, Effective, Transparant, Open, Competitive, Fair/indiscriminate, and Accountable, but it is seen that there is injustice in the requirement to give a guarantee where the one who gives a guarantee in the agreement is only the provider of goods/services while the government does not have an obligation to give a guarantee.

One of principles of provision is principle of justice but it is seen that there is an injustice in the requirement to give a guarantee in which the one who gives a guarantee in agreement is only the provider of goods/services while the government does not have an obligation to give a guarantee.¹ According to Sogar Simamora that in Contract of government "Transplant" happens². In one side the arrangement is the same as contract but the content has regulation effect. It is attached because the position of government as public organ has the implication to the implementation of public law against the contract with element of private law. Both norm types are implemented in entire stages of contract. Government in doing provision of goods and services has a cooperation with the third party or partner through tender based on Article (3) Presidential Regulation Number 16 Year 2018, that provision of goods/services is done by *Swakelola* (self-management) and or provider. In this case provider means that it can work if it is determined as the winner of tender through direct appointment as stipulated in Article (9) letter n paragraph (1), Presidential Regulation Number 16 Year 2018. And when it has been determined as winner of tender thus a contract is arranged and at that time the parties are binded to implement that contract.

The implementation of contract should be based on good intention from parties. According to Wyasa Putra good intention is really needed in a contract because if there is no good intention it will be one of problems that frequently becomes a trigger of dispute emerged in contract beside the accuracy, then it is said that good intention is related to honesty and mental quality of parties³. In order to achieve good implementation of provision of goods/services and there is a legal certainty thus it needs a guarantee. Article 1 Paragraph 48 Presidential Regulation Number 16 Year 18 determines that Letter of Guarantee is a written guarantee established by commercial Bank/the guarantee company/Insurance/specific financial institution that run a business in financing, guarantee, and insurance to increase export of Indonesia in line with stipulation of legislation in The Indonesian Export Financing Agency.

Principle of *Equality Before The Law* is reflected in Article 27 paragraph (1) Constitution 1945 stating that: "All citizens shall have equal status before the law and the government and hold without exemption the law and the government in esteem". It is an admission and guarantee of equality rights of all citizens in law and governance. *Equality before the law* is one of the most important principles in modern law. This principle becomes one of main doctrine of *Rule of Law* that is also spread out in developing country such as Indonesia and this principle is one of manifestations of *rechtstaat* thus there is an equal treatment for each people under the law. Hence, attached element has a meaning of equal protection under the law (equal justice under the law) and gets the equal justice under the law. Principle of equal justice under the law starts from the concept of *The Rule of Law* by Albert V Dincey that appeared in Modern Britain period, the concept states that every citizen should obey the equal law and adjudicated in same court⁴. It appears in practice of PBJ agreement as regulated in Presidential Regulation Number 1 Year 2018 on Provision of Government Goods/ Services, it shows that there is no position equality between Government and Provider of Goods and Services thus there is an injustice because temporarily there is a requirement on providing guarantee by provider of goods/services, while the government does not have an obligation to provide guarantee. Provider of goods /services for all this time always violate the agreement but how if the government who violates the agreement. In contrast, there is a possibility that parties either government or provider of goods/services violate the agreement. If it happens, there is probably no guarantee that government will not violate the agreement.

Guarantee in agreement of provision of government goods/services is only implemented for provider of goods/services, it is seen in Article 33 to 35 Presidential Regulation No. 16 Year 2018 while in agreement it is

¹ Pasal 1 butir 48 Perpres No 16 Tahun 18 menentukan bahwa Surat Jaminan adalah jaminan tertulis yang dikeluarkan oleh Bank umum/perusahaan, penjamin/Asuransi/lembaga keuangan khusus yang menjalankan usaha dibidang pembiayaan, penjaminan, dan Asuransi untuk mendorong ekspor Indonesia sesuai dengan ketentuan peraturan perundang-undangan dibidang lembaga pembiayaan ekspor Indonesia.

² Yohanes .sogar Simamora, 2017, *Hukum Kontrak, Prinsip-Prinsip Hukum Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia*, LaksBang PRESSindo, Surabaya., h. 63

³ Wyasa Putra, 2008, *Aspek-Aspek Hukum Perdata Internasional Dalam Transaksi Bisnis Internasional*, PT Refika Aditama, Bandung, h. 64

⁴ Saraswati, D. A. S., & Suantra, I. N. *Implikasi Perluasan Hak Imunitas Anggota Dewan Perwakilan Rakyat Republik Indonesia Terhadap Prinsip Equality Before The Law*.

not stipulated that the government as one of the parties should give the guarantee; in this case it shows an inequality in the agreement, how if the government doing default, what guarantee that can be used by provider of goods/services that government will fulfill the obligation to pay a fee that had been decided, it is seen that there is an injustice in agreement of government goods and services.

1.2. Research problems

Based on research problems, the main problems that can be formulated in this study are Legal Protection for Provider in Contract of Provision of Government Goods/Services in Justice Perspective. In general this study is aimed to: analyze how Legal Protection for Provider in Contract of Provision of Government Goods/Services in Justice Perspective to provide position equality between government and provider of goods/services in order to be able to give justice for provider in contract of provision of goods/services.

II. RESEARCH METHOD

This type of research is normative juridical research which is a process to find the rule of law, legal principles and legal doctrines in order to address the legal issues encountered.¹ The research approach used is the statutory approach, comparative approach, and conceptual approach. Sources of legal materials used are primary legal materials (rules and regulations, writings or official records, or also treatises, which are found in making regulations and legislation including decisions of judges in court), secondary (legal books, legal journals, legal magazines, legal articles, and obtained from the internet in the form of legal readings and legal cases) and tertiary (legal material that can provide instructions or explanations to strengthen primary and secondary legal materials, such as those originating from legal encyclopedias and dictionaries). The analysis technique in this research was carried out in a literature study and documentary study.²

III. RESULT AND DISCUSSION

3.1. Concepts

Concept of provision of goods/services as stipulated in Article 1 paragraph 1 Presidential Regulation Number 16 Year 2018 that Provision of Government Goods /Services is further defined as an activity of Provision of Goods/Services conducted by Ministry/Institution/Regional Working Unit which is funded by APBN/APBD that has several processes from need identification to handover of work result.

Contract of Provision of Goods/Services further called Contract is a written agreement between Commitment-making Official and Provider of Goods/Services or implementer of *Swakelola*. Provision of Government Goods/Services further called Provision of Goods/Services is an activity to obtain Goods/Services by Ministry/Institution/Regional Working Unit/Institution that processes started from need planning until the all activities are done to obtain Goods/Services. Concept of provision of goods/services as written in Article 1 paragraph 1 Presidential Regulation Number 16 Year 2018 that Provision of Government Goods /Services further called Provision of Goods/Services is an activity of Provision of Goods/Services by Ministry/Institution/Regional Working Unit that is funded by APBN/APBD which has processes started from need identification, up to handover of work result. There are two definitions of government, namely government in a broad sense and government in a limited mening.³ Government in a broad sense consists of three powers according to "*trias politica by Montesquiu*") that are separated from each other (*separation des pouvoirs*) including power: legislative, executive, and judicial.

Concept of Government in this study is based on Article 1 paragraph (1) Presidential Regulation Number 16 Year 2018 that Ministry/Institution/ Regional Working Unit. State ministry further called Ministry is a government working unit that serves a certain field in government. Institution is a non-State ministry organization and other institution of budget user that is made to do certain duty based on Constitution of Republic of Indonesia Year 1945 or other legislation. Regional Working Unit is supporting element of Regional Head and Regional People's Representative Council in implementation of Governance that becomes regional authority. Regional Government is a Regional Head as a element of operator of Regional Government which lead implementation of governance that becomes an authority of autonomous region.

In *Kamus Besar Bahasa Indonesia*.⁴ "*adil*" berarti sama berat; tidak berat sebelah; tidak memihak" ("fair" means having equal weight, taking side to the right one; holding the truth; the proper; being not arbitrary). Definition of justice is also found in *Dictionary of Law Complete Edition*,⁵ mentions that, fair: it does not take

¹ Marzuki, Peter Mahmud. *Penelitian Hukum* (Jakarta : Kencana Prenada Media, 2011), p.35.

² Abdlatif and Hasbi Ali. *Perihal Kaedah Hukum*, (Bandung : Citra Aditya Bakti, 2010), p.9.

³ Utrecht, 1994, *Pengantar Hukum Administrasi Negara Indonesia*, Pustaka Finda Mas, Surabaya , h. 12.

⁴ Departemen Pendidikan Nasional, 2005. *Kamus Besar Bahasa Indonesia*, Edisi Ketiga, Balai Pustaka, Jakarta, h. 8

⁵ Marwan dan Jimmy P, 2009. *Kamus Hukum, Dictionary of Law Complete Edition*, Reality Publihsers,

side to one party; honest; take side to the truth based on law. In contrast, in Latin term, “fair” is “Giving the people based on their rights” (*the constant and perpetual will to give each his due*), it means that every people has rights (*due*).

Then John Rawls declares, there are 2 (two) principles of justice: First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for other, second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be everyone’s advantage, and (b) attached to positions and offices open to all.¹ (*pertama-tama, tiap orang agar memiliki hak yang sama terhadap kebebasan dasar terhadap yang lain, dan kedua, ketimpangan sosial dan ekonomi agar diatur sedemikian rupa sehingga sesuai dengan kemampuan dan tugas dan wewenangnya*).

3.2. Legal protection for provider in contract of provision of government goods/services in justice perspective

Existence of guarantee in civil contract is a common habit and frequently happened. The characteristics of legal anticipation is more dominant in every civil transaction because rationally every people involved in contract especially budget owner does not want to have losses of spent fund.² The existence of benefit equality in contractual relation according to Roscoe Pound called equivalent theory³. In ontology⁴ a discussion on government’s obligation as one of parties in agreement to provide guarantee in provision of goods and services is a matter of injustice in implementation of agreement of provision of government goods and services.

The aim of guarantee requirement is to help the provider in covering the additional fee which is required or appeared in doing the obligation/duty because of the violation of provision existing in provision document or contract. Moreover, it is also to prevent the act of provider that violates procedure of provision stipulated in Legislation of Guarantee of Provision of Goods/Services which functions for controlling and risk mitigation of possibility of failure or obstructed process of implementation of Provision of Goods/Services, either in stage of selecting provider and implementation of Contract. Guarantee of Provision is established and will be paid by guarantor if member of Tender or Provider does not fulfill the required duty in Document of Selection or Document of Contract.⁵ Each agreement of Provision of Goods/Services requires Guarantee as affirmed in Article 30 Presidential Regulation Number 16 Year 18. namely; Guarantee of Tender, Guarantee of objection appeal, Guarantee of Implementation and Guarantee of Maintenance.

Basically, the obligation to provide guarantee should be applied for both parties involved in agreement of provision of government goods and services⁶ because ontologically it will give legal certainty that create a justice for parties either government or provider of goods/services. From the perspective of axiologically, values that will be investigated are justice and legal certainty. Justice value is related to a justice to provide guarantee in agreement of provision of government goods and services, in which regulated in Presidential Regulation it is only the obligation of a provider of goods /services while the government does not have that obligation. How if the government conducts default or violate the agreement. Value of legal certainty is related to clear regulation on rights and obligation of government or state official, rights and obligation of the citizens, in this case it is an obligation to provide guarantee of the government that government should be regulated clearly in that presidential regulation.

Theory of law in analyzing arrangement of legislation norm should consider real condition happened in societies in order to realize norm and regulation established and protect rights and obligation of all citizens, there is no rule that regulates the obligation of government in providing guarantee in agreement of provision of goods/services.

In legal dogmatics, Presidential Regulation Number 16 Year 2018 on agreement of provision of government goods/services, in Article 33 it regulates the guarantee, it only gives obligation to the provider of services in providing the guarantee and it is given in every stage of agreement. Looking at substance of Presidential Regulation Number 16 Year 2018, in fact there is no norm that regulates the obligation of

Surabaya, h.16

¹ John Rawls, 2006, *Teori Keadilan Atau Theory of Justice* (Terjemahan Pustaka Pelajar), Pustaka Pelajar, Yogyakarta, h. 60

² Purwosusilo, 2017, *Aspek Hukum Pengadaan Barang dan Jasa*, Kencana, Jakarta, , h. 295

³ *Ibid*, h. 398

⁴ Ontologi hukum menyangkut hakekat hukum.

⁵ <http://ditjenpp.kemenkumham.go.id/arsip/bn/2018/bn762-2018.pdf>. Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah Nomor 9 Tahun 2018 4 Tahun 2017 Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Melalui Penyedia LKPP. Pedoman Pelaksanaan Pengadaan Barang/Jasa Melalui Penyedia. Diakses Pada Senin, 4 November 2019

⁶ Aksiologi hukum menyangkut ajaran nilai dalam meneliti nilai-nilai yang terdapat dalam norma atau tindakan penyelenggara Negara, seperti : keadilan, kepastian hukum, kepatuhan, persamaan dan kebebasan.

government in providing guarantee in the agreement of provision of goods and services. Legal consequence of the absence of norm or empty norm is that there is no legal certainty, which cause injustice for provider of services specifically and societies generally. In addition, it also affects state losses.

A contractual relation makes rights and obligation of a agreement, it is also happened in agreement of provision of government goods/services, it makes rights and obligation for government and provider of goods/services. In general in a contractual relation there is always a fulfillment of reciprocal achievement. The achievement is in the form of payment some money. However, in some cases the government does not fulfill obligation to pay some money to the provider of goods/services. There is a case related to default conducted by government namely Supreme Court decision RI Number 3229/k/Pdt/2015 on 24th of February 2016, case between Government of Republic of Indonesia, cq. Governor Aceh, and PT. Citra Bunda. PT. Citra Bunda conducted 100% work of beach safety of Ujong Tanoh village, Samadua Subdistrict, Aceh selatan Regency, but the government does not pay 100% of value of the finished duty since 2011 thus it makes losses for PT. Citra Bunda and until Budget and Expenditure of Aceh (APBA) 2014, then it is not allocated to pay the rest of work result of PT. Citra Bunda at Rp. 8.501.282.000,00 (Eight Billion Five Hundred and One Million Two Hundred and Eighty Two Thousand Rupiahs).

According to Fitzgerald as quoted by Satjipto Raharjo, the beginning of the emergence of legal protection theory sources from theory of natural law or school of natural law. This school is firstly found by Plato, Aristoteles (Plato's student), and Zeno (founder of school of Stoic). Based on this school it is stated that the law comes from God that is universal and eternal, and law and moral cannot be separated. These adherents view that law and moral are reflection and rules internally and externally from human's life achieved through law and moral.¹

Legal protection should see the stages namely legal protection that is made by a legal stipulation and every regulation of law given by the societies that is basically from agreement of societies to regulate relation of act between the members of societies, individuals and government that is considered to represent interest of societies². According to Satjipto Raharjo, legal protection is giving protection to human rights (HAM) violated by other people and that protection is given to the societies in order to be able to enjoy all rights given by law. Law can function to achieve protection that is not merely adaptive and flexible, but also predictive and anticipative. Law is needed for them who is weak and not strong socially, economically and politically to obtain social justice.³

According to Phillipus M. Hadjon legal protection for societies is as a government's act which is preventive and repressive. Preventive legal protection is aimed to prevent the dispute happened, which lead government's act to be careful in decision making based on discretion, and repressive legal protection is aimed to solve the dispute, including the settlement in judicial institution⁴ Based on the previous explanation it is stated that function of law is to protect people from danger and act that can harm and hurt his life from the others, societies or authorities. Furthermore, it also functions to give justice and become a medium to achieve justice for all people. Theory of welfare state is used to analyze role/intervention of state in arrangement of legislation to provide welfare and justice for societies especially for provider of goods/ services in agreement of provision of government goods/services. The state has two main duties, namely: first, state is really responsible in giving the calmness from all fears in the form of anything for all nations. Second, the state should also convince and make a way of economic welfare for all citizens. Theory of welfare state is very appropriate to be used in this study, in which the state has obligation to give or achieve welfare for the citizens by providing needs of societies and one of them is by implementing contract of provision of goods/services.

Main purpose in welfare state or modern state as stated by Muschan in Melkianus Ndaomanu⁵, it is not positioned as defending positive law, but in the term of achieving social justice or *social gerechtigheid* for all citizens. Therefore, if it is necessary, the state can act beyond the law to reach social justice for all citizens. Administration tool of state in doing the function or *Bestuurszong* is given the freedom to act or *freies ermesen*, without violating the principles of legality and being not arbitrary. Theory of welfare state is appropriately used in this study to answer raised research problems, in which a state has a role to give justice to the societies by providing need of societies, which is supported by sufficient regulation of law and in making decision, the government should act based on applied regulation of law in Indonesia. In a agreement there are minimally two parties, in which two parties agree to cause a certain consequence of law. An "agreement" or "concurrence" in

¹ Satjipto Raharjo, 2000, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, h.53.

² *ibid.* h. 54

³ *Ibid.* h.55

⁴ Phillipus M. Hadjon, 1987, *Perlindungan Hukum Bagi Rakyat Indonesia*, PT. Bina Ilmu, Surabaya, h.29.

⁵ Melkianus Ndaomanu, 2015, *Kedudukan Kontrak Kerja konstruksi Pemerintah dan Akibat Hukum Serta Implikasi Penegakan Hukumnya*, Program Pasca Sarjana Universitas Gadjah Mada, h. 81.

term of civil code, namely an act with one person or more bind themselves against one person or more (Article 1313 Civil Code).

By making the agreement, it will cause consequence of law in which one party may sue something against another party, vice versa. Based on formulation of agreement it can be formulated that element of agreement is that: there are parties, there is an agreement between parties, there is a aim that will be achieved, there is achievement that will be held, there is certain form and there is certain requirement. By this case, relation of law between two people or more is appeared, in which rights and obligation between those parties are guaranteed by law. Relation between two people is called bond. That agreement establishes bond between two people who made it. In its form, the agreement is in the form of a set of statements that contain commitment or ability stated or written. Theory of this agreement is used to know the legal requirement of agreement and the parties involved in the agreement. Therefore, this theory is appropriately used in this study.

Jhon Rawls states that in societies which are regulated by utilitarianism principles, people will lose self esteem, the service for the joint development will also be disappeared. According to Rawls, regulation should exist in the situation of inequality thus the weakest group of societies is the most advantageous in this case. It happens if the two requirements are fulfilled. First, the inequality situation guarantee maximum minimum for the weakest group of societies. That means societies should as it should be, thus it may obtain the highest benefit for people from low social class. Second, inequality is binded into open position for all people. It is aimed to give the chance to people as greatest as others in life. According to the writer, this theory is appropriately used to answer problems related to the obligation of government in providing the guarantee should be formulated in the legislation thus it can give legal certainty in implementation of provision of government goods/services. Government frames relation of law with provider of goods or services in a contract of provision of goods or services. In other words, the government becomes a party in a contract. In this case, the government does not position itself higher than the provider of goods or services, even the government is an institution conducting acts as regulating (*regulator*). It is because in the law of agreement, the parties have the same position, as reflected in Article 1338 civil code. Hence, both the government and the provider of goods/services have an equal position in fulfilling rights and obligation stated in agreed contract.

IV. CONCLUSION AND SUGGESTION

4.1 Conclusion

1. The implementation of contract should be based on good intention from the parties. In order to achieve good implementation of provision of goods/services and there is a legal certainty thus it needs a guarantee.

2. Form of legal protection of government to the provider in contract of provision of government goods/services is by giving guarantee that government will conduct its duty to spend some money as what has been agreed in contract. The consequence of law namely the absence of norm or empty norm is that there is no legal certainty which causes injustice for provider of goods/services especially and societies generally. In addition, it can make state losses.

4.2 Suggestions

1. In order to give legal certainty thus it needs to add clause in regulation on guarantee from the government to do its contractual obligation thus it gives legal certainty and certainly gives justice for provider in contract of provision of government goods/services.

2. The involved parties in contract of provision of government goods/services should do their contractual obligation with good intention.

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