

The Nature of Guarantees in Appeals for Procurement of Construction Goods/Services

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ABSTRACT

The philosophy of procurement of construction goods/services is that the procurement of construction goods/services financed by the APBN/APBD is carried out effectively, efficiently, with the principles of healthy, transparent, open competition, fair treatment for all parties, so that the results can be accounted for, both from a physical and financial perspective. , as well as its benefits for the smooth running of government duties and community services. Disputes over the procurement of goods and services can occur from the qualification implementation stage to the contract signing stage and contract implementation. There are at least three legal aspects in the process of procuring construction goods and services, namely: (1) Administrative Legal Aspects; (2) Civil Law Aspects; (3) Aspects of Criminal Law.

The objection to the appeal in the Regulation of the Public Policy Institute for Procurement of Government Goods/Services Number 9 of 2018 (LKPP Institution Regulation) number 42.14 as has been adjusted to the Regulation of the LKPP Institution Number 12 of 2021 concerning Guidelines for the Implementation of Procurement of Goods/Services through Providers states that the objection to the appeal is a protest from the objection to the budget user authority (KPA) in the procurement of construction work who does not agree with the objection answer which is accompanied by a guarantee of appeal objection.

Based on the provisions of Article 75 paragraph (5) of Law Number 30 of 2014 concerning Government Administration, every administrative effort carried out by the public regarding government decisions and/or actions in the form of objections and appeals should not be charged a fee. However, efforts to appeal against the results of the procurement of construction services were found to be subject to costs in the form of a guarantee against the appeal.

Keywords: Essence of Appeal Guarantee, Procurement of Goods/Services, Construction Work.

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A. Introduction

The Unitary State of the Republic of Indonesia is a state based on law (*rechtstaat*) and not a state based on power (*machtstaat*), so the position of law must be placed above everything else. Every action must be in accordance with the rules of law without exception.¹ In connection with the concept of a legal state, the true aim of law is to provide legal certainty, legal justice and legal benefits for humans and society. Gustav Radbruch believes that the goals of law are justice, certainty and usefulness. Justice must have a first and foremost position rather than legal certainty and legal benefits. All state activities in administering government or carrying out development must be based on legal provisions.²

Arranging the procurement of construction goods/services through tenders for the procurement of construction goods/services, providers of construction goods/services often object to the decision of the working group of the goods/services procurement work unit, because it is suspected that there are practices of corruption, collusion and nepotism in the process. The provider submits an appeal to the budget user/budget user authority as the head of the budget user agency/budget user authority (PA/KPA) after the buffer does not receive the appropriate answer from the working group of the goods/services procurement work unit.

In relation to the nature of the guarantee for objections to appeals for the procurement of construction goods/services, submitting a deposit for objections to appeals is too excessive because the provider who defends his rights must first hand over a certain amount of security deposit. If the objection to the appeal is declared wrong, the security deposit is confiscated by the state, while if the objection to the appeal is declared correct, the goods and services procurement work unit (UKPBJ) is ordered to re-evaluate or re-procure goods and services. It can be seen that the errors and sanctions received by providers of goods and services are unfair to the errors and

¹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, Jakarta, p 69.

² Musakir, 2013, *Putusan Hakim Yang Diskriminatif Dalam Perkara Pidana, Suatu Tinjauan Sosiologi Hukum dan Psikologi Hukum*. Cetakan Pertama, Yogyakarta, Rangkang Education, 2006, p. 3.

sanctions received by the government, even though both are in the same position as parties involved in a goods and services procurement activity.

In a tender, of course there will be parties who are selected and who are not selected. The same thing also applies to the procurement of goods/services as regulated in Presidential Regulation Number 16 of 2018 concerning Procurement of Goods/Services. Article 50 of Presidential Regulation Number 16 of 2018 concerning Procurement of Goods/Services states that one of the stages in tender selection is refuting appeals for procurement of construction work.

Based on the background description above, the formulation of the problem that will be studied in this writing is: 1. What is the philosophical basis for appeal denial guarantees in the procurement of construction goods/services? 2. What is the appeal guarantee mechanism in the procurement of construction goods/services in Indonesia?

B. Research Methods

The research uses normative juridical research methods. This research is normative legal research to examine and analyze guarantees against appeals in the procurement of construction goods/services in Indonesia. In normative legal research, only library materials or secondary data are examined, which include primary legal materials, secondary legal materials and tertiary legal materials.

C. Results and Discussion

1. Philosophical Basis for Guarantee Disclaimer of Appeal in Procurement of Construction Goods/Services

In order for the philosophical objectives of procurement of construction goods/services to be achieved properly, all parties involved in the procurement process must follow applicable norms. According to Maria Farida Indrati S in Adrian Sutedi, a new norm exists if there is more than one person because norms basically regulate how a person behaves towards other people or towards their environment.¹

Norms for the procurement of construction goods/services consist of unwritten norms and written norms. Unwritten norms are generally ideal norms, while written norms are generally operational norms. The ideal norms for procurement of construction goods/services are, among other things, implied in the understanding of the essence, philosophy, ethics, professionalism in the field of procurement of construction goods/services. Norms for the procurement of operational construction goods/services have generally been formulated and outlined in statutory regulations, namely in the form of laws, regulations, guidelines, instructions and other forms of statutory products.

The success of development during a government period is always determined by the success or failure of the construction goods/services procurement process, because the implementation of development in all sectors is generally carried out through stages of construction goods/services procurement, so it is not surprising that the budget allocation for construction goods/services procurement projects is very high. large, because almost all provision of public facilities for the benefit of the community is carried out through the goods/services procurement process, whether carried out directly by the central government through ministries and institutions or by implementation is delegated to regional governments through balancing funds in the form of General Allocation Funds (DAU) or Special Allocation Funds (DAK).²

Procurement of construction goods/services involves several parties, namely the buyer or user of construction goods/services and the seller or provider of construction goods/services. The buyer or user of construction goods/services is the party who requires construction goods/services, in the implementation of the procurement of construction goods/services, the user is the party who receives or assigns the task to the provider of construction goods/services to supply or make construction goods/services or carry out specific job. Based on this description, for the procurement of construction goods/services, the implementation of which is assisted by the goods/services procurement committee/official, the procurement process involves three parties, namely: (1) Goods/Services Users; (2) Goods/Services Procurement Committee/Official; and (3) Goods/Services Providers. There are legal aspects surrounding the process of procuring goods/services, namely as follows:

a. Aspects of Criminal Law.

Procurement of goods as regulated in the Presidential Regulation in imposing criminal sanctions still requires Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning PTPK and/or Law Number 5 of 1999 concerning Prohibition of Monopolies and Unfair Business Competition, whereas for the procurement of construction services, the provisions for criminal sanctions have been regulated in Law Number

¹ Adrian Sutedi, *Aspek Hukum Pengadaan Barang dan Jasa dan Berbagai Permasalahannya*, Jakarta, Sinar Grafika, 2008, p. 11.

² D.Y Witanto, *Dimensi Kerugian Negara dalam hubungan Kontraktual (Suatu Tinjauan Terhadap Risiko Kontrak dalam Proyek Pengadaan Barang/Jasa Instansi Pemerintah)*, Mandar Maju, Bandung, 2012, p. 1

18 of 1999 concerning Construction Services, Article 43 paragraph (1) "Whoever "who carries out construction work planning that does not comply with engineering regulations and results in the failure of building construction work is subject to a maximum penalty of five years in prison or a fine of a maximum of 10% (ten percent) of the contract value"; Article 43 paragraph (2) "Anyone who carries out construction work that is contrary to or not in accordance with established engineering regulations and results in construction work failure or building failure is subject to a maximum penalty of five years in prison or a maximum fine of 5% (five percent) of the contract value"; Article 43 paragraph (3) "Anyone who supervises the implementation of construction work and deliberately gives other people carrying out construction work the opportunity to deviate from engineering regulations and causes the construction work to fail or the building to fail will be subject to a maximum penalty of five years in prison or a maximum fine of a lot of 10% (ten percent) of the contract value."¹

b. Civil Law Aspects

Aspects of civil law relating to the procurement of government construction goods/services are regulated in the Civil Code, especially those governing contracts. Article 1338 of the Civil Code states: All agreements made legally apply as law for those who make them. An agreement cannot be withdrawn other than by agreement of both parties, or for reasons deemed sufficient by law. An agreement must be implemented in good faith in conjunction with the conditions for the validity of the agreement, Article 1320 of the Civil Code which states: (1) The agreement of those who bind themselves; (2) The ability to make an agreement; (3) A certain thing; and (4) a lawful cause.

c. Administrative Law Aspects

In practice, parties who commit deviations are usually immediately prosecuted criminally, even though this is not the case as intended in Article 118 paragraph (2) of Presidential Regulation Number 70 of 2012 which states: Actions as intended in paragraph (1) are carried out by suppliers of goods/ government construction services, are subject to sanctions in the form of: (a) administrative sanctions; (b) sanctions for blacklisting; (c) civil lawsuit; and/or (d) criminal reporting to the authorities. Article 118 paragraph (7), for ULP: (a) subject to administrative sanctions; (b) claim compensation; and/or (c) be reported criminally.

a. Philosophy of procurement of construction goods/services.

The philosophy of procurement of construction goods/services is that the procurement of construction goods/services financed by the state revenue and expenditure budget/regional revenue and expenditure budget is carried out effectively, efficiently, with the principles of healthy, transparent, open competition, fair treatment for all parties, so that the results can be accounted for, both in terms of physical, financial, and benefits for the smooth running of government duties and community services. According to T. Gaius Lumbun: Presidential Regulation Number 54 of 2010 is an independent Presidential Regulation based on the provisions of Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, therefore, the existence of this presidential regulation is a form of government policy or president as outlined in the form of presidential regulations, which are full of several weaknesses, including:

- a) The only law that is the basis or reference for its formation is Law Number 1 of 2004 concerning the State Treasury. This means that this presidential regulation is more directed towards the administrative aspects of government administration which are related to issues of state financial accountability. In fact, if you look at the substance, there are acts that are outside the issue of independent acts that need to be sanctioned or the sanctions refer to other laws, not the Law on State Treasury, meaning that substantively the regulatory material this president is actually the subject of this type of legal regulation.
- b) In line with the first weakness, this presidential regulation limits the scope of the object of Procurement of Goods/Services to only two areas which are reflected in its legal basis, namely Government Regulation Number 29 of 2000 concerning the Provision of Construction Services as amended by Government Regulation Number 59 of 2010 and Government Regulation Number 6 of 2006 concerning Management of State/Regional Property as amended by Government Regulation Number 538 of 2008, on the scope of goods and Services are not limited to the two types above.
- c) Presidential Regulations contain norms whose violations can be subject to criminal sanctions, but because the only laws and regulations that can contain criminal sanctions are Regional Laws and Regulations, Presidential Regulation Number 54 of 2010 jo. Presidential Regulation Number 70 of 2012 criminal sanctions refer to the provisions of other laws.²

b. Ethics in Procurement of Construction Goods/Services

¹ Adrian Sutedi, *op. cit.*, p, 4-5

² T.Gayus Lumbun, *Tulisan Pakar: Urgensi Pembentukan Undang-Undang tentang Pengadaan Barang dan Jasa*, Perum LKBN ANTARA, Jakarta, 2012, p. xiv-xv.

Ethics according to the Law and Jurisprudence Dictionary is defined as the study of good and bad.¹ According to the General Indonesian Dictionary, ethics is defined as a collection of principles/values relating to morals or an assessment of right or wrong held by a group or society.² Ethics is actually a standard of behavior, growth and development through socialization and internalization will make ethics more characteristic and function as a means of control that moves from within, whose obedience is more voluntary but full of commitment. Ethics is not a means of control that operates as an external force with its coercive nature.³ Ethics in the procurement of construction goods/services is good behavior from all parties involved in the process of procuring construction goods/services. Good behavior here is the behavior of mutual respect for the duties and functions of each party. Article 6 of Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services, states eight procurement ethics that must be adhered to by parties, namely:

- a. Carrying out tasks in an orderly manner, accompanied by a sense of responsibility to achieve targets, smoothly and accurately achieving the objectives of procurement of goods/services;
- b. Work professionally and independently, and maintain the confidentiality of goods/services procurement documents which by their nature must be kept confidential to prevent irregularities in the procurement of goods/services;
- c. Do not influence each other, either directly or indirectly, resulting in unhealthy competition;
- d. Accept and be responsible for all decisions determined in accordance with the written agreement of the parties;
- e. Avoiding and preventing conflicts of interest between the parties involved, either directly or indirectly, in the process of procuring goods/services;
- f. Avoid and prevent waste and leakage of state finances in the procurement of goods/services;
- g. Avoid and prevent abuse of authority and/or collusion with the aim of personal, group or other party gain which directly or indirectly harms the state; And;
- h. Do not accept, do not offer or promise to give or receive gifts, rewards, commissions, rebates, etc. from or to anyone known or reasonably suspected to be related to the procurement of goods/services.

The description above can illustrate that actions that are inappropriate and are very contrary to procurement ethics are if one party or both of them jointly engage in practices of corruption, collusion and nepotism (KKN). Procurement of construction goods/services can be a vulnerable point for KKN practices, therefore efforts need to be made to improve the quality of the implementation of procurement of construction goods/services, through improving laws and regulations relating to procurement, increasing the professionalism of procurement actors, increasing supervision and enforcement. law.

2. Principles of Procurement of Goods/Services

Procurement of construction goods/services recognizes several principles as regulated in Article 5 of Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services, namely:

- a. Efficient, meaning that the procurement of goods/services must be carried out using minimum funds and resources to achieve quality and targets within the specified time or using predetermined funds to achieve results and targets with maximum quality;
- b. Effective, meaning that the procurement of goods/services must be in accordance with the needs and targets that have been determined and provide maximum benefits;
- c. Transparent, meaning that all provisions and information regarding the procurement of goods/services are clear and can be widely known by interested machete/service providers as well as by the community in general;
- d. Open, meaning that the procurement of goods/services can be participated in by all providers of goods/services who meet certain requirements/criteria based on clear provisions and procedures;
- e. Competitive, meaning that the procurement of goods/services must be carried out through healthy competition among as many providers of goods/services as possible who are equal and meet the requirements, so that the goods/services offered can be obtained competitively and there are no interventions that disrupt the creation of market mechanisms in the procurement of goods/ service;
- f. Fair/non-discriminatory, meaning providing equal treatment to all prospective providers of goods/services and not aiming to provide benefits to certain parties, while still paying attention to national interests; And

¹ H.M.Fauzan dan Baharuddin Siagian, *Kamus Hukum & Yurisprudensi, Cetakan ke-1* Depok, Kencana, 2017, p, 249.

² *Kamus Besar Bahasa Indonesia Edisi Ketiga*, Departemen Pendidikan Nasional, Balai Pustaka Jakarta, 2007, p. 309.

- g. Accountable, meaning that it must comply with the rules and regulations related to the procurement of goods/services so that it can be accounted for.

The use of APBN/APBD funds can be carried out effectively and efficiently if competition is carried out transparently and openly, and users of government goods/services act fairly/non-discriminatorily, so that their decisions can be justified. This principle of justice is the spirit of all existing principles. Fairness in this case includes justice for participants or providers of procurement of government construction goods/services. The implementation of development so far has apparently been unable to carry out the ideals and objectives mandated by the 1945 Constitution. The implementation of development so far has not included the wider community, in fact it has resulted in negative impacts that are detrimental to the people. The emergence of a conglomerate economic system has given rise to many unhealthy practices, such as monopolies, oligopolies, monopsony, oligopsony and cartels which also widen the economic and social gap between rich and poor, between regions and between sectors.¹

Based on the provisions of Article 75 paragraph (5) of Law Number 30 of 2014 concerning Government Administration, every administrative effort carried out by the public regarding government decisions and/or actions in the form of objections to appeals should not be charged a fee. However, efforts to appeal against the results of the procurement of construction services were found to be subject to costs in the form of a guarantee against the appeal. Thus, it is clearly contrary to statutory regulations and violates the rights and is unfair to providers of construction goods/services.

2. Mechanism for guarantees against appeals in the procurement of construction goods/services in Indonesia.

So that the essence or essence of the procurement of construction goods/services can be carried out as well as possible, both parties, namely the user and the provider, must always adhere to the philosophy of procurement of construction goods/services, comply with the ethics and norms of applicable construction procurement/services, follow the principles - principles, methods and processes for procurement of construction goods/services that are standard and fair for users and providers of procurement of construction goods/services.

There are many definitions of philosophy, including that philosophy is knowledge and investigation with reason regarding the causes, principles, laws and so on of everything that exists in the universe or regarding the truth and meaning of the existence of something. Meanwhile, in the Indonesian Encyclopedia, the definition of philosophy is a way of thinking based on logic that is carried out freely, as deeply as possible, getting to the bottom of the problem.

Based on this description and understanding, it can be stated that the philosophy of procurement of construction goods/services is an effort to obtain the desired construction goods/services by doing so on the basis of logical and systematic thinking (the system of thought), following applicable norms, ethics and fairness. in accordance with the principles of procurement of goods/services. The position of procurement of construction goods/services is not always at the same level, depending on the type of procurement of construction goods/services. Below are several positions/positions for procurement of construction goods/services, including in the implementation of physical development, in activities financed by foreign loans, and in logistics (inventory) management.

In a tender, of course there will be parties who are selected and who are not selected. The same thing also applies to the procurement of goods/services as regulated in Presidential Regulation Number 16 of 2018 concerning Procurement of Goods/Services. Article 50 of Presidential Regulation Number 16 of 2018 concerning Procurement of Goods/Services states that one of the stages in tender selection is refuting appeals for procurement of construction work.

The appeal guarantee mechanism for the procurement of construction goods/services is regulated in the provisions of Article 32 of the Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to the Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services, namely a 1% (one percent) appeal guarantee. from the estimated price value for the procurement of construction work. Submitting a deposit against an appeal is too excessive because the provider defending his rights must first submit a deposit amount. If the objection to the appeal is declared wrong, the security deposit is confiscated by the state, while if the objection to the appeal is declared correct, the goods and services procurement work unit (UKPBJ) is ordered to re-evaluate or re-procure goods and services. It can be seen that the errors and sanctions received by providers of goods and services are unfair to the errors and sanctions received by the government, even though both are in the same position as

¹ Zudan Arif Fakrulloh, *Pola Pemberdayaan UKM Melalui Kerja Sama dengan LMV, Dalam Bahan Bacaan Program S-3 Ilmu Hukum UNTAG*, Surabaya, 2011. p. 11

parties involved in a goods and services procurement activity. Future appeal deposits from providers of construction goods/services must be eliminated.

D. Closing

1. That based on the provisions of Article 75 paragraph (5) of Law Number 30 of 2014 concerning Government Administration, every administrative effort carried out by the public regarding government decisions and/or actions in the form of refuting appeals should not be charged a fee. However, efforts to appeal against the results of the procurement of construction services were found to be subject to costs in the form of a guarantee against the appeal. Thus, it is clearly contrary to statutory regulations and violates the rights and is unfair to providers of construction goods/services.
2. That the appeal guarantee mechanism for the procurement of construction goods/services is regulated in the provisions of Article 32 of the Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to the Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services, namely a 1% appeal guarantee (one percent) of the estimated price value for the procurement of construction work. Submitting a deposit against an appeal is too excessive because the provider who defends his rights must first submit a deposit amount. If the objection to the appeal is declared wrong, the security deposit is confiscated by the state, while if the objection to the appeal is declared correct, the goods and services procurement work unit (UKPBJ) is ordered to re-evaluate or re-procure goods and services. It can be seen that the errors and sanctions received by providers of goods and services are unfair to the errors and sanctions received by the government, even though both are in the same position as parties involved in a goods and services procurement activity. Future appeal deposits from providers of construction goods/services must be eliminated.

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