

RECONSTRUCTION OF CRIMINAL SANCTIONS FOR PERPETRATORS OF BUSINESS CRIMES

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Abstract

The development of criminal liability in Law Number 1 of 2023 concerning the Criminal Code differentiates in detail the form of liability for individual legal subjects with legal entities. The regulation specifically for criminal liability for legal subjects in the form of legal entities (corporations) is contained in paragraph 3 of Article 45 to Article 50 of Law Number 1 of 2023 concerning the Criminal Code. As the principle of the case before the law, the new Criminal Code in terms of law enforcement against legal subjects in the form of corporations also adheres to the reasons for the elimination of criminal penalties (justification and excuse) as contained in Article 50 which states that in essence justification and excuse apply in the corporate criminal liability system as long as the reasons are directly related to the criminal act being prosecuted.

I. Introduction

Business crimes in government procurement of goods and services resulting in corruption are a conventional mode of corruption that often occurs, based on research by the World Bank, every year in Indonesia from around Rp. 85,000,000,000,000 (eighty five trillion) of the budget allocated for procurement of goods and services there has been a budget leak of 20% to 40%, this amount is so fantastic from the amount of the budget allocated, then the Financial and Development Audit Agency found that the leak from government goods and services spending was 30% so that from the central government's finances alone the potential for leakage could reach Rp. 25,000,000,000,000. 000 (twenty five trillion), the leakage that resulted in state financial losses occurred due to the actions of parties in the procurement of government goods and services who did not exercise their authority properly, so that according to various studies conducted, criminal acts of corruption in the procurement of goods and services are the most common criminal acts of corruption and have not decreased significantly.¹

Efforts to prevent corruption in the procurement of goods and services have been such that Presidential Instruction Number 17 of 2011 concerning Action to Prevent and Eradicating Corruption in 2012 mandates that 75% of all procurement spending for goods and services in the State Budget (APBN) and 40% of the Regional Budget (APBD) must use Electronic Procurement Services (LPSE).² Since Presidential Decree 54 of 2010 that Ministries/Institutions/Regional Work Units/Other Institutions (K/L/D/I) are required to carry out electronic procurement of goods and services, this effort is actually to reduce acts of corruption, collusion and nepotism, but in fact the state financial losses caused by procurement of goods and services are still at the top of the standings compared to corruption in the non-procurement sector of goods and services in Indonesia. It is likely that we will be confused in the procurement of goods and services using the LPSE system can be cheated again with unhealthy activities in implementing the determination of winners, auctions, selection and procurement provisions are three alternative parts to get the best partners in the procurement of goods and services, although in fact the project can be managed by the relevant agency (self-management), in the search for partners and auctions for the procurement of goods and services several methods, namely public auctions, simple auctions.

Fraudulent behavior, abuse of authority in the procurement of goods and services is included in the category of business crimes. Philosophically, business crimes contain the meaning that there has been a change in values in society when a business activity is operated in such a way that it is very detrimental to the interests of the wider community to the lowest class, while the meaning of business crimes legally shows that there are two sides to one coin, namely on the one hand there is a civil law aspect and on the other hand there is

¹ Fauzan. *Tindak Pidana Korupsi Pengadaan Barang dan Jasa di Lembaga Pemerintahan*, (Jurnal Ilmiah Mizami, Wacana Hukum, Ekonomi dan Keagamaan Vol I No. 2 Tahun 2014), hlm 2.

² Samsul Ramli. *Bacaan Wajib Para Praktisi Pengadaan Barang dan Jasa Pemerintah*, (Jakarta :Visi Media, 2013), hlm 132

a criminal law aspect, while sociologically, the meaning of business crimes has shown the real situation that has occurred in business activities or the world but on the other hand it also shows that business activities are no longer running or as if there is no one who can be trusted in business activities.³

The urgency of the birth of additional criminal sanctions in the form of revocation of the right to do business with the state in the procurement of goods and services because all elements including Islamic religious leaders have viewed corrupt behavior that occurs in the procurement of goods and services as exceeding the threshold. The reason is that Islam strongly opposes acts of corruption or what is called *ghulul*. Even several large Islamic organizations such as the Fatwa of the Indonesian Ulema Council (MUI) in 2000 stipulated the prohibition of corruption in the Fatwa decision of the VI National Conference of the Indonesian Ulema Council Number: 4 / MUNAS VI / MUI / 2000 concerning *riswah* (bribery), *ghull* (corruption) and gifts to officials.

The need for a criminal law policy regarding additional criminal sanctions in the form of revocation of the right to do business with the state against private actors or entrepreneurs who have collaborated with goods and services procurement organizers must be carried out by reconstructing Article 18 paragraph (1) letter d of Law Number 31 of 1999 concerning the Eradication of Corruption in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption.

The urgency of reconstructing Article 18 paragraph (1) letter d of Law Number 31 of 1999 concerning the Eradication of Corruption Juncto Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption in order to provide additional criminal sanctions in the form of revocation of the right to not be able to do business with the state for private legal subjects who are active as entrepreneurs who have committed business crimes in the procurement of government goods and services, especially as stated in Article 2 of Law Number 31 of 1999 concerning the Eradication of Corruption Juncto Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption, the basic objective is so that a person who has been given a sanction in the form of revocation of the right to do business with the state will be prevented from submitting bids in the Electronic Procurement System (SPSE). Reconstruction of Article 18 paragraph (1) letter d of Law Number 31 of 1999 concerning the Eradication of Corruption in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption to reflect justice in accordance with our state philosophy, namely Pancasila. Because it is fair and civilized according to researchers if both parties who cooperate in carrying out the *modus operandi* in the procurement of goods and services, the sanctions imposed should also be proportionate both in terms of the main and additional criminal penalties.

2. Research Method

³ Romli Atmasasmita. *Hukum Kejahatan Bisnis (Teori dan Praktek di Era Globalisasi)*, Jakarta : Prenamedia Group, 2016), hlm 45-46

In accordance with the subject matter, the type of legal research conducted is normative juridical research or research that analyses written law, jurisprudence and norms that live in society.⁴ Soemitro said that normative legal research is also called library legal research, because it is mostly carried out on secondary data found in libraries.⁵ An approach is a researcher's perspective in selecting a spectrum of discussion space which is expected to provide a clear description of the substance of a scientific work.⁶ Analysis of legal materials is carried out using the content analysis method (content analysis method) which is carried out by explaining the material of legal events or legal products in detail in order to facilitate interpretation in the discussion.⁷ The data sources needed in this study were obtained from libraries and documents, through secondary data. According to Sugiyono, secondary data is a source of data that does not directly provide data to data collectors, for example through other people or through documents. In research, the sources of secondary data can be laws, books, journals, articles related to the research topic.⁸

3. Results and Discussion

a. Legal Regulation Of Business Crimes In Government Procurement Of Goods And Services

Legally, the implementation of government procurement of goods and services is regulated in Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services, but these regulations are normative in nature, while procedurally they are regulated based on their derivatives, namely the Regulation of the Head of the Goods/Services Procurement Policy Agency.⁹ The update of Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services has produced 13 (thirteen) derivative regulations as the basis for the administration of government procurement of goods and services.

The regulation on government procurement of goods and services is the regulation that is most often updated by the President of the Republic of Indonesia. In principle, regulations that are often changed indicate that there are events that must be regulated in them. The changes that tend to be rapid should emphasize the principle of clarity of the purpose of the regulation. A. Patra M. Zen in his writing conveys the clarity of the purpose of the formation of legislation, namely that every formation of legislation must

⁴ Ida Hanifah, dkk, "Reconstruction Of Corporate Liability Law In The Provision Of Construction Services", *Journal Of Law And Sustainable Development*, Vol. 11, No. 7 Tahun 2023.

⁵ Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri* (Jakarta: GhaliaIndonesia, 1990), hlm. 11

⁶ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*, Cetakan Kedua (Jakarta: Kencana, 2017), hlm. 11-12

⁷ Ismail Koto, "Cyber Crime According to the ITE Law", *IJRS*, Vol. 2 No.2 Tahun 2021.

⁸ Sugiyono, *Metode Penelitian Kuantitatif* (Bandung: Alfabeta, 2018), hlm. 456

⁹ Bhekti Arum Lestari, *Tinjauan Perubahan Kebijakan Pengadaan Barang Dan Jasa Pemerintah Dalam Perpres Nomor 16 Tahun 2018*, (*Jurnal Administrasi Dan Manajemen* Vol 9 No. 1 Tahun 2022) hlm 13

have a clear purpose to be achieved.

Law is the guardian of national development. Good law will produce good national development, this is if it is studied from the substance of law. The working of law is conveyed in Levitham's understanding, namely that law and culture that originate from a culture have not yet determined to be loyal or obedient to the rules in their area, and this culture can only stimulate normative compliance and has the potential to create social change in the midst of society. The essence of the implementation of government procurement of goods and services is to provide welfare for the people and this goal cannot be carried out by the government alone (Budget Users, Commitment Making Officials) but must also be sustainable with providers (corporations) that have good corporate governance. Because the discontinuity of several procurement activities of goods and services can also arise from providers or companies that have poor management. And one of the important things in the implementation of good corporate governance is corporate social responsibility and business ethics.¹⁰

The essence of government procurement of goods and services or in foreign terms procurement is born due to the need for goods, services and if interpreted broadly the essence of procurement of goods and services includes the preparation, determination and implementation or administration stages of tenders for procurement of goods and services. Normatively in Chapter 1 General Provisions Article 1 of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services states that Procurement of goods / services is an activity to obtain goods / services by Ministries / Institutions / Regional Work Units / other institutions whose process starts from planning needs until all activities are completed to obtain goods / services. The procurement of goods / services is financed by the State Budget (APBN) or Regional Budget (APBD), both those carried out independently or by providers of goods / services.

b. Criminal Responsibility For Corruption For Business Crimes As Private Legal Subjects In Government Procurement Of Goods And Services

Criminal liability for corruption against parties involved in the stages and/or processes of procurement of goods and services is an assessment of the responsibility imposed on their obligations as officials or officers of procurement of goods and services and on providers of government procurement of goods and services. Although usually officials or officers of procurement of goods and services do not fully master their obligations, they can be legally held accountable based on the principle of *ignorantia juris neminen excusat*, which in essence means that a person's ignorance is not an excuse.¹¹

¹⁰ Masitah Pohan, *Tanggungjawab Sosial Perusahaan Terhadap Buruh*, (Medan : Pustaka Bangsa Press, 2008), hlm 37

¹¹ Bina Hutagalung, *Negosiasi Dalam Pengadaan Barang dan Jasa Oleh Pemerintah Sebagai Upaya Mencapai Kesepakatan*, Jurnal Privat Law, 07 Juni 2015, hlm 65

Theoretically, after the enactment of Law Number 1 of 2023 concerning the Criminal Code (KUHP), it has been widely reported that it will have a negative impact on the specific types of eradication of corruption, but this narrative is baseless, because the new Criminal Code adheres to the postulate of "lex posterior generalis non derogate priori specialist" which means that the provisions of the general law that apply later do not abolish and/or cancel the special laws that existed first. Maidin Gultom in his writing conveyed that the direction of criminal liability for corruption is different from criminal liability in general because of the element of state financial loss, then Maidin Gultom also conveyed that there are 3 (three) methods of corruption liability, namely the first administrative responsibility for the occurrence of corruption. Second civil liability for the occurrence of corruption and third criminal liability for the occurrence of corruption.

Each of the three methods of criminal responsibility for corruption that have been conveyed above, only criminal errors can be subject to criminal sanctions, while administrative and civil errors will be punished by private law. The highest corruption that occurs is that which results in state financial losses, bribery, gratification, conflicts of interest in the procurement of goods and services as summarized in Article 2 and Article 3 of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption Juncto Law Number 20 of 2001 concerning amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.

Government procurement of goods and services using electronic systems in Indonesia has not shown any progress in the field of reducing state financial losses in the implementation of procurement of goods and services, so that in accordance with Romli Atmasasmita's view in his writing, business crimes in the era of globalization have a character that is in line with new technological developments, so that it also has an impact on narrowing the distance between the tempus delicti and the locos delicti.

Crimes that arise and arise in the procurement of goods and services will be accounted for to the legal subject who committed the violation by referring to the rights and obligations of each subject given for their position. The barometer of accountability is assessed from the assigned responsibilities, the position of the Commitment Making Officer (PPK) is considered less advantageous with the existence of Article 10 paragraph 3 of Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services which conveys the Budget User Authority (KPA) can assign the Commitment Making Officer (PPK) to carry out the authority as referred to in Article 1 related to (a) taking actions that result in budget expenditures and (b) entering into agreements with other parties within the budget limits determined by the rules.

Based on the description above, the author is of the opinion that the accountability of obligations in the procurement of government goods and services has a

disproportionate portion, especially for the Commitment Making Officer (PPK) who at any time the Budget User Authority (KPA) delegates his authority to the Commitment Making Officer (PPK) regarding actions to issue budgets and or agreements / contracts between the Commitment Making Officer (PPK) and the provider (partner). In addition, the most difficult obligation of the Commitment Making Officer (PPK) is his main task as a "contract controller" meaning that any work that is not in accordance with the contract, then apart from the provider (partner), the most responsible party is the Commitment Making Officer (PPK). Moreover, the facts underlying the mistakes made by the Commitment Making Officer (PPK) are too broad, especially in areas with human resources that are not as skilled as people in urban areas. So according to Nandang Sutisna's view in his writing, the division of tasks needs to be supported by adequate competence, what is adequate competence in the form of a person's basic ability to accept and or carry out work in accordance with the established standards.¹²

4. Conclusion

The essence of government procurement of goods and services or in foreign terms procurement is born due to the need for goods, services and if interpreted broadly the essence of procurement of goods and services includes the preparation, determination and implementation or administration stages of tenders for procurement of goods and services. Normatively in Chapter 1 General Provisions Article 1 of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services states that Procurement of goods / services is an activity to obtain goods / services by Ministries / Institutions / Regional Work Units / other institutions whose process starts from planning needs until all activities are completed to obtain goods / services.

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¹² Nandang Sutisna, *Manajemen Resiko Hukum dan Regulasi Pengadaan / Jasa Studi Pemerintah, BUMN, dan BUMD*, (Jakarta : Kencana, 2024) hlm 66 – 67.

References

- Fauzan. *Tindak Pidana Korupsi Pengadaan Barang dan Jasa di Lembaga Pemerintahan*, (Jurnal Ilmiah Mizami, Wacana Hukum, Ekonomi dan Keagamaan Vol I No. 2 Tahun 2014).
- Samsul Ramli. *Bacaan Wajib Para Praktisi Pengadaan Barang dan Jasa Pemerintah*, (Jakarta :Visi Media, 2013),
- Romli Atmasasmita. *Hukum Kejahatan Bisnis (Teori dan Praktek di Era Globalisasi)*, Jakarta : Prenamedia Group, 2016).
- Ida Hanifah, dkk, "Reconstruction Of Corporate Liability Law In The Provision Of Construction Services", *Journal Of Law And Sustainable Development*, Vol. 11, No. 7 Tahun 2023.
- Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri* (Jakarta: Ghalia Indonesia, 1990), hlm. 11
- I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*, Cetakan Kedua (Jakarta: Kencana, 2017).
- Ismail Koto, "Cyber Crime According to the ITE Law", *IJRS*, Vol. 2 No.2 Tahun 2021.
- Sugiyono, *Metode Penelitian Kuantitatif* (Bandung: Alfabeta, 2018), hlm. 456
- Bhekti Arum Lestari, *Tinjauan Perubahan Kebijakan Pengadaan Barang Dan Jasa Pemerintah Dalam Perpres Nomor 16 Tahun 2018*, (*Jurnal Administrasi Dan Manajemen* Vol 9 No. 1 Tahun 2022) hlm 13
- Masitah Pohan, *Tanggungjawab Sosial Perusahaan Terhadap Buruh*, (Medan : Pustaka Bangsa Press, 2008), hlm 37
- Bina Hutagalung, *Negosiasi Dalam Pengadaan Barang dan Jasa Oleh Pemerintah Sebagai Upaya Mencpai Kesepakatan*, *Jurnal Privat Law*, 07 Juni 2015.
- Nandang Sutisna, *Manajemen Resiko Hukum dan Regulasi Pengadaan / Jasa Studi Pemerintah, BUMN, dan BUMD*, (Jakarta : Kencana, 2024).