



The Legal Responsibility of Officials Making Commitments in the Procurement of Government Goods and Services After the Decision of the Constitutional Court Number 25/Puu-Xiv/2016

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Abstract. This writing aims to examine the legal responsibility of commitment-making officials in the procurement of government goods and services after the decision of Constitutional Court Number 25/PUU-XIV/2016. Criminal acts of corruption in the procurement of goods and services have often interpreted the abuse of authority, even though the procurement of government goods and services is an administrative error. The problem of this research is the legal responsibility of officials making commitments in the procurement of government goods and services. The empirical juridical research method is used to examine a legal approach and a conceptual approach. The results of this study indicate that (1) Commitment Making Officials in the procurement of government goods and services is based on the principles of justice and the principle of balance according to the amendments to Article 2 and Article 3 of the Corruption Crime Act through the Constitutional Court Decision Number 25/2016. (2) The legal responsibility of commitment-making officials in the procurement of government goods and services after the Constitutional Court Decision Number 25/PUU-XIV/2016, if it meets the elements of error with the criminal act committed, can result in the defendant being convicted. Perpetrators of criminal acts who can be prosecuted in court and sentenced to crime must commit a crime with a fault.

Keywords: Legal Liability · Commitment Making Officer · Government Procurement of Goods and Services · Constitutional Court

1 Introduction

Indonesia is a state of the law as regulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), which stipulates, “The State of Indonesia is a state of law.” And everything must be based on the provisions of the applicable law, so it is not an act with no provisions. This is following the legality principle contained in Article 1 paragraph (1) of the Criminal Code (KUHP), which explains, “That no one can be convicted or subject to action unless the act committed is determined as a crime in the laws and regulations in force at the time the act was committed.”

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Based on the provisions of Article 1 paragraph (1) of the Criminal Code, it has shown that Indonesia carries out the instructions in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which explains, "The State of Indonesia is a state of law." The law's primary purpose is to create an orderly society, order, and balance. In realizing order in society, human interests are hoped to be protected [1].

The law regulates human behavior in society when doing activities and interacting with other people. Applying law is one of the efforts to create order, security, and peace in society to prevent law violations. The main principle in question is that in a state of law, all people are equal before the law without differences in race, religion, social position, and wealth [2].

In line with that, to regulate relations between citizens so that there is no conflict of interest, a legal rule is needed to ensure legal certainty for every Indonesian citizen. With clear rules and good law application, it is hoped that the community's interests can be protected from criminal acts.

The limited involvement of the government in people's lives, especially when there are changes in development in society, while the legislators have not been able to or are too late to follow up with the formation of new laws and regulations, will make it difficult for the government especially when there is a new and urgent problem that the government must implement but has not been regulated in the legislation.

Society is the main thing. To achieve this, it is necessary to prioritize the function of public services [3]. To provide public services to improve the welfare and intelligence of the community, the government has the authority to administer the government. In implementing this, the Government has a broad, objective, and responsible authority based on practicality, fairness, openness, participatory, and accountable principles. [4].

The meaning and element of "abusing authority" is not the same as the element of "against the law," especially regarding the understanding of studies on criminal acts of corruption (although it raises widespread debate whether against the law is defined formally or materially). However, it does not mean that fulfilling the "against the law" element also means fulfilling the element of "abusing authority." The two elements are different from "fiet and strafbarefeit materials." This is because the placement of the two provisions is separate articles in the Corruption Crime Act in Indonesia.

In the perspective of criminal law, especially according to Law Number 31 of 1999 concerning the Crime of Corruption as amended by Law Number 20 of 2001, if the State Administration in taking legal action or making a decision to abuse its authority can be qualified as having committed a criminal act that has implications for imprisonment and/or fines for state administrations proven to have committed them.

The law enforcement process, especially regarding allegations of state losses and abuse of authority, against these two elements currently shows a bias in enforcing them in the state administrative law mechanism or the criminal law mechanism is increasingly unclear. [5] This bias has occurred since 1999, after the era of political and legal reforms, which caused all law enforcement against government administration officials to tend to be prioritized and prioritized with criminal mechanisms.

The mechanism for enforcement of state administrative law and criminal law occurs primarily in cases related to the procurement of government goods/services, which tend

to be more dominantly carried out by criminal mechanisms due to the widespread elements of harming state finances and abuse of authority to be single in the domain of criminal law. This causes criminal law to interfere with elements of harming state finances and abuse authority that should be in the science of state administrative law.

Concerning criminal law, the doctrine of legal certainty is formulated with the sentence *nullum delictum nulla poena sine praeva lege poenali*, which means that there is no offense, no crime without criminal provisions first. The doctrine is also applied in Article 1 paragraph (1) of the Criminal Code, which states that “no action can be punished except by the force of the criminal law rules in the legislation that existed before the act was committed.” In addition to Article 1 paragraph (1) of the Criminal Code, the principle of legality or legal certainty in Indonesia has also obtained a constitutional basis in Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that “Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law.”

The issue of state apparatus committing acts that are considered to be abusing their authority and against the law will be used as a test for deviations from the state apparatus, state administrative law, or criminal law, especially in jurisdictional cases, which are still very limited in judicial practice. It is interesting to study the title “The Legal Responsibility Of Officials Making Commitments In The Procurement Of Government Goods And Services After The Decision Of The Constitutional Court Number 25/PUU-XIV/2016.”

2 Research Method

The empirical juridical research method is used to examine the legal approach (statute approach) and conceptual approach. This study uses a conceptual approach and a comparative approach. The conceptual approach is carried out until an effort to reform, and a new approach is found to overcome the existing problems. This research is supported by primary and secondary data related to the procurement of government goods and services after the Constitutional Court Decision Number 25 /PUU-XIV/2016.

3 Findings and Discussion

1. Commitment-Making Officials in the Procurement of Government Goods and Services

In Presidential Regulation Number 4 of 2015 concerning the Fourth Amendment to Presidential Regulation Number 54 of 2010 concerning the Procurement of Goods and Services, PPK is defined as the official responsible for implementing the Procurement of Goods/Services. Definition of Procurement of Goods/Services is an activity to obtain goods/services by the Ministry/Institution/Work Unit of Regional Apparatus/other institutions whose process starts from planning needs until completion of all activities to obtain goods/services.

In this case, the process in question is regulated in Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services. The types of government procurement of goods/services under Presidential Regulation 16/2018 are divided into 4 (four) major groups:

- a. Goods
- b. Construction Works
- c. Consultation Service
- d. Other services

In Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods and Services as amended by Presidential Regulation Number 12 of 2021, goods are tangible or intangible, movable or immovable, which can be traded, used, used, or utilized by goods user. [7].

activities that include construction, operation, maintenance, demolition, and rebuilding of a building. Meanwhile, consulting services are professional services that require specific expertise in various scientific fields that prioritize a mindset. Other services are non-consulting services or services that require special methodological equipment and/or skills in a governance system that is widely known throughout the business world to complete a job.

Presidential Regulation Number 16 of 2018 concerning the Procurement of Goods and Services as amended by Presidential Regulation Number 12 of 2021 means that the procurement of goods and services is an activity of procurement of goods and services by ministries/agencies/regional apparatuses financed by the APBN/APBD whose process has been identified since the need until the handover of the work.

The implementation of the Presidential Regulation includes the procurement of goods and services within the ministries/agencies/regional apparatuses using expenditures from the APBN/APBD, including the procurement of goods and services which partially or wholly derives funds from domestic loans and/or domestic grants received by the Government and/or Regional Government and/or procurement of goods and services using the budget from the APBN/APBD including the procurement of goods and services partially or wholly financed from foreign loans or foreign grants.

Based on Presidential Regulation Number 54 of 2010 in conjunction with Presidential Regulation Number 16 of 2018 in conjunction with Presidential Regulation Number 12 of 2021, the authority and work of PPK in the Procurement of Goods and Services have been regulated. Therefore it is appropriate that if a problem arises, PPK is allowed to explain, so it is not too hasty to be brought to the realm of Criminal.

According to P. Nicolai et al., the means of law enforcement for state administration contains.

- a. Supervision of government organs can carry out compliance with or based on written laws and oversight of decisions that place obligations on individuals;
- b. Application of government sanction authority.

In line with Ten Berge, as quoted by Philipus M. Hadjon, who mentioned the instrument for enforcing sanctions. Supervision is a preventive measure to enforce compliance, while the application of sanctions is a repressive measure to enforce compliance [8].

The government goods and services procurement policy agency (LKPP) is a Non-Ministerial Government Institution (LPNK) under and responsible to the President of the Republic of Indonesia. LKPP was formed based on the Regulation of the President of the

Republic of Indonesia Number 106 of 2007 concerning the Government Goods/Services Development Policy Institute.

Considerations for the establishment of LKPP considering that the scope and scope of procurement of government goods and services is a cross-institutional and cross-sector problem and has a direct impact on the development of small businesses, domestic production, and the development of the climate and the business world in general so that the procurement of government goods and services is financed by The Indonesian Budget/Regional Government Budget can be implemented more effectively and efficiently and prioritize the application of the principles of healthy money business competition, transparency, openness and fair treatment for all parties.

The procurement value system is based on Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services as amended by Presidential Regulation Number 12 of 2021, consisting of procurement principles and ethics that apply to all actors in the procurement of government goods/services, procurement of government goods and services is an activity of procurement of goods and services by the Ministry of Regional Apparatus Institutions financed by the APBN/APBD whose process starts from the identification of needs until the handover of the results of the work [9].

According to the author, for the procurement of government goods and services to be carried out properly, the procurement actors must always rely on the values of the procurement of goods and services, namely principles and ethics, and comply with the norms for the procurement of goods and services, procedures and processes for the applicable procurement of goods and services. The basic rules used in the procurement of government goods and services are included in the State Administrative Law, which regulates the implementation of government in carrying out its duties and authorities.

2. The Legal Accountability of Commitment Making Officials in the Procurement of Government Goods and Services After the Decision of the Constitutional Court Number 25 /PUU-XIV/2016

Corruption in terms of the term comes from Latin, namely from the word “*corrupteia*” which means bribery or seduction; then it is translated as “corruption” in Latin “*corrupter*” or “*seducer*.” Bribery can be interpreted as giving/handing over to someone, so the person has bolted for/for the giver’s benefit. Meanwhile, what is meant by seduction is interesting to blind someone to deviate from “seduction” [10].

Van Hattum in P.A.F Lamintang defines “*wederrechteljkheid*” in a formal sense and in a material sense. *Wederrechteljkheid*, in a formal sense, is an act that can only be seen as being against the law if the act fulfills all the elements contained in formulating an offense according to the law. Meanwhile, the nature of being against the law in a material sense is whether an act can be seen as against the law or not. The problem must not only be reviewed following written legal provisions but also according to general legal principles of an unwritten law.

The view on the nature of being against the law in practice is sometimes difficult to see to what extent the act is against the law in the realm of criminal law because the address of the criminal act of corruption is primarily aimed at civil servants, including state officials in it so that corruption crimes enter the grey region. According to Indrianto

Seno Adji, decisions of state officials, both in the context of “Beleid” or discretion, are the reasons for rejection and justification for punishment in criminal law. The principle of acts against the material law has undergone extensive shifts, and even this shift is considered a direction of the destruction of conventional principles in criminal law [11].

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The gray area occurs because the criminal law field and the HAN legal field recognize the unlawful nature of the act. Still, with different sanctions in criminal law, criminal sanctions are given, while in HAN, administrative sanctions are given. About this, Indriyanto Seno Adji said: “...In the legal framework of State administration, the parameters that limit the free movement of the authority of the State apparatus are “détournement de pouvoir” (abuse of authority) and *abus de droit* (arbitrarily), while in the area of criminal law there are also criteria that limit the free movement of the authority of the state apparatus in the form of elements of “wederrechtelijkheid” and abuse of authority.

In the Anti-Corruption Law, this materially unlawful nature is associated with the impact of corruption which is considered to have harmed the community’s human rights, namely the economic and social rights of the community. Corruption crimes result in not only the loss of state money and the state’s economy but also violations of the social and economic rights of the community widely, so corruption in the Corruption Law is classified as an extraordinary crime.

According to Dian Puji, [13] phrases related to words that can harm state finances and benefit individuals or corporations, as referred to in Article 3 of the Anti-Corruption Law, create unstructured norms or structural problems. This will encourage the creation of unstructured problems, which results in the results being unpredictable and causing a very high level of certainty. Some facts and decision-making on state and regional financial administration and administration policies that arise as a result of the infrastructure problems in these norms, among others:

- a. Unclear norms, terms, and procedures in financial administration/administration arrangements do not meet the norm requirements. Procedures are considered an act against the law, even though, for example, the norm is only regulated in administrative regulation.
- b. Exceeding limits and exercising authority is always considered to be detrimental to the state.
- c. A legal payment, but based on an administrative error as benefiting another person or corporation, which is detrimental to state finances, but paradoxically the assessment of state losses are carried out using unsystematic and non-standardized methods and standards for assessing state losses, and not convincing enough.

- d. The meaning and nature of legal actions in articles of legislation that are not clear through direct policy-making are considered against the law and detrimental to state finances. [13]

The Constitutional Court Decision Number 25/PUU-XIV/2016 revoked the phrase “can” in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (Anti-corruption Law).

The Constitutional Court’s decision interprets that the phrase “may harm state finances or the state economy” in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law must be proven by real state financial losses (actual loss), not potential or estimated state financial losses (potential loss). In his consideration, at least four benchmarks become the Constitutional Court’s *legis ratio* shifting the meaning of substance to corruption offenses. The four benchmarks are (1) *nebis in idem* with the previous Constitutional Court Decision, namely the Constitutional Court Decision Number 003/PUU-IV/2006; (2) the emergence of legal uncertainty in formal corruption offenses so that they are converted into material offenses; (3) the relation/harmonization between the phrase “may harm state finances or the state’s economy” in the criminal approach to the Anti-Corruption Law and the administrative approach in Law Number 30 of 2004 concerning Government Administration; and (4) there is an alleged criminalization of the State Civil Apparatus (ASN) by using the phrase “may harm state finances or the state economy” in the Anti-Corruption Law.

In this case, the author agrees with the expert statement Dian Puji N. Simatupang regarding State Losses and Authorities and Procedures in the Assessment and Calculation of State Losses Based on State Administration Law and Public Finance. In addition, the assessment and calculation of state losses according to Article 13 of Law Number 15 of 2004, which reveals indications of state/regional losses and/or criminal elements, the examiner may carry out an investigative examination.

Based on the Regulation of the Supreme Audit Agency Number 1 of 2017 concerning State Financial Audit Standards, investigative audits, or coherent with the terms used by BPK with audits with specific objectives, to detect deviations from the provisions of laws and regulations, fraud, and impropriety (abuse). Investigative examination of state losses in total and definite amounts declared to have occurred due to unlawful acts or maladministration. If the state loss is considered maladministered, the examiner recommends imposing compensation or a fine by determining state losses. Suppose it is concluded that there is an indication of an act against the criminal law. In that case, the examiner shall convey the total calculation of the state loss in an accurate and definite manner.

According to Ruslan Saleh, the system of accountability in criminal law is useless in holding the accused accountable for his actions if the act is not against the law. [14] In this case, there must be certainty about the existence of a criminal act. Then all the elements of the error must also be connected with the criminal act committed so that for an error that results in the conviction of the defendant, it must be:

- a. Committing a criminal act;
- b. Able to be responsible;

- c. By intention or negligence; and
- d. No excuse for forgiveness.

Based on the four elements above, the person concerned or the perpetrator of the crime can be declared to have criminal responsibility so that he can be punished. People who can be prosecuted in court and sentenced must commit a crime with a fault. Errors can be divided into three, namely: (a) Responsible ability; (b) Deliberately (Dolus/Opzet) and negligent (Culpa/Alpa); (c) There is no excuse for forgiveness.

The error element, if fulfilled in the procurement of government goods and services, must be accounted for. In the system of accountability for the procurement of goods and services to prevent corruption, criminal responses to government procurement of goods and services are set with three sanctions, namely:

- a. Misuse of procurement of goods and services by providers, namely sanctions in the form of blacklisting for two calendar years;
- b. Civil lawsuits and/or K/L/D/I may file a civil lawsuit against the goods/services provider following the laws and regulations;
- c. Criminal sanctions are stated in the Criminal Code and Law Number 20 of 2001.

Law enforcement against abuse of authority arising from procuring goods and services must be carried out firmly and without discrimination. It is hoped that there will be a deterrent effect so as not to repeat the act. The growing awareness to dare to say no to all forms of fraud in the implementation and use of the budget will impact the growth of trust from other nations in Indonesia to create a prosperous, orderly, and law-abiding Indonesia as a condition of good governance and clean governance.

In realizing good governance requirements is the absence of corruption, collusion, and nepotism (KKN). The efforts of law enforcement officers are continuously being carried out, but the reality faced is directly proportional to the cases that occur. Welfare can be achieved if the government can synergize and support each other in administering power and authority that is accountable, transparent, open, and responsible. Effective government depends on the legitimacy of broad-based participation, fairness, and accountability.

4 Conclusion

Based on the description of the discussion above, it can be concluded as follows:

1. Commitment Making Officials in the Procurement of Government Goods and Services, in some cases, the procurement of Government Goods and Services is not always included in the criminal realm as regulated in the Corruption Crime Act. The role of APH should be more sensitive to the complaints of ASN who feel they are not getting justice. It is time for law enforcement to be based on the principle of justice and balance, as seen in the amendments to Article 2 and Article 3 of the Corruption Law through the Constitutional Court Decision Number 25/2016. In addition, Article 21 of Law Number 30 of 2014, as a basis for ASN to take legal action if against

him is declared to have abused his authority by filing a lawsuit to the Administrative Court to prove that there is no abuse by the ASN which indicates a criminal realm.

2. Legal accountability of commitment-making officials in procuring government goods and services after the Constitutional Court Decision Number 25/PUU-XIV/2016. The defendant's responsibility for his actions must have certainty about the existence of a criminal act. Then all elements of the error must also be linked to the criminal act committed so that for an error that results in the defendant being convicted, he must: (a) commit a criminal act; (b) be able to take responsibility; (c) intentionally or negligently, and (d) there is no excuse for forgiveness. Perpetrators of criminal acts who can be prosecuted in court and sentenced must commit a crime with a mistake.

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