

Problems of state-owned enterprises contracts that violate the procurement of goods and services procedures

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Abstract

The present study was aimed at finding out the problems of contract implementation emerging from the process of goods and service procurement in the SOE that violates procedure. The research method used was a normative legal study with conceptual approach and statutory approach. Whereas the findings resulted in this study, namely contract resulted from the process of goods and service procurement in SOE violating the procedure, led to null and void since it did not meet the requirement of a contract. Thus, it may cause problems in the result of the implementations that have been done. In accordance with the concept of corrective justice and the principle of unjust enrichment, the void of a contract does not mean it has to be returned to the prior condition before the termination of the contract, but it should take into account the rights and obligation of the parties that have been exchanged before the contract is canceled in accordance with the law.

Keywords: state-owned enterprises, contracts, procurement, justice

1. Introduction

The conception of a State-owned enterprise (SOE) as a business entity controlled and owned by the state often creates dilemmas and problems. Particularly in Indonesia, problems arise due to the uncertainty regarding the extent to which the aspects of public law are regarding state ownership in SOE and the intersection with the private aspects in civil actions carried out by SOE. If a dispute arises in a business run by an SOE, what should be put forward is the public legal approach, especially corruption. The aspect of private law that forms the basis of SOE business is often ignored. So that the policies taken by SOE officials are based on the consideration of concerns about corruption, rather than aspects of balance/justice in business. This may potentially cause imbalance/injustice in businesses run by the SOEs.

One of the business processes carried out by SOE is the procurement of goods and services. In order that the procurement of goods and services can be conducted effectively, provisions regarding the procedures for the procurement of goods and services are drawn up. However, in practice, violations of the procedure may occur, regardless of whether it is intentional or negligent. Violations of the procedures for goods and services procurements that occur are generally identified only later after the signing of a contract and/or even after the execution of the work (partially / completely). This study was aimed to explain the problems that arise with contracts that have been signed and/or work that has been partially / completely carried out, in the event that a violation of the procedures for procurement of goods and services is identified.

The position of the contract in the procurement of goods and services for an SOE is an estuary of the negotiation process

or mutual bargaining between SOE and participants in the procurement of goods and services. The agreements that occur in the process of procuring goods and services are then framed in a contract document. In the event of contract signed, the reciprocal rights and obligations of the parties are born. The contract has coercive power over the parties, and there are consequences for the party who does not carry out their obligations. Liability in a contractual relationship is known as a default claim. In a case of default, the party filing the lawsuit can demand that the non-performing party fulfill the obligations in the contract or request termination of the contract, accompanied by payment of compensation and interest.

Any violation in the process of goods and services procurement will certainly result in the validity of a signed contract. Especially if the violation / procedural mistake causes the objective conditions of a contract to be not fulfilled, then the contract becomes null and void ^[1]. The legal effect on the void of the contract is the return to its original position, as it was before contract closing ^[2] With the void of the contract, the institution of default is irrelevant. There is also no contractual relationship that is the basis of liability for default.

One of the goals of the law is to bring about justice. Examining the principles of justice in providing solutions to legal problems is deemed very important. The principle of corrective justice is intended to correct imbalances that occur due to injustice. So that the use of the principle of corrective justice is expected to solve the problems that occur and provide a fairly strong and implemented

¹ Article 1320 Burgerlijk Wetboek.

² Agus Yudha Hernoko, Hukum Perjanjian Azas Proporsionalitas dalam Kontrak Komersial, LaksBang Mediatama, Yogyakarta, 2008, page 264.

foundation.

2. Research Methods

The research method used was normative legal research with a statutory approach and a conceptual approach. This research method is carried out by examining library materials or secondary data, which includes primary legal materials in the form of statutory regulations, secondary legal materials in the form of legal literature, and tertiary materials consisting of legal dictionaries.

3. Discussion

In Indonesia, the regulation of the procurement of goods and services is divided into two, namely the procurement of government goods and services and the procurement of goods and services in SOEs. Procurement of government goods and services is regulated in Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Procurement of Government Goods and Services. The scope of the application of these provisions includes the procurement of goods and services within the Ministries / Institutions / Regional Apparatus which use the expenditure budget of the State / Regional Revenue and Expenditure Budget, including those in which part or all of the funds come from domestic/foreign loans and/or domestic grants / overseas received by the Government and/or Local Government ^[3]. Meanwhile, procurement of goods and services in SOEs is carried out based on the Regulation of the Minister of SOE of the Republic of Indonesia Number PER-08 / MBU / 12/2019. The scope of these provisions includes all procurement of goods and services carried out by SOE whose financing comes from the SOE budget, including those whose funds come from state capital participation, SOE funds for the implementation of subsidies / public service obligations / Government assignments which are replaced from the Revenue and Expenditure Budget funds State, and SOE loans from the Government ^[4]. The difference in scope between the two provisions indicates a clear difference between the procurement of goods and services carried out by the Government and SOE. So that the provisions in the procurement of government goods and services do not automatically apply to the procurement process of goods and services in SOEs.

The Regulation of the Minister of SOE of the Republic of Indonesia Number PER-08 / MBU / 12/2019 explains that each SOE Board of Directors has to further regulate the procedures for implementing the procurement of goods and services in each SOE. This procedure is generally known as the Standard Operating Procedure (SOP) for the Procurement of Goods and Services (hereinafter referred to as the Goods and Services Procurement Procedure), which is then used as the basis for the Goods and Services Procurement Implementing Unit in SOE to carry out the process of goods and services procurement. The procedures for the goods and services procurement which are regulated by the Directors of SOEs take into account the principles of procurement, namely efficient, effective, competitive,

transparent, fair and reasonable, open, and accountable ^[5]. In addition, it must also pay attention to generally accepted practices ^[6]. The procedure for the procurement of goods and services generally includes the planning stage, the preparation stage, and the implementation stage. The planning stage includes the identification of needs, determination of goods/services, methods, schedules, and budget for the procurement of goods and services. The preparation stage includes the determination of the Provisional Estimated Price, the determination of the Technical Specifications / Term of References, determination of down payment, and assurance. The implementation stages include the process of selecting providers, executing contracts, and completing contracts.

Violation of the Goods and Services Procurement Procedure has an impact on the ongoing process of procuring goods and services. If the violation or deviation is noticed during the procurement process, it must be stopped and evaluated. However, the problem is in the event that the violation or deviation of the procurement procedure is identified after the signing of the contract and/or after the implementation of the work or achievements of the goods and service providers.

Whereas, in relation to this, it has been regulated in the Minister of SOE Regulation of the Republic of Indonesia Number PER-19 / MBU / 2012 concerning Guidelines for Postponing Business Transactions with Indication of Deviation and/or Fraud. The regulation set out guidelines for SOE in the event of irregularities and/or fraud as well as steps that need to be taken to overcome irregularities, fraud, and/or losses to SOE. The intended acts of deviation and/or fraud include the followings: ^[7]

- a. There is an indication of pricing manipulation either mark up or mark down;
- b. There is an indication of a fictive project;
- c. There is an indication of false identification of business partners;
- d. There is an indication that the procured goods/services are under the agreed specification/quality.

Based on reports or findings regarding acts of irregularities and/or fraud, then the Board of Directors, Board of Commissioners / Supervisory Board, or GMS / Minister of SOE shall evaluate business transactions in the event that there are indications of irregularities and/or fraud to ensure irregularities, fraud and/or losses. After confirming irregularities, fraud, and/or losses for SOE, the Board of Directors is obliged to take strategic steps to deal with irregularities, fraud, and/or losses to SOE. If this cannot be resolved, steps that must be taken are to postpone the implementation of the contract and then ask the Financial and Development Supervisory Agency (BPKP) to carry out an inspection/audit for a specific purpose. Based on the audit results, the Board of Directors decided to continue or cancel the contract with the said business transaction partner. However, this provision does not explain further about the criteria or conditions that determine whether the contract is continued or canceled.

³ Article 2 Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods and Services.

⁴ Article 2 Regulation of the Minister of SOE of the Republic of Indonesia Number PER-08 / MBU / 12/2019 concerning General Guidelines for the Implementation of Procurement of Goods and Services for State-Owned Enterprises.

⁵ Ibid, Article 4.

⁶ Ibid, Article 10 paragraph (1).

⁷ Attachment to the Regulation of the Minister of SOE of the Republic of Indonesia Number PER-19 / MBU / 2012 concerning Guidelines for Postponement of Business Transactions with Indication of Irregularity and / or Fraud.

The provisions regarding the postponement of business transactions also cover business transactions in the context of procuring goods and services in SOE. Based on the provisions above, the occurrence of irregularities, fraud, and/or losses in the process of procuring goods and services can result in the null and void of the contract that has been made. The result of the null and void of contract is that everything has to be returned to its original position before the contract was closed. The question that arises is whether the costs incurred by each party can be mutually requested for reimbursement. Such as labor mobilization costs, heavy equipment rental costs, insurance costs, shipping costs, and other costs. At this point, the position of corrective justice becomes very important.

Corrective justice was originally presented by Aristotle in the *Nicomachean Ethic*. Aristotle divides justice into universal justice and particular justice. Universal justice is something that should exist in every human being. Particular justice is a concept of justice that is born from the relationship between humans and one another, which is further divided into two, namely distributive justice and corrective justice.

Distributive justice requires the distribution of members in a group proportionally, those who are the same get the same rights, and those who are different get different rights. Meanwhile, corrective justice works in the realm of civil relations, by looking at the consequences of one's actions, namely whether anyone has benefited and someone has suffered a loss. If there is injustice, it is the judge's duty to make it fair and balanced by taking the fortune that one person earns at the expense of another and giving it to those who suffer the loss^[8]. Aristotle explained that there are two differences between distributive justice and corrective justice. The first difference is that the nature of equilibrium in distributive justice has a geometric character, where everyone gets their rights according to the proportion of their respective circumstances, while corrective justice has an arithmetic nature, which aims to return to the original position of a person who suffered losses and someone who received benefits/profit. The second difference is that corrective justice does not look at a person's position but only looks at the extent of the damage or loss it causes^[9].

This view of corrective justice serves as a basis for accountability, which is known as the principle of preventing unjustified enrichment or often called unjust enrichment. This principle basically implies that no one has the right to benefit/gain/increase in wealth which causes harm to others. According to Black's Law Dictionary, unjustified enrichment is described as "a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense"^[10]. The provisions regarding Unjustified Enrichment in various countries include:

- a. Nieuw Burgerlijk Wetboek, Article 212 Book 6, mentions that "a person who has been unjustifiably enriched at the expense of another person, has the obligation towards that other person to repair the

damage up to the amount of his enrichment, as far as this is reasonable".

- b. Restatement of the Law of Restitution, Quasi Contracts and Constructive Trust (1937), mentions that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other".
- c. French Civil Code, Article 1376, mentions that "one who has, with the knowledge or in ignorance, received what is not due to him is obligated to make restitution to the person from whom he has received what is not due".
- d. German Civil Code, Article 812, mentions that "(1) One who by transfer from another person or in some other way obtains something at that person's expense without legal justification is required to give it up. He is also under this obligation when the legal justification later ceases to exist or when, according to the content of the legal transaction, the purpose of the transfer is not achieved; (2) A transfer includes the contractual recognition of the existence or non-existence of an obligation with regard to another".

That unjustified enrichment is used as a basis of liability for a situation, where there is no contractual relationship between the parties and there is no fault of the party benefiting from a situation.^[11] For example, regarding payment mistakes, if a customer pays the bill twice, in this case, the second payment is made outside of the contractual relationship and there is no mistake to the payee.^[12] So that based on this the customer cannot file a lawsuit based on a contractual relationship/default and a tort lawsuit but through unjustified enrichment.

Ernst von Caemmerer explains unjustified enrichment through four typologies of cases that can be used as a basis, namely *leistung* (the execution of work without the basis of rights), *eingriff* (disturbance of other people's property), *verwendungen* (expenses to increase the value of other people's property), and *rückgriff* (debt payment of other people)^[13]. Peter Birks gives his view on unjustified enrichment as follows "it will be true of every case in which an enrichment is received without any explanatory basis that its claimant will not have intended it to accrue to the defendant for in every case it will either have accrued absolutely without his/her consent or, if with his consent, on a particular basis which has failed"^[14]. Whereas there is unjustness if the profits/benefits obtained are without any reasonable basis or without rights. It is said to be groundless if the gift is not required or the purpose/hope of the gift is not achieved^[15]. Under applicable law in Australia, an action is categorized as unjust enrichment if the payment is made based on a legal mistake or factual mistake, the payment or benefit received is based on a contract made illegally or contrary to law, the payment is made based on a quantum meruit, payment is made by force or negligence, must be made without any intention to benefit the defendant

⁸ Attachment to the Regulation of the Minister of SOE of the Republic of Indonesia Number PER-19 / MBU / 2012 concerning Guidelines for Postponement of Business Transactions with Indication of Irregularity and / or Fraud.

⁹ Ibid, page 7-8.

¹⁰ Bryan A. Garner, *et al*, Black's Law Dictionary 9th Edition, West, America, 2009.

¹¹ Faizal Kurniawan, *et al*, Unsur Kerugian dalam Unjustified Enrichment untuk Mewujudkan Keadilan Korektif (Corrective Justice), *Yuridika*, Vol. 33, No 1, 2018, page 20.

¹² Ibid.

¹³ James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, Oxford University Press, New York, 2010, page 420.

¹⁴ Tariq A. Baloch, *Unjust Enrichment and Contract*, Hart Publishing, Portland, 2009, page 77

¹⁵ Ibid, page 72.

[16]. The provisions in Indonesia that are often equated with the concept of unjustified enrichment are the provisions of Article 1359 paragraph (1) *Burgerlijk Wetboek* which says "every payment takes into account the existence of a debt, and what has been paid irresponsibly can be reclaimed". This arrangement has not yet accommodated the development of the unjustified enrichment principle described above.

The null and void of a contract has the legal effect of returning it to its original position as it was before the contract was signed [17]. In line with these provisions, the violation of the procurement of goods and services results in the null and void of the contract, consequently what has been done is not recognized. Based on the principle of prevention of unjustified enrichment, the party who gets profits and benefits from the exchange of achievements that occur before the contract for the procurement of goods and services is declared void, should return the profits and benefits that have been received by each party.

The perspective that SOE losses are state losses [18] by which become a determining factor in the application of the precautionary unjustified enrichment principle. Most of the time, SOE decision-making is overshadowed by the fear of state losses, which override the rights that should be received by goods and services providers who have fulfilled their obligations before the contract is canceled. For example, the implementation of work from goods and services providers is not recognized by SOE for the reason that the results of the work are not used or are not needed. As a consequence, SOE will not provide restitution or compensation to the providers of goods and services. Whereas in accordance with the principle of unjustified enrichment, even though in reality after the contract is null and void, the results of the work are not wanted back, SOEs are still obliged to pay the price of the work. James Gordley gives an example in a special-order sale and purchase contract when the seller has delivered the goods to the buyer and it is figured out that the contract is void, then the null and void of the contract does not become a barrier for the buyer to remain obliged to make restitution of the value of the goods. Although in this case it is said that the buyer does not need the goods or the goods will be damaged due to the buyer's risk [19]. Whereas the result of a null and void of contract does not automatically cancel all legal acts that have been done normally in the work execution. So, there is no need to ask again whether the defendant received an enrichment or not [20]. The same thing was conveyed by Peter Birks with the concept that was so-called as "free acceptance" when receiving services/benefits, the beneficiary/defendant had estimated that the service provider had rights to obtain the payment [21].

A dispute occurs when one of the parties receiving benefits or profits (SOE or providers of goods and services) does not make restitution or provide compensation. The absence of this unjustified enrichment principle in the judiciary institution in Indonesia will make it difficult in the event

that a dispute occurs. As a result, the party being disadvantaged finds it difficult to reclaim or recover from the party who received the profit or benefit, because the contract which is the basis for the implementation of these rights and obligations is void. The use of liability in a contractual relationship (default) is not appropriate, because, with the void of the contract, the contractual relationship is deemed to have never existed. Likewise, the use of accountability due to an unlawful act (tort) is also inappropriate because that accountability requires a mistake and causality with the losses suffered by the plaintiff. In addition, the liability based on the unjustified enrichment in the lawsuit petition is not carried out in the form of compensation as a claim for default and unlawful acts, but through restitution or recovery of profits/benefits obtained illegally [22].

In the event of a dispute, the disputing parties can resolve on their own or at least through a third party as an intermediary in an alternative dispute resolution forum without going through the accountability mechanism in the judiciary. The presence of a third party in dispute resolution plays an important role, apart from being an intermediary, they must also be independent and have the capability to assess the profits or benefits received by SOE or providers of goods and services, and determine the amount of restitution and compensation that must be paid. However, this must also be supported by regulations that can accommodate the application of the principles of corrective justice in the event of a violation of the procedure for goods and services procurement in SOE which leads to null and void of contract. So that it can minimize the occurrence of unjustified enrichment when there is a violation of the procedure for goods and services procurement at SOE which results in the void of the contract.

4. Conclusion

Violation of goods and services procurement procedures in SOEs may have implications on the null and void of goods and services procurement contracts. The void of the contract which has been signed has the consequence that it must be restored back to the state before the contract was closed. Whereas in accordance with the principle of corrective justice and the principle of prevention of unjustified enrichment, parties who have received profits/benefits prior to the void of the contract (SOE or providers of goods and services) must return the work that has been received and if the return is not possible, then they must provide restitution or compensation for the work that has been carried out. However, this is not easy to do, because in Indonesia there is no formulation on the principle of prevention of unjustified enrichment that has been agreed upon either in substance or formally in terms of civil liability, including in relation to losses of SOEs which are often perceived as state losses. Whereas in order to provide legal certainty for decision-makers in every SOE regarding the process of goods and services procurement, the implementation of the principle of unjustified enrichment prevention needs to be regulated in the provisions of the prevailing laws and regulations.

¹⁶ Faizal Kurniawan, op cit, page 30.

¹⁷ Agus Yudha Hernoko, loc cit.

¹⁸ Henny Juliani, *Pertanggungjawaban Direksi BUMN terhadap Perbuatan yang mengakibatkan Kerugian Keuangan Negara*, Masalah-Masalah Hukum, Vol 45, No 4, 2016, page 304.

¹⁹ James Gordley, op cit, hal 438.

²⁰ Ibid, page 439.

²¹ Ibid, page 440.

²² Faizal Kurniawan, op cit, page 28.

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