CRIMINAL RESPONSIBILITY IN GOVERNMENT PROCUREMENT OF GOODS AND SERVICES IN OFFICIAL AND PERSONAL CONTEXTS

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Abstract

Procurement of goods and services is a very urgent need in a developing country, the need for goods and services certainly requires quite large funds to obtain them. Service Users (in this case the Government) certainly expect good quality goods and services with the smallest amount of capital, while Service Providers (in this case the Contractor) will expect large profits, these two interests will attract each other. other. Procurement of goods and services is increasingly chaotic due to the lack of legal regulations in the form of laws, while the legal regulations used so far are only at the level of Presidential Decrees (Kepres) and Presidential Regulations. When talking about Procurement of Goods and Services, it includes several legal provisions, namely Civil law, if it concerns contracts, of course the legal consequence is a Civil lawsuit, if it concerns administrative decisions then it will be resolved through the Administrative Court, then if there is an allegation of a criminal act of misappropriation of State finances it will be resolved through criminal law, however, the specific legal rules for criminal liability for perpetrators of procurement of goods and services still use the provisions of general criminal law and the Corruption Crime Law. The method used in this research uses normative research. Normative legal research methods are research that positions law as a building system of norms.

I. Introduction

The term procurement of goods and services or procurement is interpreted broadly, including an explanation of the stages of preparation, determination and implementation or administration of tenders for the procurement of goods, scope of work or other services. Procurement of Goods and Services is not only limited to the selection of project partners with the Purchasing department or an official agreement between both parties, but includes all processes from the beginning of planning, preparation, licensing, determining the tender winner to the implementation stage and administrative processes in procuring goods. , work or services such as technical consulting services, financial consulting services, legal consulting services or other services.

Procurement of goods and services in the government is subject to new legal regulations in the form of a Presidential Decree which currently still uses Presidential Regulation number 16 of 2018 Jo. Presidential Regulation number 12 of 2021, while the Procurement of Goods and Services concerns several legal aspects, namely civil law aspects, criminal law aspects and administrative law aspects.

In this process, the user of goods/services is the country represented by PA/KPA/PPK/ULP as an individual/person. Meanwhile, the provider of goods/services is a person or legal entity (private). In the Civil Code (Civil Code) in Book III concerning Engagements, it is stated that an agreement can be created because of a law or agreement. An agreement in the procurement of goods/services is an agreement by which a party carries out work for another party and receives a certain price. The agreement is the basis for implementing activities. According to R. Subekti, an agreement is "an event where someone makes a promise to another person or where two people promise each other to do something.[1]

The criminal law aspect regulates the legal relationship between providers and users from the procurement preparation stage to the completion of the goods/services procurement contract. The legal relationship between the user and the provider that occurs during the procurement preparation stage until the completion of the contract is a criminal legal relationship. Criminal law (criminal law) because it regulates actions regarding crimes and matters related to criminal behavior of members of society in social life. The aspect of criminal law in the process of procuring goods/services is that criminal law is applied if there has been a criminal violation committed by the user of goods/services or the provider of goods/services in the process of procuring goods/services.[2] This is in accordance with the legal principles of "geen straf zonder schuld", no punishment without guilt. Criminal acts in the procurement of goods/services are prone to irregularities, such as at the procurement planning stage, there are indications of budget inflation or mark-up, directed procurement plans, packaging engineering for Corruption, Collusion and Nepotime (KKN), determining unrealistic procurement schedules. Apart from that, the vulnerable points for criminal acts mentioned above can also occur at the auction committee formation stage, company

[1] R. Subekti, 1998, *Hukum Perjanjian*, Intermassa, Jakarta, hlm 1

[2] Sahat Maruli Tua Situmeang, 2014, *Aspek Hukum Pengadaan Barang/Jasa Pemerintah Dalam Rangka Mewujudkan Good Governance*, Jurnal.

prequalification stage, preparation of auction documents, auction announcement stage, announcement of potential winners, auction participants' rebuttal stage, auction winner appointment stage, contract signing and delivery. goods/services that do not meet the requirements and are of low quality.

State Administrative Law regulates the legal relationship between providers and users from the preparation process to the process of issuing a letter of determination as a provider of goods/services. The legal relationship between the user and the provider of goods/services occurs in the procurement preparation process up to the process of issuing a letter determining the provider of goods/services, a government agency, which is a relationship between State Administrative Law (HAN) or State Administration (TUN). In this process, users of government agency goods/services (Budget Users/Authorized Budget Users) act as state/regional officials rather than representing the state/region as individuals/individuals. All decisions issued in this process are decisions of state/regional or public officials. Because the decision of the user of goods/services of a government agency is the decision of a state/regional official, if there is a party who suffers losses (providers of goods/services, or the public) as a result of the issuance of the decision, they can file a written lawsuit for cancellation of the decision through the State Administrative Court (PTUN)) with or without claims for compensation or rehabilitation.

2. Research Method

This research uses normative research methods. Normative legal research is legal research that places law as a building system of norms. The norm system in question is about principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings).[3] Normative research with a statutory approach is a statutory approach carried out by examining all laws and regulations related to the legal issue being handled. For research for practical activities, this legal approach will open up opportunities for researchers to study whether there is consistency and conformity between one law and other laws or between laws and the Constitution or between regulations and laws. The results of this study are an argument to solve the issue at hand.

3. Results and Discussion

Pertanggung Jawaban Pidana

According to Roeslan Saleh, criminal responsibility is defined as continuing the objective blame that exists in a criminal act and subjectively fulfilling the requirements to be punished for that act.[4] What is meant by objective censure is that an act carried out by a person is a prohibited act. The prohibited act referred to here is an act that is contrary to or prohibited by law, both formal law and material law. Meanwhile, what is meant by subjective censure refers to the person who committed the prohibited act, or it could be said that subjective censure is the person who commits an act that is prohibited or contrary to the law. If the act carried out is a disgraceful act or an act that is prohibited, but if there is a

[3] Mukti Fajar Nur Dewata, Yulianto Achmad, 2022, *Dualisme Penelitian Hukum Normatif & Empriris*, Pustaka Pelajar, Yogyakarta, hlm….

[4] Roeslan Saleh, *Pikiran-Pikiran Tentang Pertanggung Jawaban Pidana*, Cetakan Pertama, Jakarta: Ghalia Indonesia. hlm 33

mistake within the person that makes him unable to take responsibility, then criminal liability cannot possibly exist.

In criminal liability, the burden of responsibility is borne by the perpetrator of a criminal offense in connection with the basis for imposing criminal sanctions. A person will have the nature of criminal responsibility if something or an action he or she commits is against the law, but a person can lose the nature of responsibility if an element is found within him or her that causes the loss of a person's ability to be responsible.

According to Chairul Huda, the basis for criminal acts is the principle of legality, while the author can be punished based on error. This means that a person will have criminal responsibility if he has committed a wrong act and is contrary to the law. In essence, criminal liability is a form of mechanism created to react to violations of certain agreed acts.[5]

Position Responsibilities in Procurement of Goods and Services

The study of the issue of office responsibility and personal responsibility related to the implementation of the procurement of goods and services is in order to provide a specific distinction, when an official who is proven to have committed irregularities in the implementation of the procurement of goods and services becomes an official responsibility and when does it become a personal responsibility.[6]

These two concepts (position responsibility and personal responsibility) require further explanation, specifically regarding the term "responsibility" (responsibility, aansprakelijk). In the dictionary the legal term "aansprakelijk" means responsibility according to law for mistakes or the consequences of an action. Thus, "office responsibility" is a legal responsibility imposed on the state/government for errors or consequences of office actions. Meanwhile, "criminal responsibility" is responsibility according to law imposed on a person for mistakes or the consequences of his or her personal actions. This last understanding is no different from the meaning of "personal responsibility", because criminal responsibility is personal responsibility.

According to Philipus M. Hadjon, in Amiruddin the distinction between official responsibility and personal responsibility is important, because it carries consequences related to criminal responsibility, civil liability and state administrative liability (TUN).

As a consequence of administrative law, the parameters of office responsibility are the principle of legality (validity) of official actions. In administrative law, the issue of the legality of official actions is related to the power approach. Meanwhile, personal responsibility is criminal responsibility, so this is related to the functional approach or behavioral approach. Personal responsibility concerns maladministration in the use of authority and public service. In criminal law, the parameter of criminal responsibility is the principle of error. Not punished if there is no mistake (Geen Straf Zonder Schuld). In doctrine, for there to be a mistake, you must commit an unlawful act, be capable of responsibility, the act was done intentionally or negligently, and there is no excuse. In practice, especially those related to criminal acts of corruption in the procurement of goods and services, all of these parameters do not absolutely have to be met, such as the element of being able to take responsibility.

[5] Chairul Huda, 2006. *Dari Tindak Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggung jawab Pidana Tanpa Kesalahan*, Cetakan ke-2, Jakarta: Kencana. halaman 68

[6] Amiruddin, 2010, *Korupsi Dalam Pengadaan Barang Dan Jasa*, Genta Publising Yogyakarta, Hlm 92

Elaborating on the responsibilities of the position in the procurement of government goods and services, this focuses on authority, procedures and substance. In terms of authority, the actions of officials, including in the procurement of goods and services, must rely on legitimate authority. This authority is obtained through three sources, namely attribution, delegation and mandate. Attribution authority is usually referred to as authority established by law. Authority is the right possessed by Government Agencies and/or Officials or other state administrators to take decisions and/or actions in administering government.[7] Procedures The general principles of procedures for procurement of goods and services are based on Presidential Decree Number 16 of 2018 Jo. Presidential Decree 12 of 2021 concerning Government Procurement of Goods and Services, which stipulates that the procurement of goods and services must apply the principles: efficient, effective, open and competitive, transparent, fair/non-discriminatory and accountable.

Substance is the basis for formal legality in the implementation of procurement of goods/services. Therefore, by relying on the principle of praesumptio iustae causa (a lawsuit does not delay or hinder the implementation of the decision of the State Administrative Agency or Official as well as the actions of the State Administrative Agency or Official being sued), then every lawsuit regarding the PPK's actions relating to the winner's decision For example, a tender does not prevent the implementation of the decision of the official who decides the winner of the contested tender. Aspects of the authority to procure goods/services are substantially limited by budget availability (APBN/APBD). For example, the authority of the PPK as the owner of the work and the person responsible for implementing the procurement of goods/services, however, this authority is limited by prohibiting the PPK from entering into procurement contracts with providers of goods/services if they are not yet available. budget or insufficient budget available which will result in exceeding the available budget limit for activities/projects financed from the APBN/APBD.[8]

Personal Responsibility in Procurement of Government Goods and Services

Legal responsibility by individuals is the legal obligation of someone who is legally responsible for certain actions that he can be subject to sanctions in cases where his actions are contrary to the law. Narrowly defined, an individual's actions violate the rights of others or if a person acts contrary to his or her own legal obligations, the action must violate the rights of another person or contravene the law, thus the action is said to violate the law (onrechtmatig) and also violate the law (onwetmatig).[9]

So, if someone takes an action that is detrimental to another person, without violating the written articles of the law, they may still be charged with an unlawful act, because their action is contrary to the precautionary principle. Acts against the law can be found both in the realm of criminal law (public law) and in the realm of civil law (private law). In this context, when compared, the two concepts of unlawfulness show similarities and differences.[10] The

[7] Lihat Pasal 1 butir 5 Undang Nomor Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan

[8] Amiruddin, 2010, *Korupsi Dalam Pengadaan Barang Dan Jasa*, Genta Publising Yogyakarta, halaman 112

[9] Abdulkadir Muhammad. 2000. *Hukum Perdata Indonesia*. Bandung: PT. Citra Aditya Bakti. hlm 253

[10] Rosa Agustina. 2003. *Perbuatan Melawan Hukum*, Pasca Sarjana FH Jakarta: Universitas Indonesia. hlm 14

main similarity between the two concepts of being against the law is that to say that it is against the law, both require that legal provisions have been violated. The next similarity is that both against the law in principle both protect legal interests.

The issue of error and criminal responsibility is a very important matter in criminal law, however, error and criminal responsibility still leave various problems in criminal law, this is not only in the theoretical field but furthermore in the practice of law enforcement. So sometimes the resolution or process of enforcing criminal law still reflects injustice or legal uncertainty in the final process, especially related to determining guilt and criminal responsibility for the perpetrator.

The legal principle known as the principle of "no crime without fault" (geen straf zonder schuld beginsel) is the basis for criminal liability which is determined on the fault of the maker/perpetrator (liability based on fault), and not just the fulfillment of all the elements of a criminal act. Error is placed as a determining factor in criminal responsibility and is not only seen as merely a mental element in criminal acts.

Based on the principle of geen straf zonder schuld, Moeljatno put forward a view of criminal law in Indonesia known as the dualistic teaching or where this teaching is known as the theory of "separation of criminal acts and criminal responsibility". Criminal acts only concern the issue of "acts" while the issue of whether the "person" who commits them is then held accountable is another issue. Committing a criminal act, the creator/perpetrator is not always guilty of it.

Every criminal act must have the threat of criminal sanctions for that act, but in the author's opinion this does not mean that every person who commits a criminal act must then be punished, because to punish or impose criminal sanctions on someone who commits a criminal act, it is known that there are The principle of no crime without fault is a principle in criminal responsibility. The principle of no crime without fault, which is the basis for liability in criminal law, means that a person who has committed an act that is contrary to criminal law cannot be punished because there is no fault on the part of the perpetrator.

To determine whether a person/perpetrator is responsible for committing a criminal act, there must be an unlawful nature of the criminal act he or she has committed. This unlawful nature will be lost or eliminated if there are grounds for its elimination specified in the law. The nature of unlawfulness is one of the most important elements in criminal prosecution. In the articles of the Criminal Code, the formulation does not always use express words against the law.[11]

In the articles of the Criminal Code which explicitly formulate the element of unlawfulness, there are several articles, namely Article 167 paragraph (1), Article 168 paragraph (1), Article 333 paragraph (1), Article 368 paragraph (1), Article 369 paragraph (1).), Article 372, Article 378, Article 406 paragraph (1), but there are several articles that use other terms, such as: Without permission (zonderverlop), in article 496, article 510 of the Criminal Code, and in exceeding the limits of power, namely in article 429 , article 430 of the Criminal Code.

If a review of criminal law in Indonesia is carried out, it will involve three main issues, namely: prohibited acts, people who commit prohibited acts, and penalties (sanctions) for those who commit these prohibited acts. Viewed from a normative dogmatic point of view,

[11] *Indah Sari, 2020, "Perbuatan Melawan Hukum (PMH) Dalam Hukum Pidana dan Hukum Perdata"*, Jurnal Ilmiah Hukum Dirgantara, Vol. 11, No. 1.

the substance or main problem of criminal law (material) lies in the issue of what acts should be punished, what conditions should be met to hold someone who commits the act accountable, and what sanctions (criminal) should be imposed to that person.[12]

4. Conclusion

The parameter of official responsibility is the principle of legality (validity) of an official's actions. In administrative law, the issue of the legality of official actions is related to the power approach. Meanwhile, personal responsibility is criminal responsibility, so this is related to the functional approach or behavioral approach. Personal responsibility concerns maladministration in the use of authority and public service. In criminal law, the parameter of criminal responsibility is the principle of error. Not punished if there is no mistake (Geen Straf Zonder Schuld). In the doctrine, for there to be a mistake, you must commit an unlawful act, be able to take responsibility, the act was done intentionally or negligently, and there is no excuse. In the context of procurement of goods and services, government actions in the field of public law (publiekrechtelijke rechtshandelingen) are reflected by the PPK in determining the winner of the tender resulting from the selection of the Procurement Committee/Procurement Officer/Procurement Service Unit (Procurement Unit), this action is included in the one-sided scope of public law in the form of a State Administrative Decree (KTUN).

[12] Amrani, H. (2019). *Politik Pembaharuan Hukum Pidana*..

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