

IMPLEMENTATION OF LAW AUTHORITY AND RESPONSIBILITY OF BUDGET USERS IN PROCUREMENT OF GOODS AND SERVICES IN HEALTH

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Abstract

The opening (preamble) of 1945 Constitution in paragraph IV has a goal to make a public welfare based on social justice in all fields including health. Government as a state administrator is obliged to provide all public needs in terms of goods, services, and or infrastructure development including health. The procurement of goods and services by Government is an arranged method and procedure to accommodate government activities in health care. The Budget Users (BU) is a responsible official on allocating the budget of goods/services procurement. Practically speaking, BU is often confronted by criminal accountability toward the BU personally rather than by administrative law toward the BU over his position. In fact, BU is not only governed by behavioral norms (gedragsnorm) but also position norms (bestuursnorm).

Keywords: public procurement, budget Users, law responsibility

Abstrak

Pembukaan UUD 1945 alinea ke IV memiliki tujuan memajukan kesejahteraan umum yang berkeadilan sosial diberbagai bidang, salah satunya adalah di bidang kesehatan. Pemerintah sebagai penyelenggara pemerintahan senantiasa dituntut untuk menjalankan kewajiban menyediakan kebutuhan rakyat dalam berbagai bentuk baik berupa barang, jasa maupun pembangunan infrastruktur dalam hal ini di bidang kesehatan. Pengadaan Barang dan Jasa Pemerintah merupakan cara berikut prosedur yang harus ditempuh dalam pemenuhan kebutuhan kegiatan pemerintahan yang berkenaan dengan pelayanan kesehatan. Pengguna Anggaran (PA) sebagai pejabat yang bertanggungjawab atas penggunaan anggaran dalam pengadaan barang/jasa, pada tataran pelaksanaan wewenangnya sering dihadapkan dengan pertanggungjawaban hukum pidana terhadap pribadi PA yang bersangkutan daripada pertanggungjawaban hukum administrasi PA yang bertindak mewakili jabatannya. Padahal norma yang berlaku terhadap PA tidak hanya norma perilaku (*gedragnorm*) melainkan juga berlaku norma jabatan (*bestuur-norm*).

Kata kunci: pengadaan barang/jasa, pengguna anggaran, pertanggungjawaban hukum.

Introduction

The opening (*preamble*) of 1945 Constitution in paragraph IV as an Indonesian commitment, one of which aims to make a public welfare based on social justice for Indonesian people. Health is one of human primary needs on which the government's main concern for development conducted by either central or local government.

Moreover, health is one of human rights as confirmed on Article 28 H paragraph (1) of 1945 Constitution which state:

"Each human has a right for prosperous life physically and mentally, settle, and deserve for favorable environment also to got the health service".

Accordingly, right for health is a constitutional right of citizens¹ as a formal document contain-

¹ Winda Wijayanti, "Eksistensi Hukum Perawat sebagai Tenaga Kesehatan selain Tenaga Kefarmasian Terhadap Hak atas Pelayanan Kesehatan", *Jurnal Dinamika Hukum*, Vol.

ing the result of political nation struggle in the past; the national figures' views to realize for now and next; a will to develop by which national constitution would be led; a high level of national constitution development.²

Health consequences as constitutional right means that state is responsible for providing a properly health and public service facilities. Ideally, health right has broader sense, not only related to individual right but also all factors giving contribution to healthy self including environment, nutrition, housing, and others.³ Those become responsibility among government, company (entrepreneur) and society. The optimized health level can be realized through involving of various parties.⁴ Normatively, it was further regulated on Law Number 36 Year 2009 on Health as explained on Article 4 stating that every human has right for health.

Government responsibility to increase the social health level is applied in terms of promotive, preventive, curative and rehabilitative health care implementation. The government's responsibility in health is already regulated on Article 14, Article 15, Article 16, and Article 17 of Law Number 36 Year 2009 on Health. In doing so, the provision of Article 36 paragraph (1) *a quo Law* states that imperatively government ensure the availability, proportional distribution and affordability of health supplies especially essential medicines to accommodate people's right for health services and facilities which require infrastructures like medicines, and medical devices through the mechanism of goods and services procurement.

Goods and services procurement is the government expenditure mechanism that plays important role in state budget utilization. The government goods and services procurement allocates a large amount of money (the largest

buyer) in state.⁵ Regulation in the process of supplying goods and services is governed by Presidential Regulation (Perpres) Number 54 Year 2010 on Goods and Services Procurement which is then amended as the fourth amendment by the Presidential Regulation (Perpres) Year 2015. It aims to run it efficiently, transparently, competitively, and affordably. In turn, the quality of goods and services can be obtained. There are some organizations that involve in goods and services procurement:

- (1) Organizations for Goods and Services Procurement through Goods and Services Providers:
 - a. Budget Users (PA)/Authority of Budget Users (KPA);
 - b. Commitment Maker Official (PP K);
 - c. Procurement Official; and
 - d. Task Recipient Official (PPHP)
- (2) Organizations for Goods and Services Procurement through Self-Management:
 - a. Budget Users (PA)/Authority of Budget Users (KPA)
 - b. Official of Commitment Maker (PPK)
 - c. Official of Procurement or Procurement Committee; and
 - d. Committee/Result Receiver Official.

Regarding to those provisions, the important aspect in Goods/Services Procurement deals with financial responsibility. Law of State Finance does not implicitly emphasize on the responsibility limitation of the involving parties in the governmental Goods/Services Procurement. The main subject in the procurement is the budget users and goods/services providers. Basically, the responsibility of goods and services procurement success depends on the Budget User or Budget User Authority. Goods and Services Provider is responsible for taking the goods/services

² Sri Soemantri Martosoewignjo, "Undang-Undang Dasar 1945 Kedudukan dan Artinya Dalam Kehidupan Bernegara", *Jurnal Demokrasi dan HAM*, Vol. 1 No. 4, September-November 2001, Jakarta: The Habibie Center (THC), page 48.

³ Fheriyal Sri Isriawaty, "Tanggung Jawab Negara Dalam Pemenuhan Hak Atas Kesehatan Masyarakat Berdasarkan Undang Undang Dasar Negara Republik Indonesia Tahun 1945", *Jurnal Ilmu Hukum Legal Opinion*, 2nd Ed. Vol. 3, 2015, Palu: Faculty of Law Universitas Tadulako, page 3.

⁴ Endang Wahyati Yustina, "Hak Atas Kesehatan Dalam Program Jaminan Kesehatan Nasional dan Corporate Social Responsibility (CSR)", *Majalah Ilmu Hukum Kisi Hukum*, Vol. 14 No. 1, Year 2015, Semarang: Unika Soegijapranata, page 93.

⁵ Simamora Sogar, 2013, *Hukum Kontrak; Kontrak Pengadaan Barang Dan Jasa Pemerintah di Indonesia*, Surabaya: Wins & Partners Law Firm dan LBH, page 1.

according to the requirements of the given contract. The objectives might be involved more than one providers, called as joint procurement contract.⁶ Accordingly, this journal focuses on law authority and responsibility from Budget User (BU) in local level.

Article 1 paragraph 5 of Presidential Regulation Number 54 Year 2010 mentions that BU is the official authority holder of budget user in Ministry/Institute/ Working Units or Officials who equals to another institution of State Budget/ Local Budget". It means that BU in local level is a Head of Departement in local Government. Besides, in Regional Owned Enterprises like hospital, BU is the Director of Hospital. In the Regional House of People's Representatives (DP RD), BU is the secretary.

In fact, the implementation of goods and services procurements especially in health frequently encounter several obstacles as follows. *First*, determination of good specification or identity; *second*, determination of survey price; *third*, auction time; *fourth*, contract implementation.⁷

Those mentioned obstacles often dominate the case of goods and services procurements which lead to legal process such as the case of providing medical devices in Cibabat Local Hospital (RSUD), Cimahi, West Java; Case of medicines supply in Supporting Health Centre and Meuraza Local Hospital (RSUD), Banda Aceh, Aceh; Case of speed boat procurement sea mobile Health Centre in Pulau Laut District of Public Health Office in Natuna Pekanbaru in 2010; Case of medical devices procurement of Local Hospital in Aceh Tamiang, Aceh; Case of medical devices procurement such medical support devices in Tobelo Local Hospital (RSUD), North Halmahera, Maluku.

Some cases above show that both Health Department Head and Hospital Director in their capacity as BU were often asked their accountability through the criminal legal related to the

case of violation in medical good and services procurement. The accountability does not only relate violation that ends with a lot of local financial loss, but also occurs on the procedural deviation.

In the implementation of governmental goods and services procurement in local level is often ended by a lawsuit to the related parties which give impact to public health services especially in Local Hospital and Public Health Centre. Law accountability that often hit the civil servant (PNS) of health department or local hospital influences BU's distrust to conduct the goods and services procurement to fulfill hospital to enhance the service of public health. Moreover, most of civil servants avoid to become committee of goods and services procurement due to their anxiety to be ended in court.

Law enforcement in case of corruption allegation in government goods and services procurement in Local Health cause BU prefer being passive to implement regarding to the situation in local level. As it is known, medical goods and services have different characteristics that sometime it needs to ignore some procedural rules, especially in emergency environment dealing with human life.

Normatively, presidential decree on governmental goods and services procurement does not regulate law accountability for local offices as BU with their authority. Similarly, in case of violation in goods/ services procurement that cause state/ region losses do not necessarily demand BU accountability through criminal law on charges of corruption but return to the legislation that its substance regulate state finances, namely Law Number 17 Year 2003 on State Finances; Law Number 1 Year 2004 on State Treasury; and Law Number 15 of 2004 on Inspection of Management and Financial Accountability Country. Specifically related to the state losses, Law Number 1 of 2004 on State Treasury determines Claim for Damages as a form of local official account-

⁶ Dearma Sinaga, "Tanggung Jawab Kuasa Pengguna Anggaran Terhadap Keuangan Negara Dalam Proses Pengadaan Barang/ Jasa Pemerintah (Studi Kasus Pengadaan Alat Kesehatan Di RSU Dr. Fl. Tobing Sibolga)", *USU Law Journal*, Vol. 03 No. 2, August 2015, Medan: Faculty of Law, Universitas Sumatera Utara, page 43.

⁷ See and compare with Alfian "Pemetaan Jenis dan Risiko Kecurangan dalam audit Pengadaan Barang dan Jasa", *Jurnal Pengadaan*, Vol. 4 No. 1, October 2015, Jakarta: Lembaga Kebijakan Pengadaan Barang/ Jasa Pemerintah, page 1-19.

ability, including BU. In regard to this, the article will investigate the form of legal liability on the implementation of the Budget Users authority in the procurement of medical goods and services.

Discussion

Based on Article 7 of Presidential Regulation Number 70 Year 2012, it states that Budget User (BU) is one who involves in Goods and Services Procurement Organizations as a conduct of State Administrative Law. Whether there is a violation or not for the implementation of BU authority in medical goods and services procurement lies on the speciality principles. It is a principle that decides "Authority is given to the Law Subject by certain goals. Any action beyond the goal is considered as Authority Violation". The authority itself is tested by the principle of rationality and appropriateness (*redelijk*).⁸ In the context of speciality principle as long as those BU in implementation of their authority is consistent to hold the principle, it would never bring them to accountability. In other words, BU is not asked for their accountability since they do not violate their authority. When it proves otherwise, they will be asked for their accountability and be responsible based on the Law Principle "*geen bevoegdheid zonder verantwoordelijkheid en geen veranwoordelijkheid zonder verantwoording* (there is no authority without the accountability and no accountability without the obligation)".

Dealing with professional responsibility and personal responsibility of Budget Users (BU) associated with the implementation of its authority in the procurement of medical goods gives distinct differentiation when BU which proven violating the authority personally or professionally. Both responsibilities (official responsibilities and personal responsibilities) need elaboration, especially about "responsibility" (*responsibility; aansprakelijk*). In the Law Dictionary, "*aansprakelijk*" is a responsibility by the law upon the misdeeds caused by several actions. Thus, "Official Responsibility" is a responsibility

stated by law imposed to the government over the official's misconduct, while "personal responsibility" is an individual responsibility for their misconduct or impact from their action personally. This last explanation is not different from the explanation about "personal responsibility", because the criminal responsibility is a personal responsibility. The difference between official responsibility and personal responsibility is important, because it brings a linked consequence with the law responsibilities, either criminal law, civil law, and or administration law.

In State Administrative Law, the parameters of professional responsibility is the principle of legality (validity) official actions.⁹ The issue of the legality of official actions related to power approach, while personal responsibility is the criminal liability associated with official personal behavior. Personal responsibility relates to mal-administration in use the authority or public service. In Criminal Law, the parameters of criminal responsibility is the principle of misconduct; no punishment without fault (*geen straf zonder schuld*). In its doctrine, to be considered fault, there must be an act against the law, capable of responsible, the action was committed intentionally or negligence, and no excuses.

Practically, especially those related to corruption in the procurement of goods/services, these parameters do not absolutely fulfill all. Therefore, the parameters for their criminal responsibility in the procurement of goods and services is to act against the law and authority. Authority violation could only be done by officials or government agencies. In State Administrative Law, the position that has authority need a human (Officials) which significantly acts for and on behalf of the position. The official act only binds if he performs it (*ambtshandeling*). To make it different from personal actions (*prive handeling*), the formal tools are used such as job title, official stamp, official letter head, official cover, official signature, and other. Hence, in an

⁸ Sulfriadi, "Tanggung Jawab Jabatan dan Personal responsibility Dalam Penyelenggaraan Pemerintahan di Indonesia", *Jurnal Yuridis*, Vol. 1 No. 1, June 2014, Jakarta: Faculty of Law UPN Veteran Jakarta, page 66-67.

⁹ Eko Hidayat, "Peranan Hukum Dalam Pertanggungjawaban Perbuatan Pemerintah", *Jurnal TAPIS*, Vol. 5 No. 10, July-December 2009, Lampung: Ushulludin IAIN Raden Intan, page 144.

official conduct, office holders do not act on its own name, but on behalf of an institution.

Dealing with BU authority implementation of goods procurement, BU represents its position. Yet to decide whether he violates his authority or not requires a supervising institution. In this context, Law Number 30 Year 2014 on Government Administration grants attributive authority to the Government Internal Supervisory Apparatus (APIP) as the Institution of Financial and Development Supervision (BPKP), the Inspectorat General, the Provincial Inspectorate and District Inspectorate-to oversee Government Officials (including PA) on the prohibition of authority abuse (Article 20).

Based on the provision of Article 20 of Law Number 30 Year 2014 on State Administration, it is clear that as long as there is no corruption, gratification, deception or document forgery, bad intention (*men rea*) which cause a financial loss of state/local area, and other criminal, there are two (2) possible official responsibilities: *first*, If there is a misadministration or administratively caused by other than authority abuse but causes a state loss, the return for the state budget loss is imposed to the institution because the official act on the name of his official; *second*, If there is a maladministration or administrative deviation due to authority abuse, the refund for the state budget loss is imposed to the officials.

The professional responsibility is *mutatis mutandis*; it applies for the BU responsibilities for its authority implementation. Thus, if the BU made a mistakes or deviates administratively, either due to an absence of authority abuses or for their authority abuse causing state/regional financial losses, it does not belong to corruption. As long as there is no criminal element, then the solution is using the mechanisms that contained in the norms of Administrative Law as contained in Law Number 30 Year 2014 on Government Administration.

The focus of personal responsibility is an act of maladministration as regulated in Article

1 paragraph 3 of Law Number 37 Year 2008 on the Ombudsman of Republic of Indonesia which includes unlawful acts, beyond the authority, using the powers for other purposes that become the purpose of authority and neglect or ignore legal obligations in public service provision. Since there is a maladministration and action against law, the act becomes personal responsibility. Abuse of power has broader sense than unreasonableness, but in the study of State Administrative Law, both are necessary to determine the presence/absence of official corruption. In line with the opinion above, David Stott and Alexandra Felix stated that the norm of Administrative Law is relevant to personal responsibility officials that over legality in using authority, it is "doing the right thing and is doing this' in the right way".

Based on these norms, doctrine of Ultra Vires consists of two (2) types, that is Substantive Ultra Vires and Procedural Ultra Vires. Substantive Ultra Vires is "doing the wrong thing" (doing something wrong, such as authority to buy ships, but in implementation purchase the aircraft; while Procedural Ultra Vires is doing the right thing but it is doing 'in the wrong way' (doing the right thing but in the wrong way).

Officials who perform task in a wrong way in which contain maladministration and bring adverse consequences of state finances can be set as the perpetrators of corruption. This is in line with Aung San Suu Kyi statement that "It is not power that corrupts, but fear. Fear of losing power corrupt those who wield it, and fear of the scourge of power corrupts those who are subject to it."¹⁰ In other words, any authority utilization violating the aim of given authority and containing elements of maladministration brings a consequence of personal responsibility.

Conclusion

The authority of Budget User is normatively regulated in Presidential Regulation Number 54 Year 2010 on Government Goods/Services Procurement. In fact, the implementation encountered deviations or authority abuses com-

¹⁰ Aung San Suu Kyi in Arfan Faiz Muhlizi, "Reformulasi Dis-kresi Dalam Penataan Hukum Adinistrasi", Vol.1 No. 1,

mitted by BU that led to the criminal law liability. It is proven from many corruption cases committed by BU on the implementation of its authority in medical goods/services procurement. The number of corruption cases which carried by BU for implementation of its authority in medical goods/ services procurement shows that the responsibility of BU in corruption cases more showed BU personal responsibility, because the responsibility (legally) criminal is personal responsibility. Meanwhile, in its capacity representing position of its authority implementation on the procurement, practically there is no professional responsibilities imposed on BU. Though in many cases of corruption acts committed by BU, the deviations or power abuse they commit is more administrative rather than criminal, and therefore it causes job responsibilities.

Suggestion

To prevent and minimize the occurrence of deviations or authority abuse committed by BU for its authority implementation in medical goods/services procurement, a precautionary supervision is required which covers planning stages of procurement until completion of all activities to acquire goods in health field by involving Regional Inspectorate as Government Internal Supervisory Apparatus (APIP) and coordinating with law enforcement authorities.

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