

RINGKASAN

Dalam penyelenggaraan pemerintahan suatu negara, negara dituntut untuk senantiasa dapat meningkatkan kesejahteraan rakyatnya. Untuk melaksanakan kewajiban ini salah satu caranya, pemerintah mempunyai kewajiban untuk menyediakan kebutuhan rakyatnya dalam berbagai bentuk baik berupa barang, jasa maupun pembangunan infrastruktur. Upaya pemerintah untuk melaksanakan pembangunan fisik dan non fisik (jasa), dapat dilaksanakan pemerintah sendiri maupun dengan melibatkan orang-perorangan atau suatu badan hukum. Agar keterlibatan masyarakat dalam pelaksanaan pembangunan fisik dan non fisik, tidak menyimpang maka diperlukan perangkat aturan dalam wujud peraturan perundang-undangan yang berfungsi sebagai pedoman bertindak dan berperilaku bagi para pihak dalam melaksanakan hak dan kewajibannya.

Berkaitan dengan pemenuhan kewajiban pemerintah untuk memenuhi kebutuhan rakyatnya, maka kontrak pengadaan oleh pemerintah dengan pihak swasta merupakan jalan keluar atau upaya yang dapat dilakukan oleh pemerintah, maka oleh karena itu untuk memperoleh pemahaman dan pengetahuan mengenai hakekat kontrak pengadaan, diperlukan pembahasan mengenai makna dan substansi kontrak yang melibatkan pemerintah sebagai pihak, atau yang lazim disebut dengan *government contract*.

Hubungan hukum yang terbentuk antara pemerintah dengan mitranya adalah hubungan kontraktual, tetapi di dalamnya terkandung tidak saja hukum privat tetapi juga hukum publik. Adanya ranah publik dalam jenis kontrak ini

mempunyai ciri yang khas yang membedakan dengan kontrak komersial, dimana para pihak mempunyai kebebasan yang sangat luas dalam mengatur hubungan hukum atau mengatur kewajiban kontraktual mereka, maka dalam kontrak pengadaan oleh pemerintah, kebebasan itu tidak sepenuhnya berlaku sebab terhadap kontrak ini berlaku ketentuan khusus atau khas. Karakter yang khas dari kontrak pengadaan oleh pemerintah ini di samping menyangkut pembentukan dan pelaksanaan kontrak, juga terkait dengan prosedur dalam pengadaannya. Prinsip dan norma dalam kontrak privat berlaku secara berdampingan dalam kontrak pengadaan oleh pemerintah karena kewajiban pembayaran melibatkan keuangan negara.

Di Indonesia, kontrak yang melibatkan pemerintah sebagai pihak kontraktan masuk ke dalam kategori perbuatan hukum privat. Hubungan hukum yang terbentuk merupakan hubungan hukum dalam lingkup hukum perdata. Sekalipun di dalam jenis kontrak yang melibatkan pemerintah ini, terdapat pemerintah sebagai kontraktan dan berlaku syarat-syarat khusus yang termasuk dalam hukum publik dalam pembentukannya, namun hubungan yang terbentuk adalah murni hukum perdata. Keabsahan kontrak yang terbentuk diukur juga oleh Pasal 1320 BW sebagai aturan awal untuk menentukan keabsahan suatu kontrak.

Menyangkut kewenangan untuk mengadili, bukan merupakan ruang lingkup kewenangan peradilan tata usaha negara, melainkan peradilan umum. Hal ini sebagai akibat dari tindakan pemerintahan yang dilakukan oleh badan atau pejabat tata usaha negara selaku pelaku hukum keperdataan yang melakukan perbuatan hukum keperdataan.

Perlunya perlindungan hukum bagi penyedia barang/jasa dalam pengadaan barang/jasa pemerintah, olehnya harus disediakan perlindungan hukum yang preventif dan represif bagi penyedia barang/jasa pemerintah terhadap tahap-tahap pengadaan barang dan jasa oleh pemerintah, dimana hal ini dapat dilakukan dengan menerapkan prinsip proporsionalitas dalam kontrak pengadaan barang/jasa.



SUMMARY

In the governance of a country, the government is required to continually improve the welfare of its people. In doing so, the government has an obligation to provide the needs of people in various forms of goods, services and infrastructure development. Government efforts to implement the physical and non-physical (services) development can be implemented by itself and by involving individuals or legal entities. In order to prevent fraud, a set of laws and regulations is necessary, serving as a guideline to act and behave for the parties in exercising their rights and obligations.

In connection with the Government's responsibility to provide the needs of its people, government procurement contracts with the private sector constitutes the way out. Therefore, in order to gain an understanding and knowledge of the nature of the procurement contract, it is necessary to discuss of the meaning and substance of a contract involving government as a party, or commonly referred to as a government contract.

Legal relationship established between the government and its partners is a contractual relationship, but it contains not only private but also public law. The existence of the public domain in this type of contract has distinctive characteristics that differentiate it from commercial contracts, in which the parties have a vastly extensive freedom in regulating the legal relationship or their contractual obligations. On the contrary, in procurement contracts by the government, such a freedom does not fully apply since special or distinctive

provisions apply to the contracts. The distinctive nature of procurement contracts by the government, in addition to relating to the formation and execution of contracts, is also associated with the procurement procedures. Principles and norms of private contracts apply in conjunction with those of procurement contracts by the government since the payment obligations involve the state' finance.

In Indonesia, a contract involving the Government as a contracting party is categorized as a private legal action. The legal relationship formed belongs to the sphere of civil law. Despite the Government as the contracting party and the application of special conditions belonging to the public law in its formation, the relationships formed are purely of civil law. Validity of the contract formed is judged also by Article 1320 BW as initial rules for determining the validity of a contract.

The state administrative court has no jurisdiction, but the general court does. This is as a result of the actions undertaken by the state administrative officials or bodies as those operate within the civil law who commit acts of civil law.

Providers of goods/services in the procurement of government goods/services shall therefore be provided with preventive and repressive legal protections on the stages of the procurement, where this can be performed by applying the principle of proportionality.

***THE PRINCIPLE OF PROPORTIONALITY IN THE CONTRACT OF
PROCUREMENT OF GOODS AND SERVICES BY THE GOVERNMENT***

Bambang Utoyo

ABSTRACT

Fulfillment of the needs for goods and services constitutes an important part of governance. Procurement of goods and services by the government and private sectors has different characteristics. Private sectors are capable of procuring goods/services when they need them with their own abilities or debts, whereas the government or the public sectors must carry out tight auctions in order to obtain the best possible goods/services at the lowest possible prices. It is in connection with this fulfillment of the government's needs that contracts entered into by the government with the private sectors become a common practice.

Procurement of goods and services is essentially the user's attempts to obtain or realize the goods and services desired by using specific methods and processes to reach agreed prices, time, etc. In order for the nature or essence of procurement of goods and services to be achieved as well as possible, both the user and provider of goods and services must at all times rely on the applicable philosophy and laws and regulations.

In respect of civil law instruments as a means of legal protection for providers of goods and services, the procurement contract instruments serve as a means for the implementation of the legal relationship between Committing Officers and providers of goods and services. One of the main tasks and authorities of the CO, according to Presidential Decree No. 70 of 2012, is to draw up, sign and execute contracts with the providers of goods/services, as well as controlling and evaluating the implementation of the contracts.

Providers of goods/services in the procurement of government goods/services shall therefore be provided with preventive and repressive legal protections on the stages of the procurement, where this can be performed by applying the principle of proportionality.

Keywords: *Contract, procurement of government goods/services, the principle of proportionality*