



Tender Participant in Procurement of Government Goods and Services

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Abstract

In the procurement of government goods and services often found cooperation operations in the implementation. From the background, the problem of the legal position of operations cooperation in the procurement of government goods and services and how to conduct operations cooperation in the procurement of government goods and services. The purpose of drafting this thesis forming is to know the position of law and the implementation of operations cooperation in the procurement of government goods and services and it is expected to provide a clear reference and direction or can be a thought contribution for the government and society in terms of the implementation of operations cooperation agreement. The method used is the type of normative research using a normative juridical method of approach by collecting the legal material that includes covering legislation, official documents, books, research results which is tangible reports and so on that are examined and analyzed using qualitative-descriptive analysis, which is analysis by describing and reviewing the data of the literature in the form of statements or words carefully and systematically. From the research results can be concluded that the legal position of operations in the procurement of government goods and services has essentially had a strong legal basis, both from the civil law and the administrative law that is carried out under the Agreement/Operational Cooperation (*KSO*) by the parties, so that the parties who have agreed on the *KSO* agreement is fastened in the agreement.

Keywords: *Operations Cooperation; Procurement*

Introduction

Indonesia is the legal state which build up (*developing country*), where it is currently actively implementing development in all areas. Development is an effort to create prosperity and welfare of the people.¹ Therefore, the results of development must be perceived by all the people as an increase in science and technology has encouraged the occurrence of change and progress in all areas of activities, including the procurement of goods and services.

¹ Djumaldi. 1996. *Hukum Bangunan Dasar-Dasar Hukum Dalam Proyek dan Sumber Daya Manusia*, Rineka Cipta, Jakarta, p. 1.

Procurement of infrastructure goods and services for government benefit is one of the tools to move the wheels of the economy, in order to improve the national economy to enrich the people. Procurement of goods and services starts from the purchase of goods in the market directly (*cash*), then develops towards the purchase of term payment, by creating an accountability document (*buyer and seller*), and ultimately through the auction process.

In its implementation, the Procurement Committee often provide allowance to prospective providers who participate in the process of tender procurement of construction services in order to partner with other providers in a construction services project that is being tendered, with the intention of empowering small providers also helps the provider that there is a shortage in the field of employment so it is necessary that partners to implement some of the work. The provider in cooperation with the partner is formed in an operational cooperation agreement, which is the cooperation of operations to do a job if the provider who participated tender wins the tender that is being implemented by the government.

However, on the way there are often problems that occur regarding the rights and obligations set out in the operational cooperation contract which as if not obvious, for example who has the right to be in front of the tender process and so on when the tenderation is problematic, which party has the right/obligation to object to the tender that the Government has implemented. From this, it is interesting to do further research in order to conduct operational cooperation agreements in the procurement of goods and services by attracting two problems, namely about the legal position of operations cooperation in the procurement of government goods and services and how the implementation of operations cooperation in the procurement of government goods and services. The purpose of drafting this thesis is to know the legal position and implementation of operations cooperation in the procurement of government goods and services. While the benefit of this research is expected to provide a reference and a clear direction or can be as a thought contribution for the government and society in terms of implementation of operations cooperation agreement.

Methodology

In connection with this, in case of solving problems or answering problems, used the type of normative research using a normative juridical method of approach by collecting the legal material which includes covering legislation, official documents, books, tangible research results reports and so on that are examined and analyzed using qualitative-descriptive analysis, namely analysis by describing and reviewing the literature data in the form of statements or words carefully and systematically.

Discussion

Legal Position of Operational Cooperation in the Procurement of Government Goods and Services

Government in organizing government requires also goods and services, for it needs procurement of goods and services. In the government's effort to regulate the procurement policy of goods and services, has been widely issued regulation related to the procurement of government goods and services as outlined above. The last main regulation is Presidential Regulation No. 16 of 2018 concerning Procurement of Government Goods and Services, it is intended to provide regulatory guidelines regarding the procedures of procurement of goods and services that are simple, clear and comprehensive, in accordance with good governance.

The implementation of good governance is the ideals and expectations of the nation of Indonesia. One form of implementation of *e-government* to achieve good governance is the procurement of

government goods and services electronically. It is a manifestation of the changes made due to the many problems that occur in the procurement of government goods and services conventionally. The many modes of corruption that occur in the procurement of goods and services conventionally, suggesting that the system is still bad transparency and accountability of the Government, and not the passage of effective prevention system to minimize the occurrence of corruption practices.²

Procurement of Government Goods/Services include procurement of goods, construction work, consultancy services, and other services. Procurement of goods is the procurement of every object both tangible and intangible, moving or not moving, which can be traded, used or utilized by users of goods. Procurement that uses the provider of goods and services both as a business entity and individual, is basically done through the selection of goods and services providers.

Implementation of goods/services of the Procurement of government must comply with the rules in relation to possible irregularities or in the implementation does not comply with the planning. Planning in the implementation of goods/services of the Procurement of government is a vital activity, because the good planning to be a successful determinant or whether the implementation of of goods/services of the Government procuremen.³ The stage of goods/services of the Government procuremen is done through the stages of procurement planning, procurement preparation of goods/services, implementation of of goods/services procuremen.

In the implementation of procurement of goods and services, many found in the practice, the provider that will carry out the good work of procurement of goods/services, doing operational cooperation with other parties to jointly work from the procurement of goods/services of the Government. So what makes basic/footing/umbrella law so that the providers dare to do an operational cooperation with other parties especially in the world of procurement of government goods and services.

That can be known in principle Article 1338 paragraph (1) BW is a fundamental manifestation of freedom of contract and is a principle that occupies a central position in the contract law/agreement, although the principle itself is not poured into a rule of law, but has a very strong influence on the contractual relationship of the parties. The principle of the freedom of contract itself is essentially a manifestation of the free will, the radiance of human rights whose development is based on the spirit of liberalism that glorifies individual freedoms. The principle of this contract of freedom has a close relationship with the principle of consensualism and the principle of binding strength contained in Article 1338 paragraph (1) BW.

Operation cooperation is based on civil law generally. The Law of the Alliance in particular, so that the rights, obligations, possessions, patterns of asset ownership, the pattern for income-expenses-results resulting from the alliance should be disclosed in the notes to the financial statements.

The legal relationship in the KSO itself has a binding power when it is made by fulfilling the terms of the agreement. Regarding the terms of its own agreement is governed by Article 1320 BW which reads as follows:

In order to have a valid agreement, it needs to be fulfilled four conditions;

1. Their agreement that cleave to themselves;
2. Skill to make an alliance;

² Adrian Sutedi, 2010, *Aspek Hukum. Kontrak Dalam Pengadaan Barang dan Jasa dan Berbagai Permasalahannya*, Sinar Grafika, Jakarta, p. 138.

³ Grasia Kurniati, 2017, *Akibat Hukum Pelanggaran Prosedur Pengadaan Barang/Jasa Pemerintah Dan Perlindungan Hukum Terhadap Organisasi Pengadaan Barang/Jasa Pemerintah*, Jurnal Hukum POSITUM Vol. 1, No. 2, June 2017, p. 314.

3. A certain subject matter;
4. A permissible cause.

The notion of agreeing to those who bind themselves is the meaning of "*the parties that make the agreement agreed or there is a willingness or mutual consent of each, who is born by the parties with no compulsion, confusion or deception*". Thus in this case it is said that there is a word of agreement for those who make a covenant when there is a free will of the parties, in the sense of the agreement made without compulsion, fraud or error (*Dwang, dawaling en bedrog*) in it. The matter of agreeing in the agreement itself is subject to the consensual principle which means agreeing both parties have made the agreement.

Regarding agreement between the parties in a treaty, there are 4 (four) theories as follows:⁴

1. Uitings Theorie (*theory when bring out will*).
According to this theory the agreement occurs when the offering has been born wills to receive it from the other party and this will be said to have been born.
2. Verzend Theorie (*theory when sending a letter of acceptance*)
According to this theory the agreement occurred at the time the letter of acceptance sent to the bidder.
3. Ontvangs Theorie (*current theory of acceptance letter acceptance*)
According to this theory the agreement occurs when receiving a letter of acceptance until the bidder address.
4. Theori vernemings (*theory when knowing letter of acceptance*)
According to this theory, the New Testament occurs when the bidder opens and reads the letter of acceptance.

This is in accordance with the Operational Cooperation in the process of procurement of government goods and services, which is a prospective provider of goods/services in the process of procurement of government goods and services, in which case that allows, prospective providers can conduct operational cooperation when following the selection of procurement of government goods and services. The operational Cooperation agreement can be implemented if the selection process for procurement of government goods and services is won by prospective providers who conduct the operational Cooperation Agreement. Thus, the operational cooperation Agreement is in accordance with Article 1334 of the civil law.

According to Wirjono Prodjodikoro that the goods that have not been made object of the agreement can be in absolute sense (*absolute*) and can be in the sense of relative (*nisbi*).⁵ In this case, an alliance whose objective does not meet the provisions as mentioned in Article 1333 BW is void. Nevertheless, under the provisions of Article 1334 BW that new goods will be in the later days can be an object of consent unless strictly prohibited by law.

Noting that the above can be explained by the freedom of the parties to make an agreement should pay attention to the following matters:⁶

1. Fulfilling the conditions of the Covenant;

⁴ Riduan Syahrani, *Seluk Beluk dan Asas-asas Hukum Perdata*, Alumni, Bandung, 1998, p. 214.

⁵ Wirjono Prodjodikoro, *Hukum Acara Perdata Di Indonesia*, Sumur Bandung, 1991, p. 22.

⁶ Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, Cet. 2, Kencana Prenada Media Gorup, Jakarta, 2011, p. 103.

2. To achieve the objectives of the parties, the contract shall fill the causa;
3. Do not contain false or statutory causa;
4. Not contrary to the decency, habit, decency and public order;
5. Must be executed in good faith.

In accordance with the opinion of Subekti that “*basically the treaty and alliance that arose therefore it was born since the second of the achievement of the agreement. In other words, the agreement is valid when it has agreed on the subject matter and it does not need any formalities.*”⁷

In the Operational cooperation agreement the asset owner is as a service user while the contractor is a service provider that is tied to the construction work contract that can be individual or legal entity both private and government. Construction services contracts where the user of construction services is the government, so as a consequence of the utilization of civil law instruments by the Government, especially the contract law, in the management of government affairs that is commonly referred to as contractualization, a mixture of private and public elements in the contractual relationship formed.⁸

The existence of a government or public element is what distinguishes between contracts in general with construction contracts so that construction contracts bring different implications due to the mixing between private elements and public elements. The different implications on this construction contract are both about validity in the formation of contracts, also on the implementation and enforcement aspects of the law. The existence of public law elements causes the rules and principles in private contracts not to be fully applicable to contracts made by the government through its construction contract.

These public elements are the realm of administrative law, as related to the KSO agreement in the procurement of government goods and services in the field of administrative law arranged in:

1. Article 1 point 27 Presidential Regulation No. 16 of 2018 concerning procurement of government goods and services, reads:

Business doers are any individual or business entity, whether in the form of legal entity or non-legal entity established and domiciled or conducting activities in the jurisdiction of the Republic of Indonesia, either alone or jointly through agreements conducting business activities in various areas of economics.

From the Article is explained related to the definition of business doers, namely any individual or legal entity that is the subject that can become a provider in the process of procurement of government goods and services. In the implementation of the procurement of government goods and services, business doers/providers can independently follow the selection of procurement of government goods and services or jointly/with other parties to follow the selection of procurement of government goods and services based on the agreement.

Thus, although not expressly set about the cooperation/partnership but can be interpreted that the foundation of operational cooperation in a procurement of government process of goods and services can be said the sound of the Article can be a foundation/law shelter/footing to do. The meaning of through the agreement in the sound of the Article can be interpreted that the business doers/providers can conduct agreements/operational cooperation in terms of work on the procurement of government goods and services held.

⁷ Subekti, Op. Cit., p. 15.

⁸ Yohanes Sogar Simamora, *Hukum Perjanjian Prinsip Hukum Kontrak dan Pengadaan Barang dan Jasa*, LaksBang PRESSindo, Yogyakarta, 2009, p. 14.

2. Article 1 Point 18 Regulation of the Minister of Works and People's Housing No. 07/PRT/M/2019 on guidelines and standards for procurement of construction services through the provider, which reads:

Business doers are any individual or business entity, whether in the form of legal entity or non-legal entity established and domiciled or conducting activities in the jurisdiction of the Republic of Indonesia, both alone and jointly through agreements to conduct business activities in various economic areas.

The sound of the Article is equal to the sound of the Article on the Presidential Regulation 16 years 2018 above, in fact also regulates related business doers/providers can make agreements/operational cooperation in terms of work on the procurement of government goods and services held.

3. Article 11 of the Ministerial regulation of the public works and people's housing No. 07/PRT/M/2019 on the guidelines and Standards for procurement of construction services through the provider, which reads:

Article 11:

- (1) The provider as referred to in Article 4 letter g shall meet the qualification of construction consultancy and construction works held, and in accordance with the provisions of legislation.
- (2) In the case of construction work, the provider as mentioned in paragraph (1) is the form of single business entity or operation cooperation.
- (3) In the case of construction consultancy services, the provider as referred to in paragraph (1) is an individual, single business entity or operation cooperation.
- (4) Operation cooperation as intended in paragraph (2) and paragraph (3) can be done between providers which:
 - a. To have a level qualification business, except for small-qualified business; or
 - b. Have a large qualified or medium-qualified business with a qualifying effort of 1 (*one*) level underneath.
- (5) Leadfirm Operations co-operation must have a level qualification or higher than the business entity member operations with the most capital portion of 70% (*seventy percent*).
- (6) The number of members of the operation cooperation can be done with:
 - a. For non-complex work is limited to 3 (*three*) companies in 1 (*one*) joint operation; and
 - b. For complex work is limited to at least 5 (*five*) companies in 1 (*one*) operation cooperation.
- (7) The provider as referred to in paragraph (1) shall be liable for:
 - a. Contract execution;
 - b. Quality of goods/services;
 - c. Accuracy of the amount or volume calculation;
 - d. timely submission; and
 - e. Accuracy of delivery place.

If the article is carefully considered, it appears that in the regulation of the Minister of Public Works and People's Housing No. 07/PRT/M/2019 concerning The Guidelines and Standards of Procurement of Construction Services Through The Provider, very clear and strict arrangement related to the legal basis of the agreement/operational cooperation in a procurement of government goods and services in terms of construction services and consultancy services. From the explanation of Article paragraph (2) and paragraph (3) it is expressly mentioned that there are two works of service that can be done by system of agreement/Operational cooperation that is in terms of construction services work and construction consulting services work.

As for the passage of the next verse is very visible and clear about the conditions of what a provider must fulfill if it will enter into an agreement/operational cooperation, i.e. in paragraph (4) described related to the conditions that must be fulfilled by the business doers/providers. In addition to the terms of business doers/providers who can make agreements/operational cooperation in the regulation is also regulated about who is the Leadfirm/leader (*leader/party related to employers (government)*) i.e. in paragraph (5) It is explained that the Leadfirm operation cooperation must have a level qualification or higher than the business entity of the operating member with a portion of the capital at most 70% (*seventy percent*). Thus it is also clearly regulated related to who can be a leadfirm and how much maximum capital is allowed.

Not only that, in the regulation is also regulated in relation to the limitations of how many subjects that can perform operational cooperation, namely in paragraph (7) is stipulated that the number of members of the operation cooperation can be done with certain limitation restrictions. Whereas in paragraph (8) is set regarding the extent of the parties' responsibilities in conducting an agreement/cooperation operations on the procurement of goods and services of construction. The provider or subject of the agreement/cooperation operations shall be responsible for all the work provided with the responsibility of the capital percentage of each member.

From the above exposure can be noted that basically the agreement/operational cooperation in a procurement of government goods and services has had a strong legal basis, both from the legal and legal side of the administration. From the legal side of the law basic is based on the principle of freedom of contract that is in Article 1338 BW/KUH, which is a principle embodiment that occupies a central position in the contract law/agreement, with the principle that any person or legal entity can make an agreement with anyone with any object of agreement as well as fulfill the conditions of the agreement.

From the other legal basis of the administrative law, seen from some of the existing regulations have also set about the position of law agreement/operational cooperation, that is seen in Presidential Regulation No. 16 year 2018 about the procurement of government goods and services, although it has not been described in the trunk but can be interpreted that a procurement of government goods and services is done with the model of cooperation. While in other regulations also have been regulated even clear mechanisms to be done what if a procurement of government goods and services will be done by means of partnership/operational cooperation, that is specifically related to the work of construction services and the construction consulting services in this case has been governed by the regulation of the Minister of Public Works and People's Housing No. 07/PRT/M/2019 concerning the guidelines and standards of procurement of construction services through the provider.

Implementation of Operational Cooperation in the Procurement of Government Goods and Services

Based on terminology understanding, the Operation Cooperation Agreement (*KSO*) is a "*business that is shaken together or cooperative in the economic sphere*".⁹ That has been known in the previous description related to the agreement/operational cooperation that has been firmly regulated is related to the procurement of construction services work or construction consulting services, i.e. has been contained in Article 11 of the Ministerial regulation of the Minister of Public Works and People's housing No. 07/PRT/M/2019 concerning the guidelines and standards of procurement services through the provider, so that in this case will be outlined about the legal relationship related to the activities of procurement of government goods and services field of construction services and consulting services construction.

Basically, the operating cooperation Agreement (*KSO*) is an equitability agreement with the justice and fairness elements.¹⁰ The meaning of equitability indicates a relationship of equality, not the weight next and fair between the rights and obligations. In the Operation Cooperation Agreement (*KSO*) there is the exchange of rights and obligations of the Parties in accordance with the proportion or part. Therefore in the Operation Cooperation Agreement (*KSO*) must be contained a criterion that can be used as a guideline to find the principle of proportionality in the Operations Cooperation Agreement (*KSO*).

Operational cooperation contracts is essentially beginning with the participation of the members of the cooperation in a process of tender/selection of the provider selection in the procurement activities of government goods and services. In the process of selecting the provider in the procurement of government goods and Services commitment office through the procurement officials perform the selection process/selection of providers. As for the election process if it is allowed the work to be done is allowed to cooperate operations then usually the selection of participants will be cooperating or cooperate and bind in a cooperation operations in order to follow the selection/election. That in the selection process also usually requires if the participant is a *KSO* then must show the Operational Cooperation Agreement (*KSO*) in which it should also contain about who will be the leadfirm, the division of capital and the responsibility of its Parties. Sharing in operation (*KSO*) will not be amended, either during the offer or throughout the term of the contract, except with the prior written consent of the service user and in writing the jointly written consent of each member of *KSO*.

The working capital is included in a company that is in the form of a legal entity as a leading firm, so that as long as the legal entities who deposit the capital is not doing the deed that deviates from the constitution of the company formed then the responsibility is limited to working capital entered in the company.

The parties approve if appointed as winners selection of procurement of goods and services shall be liable either jointly or respectively for all obligations in accordance with the provisions of the contract document. The responsibility of the shareholders partnership of the main company or leading firm to support the above activities, third party appointed as the main company or leading firm for *KSO* and represent and act for and on behalf of *KSO* and sign all documents including pre-qualification documents, supply documents and contract documents.

Thus, based on the provisions of the Capital division of the Operational Cooperation (*KSO*) Parties in this agreement, the profit or loss of the implementation of the work of goods and services in the field of construction services and consulting services of the construction of the cooperation (*KSO*) by the parties/providers is also based on the percentage of capital participation of each party incorporated in the *KSO*. In general, in the event of the implementation of the agreement/cooperation operations on each

⁹ IPM Ranuhandoko, *Terminologi Hukum, Inggris – Indonesia*, Sinar Grafika, Jakarta, 1996, p. 174.

¹⁰ Peter Mahmud Marzuki, *Asas-asas Kebebasan Berkontrak*, Yuridika, Volume 18 Number 31 Mei, 2003, p. 195.

decision resulting from a mutual agreement or if not reached the decision will be considered valid if approved at least 2 (*two*) members or the most votes based on the percentage of the promised capital. In its execution, if the agreement is not reached at all, then the disputes between parties in this KSO will generally be resolved through a dispute resolution mechanism that has been agreed in the agreement KSO.

That in the implementation of operations cooperation in the outline in addition to loading about rights and obligations is certainly the most important as well as about the expiration period. In the creation of KSO is usually determined when the agreement begins and when the agreement expires. The expiration of the agreement due to the agreed period of time has expired. The expired period may be renewed again based on the agreement of the parties making the agreement.

But with the deletion of agreements/operational cooperation, not necessarily eliminate the responsibility for the work of the procurement of goods and services that are being performed. This is because the parties in the operational cooperation are also bound by contracts/work agreements with employers/governments who conduct the procurement of goods and services. Thus, the operation of Cooperation Agreement (*KSO*) will expire only with the provisions that have been agreed as follows:

1. The project has been settled in accordance with the provisions of the Operation Cooperation Agreement (*KSO*).
2. Operation Cooperation (*KSO*) has received all its rights from the employer and has carried out its obligations.
3. The last financial position has been approved by the parties.
4. All duties and responsibilities and commitments as stated in the agreement document are fulfilled.
5. The Operation Cooperation Agreement (*KSO*) can also expire earlier due to a decision issued by the employer about the project.

Conclusion

The legal position of operations in the procurement of government of goods and services has essentially had a strong legal basis, both in terms of the civil and legal side of the administration. From the legal side of the law basic is based on the principle of freedom of contract that is in Article 1338 BW/KUH civil and in the field of administrative law has been stipulated in the Presidential Regulation No. 16 year 2018 on the procurement of government goods and services and the regulation of the Minister of Public Works and People's Housing number 07/PRT/M/2019 on Guidelines and Standards of Procuring Construction Services Through Providers.

The implementation of operational cooperation in the procurement of government goods and services is carried out based on the agreement/Operational Cooperation (*KSO*) that has been made and agreed to jointly by the parties, so that the parties who have agreed in the KSO agreement shall be bound in the agreement that was born because and made by fulfilling the terms of the agreement as stipulated in Article 1320 of civil law. That in the implementation of operational cooperation in the procurement of goods and services Government of the parties who have agreed in the Operational Cooperation Agreement (*KSO*) besides having to fulfill the obligation in the operational cooperation agreement must also carry out obligations to employers in this case the users of goods and services for the procurement of goods and services that will be undertaken.

Suggestion

Expected to the parties in order to conduct operational cooperation in accordance with the provisions of legislation. It is expected that the government should be in the implementation of operational cooperation on the procurement of government goods and services in its regulation in order to contain more in the implementation of everything more clearly and in-depth related to the operational cooperation not only on the construction work alone, this is given the current situation is very complex related to the procurement regulations of government goods and services. So through the parties related to legislation to be able to design and create regulations that are able to fulfill all the needs of the regulation.

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