

Reviewing the Position of the Principle of Proportionality in Public Procurement Contracts



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ABSTRACT: Procurement of Goods / Services carried out by the Ministry / Institution / Regional Apparatus as needed in order to support their duties and functions. The goods/services procurement process includes two components, namely the user of goods/services (Ministry/Institution/Regional Apparatus) and the Goods/Services Provider. Goods/services users and goods/services providers are bound in a Goods/Services Procurement Contract. The Goods/Services Procurement Contract is usually standardized, where the Procurement Contract is made by one party, namely the Commitment Making Officer (PPK) and the service provider is only a signing party. The different position between the goods/services user and the goods/services provider in the standard goods/services procurement contract causes the distribution of rights and obligations between the parties to be unbalanced or does not reflect the principle of proportionality.

KEYWORDS: Goods/Services Provider, Goods/Services User, Public Procurement Contract, Principle of Proportionality

I. INTRODUCTION

Government Goods/Services Procurement is an activity in order to obtain goods/services by Ministries/Institutions Regional Work Units/other institutions whose process starts from planning needs until the completion of all activities to obtain goods/services as stipulated in Presidential Regulation Number 12 of 2021 concerning the Second Amendment to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services. Government procurement of goods and services is divided into several procurement groups, namely; goods, construction work, construction services and other services. According to Christopher & Schooner, procurement is an activity to obtain goods or services transparently, effectively and efficiently in accordance with the needs and desires of its users.¹ In the process of procuring goods/services, e-procurement is also known. Adrianto defines e-procurement as the process of procuring goods/services through electronic auctions. In the process of procuring good/services, e-procurement is also known. Adrianto defines e-procurement as the process of procuring goods/services through electronic auctions.² Sutedi also said that e-procurement is an auction system in the procurement of government goods/services by utilizing information and communication technology based on the internet so that it takes place effectively, efficiently, openly and accountably.³

The importance of the goods/services procurement process in the implementation of national development for improving public services and developing the national and regional economies. In order to realize good government procurement of goods/services, it is necessary to regulate the procurement of goods/services that provide fulfillment of the maximum value of benefits (value for money) and contribute to increasing the use of domestic products, increasing the role of micro, small and medium enterprises and sustainable development.⁴

Procurement of goods/services involves two main components, namely the user of goods/services and the provider of goods/services. The relationship between the two is regulated in a contractual relationship. "The goods/services procurement contract is a variant of a contract where the government is a civil law subject and conducts civil relations with other civil law

¹ Badzlina D. Novitaningrum, "Accountability and Transparency of Government Procurement of Goods and Services through Electronic Procurement (Best Practices in Surabaya City Government)", *Journal of Public Policy and Management*, 2019, Volume 2 Number 1. 13-22.

² Agung Suprianto, et al. "The Effectiveness of the E-Procurement System in Government Goods/Services Procurement (Study at the Faculty of Administrative Sciences, Universitas Brawijaya)", *Scientific Journal of Public Administration (JIAP)*, 2019, Volume 5 Number 2. Accessed from <https://jiap.ub.ac.id/index.php/jiap/article/view/915/1230>

³ Adrian Sutedi, 2012 *Legal Aspects of Procurement of Goods & Services and Various Problems*. Sinar Grafika. Jakarta. 254

⁴ Government Procurement Policy Agency, "Overview of Public Procurement", 2020, Accessed from <https://virtuallibrary.lkpp.go.id/id/eprint/33/1/02.%20Buku%20Informasi%20A.%20Gambaran%20Uumum%20PBJP.pdf>

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persons or entities subject to civil law norms (*sui generis*) or known as a procurement contract."⁵ Therefore, the procurement contract must be subject to civil law norms or in other words, the concept of contract in civil law must be attached to the concept of procurement contract.

Ironically, procurement contracts are not based on the concept of civil law because procurement contracts are usually standardized. Munir Fuady explains that "a standard contract is a written contract made only by one of the parties to the contract. In fact, often the contract has been printed in the form of certain forms by one of the parties, in which case when the contract is signed, generally the parties only fill in certain informative data with little or no change in the clauses."⁶ The procurement contract is also considered to be a manifestation of the free will of the parties in that the provider is limited by laws and regulations regarding the format of the contract, the clauses in the contract and its scope.⁷ The dominance of the user of goods/services in the procurement contract reflects that the procurement contract does not reflect the application of the principle of proportionality because it puts the parties in an unbalanced or unbalanced position. This makes the distribution of rights and obligations of the parties unfair.

The principle of proportionality is one of the important principles and must be attached to the concept of goods/services procurement contracts. Agus Hernoko explained that "the principle of proportionality applies throughout the process of making a contract until the implementation of the contract in order to ensure a fair negotiation process, equality of rights, guaranteed distribution of the exchange of rights and obligations in proportion, and as a measure of the severity of the burden of proof."⁸

Departing from so many problems arising from the concept of goods/services procurement contracts in the field, the author is interested in further examining the standard contract for the procurement of goods/services with the title of the paper; REVIEWING THE POSITION OF THE PRINCIPLE OF PROPORTIONALITY IN GOVERNMENT PROCUREMENT CONTRACTS.

II. LITERATURE REVIEW

A. Overview of the Law of Treaties/Contracts

Article 1313 of the Civil Code provides a formulation of the Contract or agreement is an act by which one or more people bind themselves to one or more other people (Article 1313 Civil Code). Furthermore, Tirtodiningrat argues that "an agreement is a legal act based on an agreement between two or more people to cause legal consequences that can be enforced by law."⁹

There are three elements in the contract, namely; "the essential element, is an element that absolutely must exist for the occurrence of an agreement; The natural element, is an element that has been regulated in the law so that if it is not regulated by the parties in the contract, then the law regulates it; The incidental element, which is an element that will exist or bind the parties if the parties promise it. This element is an element that must be contained or referred to expressly in the agreement."¹⁰ Furthermore, there are conditions for the validity or invalidity of a contract regulated in Book III of the Civil Code, namely: "¹¹

1. Agreement of those who bind themselves (*de toestemming van degenen die zich verbiden*).
2. Capacity to make a contract (*de bekwaamheid om eene verbintenis aan te gaan*).
3. The object or subject matter is certain or can be determined (*eene bepaald onderwerp object*).
4. A cause or causa that is not prohibited (*eene geoorloofde oorzaak*)."

B. Procurement of Government Goods/Services

Government Goods/Services Procurement, hereinafter referred to as Goods/Services Procurement, is the activity of procuring goods/services by Ministries/Institutions/Regional Apparatus financed by the APBN/APBD, the process of which starts from the identification of needs, up to the handover of work results. In Government Goods/Services Procurement there are several types of procurement, namely; a) Procurement of Goods, b) Procurement of Construction Work, c) Procurement of Consulting Services and Other Services.

In addition, there are also principles of goods/services procurement; a) efficient, b) effective, c) transparent, d) open, e) competitive, f) fair; and g) accountable.

⁵ Riawan Tjandra, 2003 Contract Law from the Perspective of Business Law. Citra Aditya Bakti. Bandung. 121

⁶ Munir Fuady, 2003 Contract Law from the Perspective of Business Law. Citra Aditya Bakti. Bandung. 76.

⁷ Muskibah, Lili N Hidayah, "Application of the Freedom of Contract Principle in Standard Contracts for Government Procurement of Goods/Services in Indonesia", *Journal of Legal Sciences Legal Reflection*, 2020, Volume 4 Number 2, 177.

⁸ Agus Yudha Hernoko, 2010 The Law of Treaties: The Principle of Proportionality in Commercial Contracts. Prensamedia Group. Jakarta. 323.

⁹ *Ibid*.

¹⁰ Sudikno Mertokusumo, 2010 Getting to Know the Law. Cahaya Atma Pustaka. Yogyakarta. 154-155.

¹¹ Muhammad Syaifuddin, 2012 Contract Law: Understanding Contracts in the Perspectives of Philosophy, Theory, Dogmatics and Legal Practice. CV Mandar Maju. Bandung. 110.

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C. Goods/Services Procurement Contract

The types of contracts are as follows; a) Types of Contracts for Procurement of goods/Construction Works and other Services; Lump Sum, Unit Price, Combined Lump Sum and Unit Price, Turkey and Umbrella Contracts; b) Types of Consulting Services Procurement Contracts consist of Lump Sum, Assignment Time and Paying Contracts; c) Forms of Government Goods/Services Procurement Contracts consist of; proof of purchase/payment; receipts; work order (SPK); agreement letter; and order letter.

D. Legal Principle of Proportionality

Herlien Budiono argues that the principle of proportionality as an ethical principle and as a juridical principle. As an ethical principle, there is an idea of balance where there is a recognition of the equal position of individuals and communities in a common life.¹² It is also intended that the agreement between the parties is considered binding as long as it is based on a balanced relationship between the interests of both parties as each party expects it. Furthermore, the principle of proportionality as a juridical principle where every agreement between the parties based on the principle of balance can give rise to proper and fair juridical attachments. The principle of proportionality must have certain criteria so that a contract can be qualified as a fact or condition that gives rise to legal binding which in turn can be tested by juridical attachment based on the principle of proportionality.¹³

III. RESEARCH METHODS

The approach method of this research is normative juridical. The normative juridical method is legal research conducted by examining library materials consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Conducted through literature studies that examine secondary data in the form of laws and regulations, court decisions, agreements, contracts, or other legal documents, as well as research results, assessment results, and other references. In addition to the legislative approach, this research also uses a conceptual approach. Data collection is carried out by literature study to obtain data in the form of documents and writings through searching for laws and regulations, documents, scientific literature, research by experts.

IV. DISCUSSION

The concept of the principle of proportionality in procurement contracts means that in procurement contracts there is a balanced and fair exchange of rights and obligations between the parties in the entire contractual process. As a manifestation of the doctrine of fairness in contracting, the principle of proportionality is interpreted as the concept of justice. Aristotle defines justice in his work "Nicomachean ethics", as doing good or justice is the main virtue. According to Aristotle, "justice consists in treating equals equally and unequals unequally, in proportion to their inequality." This principle proceeds from the assumption "that equals should be treated equally, and unequals unequally, in proportion to their inequality."¹⁴ In addition, Ulpianus also described justice as "justitia est constans et perpetua voluntas ius suum cuique tribuendi" which means "justice is the continuous and permanent will to give to each what is due to him" or "tribuere cuique suum" - "to give everybody his own", giving to each person what is due to him.¹⁵

The principle of proportionality as a manifestation of the doctrine of fairness in contracting must guarantee freedom of contract. The meaning of freedom of contract is that the contract is born *ex nabilo*, namely the contract as a manifestation of the freedom of will of the parties who make the contract.¹⁶ This means that the standard contract does not provide space for one party to impose its free will on the other party or place the position of the other party as a party who must comply with the contract. In line with Lyon, according to Lyons, a real contract climate essentially provides opportunities for differences of opinion, bargaining, or even differences in relevant differences between the parties. Only in such a process will the outcome of an agreement truly reflect the interests of all parties.¹⁷

The principle of proportionality itself is actually not regulated in legislation. Herlien Budiono argues that the principle of proportionality is the result of extracting the principles that apply in Indonesian society based on Indonesian legal awareness

¹² Herlien Budiono, 2015 *The Principle of Balance for Indonesian Treaty Law Treaty Law Based on Indonesian Principles of Obligations*. PT Citra Aditya Bakti. Jakarta. 304-305.

¹³ *Ibid.*

¹⁴ Mohammad Iqbal Rahmawan, et al, "APPLICATION OF THE PROPORTIONALITY BASIS IN A FRANCHISE AGREEMENT", *NOTARIUS Journal*, 2019, Volume 12 Number 2. 910.

¹⁵ O.Notohamidjojo, 1997 *The Problem of Justice: Its Nature and Application in the Fields of Society, Culture, State and Inter-State*. Tirta Amerta. Semarang. 18-19.

¹⁶ Muskibah & Lili N. Hidayah, *Op. Cit.*, 177.

¹⁷ Andre Ata Ujan, 1999 *Justice and Democracy (An Analysis of John Rawls' Political Philosophy)*. Kanisius. Yogyakarta. 140.

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and also customary law, namely mutual cooperation, kinship, harmony, proper, appropriate, and barrel.¹⁸ This means that even though it is not regulated, this proportionalist principle must be used as one of the principles in the concept of making government goods/services procurement contracts. But ironically, one example where the goods/services procurement contract is not based on the principle of proportionality is as stipulated in Government Regulation No. 29 of 2000 concerning the Implementation of Construction Services related to the Obligation of Service Providers, namely service providers signing construction work contracts within the time limit specified in the tender document. This obligation shows that the service provider is only placed as a party who signs the contract and is not involved in the process of forming the contract, meaning that a balanced and fair exchange of rights and obligations is not created. Indeed, the contractual relationship in a standard contract according to Rayno Dwi Adityo has a currency dimension where one side of the standard contract becomes invalid and on the other hand the standard contract can be said to be legal and its existence is needed.¹⁹ But in principle, the standard contract must still guarantee the rights and obligations of the parties proportionally. This means that the standard procurement contract must place the bargaining position between the user of goods/services and the goods/services provider must be balanced. Therefore, the application of certain clauses by the party in a stronger position that results in harm to the weaker party is usually known as misuse of circumstances. Misuse of circumstances occurs when a person knows or should understand that the other party due to a special situation such as an emergency, dependence cannot think long, abnormal mental state or inexperience is moved to perform a legal act, even though he knows or should understand that he should actually prevent it.²⁰ So that the procurement process is carried out in accordance with the procurement principles, namely; a) efficient; b) effective; c) transparent; d) open; e) competitive; f) fair; and g) accountable.²¹

Seeing the magnitude of the role of goods/services procurement in the process of increasing national economic development, the procurement process must be carried out properly, including in terms of the goods/services procurement contract which must guarantee the rights and obligations of the parties proportionally. In the procurement contract, the position of the principle of proportionality must already exist starting from the process of making the contract to the implementation of the contract in order to ensure a good negotiation process, equality of rights and guaranteed distribution of rights and obligations accordingly and also as a measure of the severity of the burden of proof.²² In addition, in the perspective of applying the principle of proportionality in standard contracts regarding the transparency of proportional rights and obligations as well as showing the principle of good faith.²³

Agus Yudha Hernoko provides an overview of the characteristics of contracts based on the principle of proportionality, as follows;²⁴

- a. A contract based on the principle of proportionality is a contract that recognizes the rights, opportunities and equal opportunities for the parties to the contract to determine a fair exchange for them. Equality is not in the sense of equality of results but in the position of the parties, namely the existence of equality of position and rights (eguitability), the principle of equal rights / equality of rights;
- b. Based on the equal rights/equality of rights, the contract with the principle of proportionality is a contract based on the freedom of the contractors to determine the substance of what is fair and what is unfair to them (principle of freedom);
- c. A contract with the principle of proportionality is a contract that is able to guarantee the exercise of rights while at the same time distributing obligations proportionally to the parties. It should be underlined that fairness does not necessarily mean that everyone should always get the same amount of something, in which case different outcomes are possible. In this case, the principle of proportional distribution of the rights and obligations of the parties must refer to a fair exchange (principle of proportional distribution).
- d. In the event of a contract dispute, the burden of proof, the degree of fault and other related matters must be measured based on the principle of proportionality to obtain an elegant settlement and win-win solution.

The characteristics of contracts based on the principle of proportionality place the parties in a balanced position or do not create domination by one party. A position dominated by one party, especially the party making the procurement contract, opens up a wide opportunity for him to abuse his position where he only regulates his rights but not his obligations. Nieuwenhuis argues that if "the factual position of one party against the other is stronger so that it affects the content of the

¹⁸ Herlien Budiono, 2014 General Principles of Covenant Law and Its Application in the Field of Kenotariatan. Publisher of PT Citra Aditya Bakti. Bandung. 32.

¹⁹ Rayno Dwi Adityo, "The Effectiveness of Standard Contracts in Business Mobility", Journal Court, 2016, Volume 1 Number 2. 111-119.

²⁰ Dedi Harianto, "The Principle of Freedom of Contract: Problems of Its Application in Standard Contracts Between Business Actors and Consumers." Samudra Keadilan Law Journal, 2016, Volume 11 Number 2. 152.

²¹ *Ibid.*,

²² Agus Yudha Hernoko, *Op. Cit.*, 323.

²³ Rayno Dwi Adityo, *Op. Cit.*, 123.

²⁴ *Ibid.*, 88-89.

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contract, both the content, purpose and objectives of the contract, the contract must be rejected, because of the inequality of performance in the contract."²⁵ Similarly, Lyon argues that "a contractual climate of disagreement, bargaining or even relevant differences between the parties indicates a free exchange of ideas that creates a mutual agreement based on principles of fairness."²⁶

In the end, the principle of proportionality has a very important function in a procurement contract both in the formation of the procurement contract and in the implementation of the procurement contract. The function of the principle of proportionality in a contract as stated by Agus Yudha Hernoko, namely;²⁷

- a. In the pre-contract stage, the principle of proportionality opens negotiation opportunities for the parties to make a fair exchange of rights and obligations. Therefore, it is disproportionate and must be rejected by the negotiation process in bad faith;
- b. In contract formation, the principle of proportionality guarantees equality of rights and freedom to determine/set the proportion of rights and obligations of the parties in a fair manner;
- c. In the implementation of the contract, the principle of proportionality guarantees the realization of the distribution of the exchange of rights and obligations according to the agreed proportion / imposed on the parties;
- d. In the event of a failure in the implementation of the contract, it must be assessed proportionally whether the failure is fundamental (fundamental breach) so as to interfere with the implementation of most of the contract or just simple things/minor errors (minor importance).
- e. Even in the event of a contract dispute, the principle of proportionality emphasizes that the proportion of the burden of proof to the parties must be divided according to fair considerations.

Therefore, the standard contract for the procurement of government goods/services both in the stage of forming a standard procurement contract and at the stage of implementing a standard procurement contract must be based on the principle of proportionality in order to ensure equal distribution of rights and obligations between the parties to the standard procurement contract proportionally. The emphasis on the equality of the position of the parties in the procurement contract must be seen in the aspect of the formation of the contract not on the achievement achieved as stated by Niewenhuis, namely as long as the agreed achievement is reciprocal, it presupposes the equality of the position of the parties, which in the event of an imbalance, the focus of attention will be on equality related to the way the contract is formed, and not on the final result of the achievement.²⁸ This certainly reflects the concept of the principle of proportionality in contracts where there is equality of position and achievement between the contracting parties.

V. CONCLUSIONS

The formation of public procurement contracts must pay attention to aspects of the values of the principle of proportionality where there is involvement of each party in the contract-making process. In the process of making contracts for the procurement of goods/services based on the principle of proportionality, the exchange of rights and obligations between users of goods/services and providers of goods/services. Contracts for the procurement of goods/services that are not based on the principle of proportionality will create domination of one party over the other so that there is unfairness in contracting between the parties.

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²⁵ Muhammad Syaifuddin, *Op. Cit.*, 98.

²⁶ Agus Yudha Hernoko, *Op. Cit.*, 86.

²⁷ Agus Y. Hernoko, "The Principle Of Proportionality As The Basis For The Exchange Of Rights And Obligations Of The Parties In Commercial Contracts", *Journal of Law and Justice*, 2016, Volume 5 Number 3. 459.

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