



Legal Protection Of Limited Liability Company To Reduced Price In The Procurement Law

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Abstract

This study titled "Legal Protection of Limited Liability Company over Discount in Procurement Process", in which written used Normative Yuridical research methodology, using Statute Approach, Conceptual Approach and Case Study. The summary of problems in this study are: (1) Parties who responsible for any errors in determining owner estimate in the procurement process. (2) The party who entitled to rebates/benefirs from the procurement process. From those approach found that the first problem about whose responsible of any errors in determining owner estimate in the procurement process is commitment making officer (PPK) as an authorized officer in the process of procurement of goods or services, where the process of determining owner estimate must be based on the priciples, one of which is as accuracy principle, causing finacial loss to the state, then without based on that principle especially in determining owner estimate, the commitment making officer can be subject to criminal sanction. Meanwhile, the second problem discuss about the party who entitled to rebates/benefirs from the procurement process. In terms of the position of a rebate that is when the rebate was delivered by the supplier of goods or services at the time prior to contracting the procurement of goods or services, the discount is State rights that must be paid to the State treasury, but when the position rebates comes as providers of goods or services to buy goods at a distributor, then the discount become the provider of goods or services in this case is limited liability company.

Keywords : Procurement, Discount, Limited Liability Company

INTRODUCTION

Procurement of goods or services is one of the Government's efforts in increasing industrial and domestic economic growth. Based on Article 1 point 1 of Presidential Regulation Number 70 of 2012 concerning the second amendment to Presidential Regulation Number 54 of 2010 concerning the Procurement of Government goods or services is an activity carried out by Ministries/Institutions/Regional Work Units/Institutions (K/L/D/I) which aims to obtain goods or services and begins with planning needs until the objectives are achieved/fulfilled.

In carrying out the procurement of goods or services, the Government acts as a buyer and the private sector as a seller/provider of goods/services based on a contract called a contract for the procurement of goods or services. Basically the contract for the procurement of goods or services is a contract in general as regulated in Article 1320 of the Civil Code of the Republic of Indonesia, but because one of the parties has a public element, namely the Government, there are certain limitations that must be adhered to, including the 1945 Constitution of the Republic of Indonesia and the laws and regulations under it as well as the principles in contracts for the procurement of goods or services. (Simamora, 2013)

Contracts for the procurement of goods or services have a distinctive character, namely not only based on the principle of freedom of contract, but also subject to the principles and regulations regarding the procurement of goods or services. In addition to complying with laws and regulations and based on the previously mentioned principles, it must also be based on the principles of transparency and accountability which aim to protect state finances and the public interest, because the government's capital is sourced from the State Revenue and

Expenditure Budget (APBN) or the Revenue Budget. and Regional Expenditures (APBD) (Simamora, 2013) There are several principles in the procurement of goods or services, including efficient, effective, transparent, open, competitive, non-discriminatory, accountable. (Simamora, 2013)

Although the contract for the procurement of goods or services aims to protect the public interest and state finances, the contract is still commercial in nature, in other words, the contract provides benefits to the parties who make the contract (Simamora, 2013) In this case, the government or the buyer will benefit from the fulfillment of the needs of the state, on the other hand, the seller/provider will benefit from the sale of goods and services.

The provider of goods/services in the contract for the procurement of goods or services is a business entity, whether it is a legal entity or not. Limited Liability Company (PT) is one example of a business entity that is a legal entity, while *maatschap*, firm, and *Commanditaire Vennootschap* (CV) are business entities that are not legal entities. Because the procurement of goods or services is a Government activity that requires goods or services on a large scale, the majority of participants in the procurement of goods or services are the Limited Liability Companies.

In the process of procuring goods or services, the Government, represented by procurement officials, prepares and establishes a price reference that serves to assess bid prices from procurement participants. Meanwhile, PT as a provider of goods/services makes a price offer to the procurement official. This process is the basis for selecting the winner of the tender, if the bid price does not exceed the Self Estimated Price (HPS) that has been determined.

There are many cases of the process of procuring goods or services that result in state financial losses arising from the non-application of the principles mentioned above. For example, the case of state financial losses at the Palembang District Court in Decision Number 29/PIDSUS/2013/PN.PLG which in the contract for the procurement of goods or services said officials at Sriwijaya University were buyers/users of goods and PT. Transmedic Indonesia as a provider of goods in the procurement of medical devices. In this case, the procurement committee was not careful in applying the previously mentioned principles, namely in determining the HPS which was used one of them as a tool to assess the fairness of the bid. The Commitment Making Officer (PPK) does not try to find out and contact the seller or distributor of the equipment to be procured in order to obtain the actual selling price prevailing in the market, thereby causing state financial losses due to the profits obtained by PT. Transmedic from the results of the procurement of goods or services.

In the state treasury law regime, it is stated that the discount obtained by the PT is the right of the State. If the Government applies this norm, no business entity, especially PT, will dare to participate in a tender for the procurement of goods or services, because basically PT conducts its business activities with the aim of making a profit. Discounts are one source of profits obtained by PT. Many law enforcement officers apply this norm which causes all providers of goods/services to no longer want to participate in tenders for the procurement of goods or services. Thus, PT as a provider has the right to obtain legal protection for the application of these norms which should not be appropriate if applied.

Based on the background description, several problems arise, namely :

1. The party responsible for the error in determining the HPS in the procurement of goods or services
2. The party entitled to price discounts/profits obtained from the results of the procurement of goods or services

METHODS

Type of research used to discuss this problem is normative juridical, namely research based on statutory regulations or binding legal norms that have relevance to the material discussed. problem approach through a *statute approach* and a *conceptual approach* as well as *case study*. The statute approach is carried out by reviewing all laws and regulations related to the

legal issues being studied.[5] The *conceptual approach* is an approach by discussing the opinions of scholars as a basis for supporting thesis discussions. Thus the author will find ideas that give birth to legal understandings, legal concepts and legal principles that are relevant to the legal problems faced.[6] The *case study* approach is an approach to court decisions that have not been *inkracht* which are only used as examples of cases in this writing.

RESULTS AND DISCUSSION

Liability For Mistakes In Setting Your Own Estimated Price

1. Procedure for the Procurement of Goods or Services

According to Y. Sogar Simamora, the procurement of goods or services is divided into 3 (three) processes, namely Pre-Contract, Contract, and Post-Contract (Simamora, 2013).

a. Pre-contract

In this process, the first thing to do is to carry out a general plan to adjust the request to the needs of the Budget User (PA). PA is an official who holds the authority to use K/L/D/I budgets or officials who are equated with institutions that use the APBN/APBD (R. Indonesia, 2010). Based on Article 22 paragraph (3) of the Presidential Regulation on procurement, the general plan for the procurement of goods or services includes activities to identify the needs for goods or services needed by the K/L/D/I, prepare and determine a budget plan for the procurement of goods or services, establish a general policy on work packaging, how to implement and organize the procurement of goods or services. After these activities are carried out, then PA will announce to each K/L/D/I openly to the wider community which is carried out on the respective K/L/D/I websites, official bulletin boards for the community, and national procurement portals.

The next stage is the preparation of the selection of providers of goods/services. Preparation for the selection of goods/services providers includes planning for the selection of goods/services providers, selection of procurement systems, determination of qualification assessment methods, preparation of a schedule for selecting goods/services providers, preparation of documents for procurement of goods or services, and determination of HPS.

As regulated in Article 64 of the Presidential Regulation on Procurement, procurement officials (ULP) prepare procurement documents consisting of qualification documents and selection documents. PPK stipulates part of the draft procurement document which consists of a draft work order, draft agreement letter which includes general contract terms, contract specific terms, technical specifications, terms of reference, and/or drawings, quantity and price lists, and other documents, and HPS. Basically a pre-contract is a negotiation process between the committee for the procurement of goods or services as a buyer and a provider of goods/services to reach an agreement by conducting a tender.

b. Contract

Contracts occur when there is an agreement between the two parties, namely the provider of goods/services and the procurement official. The agreement arises as a result of acceptances and acceptances occur immediately after the issuance of a letter determining the winner of the auction from the procurement official (Simamora, 2013). The results of the determination of the winner are announced openly on the official website and bulletin board as well as the national procurement portal, if the election is conducted in person. In this case, the participant who feels aggrieved by the determination of the winner has the right to file an objection/rebuttal as regulated in Article 81 of the Presidential Regulation on Procurement..

If there is no objection from the participants, then the PPK will then issue a Letter of Appointment for the Provider of goods/services (SPPBJ). This appointment is *acceptance* and is considered an agreement between the two parties. Next comes the most important part, namely the signing of the contract carried out by the PPK by perfecting the draft contract.

c. Post-contract

The post-contract process is the process of implementing the contract as regulated in the

Presidential Regulation on Procurement. In the implementation of the contract, the parties may make changes to the contract if there is a difference between the field conditions at the time of implementation, with the drawings and/or technical specifications specified in the contract documents.

2. Self-Estimated Price (HPS) Determination Procedure

HPS or *owner estimate* is the price of goods or services that is calculated and compiled based on accountable data. The total value of the HPS is open and not confidential except for the details of the unit price which are not listed in the budget document in the calculation of the HPS. Furthermore, in his explanation what is meant by the total value of HPS is the result of calculating the entire volume of work multiplied by the unit price plus the entire tax burden and profit (R. Indonesia, 2010). HPS serves as a tool for assessing the fairness of bids including their details, setting the highest limit for valid bids, the basis for determining the amount of performance guarantee value for bids whose value is lower than 80% (eighty percent) of the total value of HPS, as stipulated in Article 66 paragraph (5) of the Presidential Regulation on Procurement.

3. HPS Legal Strength in the Procurement Process of Goods or Services

HPS is a very important component in the process of procuring goods or services because of its function as previously discussed and based on Article 66 paragraph (5) of the Presidential Regulation on Procurement. Moreover, based on Article 13 of Presidential Decree Number 80 of 2003 concerning Guidelines for the Implementation of the Procurement of Government Goods or Services, it is stated that the users of goods or services (who are now referred to in the Presidential Regulation on Procurement are referred to as budget users represented by the PPK as the person in charge of implementing it) have HPS calculated with expertise and based on reliable data. Therefore without HPS a contract will not be formed.

4. Legal Consequences for Errors in Determining HPS

If the HPS value made by the PPK does not meet the requirements and procedures as stated in Article 66 of the Presidential Regulation on the Procurement of goods or services and is not based on the previously discussed principles, especially the principle of accuracy, it will result in legal consequences, namely the emergence of state financial losses. In the general explanation number 6 of Law Number 1 of 2004 concerning the State Treasury (State Treasury Law) states that any state/regional loss caused by unlawful acts or someone's negligence must be replaced/borne by the party who made the mistake. So it is clear that the PPK, in this case, who has the authority to determine HPS, is responsible for the mistakes he made because he violated the principle of accuracy which resulted in state losses (P. R. Indonesia, 2004).

Right to Profits from Procurement of Goods or Services

1. Advantages arising from private contracts

In carrying out its business activities, PT makes contracts with third parties to conduct business transactions for profit and/or profit. The third party is either private or private or public or government. The following will discuss the benefits obtained by PT as a result of contracting with private or private parties. First, we will discuss the definition of profit and/or profit.

Profit and/or profit is something that is obtained from trading, conducting business activities and so on. In simple terms, the definition of profit and/or profit is the difference between the selling price which is greater than the purchase price or production costs. According to Abdulkadir Muhammad, profit and/or profit is an economic term that shows the surplus value (result) obtained from the capital that is run. Every activity in running a company is based on a certain amount of capital. With the company's capital, profits and/or profits can be obtained. And so it is the main goal of a company (Muhammad, 1991). A company seeking profit and/or profit is solely to carry out its business activities which are carried out continuously for the sake of the company's sustainability.

The definition of business is regulated in Article 1 letter d of Law Number 3 Year 1982 concerning Compulsory Company Registration (Mandatory Company Registration Law). profit

and/or profit. Furthermore, the definition of entrepreneur based on the provisions of Article 1 letter c of the Mandatory Company Registration Law states that an entrepreneur is every individual or partnership or legal entity that runs a type of company. According to Purwosutjipto, an entrepreneur is someone who does or orders a company to do. He can run the company by himself and can also enlist other people to help and run the company. So, he may not participate in running his company, because he does not have the expertise in running the company, while he has enough capital to carry out business activities and he is interested in running the company (Purwosutjipto & Indonesia, 2007). From Purwosutjipto's opinion, to become an entrepreneur there are several elements, namely an entrepreneur is a person who runs a company by doing it himself, the form of the company is simple and all company activities are carried out by themselves. An example of this form is usually a sole proprietorship. Second, an entrepreneur is a person who runs a company assisted by other people, in the sense that the entrepreneur participates in running the company, so that person has 2 (two) positions, namely as an entrepreneur and a company leader. Examples of such forms of companies are usually large companies. Third, an entrepreneur is a person who runs a company by instructing other people to run it, in the sense that the person does not participate in running the company and only has 1 (one) position as an entrepreneur. An example of this type of company is usually a large company.

PT in this case is a business entity that is a legal entity that carries out business activities by obtaining profits and/or profits. So, the philosophy of the establishment of a PT is to gain profit and/or profit or more often called *profit oriented*. PT as a legal entity has the following characteristics (Yani & Widjaja, 2006):

- a. Having an organized organization, by looking at the existence of corporate organs such as the GMS, Directors, and Commissioners as regulated in the Law on PT.
- b. Owning their own assets like a human being, which is separate from the wealth of the management and shareholders of PT. This asset is in the form of authorized capital consisting of the entire nominal value of shares as stipulated in Article 31 paragraph (1) of the Law on PT.
- c. Conducting legal relations independently in the sense that the PT has legal relations with third parties represented by the management, namely the Board of Directors and Commissioners. The Board of Directors acts for and on behalf of the PT with full responsibility for the management of the company and represents the company outside and inside the court. In carrying out its management, the Board of Directors is under the supervision of the Commissioner, who in certain situations and times assists the Board of Directors in carrying out their management.
- d. Has a specific purpose as regulated in Article 2 of the Company Law and the articles of association of PT. Because the company runs a company, and the main purpose of the company is to earn profits and/or profits, the PT was established with the aim of obtaining profits and/or profits for the sustainability of its business activities on an ongoing basis.

2. Benefits arising from public contracts

In the regime of the State Treasury Law, it is regulated that all profits in the form of commissions, discounts, or other forms obtained from the sale and/or procurement of goods or services by the State/region are the rights of the State/region as regulated in Article 16 paragraph (4) of the State Treasury Law. From this provision that all the profits referred to are State rights, it means that these profits must go to the State/regional Treasury which must be deposited at a predetermined time and regulated in laws and regulations. This verse is closely related to the previous paragraphs in Article 16 of the State Treasury Law.

In Article 16 paragraph (1) of the State Treasury Law it is stated that every State ministry/institution/regional work unit that has a source of income is obliged to intensify revenue acquisition which is its authority and responsibility. In this paragraph it is clear that the subject referred to by the State Treasury Law is K/L/D/I which has obligations and is accompanied by the authority and responsibility to intensify the acquisition of income sources. Furthermore, Article 16 paragraph (2) of the State Treasury Law states that all revenues must be deposited into the State/Regional Treasury on time, which will be further regulated in a

Government Regulation. The purpose of this paragraph is that the income received from the source of income as regulated in Article 16 paragraph (1) of the State Treasury Law which is the obligation of the previously stated subject, namely the K/L/D/I to deposit the revenue receipt entirely to the Treasury. State or Regional Treasury at a predetermined time.

Furthermore, Article 16 paragraph (3) of the State Treasury Law states that revenues from State ministries/agencies/regional work units may not be used directly to finance expenditures. In this paragraph it is mentioned once again to clarify the subject referred to in the article, namely K/L/D/I which is prohibited by this paragraph from using income derived from sources of income directly to finance expenses without going through records which must be done to ensure certainty of revenue. incoming and outgoing income. This provision also applies to Article 16 paragraph (4) of the State Treasury Law because the paragraphs in Article 16 of the State Treasury Law are closely related and have certain norms referred to by the State Treasury Law, in another sense that the subject referred to in Article 16 paragraph (4) The State Treasury Law is a K/L/D/I that receives commissions, discounts, or other forms as a result of the sale and/or procurement of goods or services carried out in the interest of the State or region which is the right of the said State or region. So, the norm as referred to in Article 16 paragraph (4) of the State Treasury Law that receipts in the form of commissions, deductions, or other forms is not the right of the subject referred to in Article 16 paragraph (4) of the State Treasury Law, namely K/L/D/ I, but is the right of the State or the region. Therefore, the K/L/D/I may not use the income directly as regulated in paragraph (3), let alone make the deductions and commissions a personal right of the K/L/D/I which should be the right of the State or the region as regulated. in paragraph (4) and must be fully deposited into the State Treasury or regional Treasury as regulated in Article 16 paragraph (2) of the State Treasury Law.

Basically, PT in terms of making contracts both with private parties and with public parties has the same goal, namely to gain profits and/or profits. However, in the public law regime, in terms of contracts for the procurement of goods or services, certain provisions are specifically regulated. Even though the contract for the procurement of goods or services has the objective of protecting the public interest, the contract for the procurement of goods or services is still commercial in the sense that the parties, both PT as a provider of goods/services and the Government as a public body or party, get their respective benefits according to the purpose for which it was made. and the implementation of the contract and subject to the principles of contracting, one of which is the principle of *pacta sunt servanda*. For PT as a provider of goods/services with the aim of obtaining profits and/or profits as previously discussed and for the Government as a public body or party that represents the State has carried out its functions. Therefore, the PT's profit obtained as a result of the price discount given by the distributor to the PT as a provider of goods in the contract for the procurement of goods or services as an example of the case at the Palembang District Court in decision number 29/PIDSUS/2013/PN.PLG should indeed be the right of PT. the. The PT has the right to get a profit/rebate because the discount obtained by the PT comes from its distributor which is based on an agreement between each party. The agreement made between the distributor and the provider of goods/services applies the principle of *pacta sunt servanda* where the agreement is only valid and binding and brings benefits between the two parties, in this case the distributor and provider of goods/services. Even though the goods/services provider makes the agreement on the basis of the Government's request or in other words fulfills the Government's order, it cannot be said that the agreement in this case the agreement between the goods/services provider and the distributor is *erga omnes* in the sense that the Government is not bound by the agreement between the providersgoods/services with distributors because the discounted price/profit is not the right of the Government based on the principle of *pacta sunt servanda*, nor does the government share in the responsibility for any losses that arise between the providers of goods/services and their distributors. Moreover, philosophically, the PT was established as a *profit-oriented* in another sense that the PT was established to seek profit which is used to carry out its business activities. The Presidential Regulation on the Procurement of Goods or Services does not regulate the percentage of profits and or profits that should be obtained by the PT in the process of procuring goods or services, so in the legal regime it is necessary to regulate the maximum limit of the percentage

of profits and or profits that should be obtained by the PT in order to protect the public interest. and the interests of private or private parties as providers of goods/services and to enforce the principle of legal certainty.

CONCLUSION

- 1). Errors in determining HPS are the responsibility of PPK, because PPK has the authority to determine HPS as stipulated in Article 11 paragraph (1) letter a second in conjunction with Article 66 paragraph (1) of the Presidential Regulation on Procurement. Therefore, the legal consequences in the form of state financial losses arising from the determination of the HPS by the PPK are the responsibility of the PPK.
- 2) The right to the benefits obtained as a result of price cuts in the process of procuring goods or services in terms of the position of the discounted price, when the price discount is conveyed by the provider of goods/services prior to the making of a contract for the procurement of goods or services, then the discounted price is State rights that must be deposited in the State treasury, but when the price discount position appears when the provider of goods/services buys goods from the distributor, the discounted price becomes the right of the provider of goods/services in this case is PT, because based on its philosophy, PT was formed with the aim of obtain profits and/or profits for the sustainability of its business activities.

SUGGESTION

- 1). Amend the Presidential Regulation on Procurement by adding arrangements regarding the party responsible for errors in determining HPS and the legal consequences.
- 2). In the laws and regulations governing the procurement of government goods or services, it is necessary to regulate the maximum percentage of profits and/or profits that should be obtained by the PT in order to protect the public interest and the interests of the providers of goods/services and to enforce the principle of legal certainty.

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