

Legal Aspects of The Agreement Between Commitment-Making Officials and Providers of Goods and Services At The Ministry of Tourism and Creative Economy

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Abstract. *Government Goods and Services Provider Contract is a type of contract that is routinely carried out by the Government to meet various needs in organizing government activities. Transactions for the procurement of goods and services, namely the Ministry of Tourism and Creative Economy. The research method used is normative research using a statutory, conceptual and field approach. The results of the study are that the work contract between the commitment-making official and the goods and services provider at the Ministry of Tourism and Creative Economy still finds contract clauses that are not fully implemented and not understood by both parties. The impacts that will occur if the contract is not fully implemented and not understood by both parties include triggering contract disputes, even a greater impact is an indication of corruption because the source of funds for the procurement of goods and services is from the APBN. The purpose of this study is to provide education to both parties that the work contract is a guideline that must be understood and obeyed like the law. The ideal concept of direct procurement work contracts in the Ministry of Tourism and Creative Economy includes strengthening the role of APIP in the procurement of goods and services through direct procurement methods through audits, evaluations, reviews, monitoring and other supervision, the creation of standard contracts by including the substance of clauses that generally occur, and the use of sectoral e-catalogs provided by LKPP.*

Keywords: *Contract, Commitment Making Officer, Provider of goods and services*

1. INTRODUCTION

The legal system of contracts is open. In other words, the Civil Code provides an opportunity for everyone to make all kinds of agreements, whether laws, special regulations, or new agreements without provisions, as long as they do not conflict with the law. The requirements for a valid contract as regulated in Article 1320 of the Civil Code. An open system contains the principle of freedom of contract, which in civil law is usually stated in Article 1338(1) of the Civil Code as follows: "Every contract made legally is considered valid for those who enter into it." The word "all" includes both those whose names are known and those that are not known by law. This means that all contracts are included". (Subekti 1996).

Government goods and services provider contracts are a type of contract that is routinely carried out by the Government to meet various needs in the implementation of government activities. One of the Ministries that often carries out procurement transactions for goods and services is the Ministry of Tourism and Creative Economy. The parties involved in

the work contract can occur between private parties or can also occur between the government as a service user and the private party as a provider of goods and services. If the Work Contract is carried out by private parties, then the Contract fully applies the principle of freedom of contract, so that it will be subject to the general requirements of the contract or general provisions of the law of obligations.

The provision of Professional Conference Organizer (PCO) services in the context of government procurement of goods and services based on Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services is included in the type of procurement of other services and the procurement method used can be through tender, direct appointment, and direct procurement. When procuring products and PCOs, the method of procurement of goods and services that is commonly chosen is direct procurement. The method of procuring other services directly is the method of choice for procurement from other service providers with a maximum value of IDR 200,000,000.00 (IDR 200 million). (Peraturan Presiden Republik Indonesia Nomor 16 Tahun 2018).

It is known that PT. Dynasty Harja Mukti is one of the PCO providers that often receives direct procurement in the procurement of goods and PCOs at the Ministry of Tourism and Creative Economy. The implementation of the procurement of goods and PCO work experienced by the parties so far has often made contracts only formalities and financial administration. This has an impact on the unclear rights and obligations and scope of work, even to accommodate this unclearness, providers often reduce technical specifications so that they have an impact on quality and quantity that do not comply with the contract.

The problem of procurement contracts for goods and PCOs like this, in addition to the applicable law of obligations based on agreements (contracts), also applies to obligations based on legislation related to state financial management and provisions of laws governing Government Procurement of Goods/Services. In the contractual relationship of procurement of goods and PCOs, the position of PCO users is not free from the examination of the Audit Board of Indonesia (BPK) in managing state finances based on provisions of laws on state financial management.

The contract signed by both parties, both the Commitment Making Officer and the Provider, culminates in the rights and obligations to be achieved based on the agreement of the parties, but the implementation of the contract cannot run as it should. This condition can occur

in contracts for goods and services work carried out by the government with the provider of goods/services, causing the rules and legal principles in contract law to not fully apply.

Based on the background description, the problems discussed are the legal aspects of the contract for direct procurement of goods and services at the Ministry of Tourism and Creative Economy, legal certainty in the contract for direct procurement of goods and services at the Ministry of Tourism and Creative Economy for the PCO Provider and the ideal concept of implementing the contract for direct procurement of goods and services between the Commitment Making Officer (PPK) and the PCO Provider at the Ministry of Tourism and Creative Economy.

2. METHODOLOGY

The type of research in this legal research is normative or doctrinal legal research. Peter Mahmud Marzuki defines doctrinal legal research as follows: “Doctrinal research: research that provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development.”

This study uses a qualitative analysis method, starting from researching to presenting in a concise state and carried out in the field. Because there will be a lot of data that is not recorded and researchers have forgotten the appreciation of the situation, so that the following things turn into meaningless fragments.(Soerjono Soekanto dan Sri Mamudji 2003).

3. RESULT AND DISCUSSION

Legal Aspects of Contracts for Direct Procurement of Goods and Services at the Ministry of Tourism and Creative Economy

Procurement of goods/services for government needs is an effort to obtain the desired goods/services carried out on the basis of goods and services needed in order to formulate and implement public policies in the field of Tourism and Creative Economy while on the other hand the Provider also has the right to receive benefits/fees for providing goods and services needed by the Government. Ethics and norms are needed for the existence of two conflicting wills or desires to reach an agreement supported by good faith to achieve the expected target goals.

The legal aspect of the obligation in the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy cannot be separated from the

concept of an agreement as one source of the obligation. As the provisions of each agreement are made in writing in order to obtain legal force, so that the purpose of legal certainty can be realized. In connection with the agreement, according to Article 1313 of the Civil Code, it provides a definition of "an agreement is an act by which one or more people bind themselves to one or more other people". That the implementation of the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy must be made in writing in order to have legal force to obtain certainty for the parties to the contract.

In making a Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy, basically the parties are free to enter into a contract with whomever they want, free to determine the contents of the contract, free to determine the form of the contract, and free to determine the legal provisions applicable in the contract. This is referred to as the principle of freedom of contract. This principle can be concluded from Article 1338 of the Civil Code:

In practice, the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy, the parties are free to do it with anyone and are free to determine the contents of the contract but are limited by the requirements for the validity of the agreement as stipulated in Article 1320 of the Civil Code. In addition to the requirements for the validity of an agreement regulated in Article 1320 of the Civil Code above, in the implementation of the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy, it is also necessary to pay attention to and apply the principles of contract law as a source of contract law.((Bandung: CV Keni Media, 2013).

The legal aspect of the contract in the direct procurement contract for goods and services at the Ministry of Tourism and Creative Economy refers to a series of rules and legal principles that govern the relationship between the parties involved in an agreement or contract. According to the author, the study of the legal aspects of the contract of direct procurement of goods and services in the Ministry of Tourism and Creative Economy serves to:

- a. Create justice and legal certainty in the relationship between the parties regarding the rights and obligations of each party clearly and fairly, so that the parties can understand and rely on their rights and obligations.
- b. Facilitate economic transactions by providing a legal framework that regulates the formation, implementation, and termination of agreements. This provides confidence for the parties to conduct transactions and drive economic activities by providing legal guarantees and protection against abuse.

Protect the interests of the parties from fraud, error, or violation of the agreement by the other party. The law of the contract provides a legal mechanism for taking action in the event of default or violation of the agreement.

Legal Certainty in Direct Procurement Contracts for Goods and Services at the Ministry of Tourism and Creative Economy for PCO Providers

The process and stages of government procurement of goods and services start from the stage of determining needs to achieving work results. Therefore, the purchase of goods and services is essentially an effort by users to obtain or realize the goods and services they want by using certain methods and processes with the intention of reaching an agreement on price, time and other agreements. (Yohanes Sogar Simamora 2005)

Normatively, Government Procurement of Goods and Services is stated in Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services. However, for adjustments to the regulations on the use of products/services of Micro and Small Businesses and Cooperatives, and regulations on procurement of construction services whose financing is sourced from the APBN/APBD in Government Procurement of Goods and Services for ease of doing business based on Law Number 11 of 2020 concerning Job Creation and adjustments to the provisions of Human Resources for Procurement of Goods and Services, it is necessary to stipulate Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services to Presidential Regulation Number 12 of 2021 concerning Procurement of Goods and Services. (Perpres No. 12 Tahun 2021).

The civil legal relationship carried out by the Government is different from commercial contracts between private legal entities and private legal entities, because the Government as a public legal entity so that this contract is no longer purely a private legal act but a mixture of public legal acts. The involvement of the government in this contract shows that the government's actions are classified as civil government actions. Therefore, the Commitment Making Officer who enters into a contract with the Provider is required to adhere to the general principles of good governance based on Law Number 30 of 2014 concerning government administration.

Legal certainty in the implementation of the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy between Rizki Permana as the Commitment Making Officer of the Directorate of National and International Events with Hendro Dwi Christian (Director of PT DHM) as the PCO Provider Party based on Presidential

Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services and the contract that has been mutually agreed upon.

This activity actually has an impact on the PCO Provider regarding the lack of legal certainty regarding the scope of work and the percentage of management fee as should have been agreed upon before carrying out the 2022 Indonesian Community Children's Music Work Competition Empowerment event. Furthermore, when legal problems occur, it can result in unclear scope of work and percentage of management fee for the procurement of services contract at the Ministry of Tourism and Creative Economy.

Regarding this, the reasons behind the implementation of the Direct Procurement of Goods and Services contract at the Ministry of Tourism and Creative Economy that are not in accordance with the legal aspects of obligations and administrative law (Hybrid Contract) as explained previously, include:

- a. PPK's verbal directions can be immediately conveyed and followed up immediately by the provider.
- b. Two schools of thought on the PCO contract model which have their own advantages and disadvantages. Model of two schools of thought on the PCO service provider contract model concept. The first model is that the Company's profit/management fee is known at the beginning and the second model is that the management fee is obtained after all work is carried out in accordance with the technical specifications.
- c. Habits and lack of understanding regarding work contracts.

Gustav Rabdruch stated that legal certainty does not only talk about something that has been regulated in laws and regulations, but also talks about its implementation also talks about legal certainty. This refers to the implementers of laws and other regulations. As is known, in the implementation of the direct procurement contract for goods and services at the Ministry of Tourism and Creative Economy between the Commitment Making Officer (PPK) and the PCO Provider, it is not in accordance with the legal aspects of the agreement in general.

The results of this thesis research, although the implementation of the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy for the PCO Provider is not in accordance with the legal aspects of the agreement in general, the mechanism that is carried out is still carrying out the procurement of services until completion

in accordance with the PPK's directions not stated in the contract and the unclear percentage of the management fee. As a legal fact in the implementation of the 2022 Indonesian Community Children's Music Work Competition Empowerment Event (attached).

Regarding these conditions, in order to fulfill the principle of legal certainty, the author provides the following views:

- a. The percentage of management fee for the 2022 Indonesian Community Children's Music Competition should be explicitly stated in the Contract/SPK.
- b. Clauses in the SPK/Contract which is a template from the Government Goods and Services Procurement Policy Agency should be adjusted by considering the conditions and characteristics of the work.

The opinion of the resource person stated that until now there have been no problems in the work and cooperation relationship in the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy for PCO Providers between the Commitment Making Officer (PPK) and the PCO Provider. Thus, this gives the impression that the mechanism carried out in the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy for PCO Providers is effective and efficient to implement.

Ideal Concept of Implementation of Direct Procurement Contracts for Goods and Services Between Commitment Making Officials (PPK) and PCO Providers at the Ministry of Tourism and Creative Economy

Public procurement of goods/services is guided by Presidential Decree Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services Since the issuance of the Presidential Decree and the practice of implementing government procurement of goods/services has been guided by it, but in the implementation in the field, sometimes there are irregularities caused by a lack of understanding or differences in interpretation between users of goods/services and prospective providers of goods/services.

Previously explained, in the implementation of the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy, PPK directions are often carried out which are included in the scope of work but are not expressly stated in the contract and the unclear percentage of management fees such as the work on the 2022 Indonesian Community Children's Music Work Competition Empowerment event. This has become a habit carried out by the parties in implementing the contract as intended and there

have never been any legal problems.

However, it is possible that in the implementation of the Direct Procurement Contract for Goods and Services at the Ministry of Tourism and Creative Economy, there will be legal problems related to the unclear scope of work and the percentage of the contract management fee which will result in the legal relationship between the parties in the contract being void and ending in a dispute in court. In addition to having an impact on the contract and the legal relationship of the parties, this practice can also indicate an investigation by the Corruption Eradication Commission regarding criminal acts that are detrimental to the Government in the implementation of the procurement contract for goods/services at the Ministry of Tourism and Creative Economy, the funds for which are sourced from the State Budget.

According to Amiruddin in his book entitled "Corruption in Procurement of Goods and Services", he stated that the pattern of deviations that occur in the procurement of goods/services will be seen at every stage of the procurement of goods and services, which can be identified as follows:

- a. The pattern of deviation that occurs at the preparation stage is the inflation (mark up) of costs in the procurement plan, especially in terms of costs. This symptom can be detected from unrealistic unit prices and the swelling of the State Budget/Regional Budget.
- b. The procurement plan is directed at the interests of certain products or providers of goods and services. Technical specifications and criteria are directed at a particular product and provider of goods and services (which cannot be done by other providers of goods and services).
- c. Unrealistic planning, especially in terms of implementation time. The implementation time is determined to be very short so that certain companies are able to carry out the work, because they have prepared themselves in advance. This can happen by bribing the committee so that they can obtain tender and work information earlier than other participants.
- d. The committee works in a closed, dishonest manner, and appears to be controlled by certain parties.
- e. The Self-Estimated Price (HPS) is covered up even though it should not be confidential.
- f. The basic price is not standard.
- g. Technical specifications are directed at a particular product.

- h. Non-standard tender documents.
- i. Incomplete tender documents.

In this regard, an ideal concept is needed for the implementation of direct procurement contracts for goods and services between the Commitment Making Officer (PPK) and the PCO Provider at the Ministry of Tourism and Creative Economy, as follows:

a. Supervision and Guidance by the Government Internal Supervisory Apparatus (APIP)

The procurement process for goods/services is an activity that has a fairly high level of vulnerability, allowing for inefficiency and ineffectiveness and the potential for misappropriation/fraud. A Probity Audit of the procurement of goods and services needs to be carried out to ensure that the procurement of goods and services has been carried out in accordance with the procedures stipulated by the Laws and Regulations.

Internal Supervision is the entire process of audit activities, reviews, evaluations, monitoring, and other supervisory activities regarding the implementation of organizational tasks and functions in order to provide adequate assurance that activities have been carried out in accordance with the benchmarks that have been set effectively and efficiently in realizing good governance.

Based on Government Regulation Number 60 of 2008 concerning the Government Internal Control System, internal supervision is carried out by the Government Internal Supervisory Apparatus (APIP) by means of:

1) Audit

Audit is a process of identifying problems, analyzing, and evaluating which is carried out independently, objectively, and professionally based on audit standards, to assess the truth, accuracy, credibility, effectiveness, efficiency, and reliability of information. Audits carried out by (APIP) are Financial Audits, consisting of:

- a) Financial audits are audits of financial statements to provide an independent opinion. In their assignments, auditors are required to use state financial audit standards (SPKN) and/or public accountant professional standards (SPAP) as stipulated in the provisions of laws and regulations.
- b) Audits of certain financial aspects (audits of financial statements not to provide opinions), are audits of certain aspects of financial management carried out by government agencies on funds financed by the APBN/APBD in order to provide adequate assurance that financial management has been carried out in accordance with the benchmarks that have

been set as per the applicable provisions. Examples include:

- (1) Audit of part of financial report/financial information;
 - (2) Audit of income and expense report;
 - (3) Audit of cash receipt and expenditure report;
 - (4) Audit of fixed asset report, budget request;
 - (5) Audit of financial management of deconcentration fund;
 - (6) Other financial audits.
- 2) Review, a review is a re-examination of evidence of an activity to ensure that the activity has been carried out in accordance with the provisions, standards, plans, or norms that have been set.
- 3) Evaluation is a series of activities comparing the results/achievements of an activity with the standards, plans, or norms that have been set, and determining the factors that influence the success or failure of an activity in achieving its goals.
- 4) Monitoring is the process of assessing the progress of a program/activity in achieving its goals. Examples of monitoring activities carried out by (APIP) include:
- (a) Monitoring the follow-up of the audit results;
 - (b) Monitoring the implementation of policies;
 - (c) Monitoring the performance achievements of government agencies;
 - 4) Monitoring of deconcentration funds;
 - (d) Monitoring of criminal trials.

In this thesis research, the ideal concept of implementing direct procurement contracts for goods and services between the Commitment Making Officer (PPK) and the PCO Provider at the Ministry of Tourism and Creative Economy is intended, namely that the APIP can conduct reviews and evaluations of the implementation of contracts that are not in accordance with the general concept of agreement law. Although it is known that so far, there have been no legal problems in the implementation of direct procurement contracts for goods and services between the Commitment Making Officer (PPK) and the PCO Provider.

However, it does not rule out the possibility of indications of corruption in managing state finances in the procurement of goods and services at the Ministry of Tourism and Creative Economy, therefore the existence of the APIP function as an early warning system is needed to avoid risks in implementing procurement of goods and services in carrying out tasks and functions, especially the implementation of contracts that are not in accordance with the general concept of agreement law.

b. Making Flexible Standard Contracts for Procurement of Goods/Services in Ministries

The use of civil law instruments in government actions, especially contract law in a modern state is commonplace. The practice of making commercial contracts by the government is a form of government action in order to fulfill various needs in organizing national life. The contracts formed are a type of commercial contract. From a budget perspective, this type of contract can be divided into two, namely commercial contracts aimed at procuring goods and services and other commercial contracts that are non-procurement in nature.

Commercial contracts made by the government are hybrid contracts. This nature is inherent because the position of the government as a public organ carries the implication of the application of public law to the contract together with private law elements. Both types of norms apply to all stages of the contract. With the principle of freedom of contract, the government has the flexibility to make and bind itself to various types of contracts.

One form of contract referred to above is a direct procurement contract for goods and services between the Commitment Making Officer (PPK) and the PCO Provider at the Ministry of Tourism and Creative Economy, the implementation of which is known to be inconsistent with the general concept of agreement law. As with the general concept of an agreement, the contract is signed first as a form of agreement, then the agreed performance is carried out. In practice, the contract and performance are carried out in parallel first according to the needs or interests of the Ministry of Tourism and Creative Economy.

This condition has been going on for a long time at the Ministry of Tourism and Creative Economy in the procurement of PCO Providers and has become a habit that is mutually understood between the Commitment Making Officer (PPK) and the PCO Provider. As previously explained, this happened because initially there was an urgent directive and immediate execution had to be carried out and several additional items were added during the event that followed the conditions or environmental conditions at the location where the event was held.

In addition, the role of the Government Internal Supervisory Apparatus (APIP) is needed in conducting reviews and evaluations of direct procurement contracts for goods and services at the Ministry of Tourism and Creative Economy, a standard contract is also needed that can overcome problems in procurement contracts for goods and services that often occur with addendums resulting in achievements being carried out first until the event is completed before being signed by the parties.

The standard contract for the Procurement of PCO Providers can be given several

additional clauses that are essential related to events required by the Ministry of Tourism and Creative Economy, which are generally found in standard agreements.

Considering the characteristics contained in the standard agreement or standard contract which sets aside the principle of freedom of contract for one party, it is certainly very possible to include certain requirements that have the potential to be more beneficial for the party that has prepared its creation. These unilaterally made conditions are then referred to as "standard conditions or standard clauses". This becomes very dilemmatic for the other party because they are also in a position that needs or has an interest in the contract or agreement. Standard agreement or standard contract (standard agreement) in the form of an agreement with clauses of the agreement that have been determined unilaterally by the Ministry with the intention that the standard clauses can be used repeatedly with other providers.

With the existence of a standard contract in the Procurement of PCO Providers, it can overcome problems from the aspect of civil law (private) as the concept of carrying out a contract or agreement related to rights and obligations (performance) which should be agreed upon through the signatures of the parties first before being carried out or implemented the agreed performance in the form of services at events at the Ministry of Tourism and Creative Economy.

c. Utilization of LKPP e-catalog

E-catalog or also called an electronic catalog is an electronic information system that contains a list, brand, type, technical specifications, price, and quantity of availability of certain goods/services from various providers (suppliers).

Various types of e-catalogs that are grouped based on needs include:

1) National E-Catalog

The national e-catalog is an electronic catalog compiled and managed by the Government Goods/Services Procurement Policy Agency. Usually this e-catalog contains information about the procurement of aid goods for state facilities. In the national e-catalog, usually the goods or services registered are related to the interests of the state or state facilities, in the form of construction work, heavy equipment, medicines, consulting services, school textbooks, to goods/services contained in other online shops.

2) Sectoral e-catalog.

The Sectoral E-catalog is an electronic catalog compiled by the Ministry. Its scope is

smaller than the national e-catalog. In the sectoral e-catalog, usually the goods or services registered are related to the interests of the respective ministry or sector, in the form of agricultural equipment, medicines, construction materials, and consulting services.

3) Regional E-Catalog

The team that compiles and manages the regional e-catalog is the local government which is directly appointed by the local regional head. In the regional e-catalog, usually the goods or services registered are related to the interests of the local region, in the form of general construction work and through the Competitive Catalog, consulting services, stationery, and others.

4. CONCLUSION AND SUGGESTION

The legal aspect of the contract of direct procurement of goods and services at the Ministry of Tourism and Creative Economy is a legal relationship between the Commitment Making Officer (PPK) and the PCO Provider based on civil law (private) and administrative law (public)/ Hybrid Contract. In addition, the parties must comply with the ethics and principles of procurement of goods and services in accordance with Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services and its amendments to Presidential Regulation Number 12 of 2021 and LKPP Institution Regulation Number 12 of 2021 concerning Guidelines for the Implementation of Government Procurement of Goods and Services through Providers.

Legal certainty in the contract of direct procurement of goods and services at the Ministry of Tourism and Creative Economy for the PCO Provider is not as it should be according to the general concept of agreement law. PT Dinasty Harjo Mukti is one of the PCOs for the Community Children's Music Competition (Kamu-Aku in 2022) by entering into an agreement in the form of a Work Order (SPK) with the PPK of the National and International Event Directorate, Mr. Rizki Permana has implemented PPK's instructions that are not included in the contract and received a percentage of management fee that is not explicitly stated in the contract. This shows the absence of legal certainty.

The ideal concept of implementing direct procurement contracts for goods and services between the Commitment Making Officer (PPK) and the PCO Provider at the Ministry of Tourism and Creative Economy through the role of APIP to review and evaluate the implementation of the contract and provide guidance to avoid indications of state financial losses. In addition, a standard contract is needed to be made by the Ministry of Tourism and

Creative Economy to overcome problems with civil law aspects in terms of contracts or agreements and no less important is to utilize the Ministry of Tourism and Creative Economy's Sectoral E-Catalog.

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