

THE INTERNATIONAL JOURNAL OF BUSINESS & MANAGEMENT

Behind the Law of Goods/Services Procurement Implementation during Covid-19

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Abstract:

Pandemic situation brings dramatic changes in many aspects, including state budget to recover the emergency situation that force the government to take immediate action known as discretion, including goods and services procurement particularly in health and social sector. Government regulation on Goods and Services Procurement always updated to adjust with current situation to anticipate changing needs. But in abnormal situation, there are many niches may use on behalf of self or certain party interest. In that, the government auditor, both internal and external, must recognize the possibility area where fraud may exist. By studying existing regulation as starting point, an auditor can develop effective audit program both to prevent or detect wrongdoing practices in GSP in health and social sector. There are some wrong doing possibilities in GSP implementation, where involved both internal apparatus and external parties, such as the vendor. Regarding the government regulation in GSP, this study found that there are five important steps should integrate into their audit program, namely assess the role of commitment holder, test the relevancies with circular letter of LKPP number 3/2020, test conformity with Presidential Regulation Number 16/2018 and Article 6 paragraph (2) of LKPP Regulation No. 13 of 2018, and check the provider qualification.

Keywords: Discretion, pandemic, goods/services procurement regulation, fraud detection

1. Introduction

The Covid-19 pandemic at the beginning of 2020 has had a tremendous impact on goods/services procurement, particularly in health sector. This research tries to disclose (1) What are some of the fraudulent actions that could arise during the pandemic period in the health sector procurement process? And (2) What role played by the laws and regulations in a pandemic that may cause this fraud? The previous research already unveil factors influencing fraud in normal situation both in private and public sectors (Maulidi, 2017); (Nuswantara, Maulidi, & Pujiono, 2017); (Nuswantara & Ach, 2020). This study tries to explore in a very different situation where the emergency decision become priority so that welcome the fraudulent action. The result of this study will benefit not only in emergency situation but also may apply in regular one in a better way. It also gives insightful recommendation for government as a regulator to reformulate existing Goods/Services Procurement regulations comprehensively to anticipate any misconduct in unusual situation such as pandemic.

The rapid and widespread of the virus forced the Indonesian government both at the central and regional levels to establish an emergency condition. On Wednesday, April 1, 2020, under President Joko Widodo (Jokowi) command, the central government declared an emergency status for the increasingly worrying outbreak of the COVID-19 corona virus. In almost a month, positive cases of the corona virus have touched the number 1,528 (www.detik.com). This forced the President to issue Presidential Decree No. 12/2020 concerning the Establishment of the Non-Natural Disaster Status COVID-19 as a National Disaster signed by President Joko Widodo on April 13, 2020. The enactment of this national disaster status shows that the state is here to protect its citizens in a real way and consistent with the dangers of exposure to the COVID-19 corona virus. Hence, emergency decision-making must be carried out as crucial role in relieving and reducing various losses and damages, such as such as losing jobs, deadness, and destructive protests (Zhang, et al, 2018).

Immediate impact is required to prevent more serious damage. Because the impact that is felt has penetrated all fields, including the mortality, economy and social sectors (Supriatna, 2020) (Heuveline & Tzen, 2021). In the health and social sector, the government has to prevent the wider spread of new cases and treat patients who have been affected by Covid-19. This treatment requires infrastructure, medical materials and medicines that must be immediately provided by the government, both central and local governments. In this emergency, the procurement of goods and services handling

Pandemic handling Covid-19 requires a high priority, prompt action and close a large number, however, stay right in practice. The condition of fulfilling the need for goods/services of this kind is urgent, it is not planned in advance in terms of type, quantity and time which cannot be postponed so it must be done as soon as possible to prevent the spread of a pandemic (Kohler & Wright, 2020).

But in pandemic situations, people are covered with anxiety and fear, thus raising suspicions. However, this feeling is natural, because in urgent situations, decision-holders have great power that can be abused by exploiting misinformation (Powell & Meyers, 2021); (Benhabib, 2021).

2. Literature Review

2.1. Discretion in Public Policies during Emergency Situation

The President of the Republic of Indonesia through Presidential Instruction of the Republic of Indonesia Number 4 of 2020 ordered that the Ministry/Institution to prioritize the use of existing budget allocations for activities that accelerate the handling of COVID-19 (Refocusing activities, and budget reallocation) with reference to the COVID-19 handling protocol. This Presidential instruction certainly requires any institution in Indonesia to immediately adjust their budgets, however, requires in-depth analysis in order to produce effective, efficient and economical budgeting. Researchers have proven that budgeting that considers the principles of value for money is not easy. The implementation of VFM in New Public management takes a long time. Even until now the implementation of VFM cannot be said to be fully applied. Especially in emergency situations such as during the covid-19 pandemic.

Decision making in normal situations misses several stages in decision making, such as the verification and validation process. This can be seen in the process of preparing government budgets, where at least must go through the process of collecting data by involving stakeholder participation to consider the Direction and General Policy. This process takes a long time, so it cannot be done in emergency conditions. Thus researcher must understand the research procedure and ethics of research in emergency situation to avoid misconducts (Biros, Fish, & Taggart, 1999).

Based on literature review, there are some statements about principal government roles in emergency situation. Regarding health development, the government of a country has an active role in interfering in the socio-economic life of its people as reflected in the WHO conceptual framework of Health for All. The ultimate goal is to realize the welfare of the people. This concept causes the state to need and even have to intervene in various social and economic problems to ensure the creation of common welfare in society. This intervention causes the state's function to include activities that were previously outside the scope of the state's function, such as extending the provision of social services to individuals and families in special matters such as 'social security', health, social welfare, education, and training and housing.

This concept gives broad authority to the government as the organizer of government functions which include the functions of regulation, service, development, empowerment, and protection. As a consequence, the government is given the authority to make decisions and/or actions in government administration. The authority possessed by the government gives rise to the rights and obligations inherent in carrying out government functions. As a manifestation, the government is also given the right to freedom of action (discretion) in the administration of government to deal with a concrete problem so that a solution can be obtained immediately.

Herbert Packer gives a negative assessment of the concept of discretion that: "The basic trouble with discretion is simply that it is lawless, in the literal sense of that term" (Juliani, 2020). Discretion essentially shows a tendency in the form of exemption from having to act in accordance with the general rules of legislation (rule-based or rule following approach). The exemption contains a character that is closely related to freedom accompanied by a broad scope functionally proportional to the scope of power/authority possessed by government agencies/officials. Furthermore, there is a view which assumes that government bodies/officials inherently have residual freedom of action without any legal authorization.

This thinking arises from the assumption that the government is allowed to take any action as long as it does not violate the law or individual rights. This view recognizes that the position of government is the same as individuals who are assumed to have equal freedom and are allowed to do anything as long as it is not prohibited by law. That means, laws or court decisions can limit these freedoms.

As long as this is not done, the government is deemed to have freedom of action. This definition is conceptualized as 'the third source authority for government action.' The notion of discretion by Koch, Jr. (1986), tried to divided concept of discretion (administrative discretion) into five, namely: individualizing discretion, executing discretion, policy making discretion, unbridled discretion, and numinous discretion.

Those determine whether the court can test the discretionary act. The concept of discretion has the spirit to provide protection for officials who run it in the form of space for freedom or the possibility of mistakes when carrying out these actions. However, the concept of discretion cannot be used indefinitely. Darumurti (in Nalle, 2018) defines discretion, at least, under following elements:

- an individual decision or action of government
- based on the government's power to be free to make choices as well as resolve important problems that arise suddenly
- Government in the context of discretion is given the choice to act or not to act for the sake of public good

The freedom to choose is prescribed in legislation or even is not prescribed from legislation. Discretion is intended for carrying out public service tasks (Wahyudi, 2017). Bagir Manan (in Yuhdi, 2013) mentioned the characteristics of discretion as follows

- Regulations do not constitute statutory regulations.

- The principles of limitation and testing of statutory regulations cannot be enforced in policy regulations.
- Policy regulations cannot be tested wetmatigheidly, because there is no legal basis for making such regulatory decisions.
- The rules are made based on Ermessen's freies and the absence of an administration that has the authority to make regulations.
- The examination of regulations that is more left to doelmatigheid and therefore the touchstone is general principles of proper governance
- In practice, the format is given in various forms and types of rules, namely decisions, circulars, announcements, etc., it can even be found in the form of regulations

The use of the principle of discretion is a means for government officials to make breakthroughs and solutions to problems that require quick solutions and there are no regulations that regulate this. The juridical consequence of the use of discretion that is not based on objectives, statutory regulations and general principles of good governance results in discretion which will encourage arbitrary acts and abuse of authority. Arbitrary actions can occur because the government does not have enough rationality as a parameter. Therefore, every government discretion must be based on legality, democratic, objective, and general principles of good governance as metanorms that underlie government action.

3. Research Method

According to Creswell, qualitative research implies an effort to explore and understand the meaning of what happens to various individuals or groups originating from social or humanitarian problems. This study uses a Sociological Juridical approach aimed at the effectiveness of the implementation of Presidential Decree No. 12/2020 concerning the Establishment of the Non-Natural Disaster Status COVID-19 as a National Disaster for possible acts of fraud in procurement procedures for goods / services. Researchers chose this type of study because researchers saw potential gaps in the application of regulations in the field. Data collection is done by reviewing the opinions of experts in FGD. Discussion questions are compiled from literature search engine using keyword related to the topic. Such hints words as government procurement, discretion, fraud, and detection choose as the keyword to find the cases might happen due to emergency discretions. When completed, data tabulated to grouped based on the similarity to build the map of wrongdoing possibilities. This study is intended to obtain a big picture mapping so that auditors can identify the possibility of fraud in discretion by public officials during the emergency period. The next phase is data analysis. In this analysis process, there are three main components, namely data reduction is the first component in the analysis which is a process of selecting, focusing, simplifying and abstraction of data. Data from literature review to gather framework of reality. The data presentation is a descriptive organizational assembly of information in the form of a narrative that allows research conclusions to be carried out. The final step is drawing the conclusions. In drawing conclusions, researcher need to discuss with the expert, such as academicians and government auditor in order to get solid and accountable conclusions. Small group discussions held to get feedback from the expert. There are criteria for the expert, both academicians and government auditor, they must have audit experience for minimum 5 years, for government auditor, they must specifically have experience in procurement audit. Informed consent form sent to 4 informants before discussions starts. Using online discussion, the researcher raises questions and make note the discussion. Once, the items questioned not confirmed, it will ask to another expert to get higher conviction. The process stopped once it confirmed.

4. Results and Discussion

4.1. Discretion in Public Policies during Emergency Situation

Based on literature review which confirm to the expert informants, there are some statements about principal government roles in emergency situation. Regarding health development, the government of a country has an active role in interfering in the socio-economic life of its people as reflected in the WHO conceptual framework of Health for All. The ultimate goal is to realize the welfare of the people. This concept causes the state to need and even have to intervene in various social and economic problems to ensure the creation of common welfare in society. This intervention causes the state's function to include activities that were previously outside the scope of the state's function, such as extending the provision of social services to individuals and families in special matters such as 'social security', health, social welfare, education, and training and housing.

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4.2. *Misconduct Practices and Violation of Health Ethics during a Pandemic*

Discretion exercise in Indonesia's bureaucracy is mostly performed by public managers. There are some cases in which public managers are blamed, impeach even sent to court because of their decisions. For example, Gus Dur with Bulog-gate and Brunai-gate in 2000's that becomes two reasons to impeach him. His decision to not consult with the council due to the emergency situation that need an immediate decision forced him to stepped down from the throne (Ratnawati, 2010).

In other side, deception and misconduct in science in 1998 was very popular, where former doctor A.J. Wakefield reported an association between measles, mumps, and rubella vaccinations and autism syndrome in children. But, in 2011 was proven that he manipulated research data and faked false ethical consent to delineate a false link between vaccines and autism, which would give him significant personal economic benefits through involvement in a lawsuit against the vaccine manufacturer for mumps, measles, rubella (MMR). The deterioration of public health continues, fueled by unequal media coverage and ineffective responses from governments, researchers, journals and the medical profession.

This picture shows that it is possible that in this pandemic situation there will be abuse of the medical profession and researchers in inclusive research to find vaccines and painkillers. The research process that is not easy to understand, multi-disciplinary, complex and has high uncertainty causes the level of detecting the validity and reasonableness of the research to be difficult to determine. So as the material needed for the research cannot get easily from regular supplier. In that, the manager and the supplier may compromise to set the material specification as well as the price. In addition, research cost is a fact that is difficult to compare in terms of fair value and output certainty.

The COVID-19 outbreak has brought unprecedented challenges for the government to ensure not only the health of its citizens but also the continuity of public services. Public procurement strategies and infrastructure plans are at the forefront of countries' responses to the COVID-19 crisis. Governments must purchase critical healthcare products and services needed in an immediate response to the COVID-19 crisis, while at the same time they must ensure the continuous and smooth management of contracts necessary to ensure public services to their citizens. The functioning of critical infrastructure is also very important during the COVID-19 response not only for public health and safety but also for the welfare of the community. Certain critical public service and infrastructure industries have a special responsibility to continue operations during unprecedented times.

Furthermore, in the immediate response phase, governments are experiencing very high demand for specific medicines and the same personal protective equipment due to the worldwide nature of the epidemic. Not only do countries compete with each other for the same products and services, in every country too, the central government is made to compete with local governments for the same essential supplies. This condition causes market plays the price so that a fair market price is not rational anymore.

This public investment - whether to acquire the necessary medical products and supplies, or to provide essential public services and maintain relevant infrastructure (physical and digital) - is channeled primarily through public procurement. Therefore, the impact of the selected procurement strategy has a direct impact on the effectiveness of policies to deal with the pandemic and its social and economic consequences. For example, procurement strategies developed before the COVID-19 crisis in some countries have failed to ensure the availability of adequate supplies - face masks or reliable tests - that are needed in the event of a pandemic.

However, the crisis has presented an unmatched challenge for the government to ensure not only the health of its citizens but also the continuity of public services. In response to the crisis, governments around the world have simultaneously taken extraordinary steps to ensure the safety of their citizens, including general lockdowns and the cessation of large-scale economic activity, which have created concurrent effects in various policy areas. Such disruption affects the way governments plan and procure them and manage their ongoing contracts, not only for the healthcare products and services needed to tackle the coronavirus, but also for the goods and services needed to provide citizens with essential public services (including, for example, digital tools to ensure wide-scale remote office operations and extended online services in the public sector). The government also faces demands to maintain and adapt infrastructure assets to the rapidly changing needs of responding to crises.

In many jurisdictions, the procurement of health products is within the jurisdiction of local, municipal and, sometimes, even individual hospitals, increasing the risk of counterproductive competition among public buyers, instead of reaping the benefits of a coordinated approach to procuring these products further increasing product prices towards an unreasonable price. Fears of a shortage of supply lead to hoarding which often leads to inefficiency. Poor coordination between the central and regional governments, between one agency and another, causes overlapping and waste because the same target group gets the same items from different governments and/or agencies.

Based on previous year, for example year 2016, External Government Auditor (i.e. BPK) found that there are 887 institutions made higher payments to vendors, 33 institutions overpaying vendors for their goods and services, 12 institution has not collected a penalty for late completion of work, 2 institutions made false transaction, 27 the institution accepts work that does not meet the contract specifications, and 28 vendors cannot finish their works as contracted. Those not happen accidentally, they planned. An auditor may find in planning document compare with budget document and goods and services procurement document. When the data crosschecked do not matched, it becomes symptoms for wrong doing.

Yustiarini & Soemardi, (2020) mention potential or loopholes in corruption can occur if the apparatus involved in procuring infrastructure has the desire to enrich themselves or their institutions. In addition, Rustiarini et al., (2019) found that apparatus behavior determined the decision to do wrongdoing action due to high pressure and opportunity. Unfortunately, during pandemic situation, the economic pressure were high because many aspects were down even stopped, and the emergency situation forced the government to focus on how to find the vaccine instead of economy recovery.

So there is opportunity for irresponsible apparatus (procurement managers) to bribe through unfair winner decision to get project fees from vendor. The scarcity, both in producer or available units, become most prevalent excuse for the managers to decide unqualified provider as the winner. There are possibilities to falsify document as well as submit uncompleted document. Another mode of bribe is accepting inconformity as well as low quality goods/services

4.3. The Role of Law and Regulation in Avoiding Fraud during an Emergency

In non-emergency situations, existing laws and policies offer reasonable guidance on empowering actors and entities to allocate health resources and deliver health care. However, during a declared state of emergency, the legal environment may change (Hodge, Gracia, Anderson, & Kaufma, 2009). The declaration of a state of emergency triggers a series of non-traditional forces designed to facilitate response efforts through the public and private sectors. Emergency laws can (1) give governments sufficient flexibility to respond; (2) mobilizing central command and infrastructure; (3) encouraging response efforts by limiting responsibility; (4) authorizes the recognition of international health care licenses and certifications; (5) allocating health personnel and resources; and (6) help change medical care standards and scope of practice (Hodge et al., 2009).

The term 'scientific fraud', which is used in the literature as a distinguishing label from all these situations, due to the imposition of a legal regime, has been gradually replaced by the term 'scientific error'. The basis of this conceptual change is the normative framework of the 'deception' regime. Indeed, for example in American law, 'fraud' presupposes verification of evidence and demonstrations of dishonesty and damage caused by a particular victim. However, in most cases of scientific research, the victim's existing needs do not fit the concept of 'fraud'. Therefore, in some countries, the two terms are used interchangeably. According to the thesaurus dictionary, it 'represents an ethically unacceptable breakdown of beliefs performed for profit or for an unfair or dishonest gain.' In other words, it is also an intentional representation of truth. These are usually classified using the so-called 'cardinal sin' FFP categorization, meaning falsification, fabrication and plagiarism. Although all are treated in the same category as a moral offense, plagiarism is somewhat placed on a different level of offense because it constitutes a violation of the scientific community but not of the truth of science.

No one does any of the following on purpose:

- Obstruct the lawful operation of any law enforcement officer, fire brigade, rescuer, medical person, emergency medical service officer, or other authorized person, involved in that person's duty at the scene of any fire, accident, disaster, riot or emergency;
- Obstruct the lawful activities of any emergency facility person involved in the work of that person in the emergency facility;
- Failure to comply with the lawful orders of any law enforcement officer involved in the duties of a law enforcement officer at the scene or in connection with a fire, accident, disaster, riot or any emergency

The wrong mental element is knowledge. To violate a law, a person must take any action that he thinks is hindering legitimate operations in an emergency setting, or fails to comply with a lawful order he knows has been issued. 'Emergency' has not been determined by law. As a result, courts have looked to the dictionary to define it and have determined that 'emergency' is, an unexpected situation or sudden event of a serious and urgent nature that demands immediate attention.

This section maintains previous measures aimed primarily at controlling observer and curiosity seekers at the scene of an emergency, to allow police, fire, rescue and medical personnel, and others, to perform their duties most efficiently at such times. Although this article is a special tool for controlling the masses in an emergency, the violations under it do not have to arise from the collective behavior of the masses but can be committed by one person.

In these conditions, as a Government Internal Auditor, known as Government Internal Supervision Apparatus (APIP) faced a situation that requires a strong legal basis in mentoring and in the supervision process for the work unit, especially regarding the procurement of medical equipment for handling the Covid-19 Pandemic. Under the auspices of the provisions of LKPP Regulation Number 13 of 2018 concerning Goods/Services Procurement (GSP hereafter) in Emergency Management and circular letter LKPP Number 3 year 2020 concerning Explanation of the Implementation of GSP in the Context of Handling Covid-19 the GSP process is more protected.

To ensure that this GSP activity has been carried out effectively, transparently and accountably, the APIP needs to supervise this activity. Presidential Regulation Number 16 year 2018 concerning Government GSP is intended to ensure that the implementation of the procurement provides the fulfillment of the maximum value for money and contributes in increasing the use of the role of Micro, Small and Medium Enterprises and sustainable development. The Presidential Regulation regulates the GSP in the Context of Handling Emergency Situations, as well as the role of the APIP in monitoring the GSP.

In Presidential Regulation Number 16 of 2018 Article 59 states that emergency handling is carried out for the safety/protection of the public or Indonesian citizens who are in the country and/or abroad, whose implementation cannot be postponed and must be carried out immediately. One of the handling in an emergency is the need for goods/services of an urgent nature which results in the level of fulfillment having priority speed and accuracy such as carrying out a rescue in a disaster condition, seeking human life help in an accident, damage to infrastructure that disrupts public service activities and/or endangers safety, community, or providing assistance/services for disaster victims. In general, the aforementioned conditions are conditions where the fulfillment of goods/services needs is urgent, not planned in advance, both in terms of type, quantity, and time that cannot be postponed so it must be done as soon as possible.

As Instruction in point six number 5 of Presidential Instruction Number 4 of 2020 concerning Refocussing Activities, Budget Reallocation, and Procurement of Goods and Services in the context of the Acceleration of Handling Covid-19, the President instructed BPKP, as regulator body of government internal auditor, to provide financial assistance and supervision in accordance with the provisions of laws and regulations on financial accountability countries to accelerate the handling of Corona Virus Disease 2019 (COVID-19).

Here are importance steps that will help auditor to supervise as well as audit the work units:

Since the increasing of breaking the regulation opportunity, the APIP should identify procurement condition. The aim to be achieved at this stage is to conduct an assessment to ensure that the procurement activities that will be the scope of the audit are strategic GSPs, have been contracted, paid for, and at the request of Commitment Holder

Identification is done by testing the following criteria:

- GSP activities in order to accelerate the handling of Covid-19 have signed a contract and have been paid, or at the request of the Commitment Holder.
- Assessment of GSP activities in the context of accelerating the handling of Covid-19 is strategic in nature, this is after an assessment and ranking of the total score based on the GSP risk register and risk factors include: significant contract value compared to the value of the refocussing budget in the health sector, there is potential fraud, the connection between GSP and the handling of the Covid-19 Pandemic, vulnerable items, easy to lose etc

The next step is testing the accuracy of the process of identifying needs both types, quantity, as well as specifications of goods/services required. This stage ensures that the process of identifying needs has been carried out appropriately and in accordance with applicable regulations. This test is carried out on the criteria for identifying needs aimed at accelerating the handling of Covid-19, the types, quantities and specifications of goods/services needed are correct and are based on the results of rapid field assessments and in accordance with the analysis of resource availability. This is in accordance with Part II Point 2.1 Attachment 1 of LKPP Regulation Number 13 of 2018 concerning GSP in Emergency Management and Circular Letter of LKPP Number 3 of 2020 point E.2. Based on Circular Letter LKPP Number 3

of 2020 concerning Explanation of the Implementation of PBJ in the context of Handling Covid-19 letter E number 2, it is stated that PA/KPA determines the need for goods/services in the context of emergency handling for handling Covid-19.

After testing the accuracy, an auditor also need to test the conformity of the planning process with regulations. This test is carried out to ensure that the planning process is in accordance with the provisions of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services and a Circular of the Government's Goods/Services Procurement Policy Institution Number 3 of 2020 concerning Explanation of the Implementation of Goods/Services Procurement in the Context of Handling Corona Virus Disease 2019 (Covid-19).

Tests carried out include the criteria for analyzing the availability of resources and determining the method of procurement. This is in accordance with Article 6 paragraph (2) of LKPP Regulation No. 13 of 2018. Testing is also carried out through analysis of planning documents whether it has been supported by a Requirement Plan accompanied by supporting evidence; alternative procurement plans; and distribution plans.

Testing the reasonableness of determining the providers of good/services. This test is carried out through the fulfillment of criteria, among others: providers of medical equipment and materials have been registered with the Ministry of Health; the closest provider that is implementing similar GSP; and other business actors deemed capable and qualified to implement similar GSP; or providers in electronic catalogs.

5. Conclusion

In normal situation, there is always niche for irresponsible apparatus (procurement managers) to do wrongdoing in GSP. It is become more prevalent in pandemic situation. This imply that psychological factors must be regulator consideration in setting regulation, including in GSP. Good system will useless when there is collaboration between units or persons. Law enforcement become the main tools to make the government officer deterred. When there are indications of wrong doing, auditor will always have techniques to detect it. This also give insight to the auditors to use their sense as investigator in special objective audit (ATT). The audit body should train and facilitate their auditor in that they have sufficient knowledge and skills in doing special audit particularly in pandemic situation.

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