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Legal Antinomy in the Implementation of Government Contract Dispute Resolution with Private Parties

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ABSTRACT

The procurement of goods and services for the benefit of the state is one of the means of driving the wheels of the economy to increase the prosperity of the national economy, because the acquisition of goods and services by the government is intended for public services. Public procurement of goods/services carried out through contracts between the government and the private sector, in addition to being subject to civil jurisdiction, is also subject to public sector rules. This research aims to discuss the implementation of dispute resolution of goods and services procurement contracts between the Government and private parties with regard to the application of public law and private law. This research is written using the normative juridical method through a Legislation and case approach using binding primary legal materials and secondary legal materials as references. The result of this research is that legal efforts to resolve disputes between the government and private parties in civil case law, namely by litigation and non-litigation, are generally carried out with public law and civil law because they are carried out for the implementation of government functions. So to overcome the problems that often arise in the field, this is regulated in the Arbitration and Alternative Dispute Resolution Law No. 30 of 1999 which regulates the procedures for resolving disputes between contracting parties. In addition, the provisions for contract termination, especially public goods/services contracts, are also contained in Presidential Regulation No. 16/2018.

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I. INTRODUCTION

One of the classifications in the division of law is that law is classified into public law and private law. Public law is usually formulated as the law that regulates the relationship between the ruler and its citizens. Because it takes into account the public interest, the implementation of public law regulations is carried out by the ruler. Meanwhile, civil law is the law between individuals that regulates the rights and obligations of individuals against one another in family relationships and in the society.

There are several benchmarks that can be used to distinguish public law and civil law. In public law, one of them is the ruler, while in civil law both parties are individuals without ruling out the possibility that in civil law the ruler can also become a party.[1]

[1] Sudikno Mertokusumo, 2008, "*Mengenal Hukum, Suatu Pengantar*", Liberty Yogyakarta, hlm 130

The principles of public law must be the basis for the government to act in a cooperation contract with service providers. The government in carrying out all actions/actions always applies the principle of legality, so that in every action the Government is always based on applicable laws/regulations.

Legislation governing the procurement of goods/services by the Government is regulated in Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods or Services. In accordance with this regulation, the entire process of procuring goods or services for the Government must fulfill the procedures set out in the Presidential Regulation. On the other hand, in the context of government procurement contracts, Book III of the Civil Code also applies, namely the Law of Agreement.

In practice, there are often cases of disputes over procurement contracts related to absolute competence. For example, when the government enters into a contractual relationship, whether it is subject to public law or civil law. This is important when there is a contract dispute between the two, whether it is resolved according to civil law or according to public law. From another point of view, if the Government enters into a contract with a civil legal entity and the contract is carried out for the implementation of government functions, then in this case the contract can be said to be a public contract.[2]

In other cases, contract disputes are resolved through litigation or non-litigation. When the verdict on the dispute is that the government is in a losing position, then the government must submit to the judge's decision. This is in line with the legal adage "*Res Judicata Pro Veritate Habetur*" which means that a judge's decision must be considered correct, until proven otherwise by a higher court judge.

District court judges are also authorized to execute the decision of the Indonesian National Arbitration Board (BANI) which is final and binding (final and appealable). The provisions in Law No. 30/1999 are in line with the provisions of Article 59 paragraph (3) of Law No. 48/2009 on Judicial Power which states that In the event that the parties do not execute the arbitration award voluntarily, the award shall be executed based on the order of the head of the district court at the request of one of the parties to the dispute.[3]

The problem is when the execution of a contract dispute decision between the government and a private legal entity in the form of confiscation of assets is faced with provisions that limit the execution of the decision. One of them is collided with the provisions in Article 50 of Law No.1 of 2004 concerning State Treasury which stipulates that any party is prohibited from confiscating money or securities belonging to the state/region both in Government agencies and third parties.

This research aims to discuss the implementation of dispute resolution of goods and services procurement contracts between the Government and private parties related to the application of public law and private law. This research is written using the normative juridical method through the Law and case approach with binding primary legal materials and secondary legal materials as references.

As for previous research in the case of disputes over the procurement of government goods /services, various studies have been conducted over the past few years to examine the case of disputes over the procurement of government goods/services. However, after reviewing several studies, it was found that the studies of Karwiyah, Farina Firda Eprilia and Adinda Putri Pertiwi "Application of Win-Win Solution in Disputes over Government Procurement Based on Electronic Contracts Through Electronic Catalogs/E-Purchasing." Media.neliti.com, April 2022, https://media.neliti.com/media/publications/460023-application-of-win-win-solution-in-dispu-006529fc.pdf. Previously, the dominant focus was only on the regulation of government procurement contracts according to Indonesian Positive Law, which is regulated in Presidential Regulation No. 12 of 2021 which replaces Presidential Regulation No.16 of 2018 concerning Goods/Services Procurement, knowing the procedures for procuring government goods/ services through electronic catalogs/E-Purchasing, and the consequences and legal remedies taken in the event of a dispute over the electronic catalog/E-Purchasing contract for procurement of government goods/services.

In addition, several other studies found that Purbowicaksono's studies "Build Operate Transfer (Bot) Contract as a Policy Agreement between the Government and Private Parties". ejurnal.uij. ac.id. June 2020, http://ejurnal.uij.ac.id/index.php/REC/article/view/658/614. Which discusses the Build Operate Transfer (Bot) Contract as a Policy Agreement between the government and private parties regarding the basis of validity regarding contract agreements with the Build Operate Transfer (BOT) system, the legal position between the government and private parties to the BOT contract agreement. Meanwhile, the author will focus on the discussion of the resolution of Legal Antinomy in the Implementation of the Decision of the Indonesian National Arbitration Board by the District Court in the context of Resolving Government Contract Disputes with Private Parties.

These problems cause regulatory conflicts or Legal Antinomy between the arrangements in the Civil Code and the Judicial Power Law with the State Treasury Law. Based on the background description above, the author

[2] Anshori Ilyas, UnhasPress, "Kontrak Publik", dalam penelitan hukum, diakses pada tanggal 31 Mei 2023, melalui http://unhaspress.unhas.ac.id/terbitan/kontrak-publik/,

[3] Pasal 59 ayat (3) UU No 48 Tahun 2009 tentang Kekuasaan Kehakiman

is interested in conducting research with the title: "LEGAL ANTINOMY IN THE IMPLEMENTATION OF GOVERNMENT CONTRACT DISPUTE RESOLUTION WITH PRIVATE PARTIES".

II. RESEARCH PROBLEMS

Based on the background above, the core problems to be studied are as follows:

1. How is the harmonization of laws and regulations in conflict resolution of disputes over public procurement?
2. How does the law resolve conflicts between norms in laws and regulations in order to achieve legal certainty?

III. RESEARCH METHODS

In this journal, the type of research used is normative juridical research, which is a method guided by the laws and regulations. This legal research uses qualitative descriptive techniques, namely research used to describe problems that occur in the present or are ongoing. In this research, a Statute Approach, a Conceptual Approach, and a Case Approach are used. Legislation used as primary legal material includes: 1). Book III of the Civil Code on Bonds, 2). Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods or Services, 3). Law No. 30 of 2014 concerning Government Administration, 4). Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, 5). Law No. 17 of 2003 on State Finance, 6). Law No.1 of 2004 concerning State Treasury. While from secondary legal materials, namely: textbooks, legal dictionaries, legal journals, internet, draft laws and regulations. This research uses the library research method. Library research where the collection of legal materials can utilize legal indexes (index of legislation, index of court decisions, and books) both print and electronic including the internet.

IV. RESULT AND DISCUSSION

1. How is the harmonization of laws and regulations in conflict resolution of disputes over public procurement?

Procurement of goods/services originates from the government's need for goods/services in the context of organizing institutions whose fulfillment is carried out based on the mandate of laws and regulations. Procurement of goods/services is essentially an effort by the user to obtain or realize the goods/services he wants, so each party must comply with the ethics and norms/regulations that apply to the procurement process. Procurement of goods/services is very important to absorb the budget. And to get goods/services can be through self-management or auction. To avoid things against the law, the legal aspects of the procurement of goods/services need to be understood, because understanding the legal aspects will be able to adjust to the applicable laws and regulations. Understanding the legal aspects will also find out the consequences or weaknesses/shortcomings in the implementation of the procurement of goods /services, which will be useful to further streamline and streamline the implementation of the procurement of goods / services.[4]

The laws and regulations related to the procurement of goods/services by the government are regulated in Presidential Regulation No.16/2018 and its implementing regulations. In addition, because agreements between the government and the private sector contain aspects of private law, other provisions also apply, namely Civil Law, Civil Procedure Law. In dispute resolution, it can be resolved by litigation or non-litigation, each of which is subject to appropriate regulations. All of these regulations should ideally run harmoniously, both in the implementation and dispute resolution stages.

Legal harmonization is an effort or process that seeks to overcome the boundaries of differences, conflicting matters and irregularities in the law. Efforts or processes to realize harmony, suitability, compatibility, compatibility, balance among legal norms in legislation as a legal system in a unified framework of the national legal system. Harmonization of laws and regulations has an important meaning that laws and regulations are an integral part or sub-system in the legal system of a country so that these laws and regulations can be interrelated and dependent and can form a unified whole. Harmonization between laws and regulations in a hierarchical relationship is very important. If the hierarchical laws and regulations are not harmonious, the meaning of the hierarchy has been lost by itself. The importance of harmonization of norms in the relationship of one legislation with other legislation is a consequence of the theory of tiered legal norms.[5]

Harmonization is also needed in resolving conflicts or disputes in the procurement of goods/services between the government and private parties. When the settlement of disputes over the procurement of goods/services is agreed to be resolved through non-litigation channels, in this case by the Indonesian National

[4] Sekretariat Badan**, "**Aspek Hukum Dalam Pengadaan Barang Dan Jasa Pemerintah", Diakses pada tanggal 01 Juni 2023, melalui https://bppk.kemenkeu.go.id/sekretariat-badan/berita/aspek-hukum-dalam-pengadaan-barang-dan-jasa-pemerintah-402094

[5] Dr. Fitriani Ahlan Sjarif, S.H, M.H. Memaknai Harmonisasi Peraturan di Indonesia, dalam penelitian hukum, diakses pada tanggal 01 Juni 2023, melalui https://www.hukumonline.com/klinik/a/memaknai-harmonisasi-peraturan-di-indonesia-lt629d92ccd8920/

Arbitration Board (BANI), the laws and regulations governing this matter apply, in this case Law No.30 of 1999. The implementation of the BANI decision requires assistance from the District Court to carry out the execution. In terms of the implementation of this decision, the Court is subject to the laws and regulations governing this matter, including the Civil Procedure Law, and the Judicial Power Law. However, from the government side, public law provisions apply, including Law No. 1 of 2004 concerning State Treasury.[6]

Ideally, as a sub-system in the national legal system, all of these regulations run harmoniously. However, in the context of this problem, there is disharmony between the Civil Procedure Law, the Judicial Power Law and the Treasury Law, namely regarding the implementation of confiscation as a BANI enforcement decision. Article 50 of the Treasury Law stipulates that state assets may not be confiscated. In the Civil Procedure Law and the Judicial Power Law, there is no exception that state assets cannot be confiscated as the implementation of a decision, in this case a BANI decision. This happens in the case that will be the object of the research that the author will compile.

2. How does the law resolve conflicts between norms in laws and regulations in order to achieve legal certainty?

Conflict of norms in the positive legal system is an issue that is always interesting to discuss, especially in countries that make legislation (legislation/law and regulation) as the main source of formal law. Legislation, which in the Indonesian legal system is known as Legislation, consists of a collection of legal norms contained in several types of written regulations that are binding on the public and arranged into a hierarchical unit that determines its legal position and strength.[7]

The existence of these laws and regulations must not contradict the regulations mentioned above or regulations that are higher in position (hierarchy) has become a basic principle where there is or is written in the Stufenbau theory. This is useful so that there is no overlap between regulations, overlapping standards This creates legal uncertainty in society. The legal uncertainty arises because both at the management level and at the technical level of law enforcement.[8]

The resolution of this norm dispute can be solved by using existing legal principles that are relevant to the problems that occur. In order to resolve conflicts or norm disputes, the principle of legal preference is used, namely 3 principles consisting of the principle of Lex superiori derogat legi inferiori, (i.e. higher legislation will paralyze lower legislation), the principle of Lex specialis derogat legi generali, (i.e. special regulations will paralyze general regulations or special regulations that must take precedence), and the principle of Lex posteriori derogat legi priori (i.e. new regulations defeat or paralyze old regulations).[9] Of the three principles of legal preference that exist, the most suitable for the problem is to solve it with the principle of lex superior derogate lex inferior because this principle means that higher rules trump lower rules, in this case the conflicting ones have different hierarchies or degrees, namely the Law.

Based on the description above, we can observe that norm conflicts often occur in the positive legal system because the substance of law is complex and dynamic. It is complex because the substance of law covers a wide scope of regulation concerning all aspects of state life. It is dynamic because the substance of law is required to always be able to adjust to the development of the legal needs of the community. Norm conflicts can occur between lower regulations and higher regulations (vertical), between equal regulations (horizontal).[10]

V. CONCLUSION

Based on the discussion described above, it can be concluded that:

Procurement of goods/services starts from the government's need for goods/services in the provision of public services whose implementation is carried out based on the mandate of the law. Legislation related to government procurement of goods/services as stipulated in Presidential Regulation Number 16 of 2018 and its implementing regulations. Harmonization of laws and regulations is needed in resolving disputes between the government and private parties in the procurement of goods / services. If it has been agreed that the procurement dispute will be resolved outside the dispute, in this case through the Indonesian National Arbitration Board

[6] Mosgan Situmorang, 2017, Pelaksanaan Putusan Arbitrase Nasional Di Indonesia *(Enforcement of National Arbitration Award in Indonesia)*, *Jurnal Penelitian Hukum De Jure*, ISSN 1410-5632 Vol. 17 No. 4, Pusat Penelitian dan Pengembangan Hukum Badan Penelitian dan Pengembangan Hukum dan Hak Asasi Manusia Kementerian Hukum dan Hak Asasi Manusia R.I, hlm 317

[7] Nurfaqih Irfani, 2020, Asas *Lex Superior, Lex Specialis*, Dan *Lex Posterior*: Pemaknaan, Problematika, Dan Penggunaannya Dalam Penalaran Dan Argumentasi Hukum, *Jurnal Legislasi Indonesia* Vol 16 No. 3, Perancang Peraturan Perundang-undangan Direktorat Jenderal Peraturan Perundang-undangan Kementerian Hukum dan HAM, hlm 306.

[8] Virginia Usfunan, dkk, 2020, Pengaturan Tentang Penyelesaian Konflik Norma Antara Peraturan Menteri Terhadap Undang-Undang, Bandung; *Jurnal Kertha Semaya*, Vol. 8 No. 8 Tahun 2020, hlm 1193

[9] Philipus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum*, Gajah Mada University Press, Yogyakarta, 2005, p.31

[10] Nurfaqih Irfani, 2020, Asas Lex Superior, Lex Specialis, Dan Lex Posterior: Pemaknaan, Problematika, Dan Penggunaannya Dalam Penalaran Dan Argumentasi Hukum, *Jurnal Legislasi Indonesia*, Vol 16 No. 3, Perancang Peraturan Perundang-undangan Direktorat Jenderal Peraturan Perundang-undangan Kementerian Hukum dan HAM, hlm 306

(BANI), then the laws and regulations governing this matter apply, namely Law No.30 of 1999. From the government side, public law provisions also apply, including Law No. 1 Year 2004 on State Treasury.

Conflict of norms in positive law is a frequent topic in the implementation of Legislation, especially in countries where legislation (laws and regulations) is the main source of formal law. These laws and regulations must not conflict with higher regulations or with equivalent regulations. Therefore, the resolution of this norm dispute can be solved by using the legal principles that exist and are relevant to the problems that occur, consisting of Lex superiori derogat legi inferiori, Lex specialis derogat legi generali, Lex posteriori derogat legi priori.

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