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## **Legal position of commitment making officers in government contracts**

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**Abstract.** This research is a normative legal research. The characteristics of Government Contracts are multi-faceted and have a special character, namely they are private with the dimensions of public law (civil law, and administrative law), which means that Government Contracts have a hybrid character. In government contracts, the Commitment Making Officer (CMO) by the Budget User/Budget User Proxy as a representative of the government is given the authority to make decisions and/or take legal action to enter into agreements and also issue funds sourced from the state budget/regional budget in procurement of goods/services. The nature of CMO's legal position in Government Contracts is a private legal subject and its legal actions are subject to private law. In this regard, the CMO can be civilly liable. Therefore, if the CMO makes a mistake, in this case it is in default, then the CMO can be sued for compensation to the Court as appropriate for individual legal subjects and private legal entities in general.

**Keywords.** legal position, contract

### **Introduction**

Philosophically, spending by the government for the procurement of goods/services (hereinafter referred to as Government Contracts) is a routine expenditure and involves a very large budget. Procurement is carried out by the central and local governments. Goods and services are provided in the context of meeting the needs of government administration and the needs of the people. In government contracts, the government is represented by a Commitment Making Officer (CMO), with the company procuring goods/services. In Government Contracts, CMO in contract implementation is often in a very vulnerable position, because many CMO's are involved in corruption cases. This is a juridical consequence of the contract documents made by the CMO and the Provider, so there is a need for legal protection for CMO.

Juridically, the government's task in making contracts for the procurement of goods/services has a dual role, namely in its capacity as a private legal subject and on the other hand as a public legal subject. Contracts for the procurement of goods/services are classified as private legal acts with a public dimension. The contract for the procurement of goods/services is a commercial contract wrapped in public law, because the contractual action is subject to private law, but the arrangement is in the field of public law, namely the Presidential Regulation, which is currently regulated in Presidential Regulation Number 12 of 2021 concerning Amendments to Regulations. President Number 16 of 2018 concerning Government Procurement of Goods/Services.

Government contracts begin with a negotiation process to reach an agreement. This initial stage is also called the pre-contract stage, and is continued at the signing stage, followed up with the implementation of rights and obligations. (Gijoh 2021) The negotiation process between the parties is basically intended to create an agreement of will. There are two elements in it, namely offer and acceptance. At this stage one of the parties submits an offer, while the other party accepts. In such circumstances there is an agreement, which is the most important element in the formation of a contract. Even in the formation of a sale and purchase agreement, an agreement between the parties has given birth to an agreement.

According to Subekti, "the principle of consensualism", has a close relationship with the principle of freedom of contract and the principle of binding force. Violation of this provision will result in the agreement being invalid and not binding as law. (Subekti 2010) The Government Contract is a written agreement between the Budget User/Proxy of Budget User/CMO and the Provider of Goods/Services or the Executor of Swakelola. This is regulated in Article 1 Number 44 of Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services. Thus, Government Contracts have a multi-aspect character, which can be seen from the public and private aspects, and this character distinguishes Government Contracts from commercial contracts in general. Government Contracts have 2 (two) legal elements, namely Public Law and Private Law (Civil Law), so that Government Contracts have a hybrid character, due to the mixture of Public Law and Private Law. There is a legal statement in this study, namely the characteristics of government contracts and the nature of the legal position of Commitment Making Officials in Government Contracts that can cause state financial losses.

### **Research methods**

This research is a normative legal research. (Pratiwi Nur Hidayah n.d.)

### **Research Results Analysis**

#### **Characteristics of KDP in Government Contracts**

Government contracts are basically not much different from contracts or agreements in general. In it there are two parties who make an agreement with the object of the agreement which is an achievement. However, it must be admitted that there are principal differences regarding the subject of the agreement, namely the Commitment Making Officer (CMO) who represents the government. Characteristics of CMO in Government Contracts with Goods/Services Providers, namely: that in making a contract for the procurement of goods/services, CMO can immediately draft a contract and submit it to the provider of goods/services to be studied article by article of the draft contract by the provider of goods/services. The draft contract contains clauses set unilaterally by the CMO, and it is hoped that the procurement of goods/services will provide proposals related to its interests. However, the draft of the contact is difficult to fundamentally change, because the draft was formed based on standard and standard provisions, which are guided by the Presidential Regulation of the Republic of Indonesia Number 54 of 2010 concerning Government Procurement of Goods/Services and refers to examples of work contracts made related ministries. Therefore, changing the contents of the contract will be difficult for the goods/service provider to do.

Considering that in the formation of government contracts based on the Presidential Regulation, in the practice of making contracts, providers of goods and services don't have the opportunity to submit proposals or bids related to the mission of the contract. In general, the providers of goods/services submit completely to the CMO, both regarding the form of the

contract and the contents of the government contract. Although theoretically the CMO sometimes provides an opportunity for the providers of goods/services to draft contracts. The draft contract made by the provider of goods/services is submitted to the CMO for study by the CMO. However, in reality, the providers of goods/services often submit a draft contract to the CMO.

After the draft contract is completed, once again each party is given time to study the articles of the draft contract, and then each party is given the opportunity to propose possible corrections, either reducing or adding articles or paragraphs, deleting/omitting articles or paragraph, accept or reject the article or paragraph of the draft contract. After going through discussions by both parties and an agreement was reached, the draft contract was signed and legally became a government contract. Taking into account the procedures for making government contracts, it can be stated that there are several stages that must be passed, namely: a) the pre-contract stage; b) drafting and closing of contracts; c) stage of contract implementation; and d) contract termination stage.

In making government contracts, it is also bound by the principle of proportionality, namely at the implementation stage of the Government Contract, especially when the government is about to terminate the contract and/or at the time of disbursement of the contract implementation guarantee. Unilateral termination from the Government can be carried out if the goods/services provider doesn't carry out the work that has been mutually agreed upon, or is in default. Default is one of the causes for the expiration of the contract period before the expiration of the contract period in accordance with a mutually agreed agreement. In government contracts, CMO has discretion (free authority) to provide or not provide opportunities for providers of goods/services to complete work (extension of time). If the CMO doesn't provide an extension of time, because the provider of goods/services is deemed unable to complete his work, then the CMO has the right to make unilateral decisions based on the provisions of Article 93 of Presidential Regulation Number 70 of 2012 concerning Amendments to Presidential Regulation Number 54 of 2010 concerning Procurement. Government goods/services. As a consequence of unilaterally terminating the government contract due to an error made by the provider of goods/services, then:

- a. The performance guarantee is disbursed;
- b. The remaining down payment must be repaid by the goods/services provider or the down payment guarantee is disbursed;
- c. Providers of goods/services are subject to blacklist sanctions.

Provisions related to these sanctions can be deviated or excluded if the work is not completed by the provider of goods/services due to circumstances beyond the ability of the provider of goods/services or force majeure.

### **The Nature of CMO's Legal Position With Providers In Government Contracts**

The state is an organization of positions, among these state positions there are government positions, which are the object of state administrative law. Although this government position is attached with rights and obligations or is authorized to take legal action, the office cannot act alone. Positions can carry out legal actions, which are carried out through people who occupy positions, hereinafter referred to as officials. Between positions and officials have a close relationship, but between the two actually have different or separate legal positions and are regulated by different laws. Official legal actions are carried out based on the legal authority granted by law.

The Government Contract will frame the legal relationship between the Government and the Provider of Goods/Services in a contract for the procurement of goods or a contract for the procurement of services. In other words, the government becomes a party to a contract. In contract law, the parties have the same position, as reflected in Article 1338 of the Civil Code. In this context, both the government and the providers of goods or services have an equal position in fulfilling the rights and obligations contained in the agreed contract.

The government as one of the legal subjects in civil actions, the government is a legal entity, because according to Apeldoorn states, provinces, municipalities and so on are legal entities. It's just that its establishment was not carried out specifically, but grew historically. The government is considered a legal entity, because the government carries out commercial activities (*acts jure gestiomisi*). The government as a legal entity can also be found in Article 1653 of the Civil Code, that "In addition to a true civil company, associations of people as legal entities are also recognized by law, whether the legal entity is held by public authority or recognized by law as such, whether the legal entity is accepted as permitted or has been established for a specific purpose that is not contrary to law or morality".

The government as a legal entity can take civil actions as stated in Article 1654 of the Civil Code that "All legal entities that are legally constituted, as well as private persons, have the power to carry out civil acts, without prejudice to the legislation. which changes that power, limits it or subject it to certain procedures". As a subject of civil law, the government can improve itself with a third party in this case the provider of goods/services. The rights and obligations of each party, up to the implementation procedure must be clearly regulated and stated in the form of a contract.

Types of contracts that involve the government as a party can basically be divided into two types, namely commercial contracts and discretionary contracts (*beleidsvoereenkomst*). Commercial contracts can be divided into two types, namely contracts for the procurement of goods/services and non-procurement contracts. (Simamora 2006) Government involvement in contracts as an effort to carry out public services in the form of infrastructure development is classified as a commercial contract, because infrastructure development is part of the contract for the procurement of goods/services.

Article 1338 paragraph (3) of the Civil Code in general is always associated with Article 1339 which states "approval doesn't only bind what is expressly stipulated in it, but also everything that by its nature approval is required based on propriety, custom, or law".

The position of the Government in the contract also doesn't have a special position, and can be a party to a civil dispute with the same position as a person or civil legal entity in a general transition. Legal subjects (Michael 2019) have a very important position and role in the field of law, especially civil law, because legal subjects are expected to have legal authority (*rechtsbevoegheid*) to carry out legal actions. There are 2 (two) kinds of civil law subjects (Banasevych et al. 2021), namely human (*natuurlijk person*) and legal entity (*recht person*). (Díaz Gude and Navarro Papic 2020) Based on civil law, the state is a collection of legal entities, in which there is a government agency, which can take legal action as well as private legal entities in general, which can be involved in the traffic of legal interactions. Such as selling and buying, renting and leasing, mortgaging and mortgaging, making agreements, and owning property rights. When the government acts in the civil field, it is subject to civil law regulations, because the government acts as a representative of a legal entity, not a representative of an office

In connection with that, if in carrying out a civil law relationship an act or doesn't do an act that causes harm to another party, the government also has an obligation to be legally responsible. As in government contracts, if the government defaults, then the government must

be responsible civilly. In this case, the government can be sued for compensation to the Court for violating the law, as is the case with individual legal subjects or civil legal entities in general.

### **Conclusion**

The characteristics of Government Contracts are multi-faceted and have a special character, namely they are private with the dimensions of public law (civil law, and administrative law), which means that Government Contracts have a hybrid character. In government contracts, the Commitment Making Officer (CMO) by the Budget User/Budget User Proxy as a representative of the government is given the authority to make decisions and/or take legal action to enter into agreements and also issue funds sourced from the state budget/regional budget in procurement of goods/services. The nature of CMO's legal position in Government Contracts is a private legal subject and its legal actions are subject to private law. In this regard, the CMO can be civilly liable. Therefore, if the CMO makes a mistake, in this case it is in default, then the CMO can be sued for compensation to the Court as appropriate for individual legal subjects and private legal entities in general.

### **References**

- [1] Banasevych, Iryna I., Ruslana M. Heints, Mariia V. Lohvinova, and Oksana S. Oliinyk. 2021. "Features of the Legal Status of Subjects of Civil Law." *Journal of the National Academy of Legal Sciences of Ukraine* 28(2).
- [2] Díaz Gude, Alejandra, and Iván Navarro Pápic. 2020. "Restorative Justice and Legal Culture." *Criminology and Criminal Justice* 20(1).
- [3] Gijoh, Lileys Glorydei Gratia. 2021. "IMPLEMENTASI HUKUM DALAM KONTRAK BISNIS INTERNASIONAL." *LEX ET SOCIETATIS* 9(1).
- [4] Michael, Tomy. 2019. "PERMASALAHAN HUKUM DALAM PERATURAN WALIKOTA SURABAYA NOMOR 21 TAHUN 2018 TENTANG TATA CARA PENYELENGGARAAN REKLAME." *DiH: Jurnal Ilmu Hukum*.
- [5] Pratiwi Nur Hidayah, Tomy Michael. "KONSEPSI NEGARA KESATUAN MENURUT UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA 1945." *Ius Civile: Refleksi Penegakan Hukum dan Keadilan* 4(2).
- [6] Simamora, Yohanes Sogar. 2006. *Pembentukan Dan Pelaksanaan Kontrak Pengadaan*. Seminar Nasional Kontrak Pengadaan Barang Dan Jasa Oleh Pemerintah, Fakultas Hukum Universitas Airlangga.
- [7] Subekti. 2010. *Hukum Perjanjian*. 23rd ed. Jakarta: Intermasa.