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Essence bank guarantee in procurement of government goods/services

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Abstract. This research is a normative legal research that examines the positive law related to bank guarantees in the procurement of government goods/services. The philosophy of forming a state is to create public welfare, and to achieve this goal the government must carry out development. One of the important and vital development sectors is the construction of construction services to support the socio-economic activities of the community to support the realization of national development goals. The construction of construction services aims to provide a direction for the growth and development of the economic sector, particularly in realizing a strong, reliable, highly competitive and efficient business structure. The essence of a Bank Guarantee in the procurement of government good/services is a guarantee agreement that aims to provide guarantees to users of government goods/services, from the possibility of default of government goods/service providers.

Keywords. essence; bank guarantee

Introduction

The philosophy of forming a state is to create public welfare (Noonan, 2006), and to achieve this goal the government must carry out development. One of the important and vital development sectors is the construction of construction services to support the socio-economic activities of the community to support the realization of national development goals. The construction of construction services aims to provide a direction for the growth and development of the economic sector, particularly in realizing a strong, reliable, highly competitive and efficient business structure. (Plato, 2013)

The legal basis for the construction of construction services is Law Number 2 of 2017, which replaces Law Number 18 of 1999 concerning Construction Services. In addition, it's also based on Presidential Regulation Number 16 of 2018 which replaces Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services. Procurement of government goods/services also aims to improve public services in the development of the national economy. In Article 1 paragraph (1) Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods /Services, determines that "Government procurement of goods/services, hereinafter referred to as procurement of goods /services, is the activity of procuring goods/services by the Ministry/Institution/Regional Apparatus which is financed by the State Expenditure Budget/Regional Expenditure Budget, the process from the identification of needs to the handover of work results.

In the procurement of goods/services, Commitment Making Officials hope that the work can be completed properly, thus requiring the enforcement of guarantees from providers of goods/services, in the form of a Bank Guarantee or *surety bond* issued by a banking institution. The issuance of a Bank Guarantee is based on the provisions of Article 30 of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services. For the issuance of a Bank Guarantee, a credible financial institution, in this case a banking institution, is required to maintain public trust and provide legal protection for the public's interests, especially the interests of the customers of the Bank concerned.(Bukit et al., 2018)

Bank Guarantee issuance is one of the services offered by banks for build the smooth running of the business world, especially the construction service business. Bank guarantees provided by the Bank can be in the form of bid guarantees, down payment guarantees, implementation guarantees and maintenance guarantees to guarantee the implementation of a project.(Adam et al., 2019) According to the provisions of article 6 letter (d) of Law Number 7 of 1992 concerning Banking, it's explained that commercial banks can buy, sell or guarantee at their own risk or for the benefit of and on orders from customers for various types of securities. Article 6 letter (n) along with its explanation implies recognition of banking services in the form of Bank Guarantee as long as it doesn't contradict the prevailing laws and regulations. The research question raised was the nature of the Bank Guarantee in the procurement of government goods/services in Indonesia.

Research Method

This research is a normative legal research that examines the positive law related to bank guarantees in the procurement of government goods/services.(Pratiwi Nur Hidayah, n.d.)

Research Results Discussion

Bank Guarantee comes from the term *garantie* (Dutch), which means guarantee. Article 1 Decree of the Board of Directors of Bank Indonesia No. 23/88/KEP/DIR, dated March 18, 1991 concerning Giving Guarantee, states that the Bank Guarantee is in essence a guarantee in the form of a script issued by the Bank which results in an obligation to pay the party receiving the guarantee if the guaranteed party is in default or in default.

Philosophically, the Bank Guarantee functions as a security for the Bank as a creditor, to ensure the continuity of the banking business, while the debtor can support the continuity of his business. Bank Guarantee is a written statement containing the Bank's approval to bind itself to the guarantee recipient within a certain period and conditions, if in the future the guarantee doesn't fulfill it's obligations to the guarantee recipient.(Gozali & Hariyono, 2018) Thus the Bank Guarantee in the procurement of goods/services is an agreement to transfer the obligations of the goods/services provider to the Bank, and if the goods/services provider fails to pay, the Bank will pay off the obligations of the goods/services provider. In order for the Bank not to lose, before the goods/services procurement agreement is made, the goods/services user asks for a guarantee from the goods/services provider, which is deemed sufficient to replace the amount of money to be paid to the goods/services user as the job provider.(Rahmayati & Sriyanti, 2021)

The objectives of the issuance of a Bank Guarantee are; a) for the Bank to provide facility assistance and convenience in expediting customer transactions; b) for the guarantee holder (the employer) is to provide assurance that the guarantee holder will not suffer losses if the guaranteed party neglects his obligations; c) foster mutual trust between the guarantor, the guarantor and the guarantor; d) provide a sense of security and tranquility in doing business, both for the Bank and for other parties. For the Bank, in addition to the benefits mentioned

above, it will also benefit from fees that must be paid by the customer as well as the opponent's guarantee given. Theoretically, the Bank Guarantee agreement actually benefits the bank, the guarantor, and the guaranteed party, as long as the parties are consistent in fulfilling the rights and obligations of each party. (Widyorini, 2020)

The issuance of a Bank Guarantee in the procurement of goods/services begins with the making of an agreement involving three parties, namely: *first*, the guarantor, in this case the Bank, issues the Bank Guarantee; *second* is guaranteed goods /services users; *third*, providers of goods/services, with their respective positions and roles. Procedurally speaking, the issuance of a Bank Guarantee can be described as follows: the issuance of a Bank Guarantee begins with negotiating a project work plan between the goods/service provider who will accept the project and the goods/service user as the project recipient, which is followed up by the contractor submitting a request for the issuance of a Bank Guarantee to the Bank by paying fees and administrative costs. (Windardi, 2020)

Furthermore, a Bank Guarantee certificate is given to users of goods/services, when delivering projects to providers of goods/services. If the goods/service provider as the recipient of the job fails to fulfill his promise, then the user of the goods/service can file a claim for Bank Guarantee disbursement at the Bank that issued the Bank Buaranteed certificate. If the submission of claims or demands from users of goods/services, in this case the government, the guarantor Bank will pay the claim as payment for goods/services users.

The problem that often arises is when a Bank Guarantee claim occurs, which begins with default from the goods/service provider. Defaults in the procurement of goods/services can occur when a provider of goods/services doesn't complete their work on time, or finishes their work not finished, or is unable to give up their work at all. In order for the procurement of goods /services to be carried out properly, it's necessary to supervise the users of the goods /services as job providers. Supervision can be carried out internally by users of goods/services, and can also be carried out by the public through complaints for the following reasons: 1) indications of procedural irregularities were found; 2) there is corruption, collusion and nepotism in the implementation of government goods/services procurement; and 3) there is unfair competition in the process of selecting providers of goods /services. (Sambodo et al., 2020)

In the procurement of government goods/services, there is a civil law relationship between the goods /services user and the goods/service provider as the implementer of the goods/services procurement. This civil relationship takes the form of goods/services procurement agreements between goods/service users and goods/service providers. In the formation of goods/services procurement agreements, the provisions contained in Article 1320 of the Civil Code in particular apply. This article regulates the terms of the validity of the agreement, which requires an agreement, skills/authority, the object of the agreement, and the reasons that are made legal by statutory regulations. Likewise, if there is default, the provisions of Article 1243 of the Civil Code also apply in particular and other articles regarding default. (Tejawati, 2012)

In accordance with the provisions of Presidential Decree Number 4 of 2015 in *juncto* with the Regulation of the Government Goods/Services Procurement Policy Agency Number 14 of 2012, if the goods/services provider is proven to have defaulted, then the goods/service provider is obliged to provide compensation for the goods /service users. As stipulated in Article 56 paragraph (2) of Presidential Regulation Number 16 of 2018, that if the official making a commitment provides an opportunity for goods/service providers who are late in completing work due to errors in goods/services providers, and users of goods/services believe that the service provider able to complete the work, then both parties will sign an extension of the contract period with a penalty for delay of 1^{0/00} (one permil) of the contract value or the

value of the contract portion, where the calculation of the imposition of fines from the contract value before Value Added Tax as stipulated in in Article 79 paragraph (4) and (5). (Naja, 2017)

If in the procurement of goods /services there are indications of legal violations, both civil law and criminal law, the parties involved must be held responsible. An assessment of whether an act is considered an act against the law isn't sufficient if it's based on a violation of the rule of law, but is also assessed from the point of view of appropriateness. (Dariwu, 2016) The fact that someone has violated a rule of law can be a factor in assessing whether or not the act that causes harm is appropriate or not with the properness that a person should have in association with fellow citizens. (Pramono, 2017)

In the procurement of government goods/services, there is a civil law relationship between the users of the goods/services and the providers of goods/services. This civil relationship takes the form of a goods/service procurement agreement that is made and mutually agreed between the service user and the service provider. The goods/services procurement agreement is a complex agreement, because it regulates many aspects, both legally and technically, regarding the process of procuring goods/services. According to Article 1 number 44 of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services, it's stated that the contract for the procurement of goods/services, in here after referred to as a contract, is a written agreement between a service user and a service provider or self-managed implementer. (Cahyani, 2018)

Goods/services procurement agreements are often made in the form of standard contracts, where a contract has been prepared in advance by one party and the other party is only faced with the choice to accept or reject the agreement. Contracts that involve the government as a party, which are usually referred to as *government contracts*, are not fully subject to the provisions of Article 1320 of the Civil Code, especially with regard to the agreement on the contents of the contract. (Wongkar, 2016) Users of goods/services only make use of civil legal instruments, because the contents of the agreement are determined unilaterally by the users of goods/services based on government regulations, so that the goods/services procurement contracts have different characteristics compared to private contracts in general. The existence of elements of public law means that the rules and legal principles in private contract law don't fully apply to contracts made by the government.

Legal protection is a form of protection provided to legal subjects in the form of legal instruments, both internal and external. In an agreement for the procurement of government goods/services, internal protection is difficult to achieve, because the position of the parties isn't equal, the users of goods/services have a dominant and superior position. Internal legal protection can be developed properly, as long as the parties have a balanced *bargaining position*. Meanwhile, external legal protection is through efforts to resolve disputes to court between users of goods/services and providers of government goods/services through institutions or agencies authorized to do.

Protection of the interests of the Bank is important to pay attention because if a government goods/service provider defaults or fails to promise, based on the guarantee agreement that was required previously, the user of the goods/services has the right to withdraw the guarantee for the implementation of the work. As previously stated, the objective of implementation guarantees is in addition to providing security to users of goods /services, so that if the contractor fails, then the obligation will be covered by the guarantor. Bank Guarantee is a means so that providers of goods/services actually carry out the work given.

Conclusion

The essence of a Bank Guarantee in the procurement of government good/services is a guarantee agreement that aims to provide guarantees to users of government goods/services, from the possibility of default of government goods/service providers. If the government goods/services provider is proven to be in default, the user of the goods/services can order the guarantee bank to withdraw the guarantee fund. So that the Bank Guarantee rights in the agreement for the procurement of government goods/services, serves to protect the interests of users of government goods/services.

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