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Preparation of Regional Regulations in the Context of Implementing the Content of Presidential Regulation Number 38 of 2015 concerning Cooperation Agreements between Government and Business Entities in the Provision of Infrastructure

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Abstract: Government cooperation with business entities (PPP) provides many benefits in infrastructure development. however, the content material of the existing PPP legal basis is not suitable for implementation in the regions due to differences in budget availability. in connection with this, it is necessary to implement the content material of the presidential regulation in the form of regional regulations. this research uses a type of normative juridical research conducted by examining various previously available sources. in connection with this, in order to facilitate the analysis of legal sources, the author also uses statutory and conceptual approaches in this research. The result of this research is that presidential regulation number 38 of 2015 which discusses PPP has covered various matters like a law and actually the local government has a clear legal basis in order to pour the content material contained in the presidential regulation which the legal basis is contained in the basic law, the law even in the presidential regulation which discusses PPP itself so that the local government should be able to pour the material of the presidential regulation in the form of regional regulations.

Keyword: Regional Regulation, Presidential Regulation, PPP.

INTRODUCTION

Indonesia as a country that wants to always make developments and also in order to ensure economic growth must certainly focus its attention on the existence of infrastructure. The government's focus on infrastructure development is very important considering that infrastructure has an important role in fulfilling the needs of the community and the existence of infrastructure can also facilitate the development of the economy various economic activities or activities in Indonesia. In terms of direct review in the field, there are currently problems in the provision of infrastructure where the provision of infrastructure is

still not evenly distributed, causing infrastructure imbalances. The infrastructure imbalance itself when viewed from the distribution of infrastructure in Indonesia is more concentrated in western Indonesia (Java, Sumatra, and Bali) and tends to be less adequate in areas other than these areas.

Infrastructure inequality itself is actually a crucial problem considering that with the existence of these problems, people in areas with inadequate infrastructure will find it difficult or unable to utilize the economic benefits and social benefits generated by infrastructure. The existence of the benefits as described above itself is present because infrastructure when examined more deeply is divided into two types of infrastructure, namely social infrastructure and economic infrastructure. Economic infrastructure can be interpreted as infrastructure that is deliberately built in order to support the implementation of economic activities that occur in a nation such as the construction of toll roads, bridges and various other physical infrastructure. While what is meant by social infrastructure is infrastructure related to the quality of human resources such as the development of educational facilities to the development of health services.

The existence of the problems as described above has actually been attempted to be resolved, which can be seen in recent years the Indonesian Government has massively increased infrastructure development. The acceleration of infrastructure development is actually an important thing to do considering that when referring to the International Institute for Management Development (IMD) data in 2011 shows that Indonesia is ranked 37 out of 59 countries with weak competitiveness, with these conditions it can actually be explained that Indonesia still does not have a strong economy so it requires infrastructure in order to strengthen the economy as reinforced by publications issued by the World Development Report which says that the existence of infrastructure has an important role in increasing the economic growth of a nation.

Given these problems, it is clear that a public policy is needed to address infrastructure inequality in Indonesia. In the field of national development, one of the well-known policies is the Public Private Partnership (PPP) program. PPP is considered a public policy because it is a collaboration between the government and the private sector in providing infrastructure and/or public services. This policy is based on criteria that have been determined by the government and involves resources from the private sector with due regard to risk sharing between the parties involved. PPP also has the potential to improve the quality of the State Budget (APBN) through more efficient budgeting and spurring new innovations.

The existence of PPP in the implementation of infrastructure development in Indonesia because it involves private business entities certainly opens opportunities for these private business entities to be able to invest in infrastructure development so that later it can certainly alleviate various problems that arise, especially problems related to the need for funds in infrastructure development in Indonesia. The existence of PPP itself when viewed from the results can be said to have had a very significant impact on the implementation of infrastructure development in Indonesia. The significant impact itself can be seen from the results of the Medium-Term Government Plan (RPJM) in the 2015-2019 period has produced a lot of new infrastructure such as new roads with a length of 2,650 km, 1,000 km toll roads, 46,770 km of road improvements, BRT construction in 29 cities, 24 new seaports, development of 59 seaports, 15 new airports, 2,159 km of rail lines and 1,099 km of commuter lines. The realization of the development itself is not possible if it is only financed by BUMN, of which 36.5% of the RPJM implementation is allocated from the PPP scheme.

The implementation of PPP that has occurred in Indonesia itself can be done because at this time PPP has a clear legal basis. The legal basis itself is Presidential Regulation Number 28 of 2015 concerning Cooperation Agreements between the Government and

Business Entities in the Provision of Infrastructure[10] and also the existence of Minister of Finance Regulation Number 260/pmk.08/2016 concerning Procedures for Payment of Service Availability in Government Cooperation Projects with Business Entities in the Framework of Infrastructure Provision.[11] The existence of infrastructure as described above certainly provides a clear legal basis for the state in the context of implementing PPP so that later infrastructure development is not carried out with various legal violations. The existence of a clear legal basis is very necessary in the context of implementing infrastructure development with the PPP scheme so that it does not exclude the possibility of violations in the implementation of PPP. The violation itself had occurred as in the case of PT Merbau Pelalawan Lestari (PT MPL), which in this case is a business entity involved in the PPP, carrying out illegal logging on a concession area of 5,590 hectares in Riau in 2013.

The existence of clear regulations can certainly overcome the problems arising from the implementation of PPP. The impact of the existence of clear regulations is also proven to be able to smooth the implementation of PPP, which in this case can be seen from the implementation of the construction of the Lhok Guci Dam Area in Aceh. The implementation of the PPP is well implemented because the implementation is carried out in accordance with applicable regulations so that the construction of the Lhok Guci Dam which requires 12,700 ha of land can be carried out and there are no problems in other fields, especially in the land sector.

The implementation of PPP as described above is actually if analyzed more deeply because the Presidential Regulation only provides certainty for the implementation of PPP in the central realm. The existence of the legal basis for the implementation of PPP in the central realm certainly cannot be implemented thoroughly in the regions because the budget allocation in the regions is not the same as the budget allocation in the central region. For example, in West Aceh, although infrastructure development is included in the priority program, the budget allocation is only 10% of the total Regency Budget (APBK), which in this case is only around 130 billion on average from a total ceiling of 1.3 trillion. The small budget allocation in connection with infrastructure financing, of course, if not resolved or handled properly, can become an obstacle in the framework of infrastructure development in Indonesia.

It is not possible for the central government to take over the development that takes place in regions such as Aceh because if the central government takes over the development, it will contradict the principle of decentralization or regional autonomy that applies in Indonesia. In addition, if the central government were to be responsible for all infrastructure development, it could place a huge burden on the state budget. Therefore, taking into account both of these, it can be concluded that infrastructure development will actually not run optimally if it only relies on the central government or local governments alone, given that the budget in the APBN and APBD will not be sufficient to cover the various infrastructure needed.

Although the implementation of Public-Private Partnership (PPP) is considered successful with the enactment of Government Regulation No. 38/2015, the success is limited to developments carried out by the central government, while local governments do not get similar benefits. This failure occurred because the amount of investment stipulated in Presidential Regulation No. 38/2015 was considered too high and could not be reached by local governments. Therefore, it is necessary to adjust the amount of PPP. The author proposes the introduction of the term "Small Scale PPP" for projects with a value of no more than 200 billion. With this new concept, local governments will also be able to fulfill the PPP requirements, which in turn will support the implementation of the PPP concept in every district in Indonesia. Thus, it is expected that this adjustment will open up wider opportunities for local governments to participate in PPP and accelerate infrastructure development across Indonesia.

The adjustment of the Government Cooperation with Business Entities (PPP) model as recommended by the author cannot be done instantly because the process requires careful steps and a strong legal basis as a foundation for its implementation. In this case, clear and comprehensive laws and regulations are needed that will be the main guidelines in the adjustment process. Therefore, the approach that can be used in reviewing and implementing PPP adjustments is the positivism approach. The positivism approach interprets the law as an order from the legislator or ruler, which is an order from a party that has authority or sovereignty. It views the law as a logical, consistent, and closed system that is clearly separated from moral considerations. In this context, judgments and considerations are based on legal provisions alone, without taking into account subjective judgments about morality.[14] It aims to achieve legal certainty, justice, as well as optimal benefits in the context of necessary changes and adjustments. By using this approach, it is expected that the PPP adjustment process can run well and effectively, in accordance with applicable legal principles and by considering the interests of all parties involved. The existence of a strong legal basis will also provide clarity and certainty to business actors and the government in carrying out sustainable cooperation for sustainable development as well.

The use of the positivism approach itself can actually be carried out by drafting Government Regulations related to PPP. With the existence of these Government Regulations, the implementation of small-scale infrastructure development can be carried out with a clear legal basis. With a clear legal basis, the implementation of small-scale PPP carried out in the regions can be carried out in accordance with procedures and can minimize the potential for violations of infrastructure development implementation. The preparation of the Regional Regulation itself can be done by paying attention to the material content of Presidential Regulation Number 38 of 2015 concerning Cooperation Agreements between Government and Business Entities in the Provision of Infrastructure. The material content itself must be done considering that the Presidential Regulation is the main regulation in the framework of implementing infrastructure development with a financing scheme using the PPP mechanism.

Departing from the explanation above, the author wants to discuss the various problems that have been described by crystallizing these problems with one title of this research, which is the title that the author wants to raise is "The Urgency of Preparing Local Governments in the Context of Implementing the Content Material of Presidential Regulation Number 38 of 2015 concerning Government and Business Entity Cooperation Agreements in Infrastructure Provision".

Departing from the various background explanations above, the author wants to raise the existing problems by crystallizing these problems into the following problem formulations:

1. What is the position of Presidential Regulations in the Laws and Regulations?
2. How is the content of Presidential Regulation No. 38/2015 on Cooperation Agreement between Government and Business Entity in Infrastructure Provision?
3. What is the urgency of the Formation of Regional Regulations on Government and Business Entity Cooperation (KPBU)?

METHOD

The preparation of this research uses a type of normative juridical legal research in which this type of research is also known as library legal research because in its implementation the research is carried out by examining pre-existing laws and regulations or legal materials. With the use of this type of research, later from various existing explanations the author can draw an explanation of the conception to be discussed and compare the application theory with its implementation in the field. In addition to the reasons as explained above, the reason the author uses this type of research is so that later the author can combine

the data contained in the field with how the implementation of this matter should be contained in the legislation so that with the implementation of this matter later a relationship can be drawn that explains between the conception of legislation and its application in the field.

The implementation of research preparation of course in its implementation cannot be done just like that but in its implementation it is necessary to use a research approach. With the existence of this research, of course, it can facilitate the author in order to achieve the goals that the author wants to achieve. As for this research, the approach that the author wants to achieve is as follows:

1. Statute Approach

The statutory approach in research is a methodological approach that allows researchers to explore and thoroughly analyze various legal aspects related to the research subject being raised. In this context, researchers focus on in-depth analysis of various laws and regulations related to the legal issues to be investigated. By using Presidential Regulation No. 38/2015 on Government Cooperation with Business Entities in the Provision of Infrastructure as a focal point, the researcher can conduct a comprehensive review of the legal framework that regulates the process of infrastructure development with the Government and Business Entity Cooperation (PPP) scheme.

The regulation is the main foundation that serves as a reference in directing all infrastructure development activities involving cooperation between the government and the private sector. With this approach, researchers not only understand in detail the applicable regulations, but are also able to explore how these regulations are applied and practiced in the context of real infrastructure development activities. In the analysis process, researchers can highlight the participation of various related institutions, implementation mechanisms, and social, economic and environmental impacts that may arise as a result of the implementation of these regulations. Thus, the legislative approach provides a solid and in-depth foundation for legal research that is oriented towards a thorough understanding and in-depth analysis of the complexity of the legal issues under study.

2. Conceptual Approach

The conceptual approach is an analytical method used to provide a deep understanding of a problem by exploring various concepts and principles that arise from developments in legal science. In this research, the conceptual approach is the right choice because it allows the author to explore legal concepts and principles related to the problem being studied. Through this approach, researchers can explore and analyze various sources that arise as a result of the dynamics of the development of legal science. In an effort to find answers to the problems that are the focus of the research, researchers adopt several key concepts such as the conception of Government and Business Entity Cooperation (PPP), the concept of infrastructure in the context of development, to the concept of relevant local government regulations. By exploring these concepts, researchers can gain a better understanding of the dynamics and legal implications of the issues under investigation. In addition, the conceptual approach also allows the author to develop a solid conceptual framework as a foundation for further analysis in the research. Thus, the use of a conceptual approach enriches the research process by allowing researchers to explore the various dimensions and perspectives associated with complex legal issues.

RESULTS AND DISCUSSION

What is the Position of Presidential Regulations in Legislative Regulations

Before explaining the content material contained in Presidential Regulation No. 38/2015 on Cooperation Agreements between the Government and Business Entities in the

Provision of Infrastructure, it is necessary to first explain the position of Presidential Regulations in Legislation. Historically, the President has the authority to issue a regulation based on the Articles of the 1945 Constitution of the Republic of Indonesia, especially in the provisions of Article 4 paragraph (1), Article 5 paragraph (1) and (2), in which the legal basis of the President's authority in terms of regulation is called a Presidential Decree. The use of the term Presidential Decree then experienced development in the form of a change of term to Presidential Regulation with the enactment of Law Number 10 of 2004 which has now been replaced by Law Number 12 of 2011 concerning Legislation.

In terms of referring to the provisions of Article 7 of Law Number 12 of 2011, it can be seen that the Presidential Regulation is actually a legal product whose position is in Government regulations. In other words, the content material contained in the Presidential Regulation may not contradict or be higher than the Government Regulation, but the Presidential Regulation still has the power in the Legislation because the Presidential Regulation is actually a legal product directly initiated by the President in order to provide regulations regarding the implementation of various norms contained in the Law. Regarding the content material of the Presidential Regulation, an explanation can be drawn by basing the understanding on Article 13 of Law Number 12/2011 which regulates the content material of the Presidential Regulation. When referring to this article, it can actually be explained that Presidential Regulations are materials directly ordered by the Law as a means to implement laws, government regulations to the implementation of the exercise of government power.

The existence of the Presidential Regulation itself in its implementation can be formed with two conceptions, the first conception is the Presidential Regulation formed by the President on the basis of the President's own initiative and desire in order to explain the implementation of the Law. In addition, the second conception of the formation of Presidential Regulations is presented in order to regulate various content materials that have been ordered by Government Regulations. Departing from the various explanations above, it can actually be explained that the formation of presidential regulations has a strong legal basis because the formation of presidential regulations is obtained by the president in the form of attribution authority (authority given based on the Constitution and Law).

When connecting the Presidential Regulation implemented by PPP with the position of the Presidential Regulation, it can actually be explained that the Presidential Regulation is present based on the authority given by the president, which in this case the authority is as stated in Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The existence of the Presidential Regulation itself is actually presented by the president in order to provide an explanation of how the PPP implementation mechanism is so that later between various parties related to PPP can mutually reduce the risk of losses that could potentially arise. In addition, the existence of a Presidential Regulation that discusses PPP can later ensure that the implementation of PPP runs in accordance with and does not conflict with the Laws and Regulations so that infrastructure development for the advancement of the economic pace and improvement of people's welfare can really be achieved.

Content Material of Presidential Regulation No. 38/2015 on Cooperation Agreement between Government and Business Entity in Infrastructure Provision

When referring to the National Medium-Term Development Plan, it can be explained that the implementation of infrastructure development is the main agenda that must be carried out in the context of national development in order to improve people's welfare. Thus, the implementation of national development is something that must be done quickly in order to achieve these goals. Returning to Presidential Regulation No. 38 of 2015 concerning Cooperation between Government and Business Entities in the Provision of Infrastructure, which in this case is the focus of discussion, we can actually see the purpose of the content material of the Presidential Regulation as stated in the consideration of the Presidential

Regulation. When referring to the preamble, the purpose of the Presidential Regulation is not to explain the power of the government but to improve the national economy, to improve the welfare of the people and also to increase Indonesia's competitiveness in global competition, all of which are carried out by accelerating infrastructure development.

When viewed from the consideration contained in the Presidential Regulation, the content material contained in the Presidential Regulation is actually not suitable to be contained as a Presidential Regulation but is more suitable to be made in a law because the content material regulates things that have not been regulated before and the regulations regarding PPP tend not to be an implementing regulation of the law like the content material of the Presidential Regulation. In addition, the content material contained in the Presidential Regulation that discusses is actually more suitable in the form of a Law because its implementation requires a lot of coordination from government agencies which will be outlined in each regulation, one example of which is the Regulation of the Head of the Institution.

In addition, the content material of the Presidential Regulation is also more suitable in the form of a law because the matters regulated in the Presidential Regulation regulate large-scale development such as the development of transportation infrastructure, telecommunications, electricity, education, tourism and community development which have actually been regulated in the form of Sectoral Laws. For example, in the case of toll road development, there are sectoral regulations governing this matter as stipulated in Law No. 38 of 2004 concerning Roads and also as stipulated in Government Regulation (PP) No. 15 of 2005 concerning Toll Roads as last amended by Government Regulation No. 43 of 2013, Government Regulation No. 34 of 2006 concerning Roads. In addition, the implementation of road construction, which currently can also be carried out based on the Presidential Regulation on PPP, has actually also been regulated in Presidential Regulation No. 38 of 2015 and also Law No. 2 of 2012 concerning Land Acquisition for Public Interest.

When viewed from the explanation as explained above, it can actually be explained that the content material contained in Presidential Regulation No. 38/2015 can be said to contradict or regulate matters that have actually been regulated in sectoral laws. However, the Presidential Regulation does not necessarily only explain what has been contained in the sectoral laws because the existence of the Presidential Regulation also explains new matters such as funding, PPP implementation mechanisms and also various matters related to PPP which is actually a new conception. In addition, the existence of the Presidential Regulation is also actually a good thing to do considering that there is a legal vacuum in the form of a vacuum of laws that can overshadow the implementation of PPP which actually must be done to fulfill public needs.

In addition, the existence of the content material of Presidential Regulation No. 38 of 2015 actually also has to be done by the community which requires the acceleration of infrastructure development and the existence due to a legal vacuum in the form of a law, the presidential regulation can indeed be justified. Due to the current implementation of PPP content material that should be contained in the law but instead contained in the Presidential Regulation, the legislator can actually utilize the existing presidential regulation in the context of drafting future laws. Thus, because the drafting of the law has seen the results of legal products, the law that has been drafted can be prepared more optimally so that it can again regulate PPP so that it can be implemented better.

In the absence of a law that specifically regulates PPP and only a Presidential Regulation is available, therefore, when referring to the Hierarchy of Laws and Regulations as stipulated in Law Number 12 of 2011, the regulations under the Presidential Regulation must be guided by and must not conflict with Presidential Regulation Number 38 of 2015 and also include Regional Regulations that must not conflict with the Presidential Regulation. As explained above, the implementation of the Presidential Regulation will be difficult to follow

or apply in regions that have a small budget allocation for infrastructure development because the content of the Presidential Regulation only focuses on infrastructure development that requires relatively large funds. In relation to this, local governments should immediately adjust their local regulations to run in accordance with the objectives of Presidential Regulation No. 38/2015 even though the budget allocation for infrastructure development is not as large as that allocated by the central government.

Urgency of Establishment of Regional Regulations on Government and Business Entity Cooperation (KPBU)

The existence of regional governments actually needs to be formed because the implementation of infrastructure development with PPP schemes on a small scale in the regions certainly requires a strong legal basis in addition to the Presidential Regulation which can be considered at the central government level. The establishment itself can actually be done considering that when referring to Article 1 paragraph (6) of Presidential Regulation Number 38 of 2015, it is explained that PPP is actually carried out with reference to the specifications set by the Minister / Head of Institution / Head of Region / State-Owned Enterprises / Regional-Owned Enterprises. The existence of the regional head's intervention in the implementation of PPP proves that the regional head actually understands more about the implementation of infrastructure development in his area and with this understanding, the regional government should be able to prepare regional regulations regarding PPP so that later the implementation of PPP in the regions can be regulated in more detail and specifically.

The preparation of the Regional Regulation on PPP itself must still be guided by the Presidential Regulation, especially guided by Article 4 of Presidential Regulation Number 38 of 2015 which explains the principles in PPP. The principles are as follows:

1. The principle of Partnership: what is meant by the principle of partnership here itself is that the implementation of PPP must be carried out by establishing cooperation between the government and Business Entities based on positive laws applicable in Indonesia and also based on various requirements agreed by various parties.
2. Principle of Benefit: the principle of benefit can be explained as a principle that requires that if you want to carry out infrastructure development, the development must be able to provide benefits for social and economic benefits to the parties.
3. The principle of competition: what is meant by the principle of competition here is that the selection of business entities that will be involved in PPP must be based on the principles of fair, open and transparent competition so that later all business entities have the same opportunity to be involved in infrastructure development with the PPP scheme.
4. Risk control and management: this principle is actually a form of cooperation in infrastructure provision carried out by risk assessment, strategy development and also mitigation of various potential risks that may occur in the implementation of PPP in the region.
5. Effective principle: the effective principle is a principle that explains that the provision of infrastructure should be based on an assessment that explains that the development can effectively improve the quality of infrastructure management and maintenance services.
6. Efficient principle: what is meant by the efficient principle here means that the provision of infrastructure with the PPP scheme must be able to meet the needs of funding the development in a sustainable manner.

By continuing to refer to the principles described above, the local government can immediately formulate local regulations on PPP because basically the local government has the authority to be able to utilize and also manage its autonomous region in accordance with the various potentials and strengths contained in the region. The authority also actually has a clear legal basis, which is as stated in Law Number 33 of 2004 concerning Financial Balance

between the Central Government and the regions, which with the existence of this law the local government has been given a reference related to the management of its regional finances, which of course can be utilized in the context of regulating the PPP budget in the Regional Regulation that will be drafted.

In addition to being based on the legal basis, in fact, local governments also have other legal bases that can be used as the basis for the preparation of Regional Regulations on PPP. The first legal basis is as stipulated in Article 4 paragraph (2) of Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure, in which the article states that local governments can regulate the procedures for implementing KPBU in accordance with their respective authorities. The second legal basis is as stipulated in Article 18 of the 1945 Constitution which in the Article explains that local governments have the principle of autonomy and assistance tasks so that local governments can actually manage their own regions. The last legal basis in the context of preparing local regulations on PPP can also be seen in Article 349 paragraph (1) and paragraph (2) of the Regional Government Law which in the Article explains that the authority of regional autonomy must be carried out with a focus on accelerating the improvement of community welfare.

In connection with the legal basis that can be used as a basis for the preparation of regional regulations, what must be considered next is related to the mechanism for preparing regional regulations on PPP. The drafting of the regional regulation itself must be carried out by prioritizing collaboration between local governments. What is meant by local government here itself can be interpreted as the Governor and also the DPRD. In this case, DPRD is important to be involved because the existence of DPRD will be closely related to funding approval activities from the legislative aspect. If the DPRD is not involved in the drafting of the Regional Regulation, then funding from the APBD sector will potentially arise problems because DPRD approval is needed in the use of these funds.

If in the preparation of the PPP, all local government organs have collaborated and mutually agreed on the implementation of PPP in accordance with the principles contained in the content material of Presidential Regulation Number 38 of 2015, then the next thing that must be prepared by the local government is the budgeting of availability payment which is a regional expenditure in the APBD as stipulated in Permendagri Number 96 of 2016 concerning Payment for Services in the Framework of Cooperation between Local Government and Business Entities in the Provision of Infrastructure in the Region. Meanwhile, the implementation of PPP in the regions after the issuance of the Regional Regulation is the implementation of PPP with the solicited type or PPP initiated by the regional government. This itself is important to do because it is the local government that has more knowledge in relation to the needs and interests of infrastructure development.

CONCLUSION

Departing from the various explanations above, it can be concluded that the content material in Presidential Regulation Number 38 of 2015 which discusses PPP can be said to be very adequate because the content material in the regulation should be contained in the law and in connection with the adequacy of the content material, it is actually necessary to adopt the presidential regulation into a regional regulation in order to ensure the implementation of PPP in the region.

The implementation of Presidential Regulation No. 38 of 2015 in the form of Regional Regulations must actually be done and local governments already have a legal basis for implementing this, which legal basis is contained in the Presidential Regulation itself, the 1945 Constitution of the Republic of Indonesia to the Law on Regional Government. With the existence of this legal basis, what the local government actually needs to do is only need

to prepare local regulations in collaboration with the DPRD and when the settlement has been made, it is necessary to make budget adjustments that can be taken from the APBD.

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