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The Validity of Goods/Services Contracts Signed by Commitment Making Officials Who Do Not Have A Certificate of Competency

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Abstract: This research discusses the validity of goods/services procurement contracts signed by Commitment Making Officials (PPK) without a certificate of competence, in accordance with the provisions of Presidential Regulation No. 16/2018. This regulation requires PPK to have a certificate of competence by December 31, 2023, but many PPKs have not yet met this requirement. Through LKPP Circular Letter (SE) Number 1 of 2024, relaxation of this requirement is given, allowing the assignment of PPK from Other Personnel with basic certificates. This research uses a normative method with a conceptual and statutory approach, analyzing the legal implications of the relaxation. The results show that contracts signed by PPK without a certificate of competence can be considered "voidable" (vernietigbaar) according to Article 1320 of the Civil Code. This is due to the PPK's incompetence in fulfilling the required competency requirements.

Keyword: Goods/Services Procurement, Contract, Competence.

INTRODUCTION

Indonesia, as stipulated in Article 1 paragraph (3) of the 1945 Constitution, is a constitutional state, which implies that all government administrations must adhere to the principle of legality. This include the acquisition of government products and services, wherein the allocation of the state budget must be effectively and openly administered.

Procurement of government goods/services receives special attention because it is closely related to state finances. Therefore, Indonesia as a state of law guarantees legal certainty for all its people, including in the regulation of public procurement. One important aspect in this process is the signing of a contract between the Commitment Making Official (PPK) and the business actor. This contract needs to be valid and legally binding for both parties.

A contract is an agreement between civil law subjects that contains rights and obligations, with due regard to applicable law (Hikmahanto Juwana in Agus Kasiyanto, 2022). In the procurement of government goods/services, the original authority in making a bond in accordance with Presidential Regulation Number 12 of 2021 is the authority of the Budget User. However, this authority can be delegated to the Power of Budget User. The Budget User / Power of Budget User can assign the Commitment Making Officer to carry

out the authority to enter into agreements with other parties in accordance with the established budget limit.

As a PPK who gets the task of signing contracts on behalf of the agency, of course, he must fulfill the legal requirements of an engagement. One of the conditions that must be met for the contract to be legally binding is the capacity of the parties concerned . The meaning of capability is the authority to take legal action (Hanim, 2011)Therefore, the parties must have sufficient legal capacity to enter into an agreement . Therefore, in the appointment of PPK, the requirements for capacity must be considered in accordance with the laws and regulations.

In carrying out their duties, PPK is required to have expertise and experience related to the procurement of goods / services. PPK is tasked with preparing the draft contract so that it meets the legal and technical aspects of procurement. Thus, the contract signed by PPK can be legally accounted for. With the fulfillment of the requirements for PPK skills and expertise, it is hoped that the agreed contract can be carried out effectively and efficiently in accordance with the principle of *pacta sunt servanda*.

The requirements for PPK appointments have recently gained significant attention. According to Presidential Regulation Number 16 of 2018, individuals who have PPKs must get a certificate of competence in the field of Goods/Services Procurement by December 31, 2023. Competence in the field of Goods/Services Procurement is demonstrated through the acquisition of a certificate of competence. Nevertheless, the actual situation in the field indicates that a significant number of PPKs have failed to fulfill this certification criteria. According to data from the Government Goods/Services Procurement Policy Institute (LKPP), the nationwide need for Goods/Services Procurement Managers (PPK) is 24,000 individuals. By December 31, 2023, a total of 11,671 individuals (48.63%) have obtained certification. This includes 221 individuals certified with Type B PPKs and 11,450 individuals certified with Type C PPKs. In response to this circumstance, LKPP published Circular Letter (SE) Number 1 of 2024 to ease the standards for PPK certification, in order to avoid hindering the government's procurement process for products and services.

Circular No. 1 of 2024 provides explanations and arrangements for government agencies that have not met the needs of competency-certified PPKs. Broadly speaking, the Circular explains three main options. First, assigning PPK from the Functional Official of the Goods/ Services Procurement Manager. Second, through the assignment of PPK from other personnel by paying attention to the order of priority as clause 7.d.3). Third, through efficiency and consolidation of Procurement Human Resources assignments.

In clause 7.d.3) of SE No. 1 of 2024 related to the priority order of PPK assignments, it indirectly allows State Civil Apparatus (ASN) or Other Personnel who do not yet have a certificate of competence to be assigned as PPK on condition that they already have a Basic/Level-1 Goods/Services Procurement (PBJ) Certificate . If this option is taken in the appointment of PPK, it will raise questions about the legal implications of the SE LKPP on competency requirements for PPK. Can the fulfillment of the PPK obligation to have a certificate of competence, as stipulated in the Presidential Regulation, be overridden only by the issuance of the LKPP SE. Of course, this needs to be reviewed in relation to the hierarchy of laws and regulations.

Furthermore, it is also necessary to study the validity of the goods/services procurement contract signed by PPK who does not yet have a competency certificate, after the issuance of this LKPP SE. Based on Article 1320 of the Civil Code, one of the conditions for the validity of an agreement is the capacity (*bekwaamheid*) of the parties to the agreement. So it needs to be studied further about its validity.

Research on the validity of goods/services procurement contracts signed by PPK without a certificate of competence is very important. It aims to anticipate various legal implications that may arise due to relaxation of competency requirements for PPK. Through

this research, it is hoped that a clear picture can be obtained of the legal consequences of conditions where PPKs who have not met the competency requirements and are still assigned to sign contracts.

METHOD

This study used normative legal research methodology, which involves analyzing and studying the law as a set of norms, rules, legal principles, doctrines, theories, and other relevant literature in order to address the legal issues under investigation (Muhaimin, 2020). In the context of this research, the analysis will focus on the legal implications related to the relaxation of competency certification requirements for Commitment Making Officials (PPK) carried out by the Public Procurement Policy Agency (LKPP) through a Circular Letter. To analyze these issues, this research uses two types of approaches, namely: 1) Conceptual approach, which is an approach that examines concepts related to the theory of contract validity, especially the principle of competence, as well as the concept of public procurement. 2) Statutory approach, which is an approach that examines laws and regulations relating to public procurement and competency requirements for PPK.

This research uses secondary data obtained through literature studies, in the form of: Primary legal materials, such as laws and regulations related to public procurement and LKPP Circular Letters. Secondary legal materials, such as books, scientific journals, and other sources relevant to the research topic. The data that has been collected will be analyzed qualitatively through legal interpretation, focusing on juridical aspects related to the legal implications of relaxing PPK competency certification requirements.

RESULTS AND DISCUSSION

Position of LKPP Circular Letter In Laws and Regulations

Circular letters are a type of legal instrument that is issued by the government. According to Law Number 12 of 2011, circular letters are not considered as regulations with direct binding effect in the hierarchy of laws and regulations in Indonesia.

The Regulation of the National Archives of the Republic of Indonesia Number 5 of 2021, which provides General Guidelines for Office Manuscripts, defines a circular letter as an official document that notifies critical and urgent matters. Circular letters are sent by the top leadership and might be assigned to certain personnel based on their given authority. A circular letter is composed of a head, body, and foot, which make up its structure and form. The regulations governing the structure and format of circular letters are outlined in the appendix, which is an integral component of the National Archives of the Republic of Indonesia Regulation.

Circular letters are more likely to be policy regulations or policy rules issued by state institutions or government officials to provide direction or guidance regarding certain matters that are considered important and urgent. In research conducted by Wafa Yusdheaputra (2023), circular letters are identified as policy rules that are administrative in nature and do not have the same legal force as laws and regulations. Its binding force is only on the address or to whom the letter is addressed and for government officials in their fields and does not have the power to bind or force out to the public because it does not contain norms or regulate coercion in the form of sanctions.

Philipus M. Hadjon (in Remaja, I Nyoman Gede, 2017) states that discretionary regulations are actually the result of state administrative actions aimed at "naar buiten gebracht schriftelijk beleid", which means showing written policies. Several requirements must be taken into account when making and applying discretionary regulations. According to Indroharto, the act of discretionary regulation must pay attention to the following: 1) It must not conflict with the basic regulations containing the discretionary authority described; 2) it must not be manifestly contrary to common sense; 3) it must be carefully prepared; 4)

the content of the discretion must provide sufficient clarity regarding the rights and obligations of the citizens affected by the regulation; and 5) the objectives of the discretion must be achieved.

In government practice in Indonesia, policy rules such as circulars letters can be issued to provide guidance in carrying out tasks and work within government agencies (Fitriani & Efrain, 2021). Although formally not included in the laws and regulations, circular letters have an important role in providing direction and guidance to government employees in carrying out their duties.

Thus, circular letters can be classified as policy rules issued based on the free authority (*freis ermessen*) of the government. Although they do not have the same legal force as laws and regulations, circulars still have value as guidelines or instructions in the implementation of tasks and activities of government agencies. Therefore, in the context of the hierarchy of laws and regulations, circulars have a lower position and are more of an administrative guide than a legally binding regulation.

LKPP Circular Letter As A Policy Regulation In Goods/Services Procurement

The National Public Procurement Agency (LKPP) has the power to issue circulars in the field of public procurement, which provide guidance, instructions, or information regarding the execution of public procurement. The LKPP circulars play a crucial role in the practical execution of government responsibilities in the purchase of goods and services. Presidential Regulation No. 106/2007 assigns the Public Procurement Policy Agency (LKPP) with the responsibility of developing and formulating policies related to public procurement. LKPP functions as an entity that is accountable for formulating and establishing regulations, guidelines, and standards pertaining to the acquisition of government goods and services. The circular letter issued by LKPP serves as a means of implementing these policies and initiatives, hence carrying legal weight for the parties involved in the public procurement process.

The legal force of the LKPP circular letter can be determined by its position in the hierarchy of laws and regulations. While not explicitly listed in Law Number 12/2011 on the Formation of Laws and Regulations, LKPP circular letters possess legally binding authority for the relevant parties. The circular letter is issued based on the discretionary authority (*discretionare bevoegdheid*) possessed by LKPP, an authorized agency responsible for regulating public procurement. According to Cholida Hanum's (2020) research, circular letters are legally binding documents that have material significance, although not being considered laws or rules. Circular letters have been included into the policy of state institutions, including judicial institutions and local governments, such as regents and mayors.

In addition, LKPP circulars also serve as a means to interpret and implement applicable laws and regulations in the field of public procurement. Circular letters can provide explanations, instructions, or directions regarding the implementation of a regulation, so as to help the parties involved in the procurement of goods/services in understanding and implementing the regulation effectively.

In practice, LKPP circulars are often used as references and guidelines for government procurement organizers in carrying out the procurement process. This is because LKPP circulars are considered to provide legal certainty and uniformity in the implementation of goods / services procurement. In addition, LKPP circulars can also be a means for LKPP to supervise and control the implementation of government procurement of goods / services.

However, it should be noted that the position of LKPP circulars is not equivalent to higher laws and regulations, such as laws or government regulations. In the event of conflict or inconsistency between LKPP circulars and higher laws and regulations, the higher laws

and regulations will be the reference that must be obeyed. Thus, LKPP circulars must still be placed within the framework of the hierarchy of applicable laws and regulations.

Obligation to Hold Competency Certification For Commitment Maker Officials

According to LKPP Regulation number 15 of 2018, as amended by LKPP Regulation number 19 of 2019, the position of PPK (Goods/Services Procurement Manager) can be held by individuals who fall into the following categories: a) Goods/Services Procurement Manager, APBN Financial Management Analyst, Advanced APBN Financial Officer, Supervisor APBN Financial Officer, or State Civil Apparatus within the Ministry/Institution/Regional Apparatus; b) State Civil Apparatus/Indonesian National Army/Indonesian National Police within the Ministry of Defense and the Indonesian National Police; or c) personnel who do not fall into the categories mentioned in a) and b). According to LKPP Regulation Number 7 of 2021, the commitment-making authority responsible for goods/services procurement resources can be chosen from either the PBJ Manager or other personnel.

In LKPP Regulation Number 7 of 2021, a PBJ Manager is defined as a State Civil Apparatus who holds the position of Functional Official of Goods/Services Procurement Manager. This individual is entrusted with complete duties, responsibilities, authorities, and rights by the authorized official to oversee and execute Goods/Services Procurement activities. Meanwhile, Other Personnel, who are individuals other than Functional Officials for Goods/Services Procurement Management, consist of State Civil Apparatus, soldiers of the Indonesian National Army, and members of the Indonesian National Police. These individuals are granted complete duties, responsibilities, authorities, and rights by authorized officials to conduct Goods/Services Procurement activities.

LKPP Circular Letter Number 1 of 2024 is a response from LKPP to conditions in the field that show there are still many Commitment Making Officials (PPK) who have not met the competency certificate requirements. However, the relaxation of the fulfillment of PPK competency certificates held by other personnel through legal instruments in the form of LKPP circular letters is not appropriate, considering the position of the LKPP Circular Letter as a policy regulation must not conflict with higher laws and regulations. The LKPP circular should focus on explaining the steps that must be taken by government agencies that have not met the needs of competency-certified commitment officials without considering the PPK assignment of Other Personnel without a certificate of competence.

Competency ownership requirements for PPKs appointed from other personnel based on Presidential Regulation number 16 of 2018, after December 31, 2023 are mandatory. Provisions regarding the appointment of PPK in situations where government agencies do not have qualified personnel are explained in LKPP regulation number 19 of 2019. Article 7 states that if there are no employees who meet the requirements as mentioned in Article 6 paragraph (1) and paragraph (2), the PA / KPA can act as PPK. Employees who have competence in accordance with the field of PPK duties or Procurement Agents can provide assistance to PA/KPA acting as PPK in accordance with the provisions in paragraph (1). PA/KPA acting as PPK is not required to meet competency requirements.

LKPP should not include clause 7 letter d paragraph 3) g) in LKPP Circular Letter Number 1 Year 2024. The clause states that government agencies can appoint PPK from ASN / Other Personnel who only have a Basic/Level-1 PBJ Certificate. This is not appropriate, because as stipulated in LKPP Regulation Number 7 of 2021 concerning Human Resources for Goods/Services Procurement, the Basic/Level-1 PBJ Certificate only shows the fulfillment of prerequisites in carrying out tasks and functions in the field of procurement, not a certificate that shows competence to be appointed as a PPK.

Therefore, although there has been a reduction in the requirements for competency certificates for employees who would be employed as PPK, as stated in LKPP Circular Letter

No. 1 of 2024, it is still required to possess a certificate of competence. The Circular does not exclude PPK from the requirement to possess a certificate of competence in the area of procurement of goods/services, as stipulated in relevant laws and regulations. This need must still be fulfilled in order for PPK to effectively carry out its obligations and responsibilities in compliance with relevant rules.

Status of Goods / Services Procurement Contracts Signed by Ppk Without a Certificate of Competence

In carrying out government duties, the government can act in two different capacities. First, the government can act as a public law actor that exercises public power through its quality as an authority. Second, the government can act as a civil law actor who performs various civil law actions, such as entering into sale and purchase agreements, leases, contracting, and so on, in its quality as a legal entity (*legal person, rechtspersoon*) (Sahya Anggara, 2018).

The legal relationship between the government and citizens is contingent upon the government's nature and position in executing these legal actions. The government holds two distinct legal roles: firstly, as a representative of a public legal body (*publick rechtspersoon*), and secondly, as an official (*ambtsdrager*) occupying a government office. When the government takes legal action on behalf of a legal entity, it is regulated by civil law. However, when the government acts in its official role, the activity is regulated by state administrative law. Both civil and public legal measures undertaken by the government can provide opportunities for unlawful activities that infringe upon the rights of citizens.

In the context of government procurement of goods/services, the activity of entering into an engagement/agreement/contract with a provider/private party is a government action carried out in its capacity as a civil law actor. These actions are regulated and subject to the provisions of civil law, including in terms of signing contracts with private parties, implementing contracts, and resolving disputes. Thus, the government acts as a subject of civil law that is bound by the legal terms of the agreement as stipulated in the Civil Code.

The requirements for a contract or agreement to be considered legitimate in civil law are specified in Article 1320 of the Civil Code (KUHPerdata) or Article 1365 of the New Dutch Book IV (NBW). Broadly speaking, there are four conditions that must be met for a contract to be declared valid, namely: The first requirement is the agreement or consent of the two parties making the contract. This agreement can be formed through various means, such as written, oral, sign language, or even silence. The purpose of making a written contract is to provide legal certainty and become accurate evidence in the event of a dispute in the future. The second requirement is the capacity of the parties to perform legal acts. Only people who are legally capable can make a valid contract. People who are not legally capable, such as minors or people under guardianship, cannot make a valid contract. The third requirement is the existence of a clear object of agreement or achievement. This achievement can be in the form of giving something, doing something, or not doing something. The object of the agreement must be determinable, permissible, possible, and can be valued in money. The fourth requirement is the existence of a *causa* or *halal* cause, which is not contrary to law, decency, and public order. If the *causa* underlying the agreement is not lawful, then the agreement is null and void.

The initial and subsequent conditions among the four are regarded as subjective conditions since they relate to the individuals involved in the agreement. The third and fourth elements are referred to as objective conditions since they relate to the purpose or goal of the agreement. The agreement can be dissolved if the requisite conditions are not met. Nevertheless, in the absence of the necessary prerequisites, the agreement becomes invalid, implying that the agreement is seen to be non-existent from its inception.

Compliance with the legal obligations outlined in the Civil Code is crucial in the acquisition of government products and services. One crucial element pertains to the parties' capacity to enter into the agreement. When it comes to purchasing products or services, the PPK must possess the ability and legal right to act on behalf of the relevant government entity. PPK proficiency standards pertain to the specific qualifications outlined in LKPP Regulation Number 19 of 2019 for PPK appointments. The prerequisites encompass possessing integrity and discipline, executing an Integrity Pact, possessing a certificate of proficiency in the domain of Goods/Services Procurement, and possessing a minimum academic level of Bachelor Strata One (S1) or its equivalent.

Regarding the status of a goods / services procurement contract signed by a PPK who does not have a certificate of competence, the contract can be declared "cancelable" (*vernietigbaar*) based on the provisions in Article 1320 of the Civil Code regarding the requirements for the competence (*bekwaamheid*) of the parties. According to the theory of capacity in treaty law, a person is considered capable of performing legal acts if they have fulfilled certain requirements, including having the competence required by laws and regulations. In the context of public procurement, Presidential Regulation No. 16/2018 requires PPKs who come from other personnel to have a certificate of competence in the field of procurement. If the PPK does not meet this competency requirement, it can be said that the PPK is not legally capable of signing a goods/services procurement contract.

On the other hand, the doctrine of *pacta sunt servanda* in treaty law emphasizes the principle of binding an agreement that has been agreed upon by the parties. Although a goods/services procurement contract signed by a PPK without a certificate of competence remains binding under this doctrine, the contract remains at risk of being canceled by the competent authority. Cancellation can be done by referring to the PPK's incompetence in fulfilling the competency requirements as stipulated in the Presidential Regulation.

Ownership of a competency certificate is a subjective requirement that must be met by the PPK as a representative of a government agency before entering into a public procurement contract. If this requirement is not met, the contract can be declared *voidable* by the interested party. However, if the contract is not canceled, the contract can still be implemented like a valid contract.

The results of this study offer valuable information for stakeholders, particularly government agencies, to guarantee adherence to rules and regulations concerning public procurement, including the necessary qualifications for PPK.

CONCLUSION

Based on the results of the research and discussion that has been carried out, it can be concluded that LKPP Circular Letter Number 1 of 2024 which provides relaxation of competency certification requirements for Commitment Making Officials (PPK) cannot override the provisions in Presidential Regulation Number 16 of 2018 which requires PPKs held by Other Personnel to have a certificate of competence in the field of goods/services procurement. The LKPP circular letter is a policy regulation (*beleidsregel*) whose position is lower than statutory regulations, so it cannot remove certification obligations that have been regulated through Presidential Regulations.

Regarding the goods/services procurement contract signed by PPK who is held by other personnel and does not have a certificate of competence, the status of the contract is "cancelable" (*vernietigbaar*) based on the provisions in Article 1320 of the Civil Code regarding the requirements of the parties' competence (*bekwaamheid*). Nonetheless, the contract remains binding on the parties until rescinded. This legal implication is important to consider, given that there are still many PPKs who have not met the competency certification requirements.

The findings in this study provide insights for stakeholders, especially government agencies, to ensure compliance with laws and regulations related to public procurement, including competency requirements for PPK.

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