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Transparency in the Preparation of Terms of Reference in the Goods and Services Procurement System in BUMN

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Abstract: This research aims to identify factors that influence transparency in the preparation of TORs in the Goods and Services Procurement system in BUMN. This research uses a normative juridical method with a legal case approach that has permanent legal force. The research results show that the factors that influence transparency in preparing TORs are policies, regulations, technology and human resources that need to be perfected. Clear policies and adequate regulations can increase transparency, the use of technology can be used to simplify and speed up the procurement process and increase transparency in the procurement of goods and services. Human resources who have adequate competence and good morals are also very important to increase transparency in the procurement of goods and services. Based on the research results, the author recommends that BUMN strengthen policies and regulations related to the procurement of goods and services and increase the competence and morality of human resources involved in the procurement process. BUMN can utilize appropriate information technology to increase transparency in the procurement of goods and services. With these recommendations, it is hoped that BUMN can increase transparency in the procurement of goods and services.

Keyword: Framework of Work, System Procurement of Goods/Services, State Owned Business Entity (BUMN).

INTRODUCTION

In the administration of the state for daily, monthly, and annual operations throughout Indonesia, it is necessary to procure goods and services whose financing is taken from the state budget or regional budget (APBN or APBD) with a very large value. According to data released by the Government Goods and Services Procurement Policy Agency (LKPP), procurement of goods and services in 2021 totaled IDR 1,214 trillion. This figure represents approximately 52.1% of the state budget's total value, indicating that goods and services account for half of the budget's funds (Hartono, 2021).

Based on this data, we can calculate that a monthly Goods & Services procurement auction, worth Rp. 101.2 trillion, or a daily auction worth Rp. 3.372 trillion, takes place across Indonesia, from Sabang to Merauke. Due to the large allocation of funds, there is a risk of

abuse or misuse of authority, including collusion, nepotism, vertical and horizontal conspiracy, and unfair business competition practices. It is necessary to strengthen the legal side, in this case the auction implementation regulations, so that the process of procuring goods and services can be transparent, effective, and fulfill a sense of justice in society (Heriyanto & Yuliani, 2021).

The government has issued several Presidential Regulations (Perpres) governing the procurement of goods and services, starting with Perpres Number 54 of 2010, signed by President Susilo Bambang Yudhoyono, then Perpres Number 16 of 2018, signed by President Joko Widodo, and finally Perpres No. 12 of 2021, signed by President Joko Widodo. In addition, there is also Law Number 5 of 1999, which contains the Prohibition of Monopolistic Practices and Unfair Competition signed by President B.J. Habibie (Putri, 2019).

A November 2021 report from Indonesia Corruption Watch (ICW) revealed that, from 2015 to 2020, the procurement of government goods and services accounted for an average of 40% corruption cases annually. Even in 2019, the amount of corruption reached 64%. (Watch Indonesia Corruption, p. 64).

Despite significant improvements in procurement of goods and services regulations, and the existence of a law governing unfair business competition, numerous corruption violations continue to negatively impact state finances. It appears that there is still a legal vacuum in BUMN's procurement of goods and services, allowing individuals to exploit themselves to the state's detriment.

Transparency is needed in the procurement process to provide high trust, increase accountability, and reduce the potential for abuse, corruption, and injustice (Nisak & Riza, 2023). Through transparency, stakeholders can better monitor and evaluate the performance of the procurement organization and can make informed decisions in subsequent policy making (Octoviany, 2020). In the sense of transparency, nothing is hidden and provides opportunities for all parties to gain fair access to relevant and important information.

In the number of legal cases decided by the Business Competition Supervisory Commission (KPPU), the violation starts with the preparation of Terms of Reference (KAK), which in turn results in discriminatory practices to prevent other business actors from participating in the procurement of goods and services. Such conditioning controls the price of goods and services to maximize profits, enabling the government, specifically BUMN, to purchase them at a premium price.

An example occurs in the KPPU's decision that has permanent legal force: KPPU No.19KPPU-L/2005 regarding the case: Tender for Gamma Ray Container Scanner at Batu Ampar Port, Batam, in which in this case there was a practice of discrimination of tender participants by determining certain technical specifications that were not owned by other participants contained in the Terms of Reference, then subject to violation of Law No.5 of 1999 article 22: conspiring to determine the winner of the tender (President BJ Habibie, 1999).

The preparation of this Terms of Reference determines whether the procurement process takes place fairly or not, so it is necessary to have a nationally applicable regulation that regulates the preparation of KAK in more detail to avoid multiple interpretations that lead to abuse of authority in preparing KAK.

The supervisory function is not limited to the auction implementation, but it must also commence during the preparation of the KAK. This is because the emergence of both vertical and horizontal conspiracies begins during the preparation of the Terms of Reference. Corruption cases, like a visible tip of an iceberg, only come to light legally, whereas systemically coordinated corruption, which is imperceptible to the naked eye, eludes the law. Corruption that is caught because it is visible is not much in terms of quantity or quality (i.e., the amount of nominal money corrupted is not much) when compared to invisible corruption that is carried out systemically (Tarigan, 2022).

Nayabarani (2018) research results indicate that the use of ICT can statistically support efforts to minimize corruption, but further evaluation of its implementation is necessary. Supporting the implementation of e-procurement requires the presence of skilled personnel, service user support, stakeholder involvement, adequate ICT infrastructure, supportive institutional conditions, and an understanding of the community's social background. Meanwhile, research by Syafar & Razak (2022) shows that the legal position of evaluation data for the selection of goods/services procurement providers in terms of Law No. 14 of 2008 has not been able to clearly emphasize the information disclosure of the government's goods/services procurement process. This study aims to identify factors that affect transparency in the preparation of KAK in the Goods and Services Procurement system in BUMN.

METHOD

This research employs a type of normative juridical research methodology, which aims to scrutinize and analyze laws and regulations that pertain to the procedures for formulating terms of reference in the goods and services procurement system within state-owned enterprises, in compliance with statutory regulations. This research will employ a case approach, which involves reviewing and analyzing cases associated with the procurement of goods and services; a statutory approach, which involves reviewing and examining legal norms related to the procurement of goods and services; and a conceptual approach, aimed at analyzing the concept of KAK in relation to the procurement of goods and services in BUMN.

RESULTS AND DISCUSSION

Transparency of Goods/Services Procurement System in State-Owned Enterprises

The principle of transparency in the tender process refers to the principle of carrying out all stages and steps in the procurement of goods or services in an open, clear, and easily understood manner by all interested parties by ensuring that relevant and important information is available to the public and decisions and actions taken in the tender process can be objectively tested (Nugroho et al., 2019). For this reason, tender announcements must be announced openly and accessible to all interested parties. The contents of the tender announcement related to needs, specifications, and other requirements must be clearly available.

Tender requirements must be described in detail and accurately. This includes job descriptions, technical specifications, evaluation criteria, and qualification requirements (Yuwinanto, 2013). These requirements should be easily understood by all participating parties. Similarly, the evaluation process used to assess bids should be open and objective. The evaluation steps, scoring criteria, and methods used should be clearly explained.

Any questions from suppliers should be clearly answered, and key information should be provided to all suppliers. The criteria used to select the winner must be disclosed to all suppliers. The need for traceability from announcement to bid evaluation should be fully documented. To maintain transparency, preferably involving an independent organization or external monitor, an accurate track record of all steps in the tender process should be maintained, including meetings, communications and decisions taken.

Information Publication

Table 1. Classification of Auction Publication Types

Publication of Auction Information	Procurement for Investment		Procurement for Operations
	Source of Funds APBN/APBD	Source of Funds Business Unit	
Web. Company Holding	Must	Must	Unnecessary
Web. Company	Must	Must	Must

Publication of Auction Information	Procurement for Investment		Procurement for Operations
	Source of Funds APBN/APBD	Source of Funds Business Unit	
Mass Media/National newspaper	Must	Unnecessary	Unnecessary
Paid Procurement Portal	Must	Must	Must
Free Procurement Portal	Unnecessary	Must	Must
Millis Group Procurement	Unnecessary	Must	Must

Table 1 above reveals whether the company's auctions are transparent or not. Often non-transparent auctions avoid the publication process, as in table 6 above, with the intention of hiding information so that only a few providers know the auction process so that it can be more easily conditioned.

Publication of auction information determines the transparency of auctions held in central and local governments and SOEs (Setyadiharja, 2017). Information technology support in the auction process must accompany the effective publication of auction information. Without the support of qualified information technology, information disclosure will not have much effect on transparency in the goods and services procurement system. Information technology support means that all stages of the process are carried out using IT systems so as to reduce or even avoid direct meetings between providers and the auction implementation team.

Good information technology infrastructure, including internet access speed, bandwidth size, and server hardware for processing tender data, is crucial for providing good information technology support. Frequently, companies design their information technology infrastructure too small or lower than their access requirements, resulting in slow, often stuttering access, which hinders bidders from participating in the auction process.

Transparent Policy

Transparency and accountability always go together, transparent policies must have high accountability, and vice versa, so that policies with high accountability in the manufacturing process must also be transparent. To ensure accountability in the procurement system of goods and services at BUMN, transparent policies necessitate the principle of openness, which involves incorporating the community's actual aspirations and refraining from discrimination during the procurement process. Policy makers, in this case procurement organizers, need to open themselves to the public to obtain complete, correct, and non-discriminatory information. Public policy in relation to the procurement system made by LKPP with external supervision, especially from the supervisory body, is quite transparent and accountable, but in the implementation of procurement there is still a need for local policies that are practical in nature in the field carried out independently by the BUMN itself, such as: policies in evaluating the implementation of the procurement system, policies in selecting prospective providers, policies in determining the technical specifications required by end users which are often made excessive (over specification) so as to prevent other providers from participating in the procurement process. Excessive policies in making technical specifications and then outlined in the Terms of Reference (KAK) will make KAK non-transparent. The non-transparency of a KAK has a tendency for the procurement process to be discriminatory to limit other providers from participating in the auction so that the direct procurement or direct appointment process can be carried out without an auction process.

Non-transparent policies in making technical specifications as outlined in the KAK to discriminate against other tender participants are carried out in plain sight as happened in cases handled by KPPU and have permanent legal force: KPPU No.03/KPPU-L/2006 where PLN

DISJAYA made a direct appointment to NETWAY and discriminated against other tender participants and made specifications in the KAK that were not transparent.

The origin of this non-transparent policy can be traced back to the cooperation in developing the CIS RISI (Customer Information System Master Plan Information System) software, which Politeknik ITB developed at DISJAYA's request and subsequently used as a platform for other software programs. The CIS RISI program oversees DISJAYA's customer database, containing crucial customer information such as name, address, electricity meter serial number, power consumption, and more. The CIS RISI program serves as a crucial data base for various applications, including the CCBS (Customer Care Billing System), which computes the customer's PLN usage, the bills that need payment, and the outstanding bills.

In addition to NETWAY, there are nine (9) similar companies that are capable of implementing CIS RISI in the DISJAYA work area. Therefore, both NETWAY and these nine companies are well-versed in the parameters and protocols of CIS RISI. There is no single company that monopolizes the implementation of the CIS RISI rollout service because all of them have received outsourcing work to carry out the CIS RISI rollout from DISJAYA.

On September 27, 2020, NETWAY presented a proposal to DISJAYA for the CCBS (customer care billing system) program. This program includes features such as calculating the PLN customer usage, calculating the amount of bills that need payment, calculating the amount of unpaid bills, among other functions. The motive for submitting this CCBS proposal on NETWAY's initiative or DISJAYA's request is still unknown. But according to my analysis, the submission of the CCBS proposal must have an RFQ from DISJAYA, officially or unofficially, because it is impossible for NETWAY to know the need for CCBS if there is no information from DISJAYA.

Most likely, only NETWAY is aware of the need for CCBS, while the other nine companies involved in the installation of the CIS RISI protocol were unaware and did not submit a proposal. It is evident that only NETWAY submitted a proposal for CCBS, with no other company contributing.

Then DISJAYA formed an Outsourcing Evaluation Team, whose task was to assess all outsourcing achievements during the CIS RISI Rollout and provide recommendations to the DISJAYA leadership. Naturally, the Evaluation Team recommended NETWAY, prompting the DISJAYA Board of Directors to ask the PLN Center's Marketing Director for permission to draft a Cooperation Agreement Letter between DISJAYA and NETWAY (letter no. 1308/061/D.IV/2000). This request received approval from the PLN Marketing Director No. 4323/060/DII-SAP/2000. Eventually, an Evaluation Report emerged, confirming NETWAY's appointment as PLN's partner in outsourcing cooperation. To give legal force to NETWAY, DISJAYA issued a direct appointment letter as a PLN partner in outsourcing work.

Based on the appointment letter, NETWAY can initiate the preparation and creation of the NETWAY version of CCBS, which will then be registered with HAKI as CCBS software intended for DISJAYA. The grace period between the Minutes of the Event and the issuance of the Appointment Letter as a PLN partner typically spans 1-2 months, providing NETWAY with ample time to prepare the CCBS software. Without the Letter of Appointment from DISJAYA, NETWAY would not have made the investment to create the CCBS software in advance. On September 1, 2001, NETWAY successfully registered the CCBS program at HAKI.

Due to time constraints and pressing requirements stemming from numerous system modifications in PLN, including TDL and other changes, DISJAYA, adhering to the original plan, procured CCBS software directly from DISJAYA, bypassing the auction process. This approach aligns with the guidelines outlined in the Decree of the PLN Board of Directors No. 038.K/920/DIR/1998 concerning Procurement of Goods and Services.

The KPPU decision reveals that DISJAYA implemented a non-transparent policy that solely required NETWAY to assume the role of the sole partner, thereby bypassing the auction process and preventing other companies in the same field from participating in the CCBS auction process.

Establishment of a Transparent Unit or Team

Establishing a transparent auction team is crucial for creating a transparent auction process. Transparency in the goods/services procurement system begins with the establishment of a transparent team, also known as the "man behind the gun." While having transparent policies, systems, and procedures is important, without a transparent procurement team, the implementation process will no longer be transparent. In the case of DISJAYA and NETWAY, the infrastructure is sufficient to establish a transparent procurement process. However, the procurement actors lack transparency by leaking information related to procurement needs to only one company, namely NETWAY. This results in a non-transparent or discriminatory auction process.

A team that works transparently will help realize transparency in the procurement process so as to avoid fraud in the auction process, such as abuse of authority. A transparent procurement team can detect suspicious or unethical actions more quickly, enabling prevention or follow-up.

In establishing a transparent procurement team, it is necessary to select highly competent and professional people. Team members have relevant competence, experience and knowledge in procurement, including a solid understanding of applicable regulations and laws. Team members should not have conflicts of interest that could affect their integrity in the procurement process. To this end, each team member should have an integrity pact that contains a clear and unequivocal code of conduct or guidelines for procurement team members. This code of conduct should include principles such as transparency, integrity and impartiality. Regular training for procurement team members is necessary to ensure proper understanding of the regulations, laws and policies governing the procurement of goods and services. This will ensure that procurement team members have the direction and procedures to conduct fair and objective procurement.

Audit and Monitoring

To create a transparent procurement process, there needs to be a check and balance system to validate whether the process is good or needs improvement. There needs to be a system of internal and external audits of the performance of each member of the procurement team to monitor compliance with procurement guidelines, codes of conduct, laws and regulations. Through audits, it can be verified that the entire procurement process is in compliance with the Regulations and applicable laws. This includes ensuring that procurement is conducted in accordance with government regulations, organizational policies, and applicable contracts.

An independent audit process can detect fraud or abuse of authority in the procurement process and ensure a transparent procurement process (Nofitriyeni & Hadi, 2023). This includes checking for potential conflicts of interest, false bids, or other unethical actions. Through the audit process, it can minimize Legal Risk, which can identify potential legal risks associated with the procurement process early (Susilo & Mahrozi, 2020). This can help organizations take the necessary preventive or corrective actions to avoid litigation or other legal issues. Through the audit process, it can increase stakeholder confidence, demonstrating that the procurement implementer is exercising rigorous oversight, which can increase the confidence of the public, bidders, and other parties involved in the process. Transparent and rigorous audits can help protect an organization's reputation from scandals or ethical issues that could damage its image and integrity.

Based on the results of research conducted on the results of the decision of the Business Competition Supervisory Commission (KPPU) which has permanent legal force, the problems faced in the procurement process of goods/services, often occur in violation of Article 19 and Article 22 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, in the form of vertical and horizontal conspiracies (President BJ Habibie, 1999) where each party plays its role in accordance with their respective responsibilities, competencies, and expertise by carrying out discriminatory practices to prevent other business actors from participating in the same goods/services procurement process.

Discriminatory practices cannot be done alone but work together vertically and horizontally in order to arrange and determine the winner of the auction even at a higher price. The process of arranging the winner of the auction consists of two stages, namely the first stage by preparing the Terms of Reference (KAK) in which there are technical specifications that lead to certain providers as in the case handled by KPPU No.19KPPU-L/2005 regarding the case: Tender for Procurement of Gamma Ray Container Scanner at Batu Ampar Port - Batam, the preparation of the KAK in which the technical specification stated that the sensor panel was PVT (Poly Vinyl Toluene), which technical specification was only owned by one product brand and not by other product brands.

Making Terms of Reference by providing specific technical specifications can also be used as a way for the procurement process to be carried out through direct appointment, among others by using copyright ownership which is only owned by certain providers, then the direct appointment procurement process can be carried out. This happened in KPPU case No. 03/KPPU-L/2006 Direct Procurement of the CIS RIS System at PLN DISJAYA, (Business Competition Supervisory Commission, 2007) PLN DISJAYA argued that the CIS RIS System that suits the needs of PLN DISJAYA is produced by the NETWAY company which also has a patent that has been registered with HAKI, so that with this reason PLN DISJAYA can make a direct appointment to NETWAY without going through the auction process.

By reading the court's decision, it is evident that before the auction process is carried out, PLN DISJAYA has provided strategic information to NETWAY to make the CIS RIS System in advance with the required specifications and has been informed by PLN DISJAYA to NETWAY which later during the auction process will be included in the Terms of Reference (KAK) with technical specifications as informed by PLN DISJAYA to NETWAY. Behind this information, of course, it can be ascertained that there is already an unwritten commitment between the two parties. NETWAY confidently produces the CIS RIS system and registers it with HAKI in advance long before the auction process is carried out so that in the end PLN DISJAYA can buy the CIS RIS system owned by NETWAY by direct appointment.

The process of arranging the winner of the second stage auction is by making a very large number of qualification requirement documents to eliminate other prospective providers so that the auction winner can be determined. In a case handled by KPPU with case number 06/KPPU-L/2007 concerning the procurement of mosquito fogging machines within the DKI Jakarta Provincial Health Office in 2006 there was pseudo-competition between bidders by arranging administrative documents in the form of letters of support from producers or distributors which were used as a tool to discriminate against certain bidders so that companies fully supported by producers or distributors could be won in the tender process. With this kind of false competition, of course, the selling price becomes high.

From the above cases, it is clear that conspiracies occur starting from the making of technical specifications, making terms of reference (KAK) and making administrative requirements tender documents. This is because there is no regulation at the Perpres level that regulates the procedures for making technical specifications, KAK and administrative requirements that are standardized and apply nationally. What currently exists is that each region has its own

regulations, there is no uniformity. Each region has different regulations or procedures that have been authorized by the head of the region or authorized local officials.

Policies and guidelines for the preparation of KAK and standardization in the form of templates for preparing KAK / technical specifications that apply nationally are needed. It would be very useful if a presidential regulation is issued that regulates the guidelines for preparing the correct ACC and standardization in order to create transparency in the procurement process (ITB, 2011).

Clear preparation guidelines, terms of reference/standardization will facilitate monitoring and supervision functions. Prevent conflicts of interest, prevent nepotism, facilitate publication to the public (Manalu, 2019). The standardization process above can be likened to the existence of jurisprudence in the legal process in court so that the same legal violation process can be prevented in different places.

Standardization can avoid mistakes or forgetfulness in including important elements in the KAK, so that all important elements can be accommodated properly, without excessive requirements that are only adjusted to the needs.

Finally, a good system must also be supported by a transparent team or work unit for the realization of a transparent procurement process accompanied by an audit process that has measurable audit criteria and easily accessible inherent supervision so that it can be done by the public easily (Syafar & Razak, 2022). It is very difficult for transparency to be realized without being supported by a transparent team or work unit.

CONCLUSION

Based on the results of the research and discussion, it is concluded that violations that occur in the procurement auction process are caused by the making of Terms of Reference (KAK) and technical specifications that are not transparent, resulting in discriminatory practices and conspiracies in the procurement process. There is no standardization of making Terms of Reference that is regulated nationally so that the process of making KAK can be transparent, can facilitate audits and is easily supervised by many parties. So that a transparent team or work unit is needed that can run a transparent procurement auction system as well. Standardization is also needed in the process of making Terms of Reference and technical specifications that apply nationally so that the procurement process can be transparent and to avoid missing elements. Transparent publication needs to be improved in order to run an inherent supervision system so that the public can also participate in the supervision process.

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