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Submission date: 04-Oct-2022 11:44AM (UTC+0700)

Submission ID: 1916168955

File name: vernment_Procurement_of_GoodsServices_during_the_COVID_19_Pa.pdf (520.64K)

Word count: 4787

Character count: 27450



KPPU's Role in Enforcement of Business Competition Law on Government Procurement of Goods/Services during the COVID-19 Pandemic

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<http://dx.doi.org/10.18415/ijmmu.v8i10.2965>

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Abstract

The purpose of this study was to determine the role of KPPU in Enforcement of the Competition Law for the Procurement of Government Goods/Services during the Coronavirus Disease (Covid-19) Pandemic in Indonesia. This type of research is normative legal research, by examining primary and secondary legal materials. The approach method used is a statutory approach, and a conceptual approach. The technique of collecting literature study materials and qualitative analysis using legal interpretations in an authentic and grammatical manner. Procurement of goods and services in emergency conditions has been regulated in Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services, where the process of implementing PBJ is carried out through Direct Appointment. In addition to the Presidential Decree, PBJ LKPP has issued Head Regulation (PERKA) LKPP No. 13 of 2018 concerning Procurement of Goods/Services in Handling Emergency Situations, which states that in the procurement process during an emergency there are at least four important phases that must be passed, namely planning, implementation, settlement of payments, and audits. President Joko Widodo on March 20, 2020 has issued Presidential Instruction (INPRES) Number 4 of 2020 concerning Refocussing of Activities, Reallocation of Budgets and Procurement of Goods and Services in the context of Accelerating Handling of Corona Virus Disease 2019 (Covid-19). The difference between the ordinary PBJ process under normal conditions is that the direct appointment time is relatively faster, there is no need to announce it on the LPSE (Electronic Procurement Service) website, there is no need for a price evaluation process, and the officials who carry it out are PA, KPA, and PPK directly. And there is no need to form a Procurement Working Group.

Keywords: *Procurement of Goods/Services; Coronavirus Disease (COVID-19)*

Introduction

The Covid-19 epidemic has created a condition that meets the national disaster indicators as stipulated in Law no. 24 of 2007 concerning Disaster Management. Article 7 paragraphs (2) explains that the indicators of a national disaster are loss of life, loss of property, damage to facilities and infrastructure, wide coverage of the area affected by the disaster, and the resulting socio-economic impact. The Covid-19

epidemic has not only spread to all provinces in Indonesia, but has experienced an exponential increase in the number of infected people and affects all dimensions of the social and economic life of citizens.¹

On April 13, 2020, the president issued Presidential Decree No. 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (COVID-19) as National Disasters. Presidential Decree No. 12 of 2020 has increased the level of government policy from the Status of Certain Disaster Emergency Conditions to National Disasters. This provides legal certainty that all the potential possessed by the state, both the government and the community, is directed at preventing, handling and recovering from national disasters due to the Covid-19 outbreak.

¹⁵ During the pandemic, all over the world are competing to procure goods and services to cope with the Covid-19 pandemic in their respective countries or regions. Likewise, the Indonesian government moved quickly to buy various items needed, ranging from test kits, masks, hand sanitizers, personal protective equipment (PPE) for health workers, to hospital facilities and infrastructure that were used as referrals. President Joko Widodo also instructed ministers in the cabinet to speed up the process of procuring goods and services.

The government must move faster to contain the spread of this new disease. However, the government still needs to prioritize transparency and apply the principle of openness in the government's procurement of goods and services (PBJ), because without these two things, it is feared that the budget for handling the Covid-19 pandemic will be Rp75 trillion.² Especially for spending in the health sector, it will be minimally effective and vulnerable to inefficiency, irregularities, and even corruption.

Result and Discussion

1. Procurement of Goods and Services in an Emergency Situation of the Covid 19 Pandemic

The term procurement specifically refers to the activity of providing goods/services to government institutions or agencies, the implementation of which is carried out by referring to the applicable laws and regulations. For companies, procurement of goods is an important activity in maintaining the survival of the company.

¹⁷ Article 1 point 1 of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services, Government Procurement of Goods/Services, hereinafter referred to as Procurement of Goods/Services, is an activity of Procurement of Goods/Services by Ministries/Institutions/Regional Apparatuses funded by the State Budget/Regional Budget whose process since identification of needs, up to the handover of work results.

The Procurement of Goods and Services (PBJ) have a very important role in the implementation of national development. PBJ is able to increase national and regional economic development. Regulations related to PBJ have also been amended several times to correct some of the shortcomings that were only discovered after they were enacted. The latest Presidential Regulation stipulated by the government as a guideline for the procurement of goods and services, namely Presidential Regulation No. 16 of 2018 concerning the Procurement of Government Goods/Services (hereinafter referred to as Perpres PBJ) which is complete with a number of derivative rules.

¹⁴ Presidential Regulation No. 16 of 2018 is a substitute for Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services, Presidential Regulation Number 70 of 2012 concerning Second Amendment to Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services, Presidential Regulation Number 172 2014 concerning the Third Amendment to Presidential Regulation Number 54 of 2010 concerning Government Procurement of

¹ To date, September 30, 2020, data from the COVID-19 task force has confirmed 282,724 cases of COVID-19 in Indonesia, 210,437 people have recovered and 10,601 have died.

² The total funds disbursed by the government to accelerate the handling of Covid-19 amounted to IDR 405.1 trillion, of which specifically the health sector was IDR 75 T. <https://www.kemenkeu.go.id/publikasi/siaran-pers/siaran-pers-economic-development-and-refocusing-budget-for-handling-covid-19-in-indonesia/>.

Goods/Services, Presidential Regulation Number 4 of 2015 concerning Fourth Amendment to Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services.

The enactment of this latest Presidential Regulation is very important in order to improve governance, reduce corruption problems in the world of procurement of goods/services tenders, increase transparency, accountability, and also increase the speed of budget absorption. In addition, the revision of the Presidential Regulation on the Procurement of Goods and Services will also provide maximum value for money and contribute to increasing the use of domestic products, increasing the role of Micro, Small and Medium Enterprises and sustainable development. Presidential Decree No. 16 of 2018 requires a digital-based government procurement mechanism for goods and services. The entire flow of the mechanism for the procurement of goods and services uses an electronic system. The electronic system will quickly find out if there is an implementation of the procurement of goods that is not in accordance with the procedure. LKPP³ serves as an intermediary only, demand and supply. Presidential Decree No. 16 of 2018 will not reduce auctions, but enter the e-marketplace era⁴, like online shops. E-catalog⁵ In the future, local e-catalogs and sectorial e-catalogs will be formed. Each region must form a permanent institution, the name is UKPBJ. This institution will take care of recruitment agent⁶.

After the Covid-19 pandemic occurred, the mechanism for the procurement of goods and services was easier than normal, especially since President Joko Widodo on March 20, 2020 had issued Presidential Instruction (Inpres) Number 4 of 2020 concerning Refocusing Activities, Budget Reallocation and Procurement of Goods and Services in the context of Acceleration of Handling Corona Virus Disease 2019 (Covid-19). The President stated that fast, precise, focused, integrated, and synergic steps are needed between Ministries/Agencies and Regional Governments to refocus⁷ activities, budget reallocation and the procurement of goods and services in the context of accelerating the handling of Covid-19.

In the third point, Presidential Instruction Number 4 of 2020 states that accelerating the implementation of the procurement of goods and services to support the acceleration of handling Corona Virus Disease 2019 (Covid-19) by facilitating and expanding access in accordance with Law Number 24 of 2007 concerning Disaster Management, Government Regulation Number 21 of 2008 concerning the Implementation of Disaster Management, Government Regulation Number 22 of 2008 concerning Funding and Management of Disaster Assistance, Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods and Services, and Presidential Regulation Number 17 of 2018 concerning Implementation of Disaster Management in Circumstances Certain. In the fourth point, Presidential Instruction Number 4 of 2020 states to procure goods and services in the context of accelerating the handling of Corona Virus Disease 2019 (Covid-19) by involving the Government Goods/Services Procurement Policy Institute and the Financial and Development Supervisory Agency (BPKP). Fifth, Presidential Instruction Number 4 of 2020 states to procure goods and services for medical devices and medical devices for handling Corona Virus Disease 2019 (Covid-19) by paying attention to goods and services in accordance with the standards set by the Ministry of Health.

³ LKPP is an abbreviation of the Government Goods/Services Procurement Policy Institute. LKPP is one of the important Government Institutions that must exist with the duties and responsibilities of developing and formulating government goods/services procurement policies (PBJP), providing technical guidance and advocacy related to the implementation of government goods/services procurement projects, as well as facilitating the system of administering PBJP expert certification exams. The legal basis for the establishment of LKPP is Presidential Regulation Number 106 of 2007 which has been revised into Presidential Regulation Number 157 of 2014 concerning the Government Goods/Services Procurement Policy Agency (LKPP).

⁴ E-marketplace for the procurement of goods/services is an electronic market provided to meet the needs of government goods/services

⁵ E-Catalogue) is an electronic information system that contains a list, types, technical specifications and prices of certain goods/services from various government goods/services providers.

⁶ Recruitment agent or Procurement Agent is a Goods/Services Procurement Work Unit (UKPBJ) or Business Actors who carry out part or all of the work of Procurement of Goods/Services entrusted by K/L/PD as the employer.

⁷ Refocusing is refocusing the budget, in the case of covid, the government is refocusing the budget to support the acceleration of handling the Covid-19 pandemic. Etymologically (the origin of the word), the notion of budget refocusing is to focus or refocus the budget. Meanwhile, in terms of terminology (according to the term), Budget Refocusing is centralizing or refocusing the budget for activities that were not previously budgeted through budget changes. <https://bungko.desa.id/2020/09/refocusing-anggaran-dan-reallocation-anggaran-itu-apa/>.

5 Procurement of Goods and Services during emergency conditions has been regulated in 3 Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services (Perpres PBJ) where the process of implementing PBJ is carried out through Direct Appointment. In addition to Perpres PBJ LKPP has issued Head Regulation (Perka) LKPP No. 13 of 2018 concerning the Procurement of Goods/Services in Handling Emergency Situations.

LKPP Head Regulation (Perka) No. 13 of 2018 states that in the procurement process in an emergency period there are at least four important phases that must be passed, namely planning, implementation, payment settlement, and audit. The Minister/Head of Institution/Head of Region assigns an internal supervisor (BPKP/Government Internal Supervisory Apparatus/Independent Auditor) to conduct an audit.

The difference between the ordinary PBJ process under normal conditions and abnormal conditions is that the direct appointment time is relatively faster, there is no need to announce it on the LPSE (Electronic Procurement Service) website, there is no need for a price evaluation process, and the official who carries it out is directly the PA, KPA, and KDP and do not need to form a Procurement Working Group. PA, KPA, or PPK can directly identify needs, analyze availability, appoint providers, issue a Letter of Appointment for Goods/Services Providers (SPPBJ), issue an Order to Start Work (SPMK), create and sign contracts, carry out work, and hand over work.

LKPP through the Circular Letter (SE) of the Head of LKPP Number 3 of 2020 concerning Explanation of the Implementation of PBJ in the Context of Handling Covid-19 still requires the government as a budget user, both at the national or regional level to determine its needs to overcome the spread of the corona virus. This policy, if the process is transparent, can open up opportunities for citizen participation to contribute in responding to the Covid-19 crisis situation. In addition, the availability of detailed information on needs also allows the public to monitor whether the number of goods to be purchased by the government is in accordance with the needs in the field and whether there are obstacles in the procurement process that will hinder the availability of goods and services.

26 2. Economic Impact in Indonesia Caused by the Covid-19 Pandemic

26 The Covid-19 emergency has an impact on the national economy and financial system stability. We can note this in Article 27 of Perpu No. 1/2020 which can be interpreted for immediate rescue actions. Therefore, the government needs to cut the bureaucratic chain of fulfilling other regulations and provide a sense of "security" for officials so that legal cases do not arise after the Covid-19 pandemic.

The Covid-19 pandemic has caused the Indonesian economy to contract in the third quarter of this year. This means that Indonesia will enter a recession phase⁸ economy. The government projects that economic growth in the third quarter of 2020 will contract deeper, in the range of -2.9 percent to -1.0 percent. The government also projects that economic growth this year will be in the range of -1.7 percent to -0.6 percent. Previously, the 2020 economic growth was estimated at -1.1 percent, with the upper limit still positive 0.2 percent.⁹

Finance Minister Sri Mulyani Indrawati stated "Indonesia's economy is expected to experience a technical recession due to minus growth in two consecutive quarters". The Minister of Finance had previously projected the economy in the third quarter of this year to grow by minus 1 to minus 2.9 percent.

⁸ A recession is a period of temporary economic downturn in which trade and industrial activity decrease, generally characterized by a decline in GDP for two consecutive quarters. The meaning of the word recession can also be interpreted as a major slowdown or contraction in economic activity. A significant drop in spending generally leads to a recession. See <https://tirto.id/arti-resesi-ekonomi-sebab-impact-characteristic-country-yang-mengalami-f2ww>

⁹ <https://ekonomi.bisnis.com/read/20200928/9/1297394/setelah-indonesia-resesi-ancaman-depresi-ekonomi-semakin-dekat>.

3. KPPU's Role in Supervising the Procurement of Goods and Services During a Pandemic

To oversee the implementation of Law No. 5/1999 (Antimonopoly Law) a commission was formed. This formation is based on Article 34 of Law no. 5 of 1999 which instructs that the formation of the organizational structure, duties and functions of the commission shall be determined through a Presidential Decree. This commission was then formed based on Presidential Decree No. 75 of 1999 and was named the Business Competition Supervisory Commission or KPPU.¹⁰

KPPU was established by the government based on Presidential Decree Number 75 of 1999 concerning the Business Competition Supervision Commission, then amended by Presidential Regulation Number 80 of 2008 concerning Amendments to Presidential Decree Number 75 of 1999 concerning the Business Competition Supervisory Commission.

KPPU is on duty¹¹ to evaluate the existence of agreements, activities and dominant positions that may result in monopolistic practices and or unfair business competition, including during this Covid-19 pandemic.

KPPU has a number of authorities as other judicial institutions. These powers include investigative authority, enforcement authority, and litigation authority. In principle, KPPU is actually a supervisory agency for the implementation of the Business Competition Law and KPPU is not a law enforcer in the criminal field, such as the police, prosecutors, and judges who have forced efforts to present suspects in court until they make a decision.

Monopoly practices and unfair business competition must be controlled and supervised by KPPU in the Covid-19 health emergency. Inadequate regulation and impossible conditions, such as a health emergency, will lead to business competition practices that are difficult to control, whether online or in-person-based businesses. For this reason, the concept of regulation that is in line with the COVID-19 outbreak is urgently needed to realize healthy business competition.

In order to overcome the occurrence of unhealthy business competition in the conditions of the Covid-19 pandemic, in order to create stability in the country's economy and avoid public losses, a regulatory concept is needed that emphasizes prevention efforts, both general and specific. KPPU as the enforcer of business competition law must implement preventive measures in limiting the occurrence of monopolistic practices and unfair business competition. Prevention efforts must be carried out through good cooperation between KPPU and other relevant agencies such as the Police, Trade Service, Health Service, Ministry of Communication and Informatics for the realization of fair and reasonable business competition.

Enforcement of business competition law must continue even in conditions of natural and non-natural disasters such as the covid-19 outbreak. This means that the KPPU as the axis of business competition law enforcement must be able to harmonize itself with the times and the current situation and conditions. In relation to the occurrence of the Covid-19 pandemic, KPPU took steps by issuing a Press Release No.16-KPPU-PR/III/2020 published by the Bureau of Public Relations and Cooperation of the Secretariat of the Commission for the Supervision of Business Competition of the Republic of Indonesia, which stated:

First paragraph, KPPU is also concerned about the global economic slowdown as a result of the novel coronavirus (covid-19) pandemic at the beginning of this year which has caused very serious problems throughout the world, including our beloved country, Indonesia. Various countries have responded through responsive, adaptive, and anticipatory policies in an effort to minimize the impact caused by the pandemic. The Government of Indonesia is also responsive in responding to this issue with structured and measured policies, especially in anticipating the spread of the virus through the establishment of the National Disaster Management Agency (BNPB) for a state of emergency for 91 days from February 29 to

¹⁰ Andi Fahmi Lubis, et al. Competition Law Between Text and Context, Published and Printed with Support of Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH October 2009, p.331.

¹¹ For details, see Article 35 of Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

May 29 2020. For this reason, KPPU greatly appreciates attitudes and actions taken by the Government, as well as the very large contribution of medical officers in overcoming these problems.

Second Paragraph, related to the occurrence of the Covid-19 pandemic, KPPU understands that there is an emergency condition. This emergency condition certainly requires quick handling, especially in the procurement of goods and services for the needs of the Covid-19 response (such as personal protective equipment (PPE) for medical personnel and the public and various other health products and services), as well as for meeting the needs of food commodities. This emergency condition authorizes the Government to carry out the procurement process through a direct appointment mechanism, as stipulated in the Regulation of the Public Procurement Policy Institute (LKPP) Number 13 of 2018 concerning the Procurement of Goods/Services in Handling Emergency Situations. Direct appointments or other forms of Government policies related to the implementation of business activities in an emergency, we can emphasize from a business competition perspective, are things that are excluded in the business competition law.

Third paragraph, KPPU realizes that in this period, business actors of all sizes (large, medium, small and even micro) in almost all sectors are greatly affected by this global pandemic. The government even estimates that national economic growth will decline from the target of 5% to 2.5% or even less than that number in 2020. Relaxation of business competition law enforcement is needed in this emergency (force majeure). One form of relaxation carried out is to provide an opportunity for business actors who carry out merger, consolidation, or takeover transactions (including the transfer of productive assets) to submit notifications after the work from home policy period ends, namely April 2nd, 2020; provided that it can be extended by taking into account the latest situation. During this period, the process of handling cases at KPPU was carried out carefully by avoiding face-to-face meetings and utilizing existing information technology, so as not to sacrifice the guarantee of legal certainty for the parties.

Fourth Paragraph, Furthermore, KPPU requests that business actors do not practice cartels or agreements to determine excessive prices either directly and/or hoard or hold PPE products, other health products and food commodities for the community's needs. KPPU RI will take firm legal action if in the distribution and logistics process efforts are found that are detrimental to the disaster management process.

Fifth paragraph, as input, various policy options that have been and will be issued by the Government are expected to be short-term and limited to efforts to overcome disasters and minimize the economic impact of the disaster. Therefore, in the future KPPU will prioritize prevention efforts, in particular to assist and advocate for the Government in preparing various economic recovery policies that are in line with the principles of business competition, as well as urging business actors to continue to behave in a healthy business business. KPPU will also facilitate the notification process of merger, consolidation, or takeover transactions (including the transfer of productive assets), consolidation, or acquisition (including the transfer of productive assets) as well as speeding up the appraisal process of these transactions, so that the investment process and business actors collaboration in the recovery effort does not hamper the national economy.

Sixth Paragraph, in particular, KPPU also encourages large and medium-sized business actors to continue to make partnerships with micro and small business actors so that these business actors are helped to: (i) survive in a situation of economic slowdown, (ii) avoid discriminatory business behavior against them; and therefore (iii) the micro and small business actors are able to rise up and can help the national economic recovery.

In addition to Press Release No.16-KPPU-PR/III/2020, KPPU also issued several press releases related to the Covid-19 condition, including Press Release No.17-KPPU-PR/III/2020 concerning KPPU Extends Temporary Suspension of Law Enforcement Activities, KPPU Press Release Number 21/KPPU-PR/IV/2020 concerning KPPU Continues to Supervise, Even During the Covid-19 Period, KPPU Press Release Number 22/KPPU-PR/IV/2020 concerning KPPU Conducts Initiative Research on Alleged Violations of Rapid Test Services For the Diagnosis of Covid-19 by Hospitals, KPPU's Press Release Number 33/KPPU-PR/VI/2020 concerning the Obligation of Notification of Mergers and Acquisitions to KPPU Still Running Despite the Covid-19 Pandemic Condition and other press releases regarding the condition of Covid-19.

KPPU is also still focused on during this covid-19 pandemic to carry out its duties, namely law enforcement in the field of business competition, providing advice and considerations to the government and conducting merger notifications, and based on Law Number 20 of 2008 concerning MSMEs, KPPU is given the authority to supervise partnerships.

Conclusion

Procurement of goods and services in emergency conditions has been regulated in Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods and Services, where the process of implementing PBJ is carried out through Direct Appointment. In addition to the Presidential Decree, PBJ LKPP has issued Head Regulation (Perka) LKPP No. 13 of 2018 concerning Procurement of Goods/Services in Handling Emergency Situations, which states that in the procurement process during an emergency there are at least four important phases that must be passed, namely planning, implementation, settlement of payments, and audits. The difference between the ordinary PBJ process under normal conditions is that the direct appointment time is relatively faster, there is no need to announce it on the LPSE (Electronic Procurement Service) website, there is no need for a price evaluation process, and the officials who carry it out are PA, KPA, and PPK directly. And there is no need to form a Procurement Working Group.

The role of KPPU in Enforcement of Law on Business Competition for the Procurement of Goods/Services during the Covid-19 Pandemic Period is as stated in Press Release No. 16-KPPU-PR/III/2020 concerning KPPU RI Responding to the Procurement of Goods and Services Related to the Covid-19 Pandemic, which. In essence, KPPU understands that there are emergency conditions that require quick handling, especially in the procurement of goods and services for the needs of the Covid-19 response, such as PPE for medical personnel and the public and various other health products and services, as well as for meeting the needs of food commodities. In addition, KPPU authorizes the Government to carry out the procurement process through a direct appointment mechanism, as regulated in the Regulation of the Public Procurement Policy Institute (LKPP) Number 13 of 2018 concerning the Procurement of Goods/Services in Handling Emergency Situations, and KPPU declares direct appointments or other forms of policy Other governments related to the implementation of business activities in an emergency are excluded from the business competition law.

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