

CONSPIRACY IN GOVERNMENT PROCUREMENT IN INDONESIA

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I. FOREWORD

Criminal provisions regarding corruption in Indonesia are regulated in Law no. 31 of 1999 on the Eradication of Corruption which was subsequently changed and supplemented by Law no. 20 of 2001. Legally, formulation and types of corruption regulated in Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 can be grouped as follows:

- Any person who unlawfully enriches him- or herself or another person or a corporation (Article 2)
- Civil servants or state officials misusing authority to enrich themselves or another person or a corporation (Article 3)
- Everyone who participates in bribery (giving or promising anything) to civil servants or state officials, judges, lawyers (Articles 5 and 6)
- Business entities or individuals committing skulduggery (Article 7)
- Civil servants or state officials, individuals, or notaries who embezzle, falsify, eliminate, or destroy money, goods, certificates, letters or administrative lists (Articles 8, 9 and 10)
- Civil servants or state officials, individuals accepting a gift or pledge (Articles 11 and 12)
- Civil servants or state officials committing gratification (Article 12B)
- Any person who gives a gift or promises something to civil servants (Article 13)
- Other crimes related to corruption (Articles 21, 22, 23 and 24)

The laws regarding government procurement in Indonesia start with the release of Presidential Decree no. 80 of 2003 and others that now apply are Presidential Regulation no. 54 of 2010 which is then adjusted by Presidential Regulation no. 35 of 2011 (first amendment) and Presidential Regulation no. 70 of 2012 (second amendment).

According to article 1, point 1 of Presidential Regulation no. 54 of 2010, government procurement is an activity to obtain goods or service by ministries, agencies, local work units, or other institutions where the process starts from planning needs until completion of all activities to acquire goods or services.

Normatively, as stipulated in article 5 of Presidential Regulation no. 54 of 2010, principles of government procurement are efficient, effective, transparent, open, competitive, fair or not discriminatory and accountable. Those principles serve as general guidelines in implementation of government procurement in every stage of procurement carried out by respective government agencies.

In practice, in Indonesia government procurement is often seen as a process prone to acts of corruption with various types and modes of irregularities committed by parties associated with the process of government procurement. The process of government procurement is often used as a means to obtain

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personal or a group benefit by ignoring principles of government procurement that ultimately lead to financial losses to the state.

Based on the data handling of corruption cases by the Corruption Eradication Commission in the period 2004 until June 2016, 148 cases out of 514 cases handled by the CEC are corruption related to government procurement.

Corruption related to government procurement that has been identified is only part of the entire corruption related to government procurement occurring throughout Indonesia. That is, there is still a lot of corruption in government procurement which has not been revealed.

The government procurement process in Indonesia implemented in all sectors of development is scattered among various government agencies either at the central level or at regional level with a range of value scales of work budget. Supervision and control efforts over the government procurement process become very essential in order to prevent occurrence of deviations which may result in leakage of budget to interests of a few people or certain groups. In addition, law enforcement efforts against the occurrence of irregularities classified as corruption in government procurement also play an important role to provide a deterrent effect and demand accountability to individual perpetrators, and to maximize efforts to recover losses to the state caused by corruption in government procurement.

Therefore, the role of law enforcers becomes very important to be able to find and deal with corruption in government procurement as part of the effort to combat corruption and maximize efforts to recover losses to the state, and ensure that the government procurement process can run according to principles of government procurement for implementation of national development, for the benefit and welfare of all people of Indonesia.

II. MAIN DISCUSSION

A. Irregularities in the Implementation of Government Procurement

Corruption may occur in the stages of government procurement process from the budget planning stage, planning and preparation of procurement, implementation of procurement activities, handover of goods or services, payments as well as inspection or audit on the implementation of government procurement.

The pattern of irregularities that may occur in the government procurement stage which leads to corruption include:

- The preparation stage of procurement: for example the procurement planning activities inflate costs (mark up), directed to the interests of a product or provider of certain goods and services, unrealistic planning particularly from the point of execution time, the committee works behind closed doors, dishonest and controlled by certain parties, owner estimate (OE) is covered up when it should not be confidential, the base price is not standardized, technical specifications lead to a specific product, not standardized tender documents, tender documents are not complete.
- Stage of the procurement process: for example the announcement period is too short, material of announcement is incomplete and confusing (ambiguous), dissemination of flawed tender documents, during the pre-bid (*aanwijzing*) there are information restrictions by the committee so that only a certain group obtains complete information, the pre-bid (*aanwijzing*) was changed into a question and answer session, an attempt to block entry bid documents by certain elements so that certain participants are late in submitting a bid sheet, on the bid evaluation activities substitution of documents is done by inserting a revised document into the initial document, the committee works behind closed doors, announcement of winning bidder only to a specific group, not entire refutation get response, sending of determination letter intentionally delayed in order to get kickbacks.
- Drafting and signing of the contract: for example signing of the contract without supporting documents (fictitious documents), the signing of contract is delayed due to performance bond that

does not exist.

- Execution of the contract and delivery of goods and services: for example, the goods delivered are not in accordance with specifications defined in the contract, signing of minutes of handover when work has not been completed, inspectors do not supervise properly and accidentally allow cheating conducted by the supplier.

Based on case studies of corruption in government procurement handled by the CEC, it can be identified that the problems surrounding government procurement are due to irregularities in the planning, implementation and monitoring or accountability of government procurement. Characteristics of corruption that commonly occur in government procurement that had been handled by the CEC, among others, are:

- Goods or services which are held genuinely not needed or not in accordance with requirements but a booking and deposit from the interested parties is not planned based on real needs.
- Specification of goods and services and owner estimate that should be made by procurement committee actually is a specification that is directed at a particular brand, at a price regulated and determined by interested parties, which inflates costs (mark up) or deflates costs (mark down) to benefit certain parties.
- Auction is supposed to be fair, open and based on competence but is instead set according to the scenario for the benefit of certain parties.
- Acceptance of a sum of money or goods in return (kickback) from provider of the goods to the sponsor, brokers and certain officials which led to the price of goods or services being increasingly bloated.
- Giving money or goods at a certain percentage, according to the value of government procurement projects, as a deposit or a tribute that must be paid by the procurement committee and project leader to superiors under the pretext as tactical funds or operational funds for the organization spending purposes.

B. Handling Corruption Related to Government Procurement

Tackling corruption related to government procurement is required to have sufficient understanding of principles and stages in government procurement in accordance with applicable provisions. Understanding and capability that will be necessary to be able to identify irregularities in the government procurement process is indicated as a form of corruption.

The process of building a case (case building) begins with handling of information (information handling) over allegations of corruption in government procurement. Information received should be immediately analysed to determine its quality by analysing the qualifications of information sources and reliability.

Information about alleged corruption in government procurement can be obtained from several sources including members of the procurement committee, the internal auditor or other internal source aware of any irregularities in the government procurement process, bidders who feel disappointed because they were treated unfairly in the process of government procurement, members of the non-governmental organizations or journalists who find indications of irregularities in the government procurement process, auditor- or examiner-found irregularities in the government procurement process which was examined or other parties. Information about alleged corruption in government procurement can also be obtained from the documents in the form of budget documents, government procurement schedules, government procurement announcements, government procurement documents, agreement documents or the government procurement contracts, documents of audit reports or examination report documents and other documents.

Furthermore, based on preliminary information about the alleged corruption in government procurement drafted several alternative of legal construction based on variety of possible irregularities in govern-

ment procurement which indicated as a form of corruption with attention to some point mark indication that may occur at any stage of process of government procurement.

The next step is collection of information material to reinforce an allegation or hypothesis on the indication of corruption in government procurement. Based on data and information collected, the most powerful legal construction to be proven on alleged acts of corruption in the government procurement is drawn.

The collection of information wherever possible should be conducted by not reaching out to the parties allegedly involved. Methods of collecting information among others can be done by finding and analysing information from open sources such as information and data that are open to the public or accessible to the public either directly or via internet such as auction announcements, auction winners, the announcement of procurement schedules and others. Collection of information may also be done by confirmation with information sources (complainants) or others who can be trusted after identification of information sources, or by direct observation of results of implementation of government procurement. Having obtained information about alleged corruption in government procurement and having gained confidence of the quality of information sources, the information can be improved in the preliminary investigation stage.

In the preliminary investigation stage, collecting information can be either closed or open which includes conducting interviews or inquiries to the parties associated with the government procurement process, clarifying testimony and documents that have been obtained, and analysing documents related to government procurement. Collection of information in this stage is intended to strengthen the legal construction that has been built by finding two items of evidence sufficient to corroborate their allegations on corruption in government procurement.

Collection of information at the level of investigation conducted openly with the aim of gathering sufficient evidence for fulfillment of elements in order to prove the alleged corruption in government procurement. The collection of information made through examination of witnesses, examination of suspects, expert examination, requesting data and financial transactions from financial service providers, asset tracking and a series of legal actions in the form of searches and seizure of evidence.

Efforts to collect evidence through a search related to government procurement are principally directed at main targets such as unit work offices or agencies in which the procurement process was carried out, offices of partners (the company winning the auction, auction participants, companies companion, suppliers, as well as broker offices) and suspect residences, and other places deemed necessary.

Search of offices or the implementing government procurement agency directed at the workspace of procurement officials (officials, procurement committee, admissions committee) with the goal of documents and files related to the procurement process and acceptance, mailing administration staff room, official secretary, finance and treasurer targeting the documents and files related to correspondence, financial transactions and payments, as well as other locations deemed necessary.

Searches in associate companies directed at boardrooms or company policymakers with target documents and files of strategic policies and agreements related to government procurement being followed, meeting rooms and secretary rooms targeting the minutes of meetings, marketing staff room and administration staff targeting the bid price and specification of goods, sales staff room, purchasing staff and inventory staff with the goal of documents and files related to sales, booking or purchase of goods and inventory records, finance staff room and accounting staff room targeting the documents and files related to financial transaction bookkeeping and company financial statements, as well as other locations deemed necessary.

Asset tracking in the form of cash, deposits, savings and other cash equivalents done as early as possible when the investigation was started because demand for such information requires considerable time and has a dependency on other parties such as financial service providers and Indonesian Financial Transaction Reports and Analysis Center (INTRAC). There is a need to build an integrated working system between investigators, financial service providers and INTRAC by assigning personnel who are

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given specific responsibility to bring together and coordinate related to the financial data request so that all the information urgently needed by investigators and the progress of producing it can be tracked by financial service providers and INTRAC.

Blocking of assets is carried out if assets were found allegedly to originate or are the result of corruption that is obtained in *tempus* relevant to acts of corruption, acquisition process involving the parties related to the corruption that occurred and other factors.

Proving corruption in government procurement in Indonesia is basically the same as proving of crimes in general which is looking for material truth that is not only based on evidence submitted formally by the public prosecutor or the accused but pursued to find the real truth. Judges shall explore and work on the evidence submitted in order to prove that what the accused is charged with actually happened and that the offender is accountable for the actions.

This begins with proving the facts of the accused actions followed by application of material criminal law namely proving facts that such actions meet the elements of the offences charged. This is done in two stages:

- Disclosure of the facts by applying the law of criminal procedure, in this case the law of evidence.
- Analysis of the facts that have been proven by applying the facts to the elements of the offences charged under the theory of criminal law (material criminal law).

Judges in adjudicating should be able to consider the facts revealed at the hearing, analyse carefully whether there is a causal relationship between the facts that occurred with actions of the accused, thus reaching the conclusion that under provisions of law such acts as indicted have been proven legally and convincingly. Rules governing such evidence are referred to as the law of evidence.

Evidence and strength of evidence in corruption cases in Indonesia is regulated in Article 26 and 26 A of Law no. 31 of 1999 as amended by Law no. 20 of 2001.

The strategy of criminal prosecution of corruption cases no longer uses conventional ways to pursue perpetrators but changes the paradigm to put forward pursuit of wealth proceeds of corruption. Imprisonment of perpetrators is still required but chasing wealth and impoverishing the accused have more preventive properties.

Referring to the United Nations Convention Against Corruption in 2003 and ratified on April 18, 2006 through Law no. 7 of 2006 on Ratification of the United Nations Convention Against Corruption in 2003 in Indonesia, several laws related to asset confiscation of proceeds of crime were enacted. Legislation among others are as follows:

- Law no. 31 of 1999 as amended by Law no. 20 of 2011 on the Eradication of Corruption
- Law no. 15 of 2002 as amended by Law no. 25 of 2003 on Money Laundering which has been repealed with the enactment of Law no. 8 of 2010.

The hunt for the proceeds of corruption started since investigation by seizing property associated directly or indirectly with corruption and expanded efforts of the imposition of sentences for additional compensation. Implementation of the criminal verdict of additional compensation has not taken precedence on implementation of imprisonment in lieu of criminal verdict additional compensation but is more aimed at authority to seize, auction off property belonging to the convicted for payment of compensation.

International cooperation for purposes of seizure and asset recovery as defined in the United Nations Convention Against Corruption needs to be realized with the countries concerned even though it is not easy to do because of the national interests of each country.

III. CONCLUSION

A. The pattern of tackling corruption in government procurement must be in accordance with and understand the pattern of irregularities in implementation of government procurement. Handling of corruption in government procurement is one of the repressive efforts of law enforcement in order to eradicate corruption that not only aims to provide a deterrent effect and prosecute criminal responsibility of the perpetrators but also aims to maximize efforts to recover losses to the state arising from acts of corruption.

B. Prosecution of corruption cases of government procurement that is proportional and professional demands application of the law of evidence in disclosure of the facts and application of material criminal law, comprehension of interpretation or understanding of the elements of the crime and also the prosecutorial strategy of deprivation of the wealth of the accused.