

## IDEAL RESPONSIBILITY FOR THE PROCUREMENT OF GOVERNMENT GOODS/SERVICES ACCORDING TO THE LEGAL ASPECTS OF STATE ADMINISTRATION

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### **Abstract**

The legal responsibility for implementing government procurement of goods/services carried out by state civil and state administrators should be identified first so that they are included in the responsibility for administrative law, civil law, and criminal law. This is because the legal protection for the responsibility of implementing goods and services procurement has not yet been maximized. Government procurement of goods/services is essentially an effort by service users to obtain or realize the goods/services needed, by using certain methods and processes in order to reach an agreement on price, time, and other agreements based on the values and procedures for the procurement of goods and services in force in the country. the government sector, so that it is in accordance with the state's goal of creating general welfare. Procurement actors must be responsible for their duties and authorities as in the stages in the procurement of government goods/services, accountability in the process of procurement of government goods and services must be carried out by procurement actors involved in the government goods/services procurement process. The legal aspects of the process of procurement of government goods and services in addition to criminal law and civil law, there is also state administrative law. Responsibility is a must for someone to carry out what has been required of him. Meanwhile, according to the law, responsibility is a consequence of the consequences of a person's freedom regarding his actions related to ethics or morals in carrying out an act.

**Keyword: Per tanggung jawaban, Procurement.**

## INTRODUCTION

Legal responsibilities of implementing goods/services procurement government officials carried out by state civil servants and state administrators should be identified first so that they are included in the accountability of administrative law, civil law, and criminal law. This is because the legal protection for the responsibility of implementing goods and services procurement has not yet been maximized.

Government procurement of goods/services is essentially an effort by service users to obtain or realize the goods/services needed, by using certain methods and processes in order to reach an agreement on price, time, and other agreements based on the values and procedures for the procurement of goods and services in force in the country. the government sector, so that it is in accordance with the state's goal of creating general welfare.

Procurement of goods and services for the needs of the people carried out by the government is an obligation of the government, to ensure order and obedience to the law, the government has made regulations and provisions governing the institution providing the procurement of goods and services. One of them is Presidential Regulation Number 4 of 2015 concerning the Fourth Amendment to Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services as later replaced by Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services.<sup>1</sup> Procurement of goods and services by the government is an activity to obtain goods/services by Ministries/Institutions/Regional Work Units/Institutions whose process starts from planning needs until completion of all activities to obtain goods/services and their responsibilities. Regarding the norms in the Presidential Regulation, Dian Puji N. Simatupang stated:

"The provisions in the presidential regulation regarding the procurement of government goods/services tend to be administrative requirements, and cannot be used as legal requirements. This because the norm in a presidential regulation on the implementation of the procurement of government goods / services is the norm elaboration, which provides the opportunity for the state administration to implement in accordance with the circumstances that exist along with motivation (excuse the fact and conclusions) are clear and valid.<sup>2</sup>

"According to John Sogar Simamora, in carrying out government functions, the existence of private legal instruments is very important, one of which is contract law. In contract law related to government functions, there are two types of government contracts, namely procurement contracts and non-procurement contracts, both of which involve state finances. there are expenditures on state

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<sup>1</sup> Pasal 91 ayat (1) Perpres 16 tahun 2018 ketentuan lebih lanjut mengenai a. jenis dan uraian barang/jasa sebagaimana dimaksud dalam Pasal 3; b. pelaku pengadaan sebagaimana dimaksud dalam Pasal 8; c. Agen Pengadaan sebagaimana dimaksud dalam Pasal 14; d. perencanaan pengadaan sebagaimana dimaksud dalam Pasal 18; e. Konsolidasi Pengadaan Barang/Jasa sebagaimana dimaksud dalam Pasal 21; f. persiapan Swakelola sebagaimana dimaksud dalam Pasal 23, dan pelaksanaan Swakelola sebagaimana dimaksud dalam Pasal 47; g. persiapan Pengadaan Barang/Jasa melalui Penyedia sebagaimana dimaksud dalam Pasal 25; h. jenis Kontrak Pengadaan Barang/Jasa sebagaimana dimaksud dalam Pasal 27; i. metode pemilihan Penyedia Barang/Pekerjaan Konstruksi/Jasa Lainnya sebagaimana dimaksud dalam Pasal 38, dan Jasa Konsultansi sebagaimana dimaksud dalam Pasal 41; j. metode evaluasi penawaran Penyedia Barang/Pekerjaan Konstruksi/Jasa Lainnya sebagaimana dimaksud dalam Pasal 39, dan Jasa Konsultansi sebagaimana dimaksud dalam Pasal 42; k. metode penyampaian dokumen penawaran dalam pemilihan Penyedia Barang/Pekerjaan Konstruksi/Jasa Lainnya sebagaimana dimaksud dalam Pasal 40, dan Jasa Konsultansi sebagaimana dimaksud dalam Pasal 43; l. kualifikasi Penyedia sebagaimana dimaksud dalam Pasal 44; m. jadwal pemilihan Penyedia sebagaimana dimaksud dalam Pasal 45; n. dokumen pemilihan Penyedia sebagaimana dimaksud dalam Pasal 46; o. pelaksanaan Pengadaan Barang/Jasa melalui Penyedia sebagaimana dimaksud dalam Pasal 50 sampai dengan Pasal 58; p. Pengadaan Barang/Jasa dalam penanganan keadaan darurat sebagaimana dimaksud dalam Pasal 59; q. pengecualian sebagaimana dimaksud dalam Pasal 61; r. Tender/Seleksi Internasional sebagaimana dimaksud dalam Pasal 63; s. katalog elektronik sebagaimana dimaksud dalam Pasal 72; t. Sumber Daya Manusia Pengadaan Barang/Jasa sebagaimana dimaksud dalam Pasal 74; u. kelembagaan Pengadaan Barang/Jasa sebagaimana dimaksud dalam Pasal 75; v. sanksi sebagaimana dimaksud dalam Pasal 78 sampai dengan Pasal 82; w. Daftar Hitam Nasional sebagaimana dimaksud dalam Pasal 83; x. layanan penyelesaian sengketa kontrak sebagaimana dimaksud dalam Pasal 85; dan y. pengembangan sistem dan kebijakan dalam Pengadaan Barang/Jasa sebagaimana dimaksud dalam Pasal 87, ditetapkan dengan Peraturan Kepala Lembaga paling lama 90 (sembilan puluh) hari terhitung sejak Peraturan Presiden ini diundangkan.

<sup>2</sup> Dian Puji N. Simatupang, *Mitigasi Resiko Hukum Dalam Pengadaan Barang/Jasa Pemerintah*, Makalah Seminar Nasional Strategi Pencegahan Pengadaan Barang/Jasa Pemerintah, (Jakarta: Hotel Best Westem, 29 Oktober 2014), hlm. 3.

finances, while in non-procurement contracts the government receives money. Transparency and accountability are fundamental principles in efforts to protect state finances that must be carried out consistently in procurement contracts to produce goods / services that are proportional to the money spent by the government. So that it can avoid fraudulent practices in the form of *mark-ups* price in the procurement of goods/services and *mark-downs* that occur in non-procurement contracts, such as swaps, will cause state losses due to revenues that are not commensurate with the value of concessions or assets released to investors. Misuse of contracts through corrupt practices by way of conspiracy using contracts as an instrument occurs due to the non-implementation of the principles of transparency and accountability consistently.

Until now our country does not yet have a law that specifically regulates government contracts. With the enactment of Law Number 14 of 2008 concerning Public Information Disclosure, there has been a step forward in implementing the principles of transparency and accountability, including in managing state finances through contract instruments. This law requires public bodies to provide public information about contracts entered into with third parties. So far, the legal instruments that are the basis for contractualization are scattered in various laws and regulations. For example, Law Number 17 of 2003 concerning State Finances and Law Number 1 of 2004 concerning State Treasury.<sup>3</sup>

Furthermore, Yohanes Sogar Simamora said that in the process of procuring goods and services, since the enactment of Presidential Decree No. 80 of 2003, there are still several weaknesses that often make the implementation of the principles of procurement of goods and services not carried out consistently, resulting in any objections to procurement cases can be continued with the investigation process. to be further directed to offenses that lead to criminal acts of corruption, although not entirely true, because in a criminal act of corruption there must be an element of state loss, even if there are deviations that occur, errors may occur in the procedural aspect. The principle of proportionality also needs to be considered in law enforcement in the area of procurement of goods/services by the government so that civil servants are not afraid to carry out their duties, for example when appointed as commitment making officials (PPK).<sup>4</sup>

Yohanes Sogar Simamora in Bambang Sugiri Vini Angeline, Sri Lestariningsih said that in the implementation of national life, the government is required to promote general welfare with social justice for all Indonesian people. To realize this, the government is obliged to provide the people's needs in various forms in the form of goods/services, as well as infrastructure development.

The Presidential Regulation concerning the procurement of government goods/services is intended to provide operational guidelines regarding the regulation of values and procedures for the procurement of government goods/services, so that the procurement of goods/services can provide the maximum *value for money*, namely producing goods/services. the right amount of money spent, measured in terms of quality, amount, time, cost, location and can contribute to increasing the use of domestic products as well as increasing the role of Micro, Small and Medium Enterprises and sustainable development.

The system established in the procurement of goods/services is in the context of accelerating the implementation of state spending in order to accelerate the implementation of development by utilizing information technology as a step to accelerate public services to realize prosperity for all elements of the nation. Procurement of government goods/services must be carried out in a credible manner through good, independent (impartial) arrangements and ensure that economic and social interactions occur between the relevant parties in a fair, transparent, professional and accountable manner. Credible procurement also means preventing unfair business competition among business actors and contains elements of preventing Corruption, Collusion and Corruption (KKN) between government officials and business actors.<sup>5</sup> To overcome this problem, it is necessary to carry out an open process in the procurement of goods/services, one of which the government stipulates Presidential Regulation Number 157 of 2014 concerning the Government Goods/Services Procurement Policy Institute (LKPP).<sup>6</sup>

Transparency and efficiency of time and ease of financial accountability in the procurement of goods and services are efforts made in implementing information leakage in the process of procurement

<sup>3</sup> Yohanes Sogar Simamora, Indonesia Perlu Membuat Hukum Kontrak, dalam website [www.unair.ac.id](http://www.unair.ac.id) (Surabaya: [www.unair.ac.id](http://www.unair.ac.id), Juli 2009), hlm. 1

<sup>4</sup> *Ibid.*, hlm. 1.

<sup>5</sup> Beridiansyah Beridiansyah, Analisis Yuridis Terhadap Pengadaan Barang Dan Jasa Guna Mencegah Tindak Pidana Korupsi, *Integritas*, 3.2 (2017), 79-103., hlm. 85-86.

<sup>6</sup> *Ibid.*, hlm. 87.

of government goods/services, one of which is with *e-Procurement* which is the best approach in preventing irregularities in the procurement of government goods/services.

The formulation of the sanctions contained in Presidential Regulation No. 70 of 2012 adheres to the consequentialist theory and has guaranteed legal certainty in the process of procuring government goods/services, which considers a punishment to be the result of behavior that causes harm, and the perpetrator should be subject to a loss in the form of imposing criminal sanctions.<sup>7</sup>

This system of procurement of goods and services was established to achieve state goals, as stated in the Preamble of the 1945 Constitution, paragraph 2, which states that one of the goals to be achieved at the time of the formation of the Indonesian state was to lead the Indonesian people to achieve a just and prosperous state.<sup>8</sup> Article 33 paragraph (4) of the 1945 Constitution states that the national economy is organized based on economic democracy<sup>9</sup> with the principles of togetherness, efficiency, justice, sustainability, environmental insight, independence, and maintaining a balance of progress and national economic unity.<sup>10</sup> Fahri Hamzah said that the welfare of the people is part of the indicators of the success of the state in maintaining its sovereignty.<sup>11</sup> The 1945 Constitution in Article 1 paragraph (3) states that the State of Indonesia is a state of law. Legal development in the economic field is influenced by globalization, which has had an impact in various fields with conditions between countries without borders (*the ends of the nation state*).<sup>12</sup>

Legal development must be able to anticipate economic life in the global era that is developing rapidly and is expected to support national economic development that does not break away from the economic democratic system. According to Rudolf Stammler, the ideal of law is a construction of thought which is a must to direct the law to the ideals desired by the community and this legal ideal serves as a guide for the achievement of the ideals of the community.<sup>13</sup> According to Radbruch, the ideal of law functions as a constitutive basis for the formation of law, in the sense that without legal ideals all legal rules lose their meaning as law and at the same time serve as a regulatory benchmark for assessing the fairness or injustice of a positive law.<sup>14</sup>

Enforcing the law as one aspect of the application of the law is the function or act of defending the law so that the law is obeyed, run or carried out as it should.<sup>15</sup> The law has an expressive function,

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<sup>7</sup> Bambang Sugiri Vini Angeline, Sri Lestariningsih, *Pertanggungjawaban Pidana Dalam Proses Pengadaan Barang/Jasa Pemerintah Yang Berbasis Sistem E-Procurement*, (Malang : Fakultas Hukum Universitas Brawijaya, 2019), hlm. 21.

<sup>8</sup> Alenia Kedua ini menggambarkan bahwa terbentuknya Negara Indonesia yang merdeka, bersatu, berdaulat, adil dan makmur merupakan hasil dari proses perjuangan yang panjang, baik untuk sampai kepada pintu gerbang itu, maupun untuk selanjutnya mempertahankan, mengisi, dan memberi makna kepada kemerdekaan itu untuk mewujudkan kehidupan kebangsaan yang adil dan makmur berdasarkan Pancasila dan Undang-Undang Dasar Negara. Lihat Jimly Asshiddiqie, *Komentar Atas Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, (Jakarta: Sinar Grafika, 2009), hlm. 4.

<sup>9</sup> Untuk Indonesia yang mewarisi berbagai ketimpangan-ketimpangan struktural, baik dari segi hukum, sosial dan politik, tak terkecuali dari segi ekonomi, maka Pembangunan Nasional haruslah dilakukan melalui suatu perencanaan nasional. Masa depan Indonesia harus didesain dan ditata, strategi pembangunan harus dengan tandas digariskan, sesuai dengan pesan Konstituf, perekonomian harus disusun, sekali lagi tidak dibiarkan tersusun sendiri melalui mekanisme pasar- bebas. Pasar tidak akan mampu mengatasi ketimpangan-ketimpangan struktural. Lihat Bahrullah Akbar, *BUMN dan Kesejahteraan Rakyat*, (Jakarta: Prenanda Media, 2014), hlm. 13.

<sup>10</sup> Lihat Pasal 33 ayat (4) UUD 45

<sup>11</sup> Fahri Hamzah, *Negara BUMN dan Kesejahteraan Rakyat*, Cetakan Pertama, (Jakarta: Yayasan Faham Indonesia, 2007), hlm. 3.

<sup>12</sup> Endang Sutrisno, *Hukum & Globalisasi*, Cetakan Pertama, (Yogyakarta: Genta Press, 2007), hlm. 90

<sup>13</sup> Awaloedin Djamin, *Pokok-Pokok Uraian Tentang Proses Pembinaan Cita Hukum Dan Penerapan Asas-asas Hukum Nasional*, *Majalah Hukum Nasional Edisi Khusus 50 Tahun Pembangunan Nasional No 2*, (Jakarta: Pusat Dokumentasi Hukum Badan Pembinaan Hukum Nasional, 1995), hlm. 23.

<sup>14</sup> Abdulkadir Besar, *Implementasi Cita Hukum Dan Penerapan Asas-asas Hukum Nasional Sejak Lahirnya Orde Baru, Pembinaan Cita Hukum Dan Penerapan Asas-asas Hukum Nasional No.2*, *Majalah Hukum Nasional Edisi Khusus 50 Tahun Pembangunan Nasional*, (Jakarta: Pusat Dokumentasi Hukum Badan Pembinaan Hukum Nasional, 1995), hlm. 27.

<sup>15</sup> Bagir Manan, *Sistem Peradilan Berwibawa*, Cetakan Pertama, (Yogyakarta, UII Press, 2005), hlm. 83.

namely expressing a view of life, cultural values and justice. Good law is law that is in accordance with the law that lives in society (*the living law*).<sup>16</sup>

As a law enforcement system, it involves various subsystems, namely:<sup>17</sup>

- a. Law enforcement institutions.
- b. Resources/law enforcement
- c. Procedures for law enforcement
- d. Infrastructure and means of law enforcement.

The preamble to the 1945 Constitution in relation to the sources of law, has two kinds of positions on the Indonesian legal order, namely being the basis for the preamble to the 1945 Constitution which provides absolute factors for the existence of the Indonesian legal order and secondly entering into it as the highest legal provision.<sup>18</sup>

In an effort to improve people's welfare through national development programs, based on the Financial Notes of the State Revenue and Expenditure Budget of the Republic of Indonesia (APBN) every year. The government budgets costs for capital expenditures and goods expenditure items which will be realized through government goods/services procurement activities.<sup>19</sup>

The stages in the procurement of government goods/services through providers<sup>20</sup> can be described as follows<sup>21</sup> :



Procurement actors must be responsible for their duties and authorities as the stages in the procurement of government goods/services, accountability in the process of procurement of government goods and services must be carried out by procurement actors involved in the process. government procurement of goods/services. The legal aspects of the process of procurement of government goods and services in addition to criminal law and civil law, there is also state administrative law.

<sup>16</sup> Mochtar Kusumaatmadja, Fungsi dan Perkembangan Hukum Dalam Pembangunan Nasional (Dalam Buku Konsep-konsep Hukum Dalam Pembangunan), Edisi Pertama, Cetakan Kesatu, (Bandung: Alumni, 2002), hlm. 10.

<sup>17</sup> *Ibid.*, hlm. 14

<sup>18</sup> Notonagoro, Pancasila Dasar Falsafah Negara I, Cetakan Keempat, (Yogyakarta : Bina Aksara, 1962), hlm. 45.

<sup>19</sup> Departemen Keuangan Republik Indonesia (DEPKEU), Nota Keuangan dan APBN Tahun 2008 Republik Indonesia, (Jakarta: Depkeu, 2007), hlm. 379.

<sup>20</sup> Pasal 3 ayat (3) Perpres 16 Tahun 2018, pelaksanaan pengadaan barang/jasa dilakukan dengan cara a. Swakelola; dan/atau b. Penyedia.

<sup>21</sup> Peraturan pelaksana dari Perpres 16 tahun 2018 terkait Pedoman Pelaksanaan barang/jasa melalui penyedia adalah Peraturan LKPP (Perlem LKPP) Nomor 09 tahun 2018.

Responsibility is a must for someone to carry out what has been required of him.<sup>22</sup> Meanwhile, according to the law, responsibility is a consequence of the consequences of a person's freedom regarding his actions related to ethics or morals in carrying out an act.<sup>23</sup> The Quarterly Point says that accountability must have a basis, namely things that give rise to a legal right for a person to sue another person as well as a matter that gives birth to another person's legal obligation to provide accountability.<sup>24</sup>

When viewed from the perspective of civil law, basic liability is divided into two types, namely error and risk, where *liability without based on fault has the* basic principle that a person must be responsible because he made a mistake because it harms others, and responsibility without error. known (*liability without fault*) known as risk responsibility or absolute responsibility (*strict liability*)<sup>25</sup> where the plaintiff's consumer is no longer required but the defendant's producer is directly responsible for the business risk.

According to Abdulkadir Muhammad, the theory of responsibility in breaking the law (*tort liability*) is divided into several theories, namely:<sup>26</sup>

- a. Liability due to unlawful acts committed intentionally (*intentional tort liability*), the defendant must have committed such an act, thereby harming the plaintiff or knowing that what the defendant did would result in a loss.
- b. Liability due to unlawful acts committed due to negligence (*negligence tort liability*), is based on the concept of fault (*concept of fault*) related to morals and law *intermingled*(*intermingled*).
- c. Absolute responsibility due to unlawful acts without questioning the fault (*strict liability*), is based on his actions either intentionally or unintentionally, meaning that even though it is not his fault he is still responsible for the losses that arise as a result of his actions.

The theory of responsibility or the theory of responsibility if it is associated with criminal law, the actions of the perpetrators who must be accounted for must first be regulated in criminal articles. Criminal law is divided into two theories, namely absolute theory and relative theory. According to the absolute theory, legal sanctions are imposed in retaliation against the perpetrators for committing crimes that cause misery to other people or members of society. The relative theory (*doeltheori*) is based on the following objectives (*doel*) :

1. Deterrence

By imposing a sentence, the perpetrator or convict is expected to be a deterrent and not to repeat his actions (*special prevention*) and the general public knows that if they do the same thing as the convict they will get similar punishment (*general preventie*).

2. Improving the Convict's Personality

Based on the treatment and education provided while serving the sentence, a sense of remorse arises from the convict, so that the convict will not repeat his actions and return to society as a good and useful person.

3. Killing or Making the Convict Powerless To

destroy is to give the death penalty, while making the convict helpless is done by giving a life sentence. Currently, many people do not agree with the death penalty. Their opinion is that only God has the right to take people's lives, these circles demand that the death penalty be abolished.

The purpose of imposing punishment in criminal law is to protect and maintain legal order in order to maintain security and public order as a whole (*for the public as whole*). Criminal law does not only look at the suffering of the victim or the suffering of the convict (*not only for the injured person*), but sees the peace of society as a unified whole.<sup>27</sup>

Procurement of government goods/services is a state expenditure process, so that it is subject to state financial regulations, the definition of state finance as referred to in Article 1 of Law Number 17 of 2003 concerning State Finances, where state finances are all state rights and obligations that can be valued in money, and everything in the form of money or in the form of goods that can be used as the property of the State in connection with the implementation of these rights and obligations.<sup>28</sup>

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<sup>22</sup> Andi Hamzah, Kamus Hukum, (Jakarta : Ghalia Indonesia,2005), hlm. 25.

<sup>23</sup> Soekidjo Notoatmojo, Etika dan Hukum Kesehatan, (Jakarta : Rineka Cipta, 2010), hlm. 10

<sup>24</sup> Titik Triwulan dan Shinta Febrian, Perlindungan Hukum Bagi Pasien, (Jakarta : Prestasi Pustaka, 2010), hlm. 48.

<sup>25</sup> *Ibid.*, hlm. 49.

<sup>26</sup> Abdulkadir Muhammad, Hukum Perusahaan Indonesia, (Bandung : Citra Aditya Bakti, 2010), hlm. 503.

<sup>27</sup> Leden Marpauluing, Asas Teori Praktek Hukum Pidana, (Bandung: Sinar Grafika, 2010), hlm. 4.

<sup>28</sup> Pasal 2 UU Keuangan Negara yang dimaksud dengan keuangan negara adalah a) hak negara untuk memungut pajak, mengeluarkan dan mengedarkan uang, dan melakukan pinjaman; b) kewajiban negara untuk menyelenggarakan tugas layanan umum pemerintahan Negara dan membayar tagihan pihak ketiga; c) penerimaan

In the public sector of regional finance, Arifin P. Soeria Atmadja put forward the concept of autonomy as the transfer of rights, authorities, and obligations in the administration of his own household, bringing implications for the legal status of his finances. In this case, the source of funding originating from the APBN which is allocated to be handed over to the regions, is in the form of balancing funds, general allocation funds, special allocation funds, regional taxes and levies with regional financial status when they have been handed over to the regions. Thus, the management and accountability of finances is left to a separate regulatory mechanism that is separate from the management and accountability of state finances, especially the State Budget. This distinction occurs because the management and accountability of regional finances, in this case the APBD, is subject to regional financial regulations.<sup>29</sup>

Regarding the procurement of goods and services, there are implementing regulations related to the procurement of goods/services, namely the laws and regulations governing the implementation of the procurement of goods/services as well as other laws and regulations related to the procurement of goods/services, both national in nature (Law, Government Regulations and Presidential Decrees) as well as international (international conventions, guidelines, and standards issued by associations/agencies and lending/grant countries).

Management of government procurement of goods/services has an important role in the implementation of national development to improve public services and develop the national and regional economy and has an impact on the efficiency and effectiveness of the implementation of development and to make it happen, the implementation of procurement applies the principles of efficient, effective, transparent, open, competitive, and accountable.

Development is translated into various policies, programs, and projects. Projects are the smallest investment unit that ter from a number of parts or activities that are operational in nature, including the procurement of goods/services, therefore the system and its management process will directly and significantly affect the level of success or failure of development.

The consistent application of good governance principles in the management of development policies, programs and projects, including the management of the procurement of goods/services, is intended to prevent development failures.<sup>30</sup>

Seeing the magnitude of the influence of the government's procurement of goods/services on the performance of state and regional expenditures, by considering the weaknesses in the guidelines for the procurement of government goods/services, the application of good governance in the national procurement system must be carried out. The concrete application of government governance principles in national procurement aims to ensure that national procurement is accountable, transparent, and encourages public participation. The application of the principles of good governance in the procurement system is expected to prevent the practice of corruption, collusion, nepotism, so as to improve the quality of goods and services, as well as encourage the efficiency of the state budget for the Central Government or Regional Governments.<sup>31</sup>

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negara; d) pengeluaran negara; e) penerimaan daerah; f) pengeluaran daerah; g) kekayaan negara/kekayaan daerah yang dikelola sendiri atau oleh pihak lain berupa uang, surat berharga, piutang barang, serta hak-hak lain yang dapat dinilai dengan uang, termasuk kekayaan yang dipisahkan pada perusahaan negara/perusahaan daerah; h) kekayaan pihak lain yang dikuasai oleh pemerintah dalam rangka penyelenggaraan tugas pemerintahan dan/atau kepentingan umum; dan i) kekayaan pihak lain yang diperoleh dengan menggunakan fasilitas yang diberikan pemerintah.

<sup>29</sup> *Ibid.*, hlm. 36

<sup>30</sup> M. Adi Toegarisman, *Pemberantasan Korupsi Dalam Proyek Strategis Nasional*, (Jakarta : Kompas, 2018), hlm. 59. Konsep Good Governance pada Inpres No. 10/2015 menyatakan pembangunan ekonomi jika tidak diawasi selalu membawa dampak pada terbukanya peluang untuk terjadi perbuatan korupsi pada setiap simpul kegiatan pembangunan tersebut. Perbuatan korupsi akan menyebabkan terjadinya kerusakan pada tataran perekonomian mikro maupun perekonomian makro, sebagai berikut: "Pada tataran perekonomian mikro, dampak yang ditimbulkan oleh korupsi ialah: (a) semakin menurunnya kualitas taraf hidup rakyat; (b) semakin sulitnya upaya masyarakat memperoleh pendapatan ekonomi; (c) semakin meningkatnya pola pengeluaran masyarakat; (d) semakin buruknya tingkat kesehatan masyarakat lantaran semakin menurunnya pola pengeluaran konsumsi untuk kesehatan; dan (e) semakin menurunnya kinerja sektor-sektor produksi, distribusi dan industri. Sedangkan pada tataran perekonomian makro, korupsi melahirkan dampak-dampak yang hebat, yakni (a) semakin merosotnya pertumbuhan ekonomi nasional; (b) semakin tingginya tingkat inflasi; (c) semakin rendahnya kinerja investasi nasional; (d) semakin merosotnya nilai tukar mata uang Rupiah; dan (e) semakin rendahnya kinerja perbankan nasional"

<sup>31</sup> *Ibid.*,

The legal aspect of the procurement of government goods/services is contained in the Jurisprudence of the Supreme Court of the Republic of Indonesia through Decision Number 252 K/TUN/2000 dated November 13, 2000 which outlines the legal rule that all State Administrative Decisions issued in the context of creating an agreement or issued in connection with the implementation of the contents of the sound of the agreement, or refers to a provision in the agreement (contract), which became the basis of the legal relationship between the parties, must be "considered fuse (*oplossing*) into the civil law", the jurisprudence followed by Decision other MA, namely:

1. Decision Permanent Jurisprudence of the Supreme Court of the Republic of Indonesia Number 245 K/TUN/1999 dated 30 August 2001.
2. Decision Number 448 K/TUN/2007 dated 22 September 2005
3. Decision Number 111 K/TUN/2008 dated 9 July 2008.
4. Decision Number 189 K/TUN/ 2008 dated 24 September 2008.
5. Decision Number 296 K/TUN/2008 dated 3 December 2008

a contains the legal rule "The act of auction is a series of actions of a civil nature which is not the object of a State Administrative Dispute", so that the State Administrative Court does not have the authority to adjudicate disputes that fall within the realm of civil law or general courts.<sup>32</sup>

Procurement of goods/services carried out by government agencies has the potential to cause state financial losses. Regarding state losses, in Law Number 1 of 2004 concerning the State Treasury, Article 1 number 22 which states that "Losses to the state/region are shortages of money, securities and goods that are real and definite in amount as a result of unlawful acts either intentionally or negligent", in Law Number 15 of 2006 concerning the Supreme Audit Agency, Article 1 point 16, that compensation is an amount of money or goods that can be valued in money that must be returned to the state/region by a person or entity that has committed an act against law, whether intentionally or negligently.

State finance as an understanding has a correlation with the state which is found in legal science, so that in the context of legal science, especially Constitutional Law, State Finance is correlated with state bodies, such as the Government (President and Minister), the House of Representatives (DPR), and the Supreme Audit Agency (BPK). Thus, the relationship between state finances and state agencies is related to the position, duties and authorities as well as responsibilities.<sup>33</sup>

The relationship between state finances and Administrative Law can be found from the process of drafting, stipulating and implementing the APBN and APBD, financial relations between the central government and the central bank, regional governments, foreign governments or institutions, state and regional companies, private companies and public fund management bodies, administration and accountability for state financial management, state budget and regional budget financial reports, government internal control, settlement of state and regional losses, aspects of income and expenditure, central and regional income sources, taxes, user fees up to the power of state financial management, even general principles of management state finances.<sup>34</sup>

This study will discuss the form of accountability for goods/services procurement actors in the laws and regulations governing goods/services, accountability mechanisms for the implementation of goods/services procurement according to administrative, civil, and criminal law related to the principle of legal certainty. Therefore, the title of this Thesis is **"IDEAL RESPONSIBILITY FOR ACTORS FOR PROCUREMENT OF GOODS/SERVICES GOVERNMENT ACCORDING TO THE LEGAL ASPECTS OF STATE ADMINISTRATION."**

The formulation of the problem studied by the author in this thesis is as follows:

1. How do aspects of state administrative law and civil law affect the regulation of government procurement of goods/services?
2. What is the ideal accountability procedure for actors in the procurement of government goods/services in accordance with the principle of legal certainty?

## Research Methods Research Methods

### 1. This research

is included in the form of normative juridical research, namely research that emphasizes the use of legal norms in writing and is supported by the results of interviews with sources and informants.<sup>35</sup>

<sup>32</sup> Bahan Diskusi Pemberi Keterangan Ahli LKPP di Bogor pada tanggal 18 September 2017.

<sup>33</sup> SF Marbun, Hukum Administrasi Negara I, (Yogyakarta : FH UII Press, 2012), hlm. 281.

<sup>34</sup> *Ibid.*, hlm. 282

<sup>35</sup> Dian Puji Simatupang, Modul Perkuliahan Metode Penelitian, (Jakarta: Program Studi Magister Ilmu Hukum Unkris, 2010), hlm. 2.

This study discusses the legal responsibility of implementing government procurement of goods/services in South Tangerang.

## 2. Type of Research This

type of research is exploratory or also called exploratory research, is a research approach that aims to find information about a topic/problem that is not fully understood by a researcher. Exploratory research is a research approach that is used to examine something (that attracts attention) that is not yet known, not understood, or not well recognized. Exploratory research is basic and aims to obtain information, information, data about things that are not yet known. Because it is fundamental, this research is called exploration. Exploratory research is carried out if the researcher has not obtained the initial data so that he does not have an idea at all about the thing to be studied. Exploratory research does not require a specific hypothesis or theory. The researcher only prepared a few questions as a guide to obtain primary data in the form of information, information, as the initial data needed.<sup>36</sup>

## 3. Types of data The

data used are primary data and secondary data. Primary data is data obtained from the source directly which is carried out by interview method, meanwhile, secondary data is data obtained directly through literature searches or from official documents, namely state administrative law books, state financial law books and corruption criminal law. general science and legislation.

## 4. Types of Primary Legal Sources,

### 1. Material

namely legal sources that become binding/legal foundations such as: Law Number 30 of 2014 concerning Government Administration, Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services and court decisions.

### 2. Secondary Legal Materials,

namely materials that provide an explanation of primary legal sources such as materials in the form of books, journals, scientific articles on the procurement of goods and services in government agencies or state institutions, daily newspapers/magazines and other scientific writings such as dissertations as research results. .

### 3. Tertiary Legal Materials Tertiary

legal materials, namely legal materials that provide instructions and explanations of primary and secondary legal materials related to this research, including newspapers and the internet.

## 5. Data Collection Tools

There are four types of data collection methods which include:

- a. Document studies conducted at the Government Goods/Services Procurement Policy Institute and government goods and services procurement agencies.
- b. Interview of the informant, namely with the Head of the Government Goods and Services Procurement Policy Institute, because as the head of the Institution knows the task of formulating policies and regulations for the procurement of government goods/services, providing technical guidance and advocacy related to the implementation of government procurement of goods/services, and facilitating the implementation of expert certification exams for procurement of goods / government services.
- c. Interviews with parties who have been executor of government procurement of goods/services related to the law enforcement process in the government goods/services procurement sector.
- d. Resource persons are conducted to experts who know and understand the procurement of government goods and services.

## 6. Data analysis method

In an effort to be able to answer or solve the problems raised in this research, qualitative data analysis methods are used, because the data obtained are of quality not quantity. .<sup>37</sup>

## 7. Form of Research Results The

form of research results is in accordance with the type of research that is descriptive, namely the form of research results designed by guiding a researcher towards an action, so that with this research method the researcher will be directed to the causes of the emergence of a symptom and then carried out analysis of the symptoms that exist in the process of procuring

<sup>36</sup> Philip Kotler, Manajemen Pemasaran, Jilid I, Edisi kesebelas, (Jakarta : PT Indeks Gramedia, 2006), hlm. 24

<sup>37</sup> *Ibid.*

government goods and services which are then given solutions to overcome the symptoms of adverse phenomena in the process of procuring government goods and services.

## Research Results and Discussion of

### A. Aspects of State Administrative Law and Civil Law Affecting Government Procurement Arrangements

Research on aspects of state administrative law, civil law aspects and criminal law aspects can be carried out through the *statute approach* (legal approach), *case approach* (case approach), *doctrine approach* (doctrinal approach).

The legislative approach to the legal aspects of state administration, civil law and criminal law certainly affects the regulation of government procurement of goods/services. Implementing regulations related to the procurement of goods/services are laws and regulations that regulate the implementation of the procurement of goods/services as well as other laws and regulations related to the procurement of goods/services, both national (UU, PP, and Presidential Regulations) and international (international conventions, guidelines, and standards issued by associations/institutions and lending countries or national legislation that specifically regulates the implementation of the procurement of goods/services currently in effect is Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services .

Regulation of the President's political set legal procurement of goods / services of the government that the procurement of government goods / services have a key role in the implementation of national development for the improvement of public services and the development of national and regional economy; that to realize the Procurement of goods / services, regulations on Procurement Goods/Services that 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; that Presidential Regulation Number 16 of 2018 concerning the Procurement of Government Goods/Services is still lacking and has not accommodated the development of the Government's needs regarding the regulation of the Procurement of Goods/Services.

In addition, there are still several national laws and regulations related to the procurement of goods/services, as follows:

1. Law of the Republic of Indonesia Number 1 of 2004 concerning the State Treasury. The consideration for the enactment of this law is that the administration of state government to realize the goals of the state creates state rights and obligations that need to be managed in a state financial management system. management of state finances as referred to in the 1945 Constitution of the Republic of Indonesia needs to be carried out openly and responsibly for the greatest prosperity of the people, which is manifested in the State Revenue and Expenditure Budget (APBN) and Regional Revenue and Expenditure Budget (APBD). In the context of the management and accountability of state finances, it is necessary to have legal rules of state financial administration that regulate the state treasury. This law is one of the juridical legal bases in the formation of Presidential Regulation 16 of 2018.
2. Law of the Republic of Indonesia Number 20 of 2008 concerning Micro, Small, and Medium Enterprises.

The considerations for the establishment of this law are that a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia must be realized through the development of a national economy based on economic democracy; that in accordance with the mandate of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number XVI/MPR-RI/1998 concerning Economic Politics in the context of Economic Democracy, Micro, Small, and Medium Enterprises need to be empowered as an integral part of the people's economy which has the position, role, and strategic potential for realizing a more balanced, developing, and just national economic structure; that the empowerment of Micro, Small, and Medium Enterprises needs to be carried out comprehensively, optimally, and sustainably through the development of a conducive climate, providing business opportunities, support, protection, and business development as widely as possible, so as to be able to improve the position, role, and potential of Micro, Small and Medium Enterprises, and Medium in realizing economic growth, equitable distribution and increase in people's income, job creation, and poverty alleviation.

3. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

Law Number 5 of 1999 regulates competition between business actors in carrying out production and/or marketing activities of goods/services which are carried out dishonestly or against the law or hinder business competition.

4. Law of the Republic of Indonesia Number 2 of 2017 concerning Construction Services.

The considerations for the enactment of this law are that national development aims to create a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia; that the construction service sector is a community activity to create buildings that function as a support or infrastructure for social and economic activities of the community in order to support the realization of national development goals; that the operation of construction services must ensure order and legal certainty.

5. Law of the Republic of Indonesia Number 33 of 2004 concerning Financial Balance between the Central Government and Regional Governments.

The consideration for the enactment of this law is that the 1945 Constitution of the Republic of Indonesia mandates the implementation of the widest possible autonomy within the framework of the Unitary State of the Republic of Indonesia; that financial relations, public services, utilization of natural resources and other resources between the Central Government and Regional Governments, and between Regional Governments need to be regulated in a fair and harmonious manner; that to support the implementation of regional autonomy through the provision of funding sources based on the authority of the Central Government, Decentralization, Deconcentration, and Co-Administration, it is necessary to regulate the financial balance between the Central Government and Regional Governments in the form of a financial system that is regulated based on the division of powers, duties and responsibilities clear between government structures.

**B. The ideal accountability procedure for actors in the procurement of government goods/services is in accordance with the principle of legal certainty.**

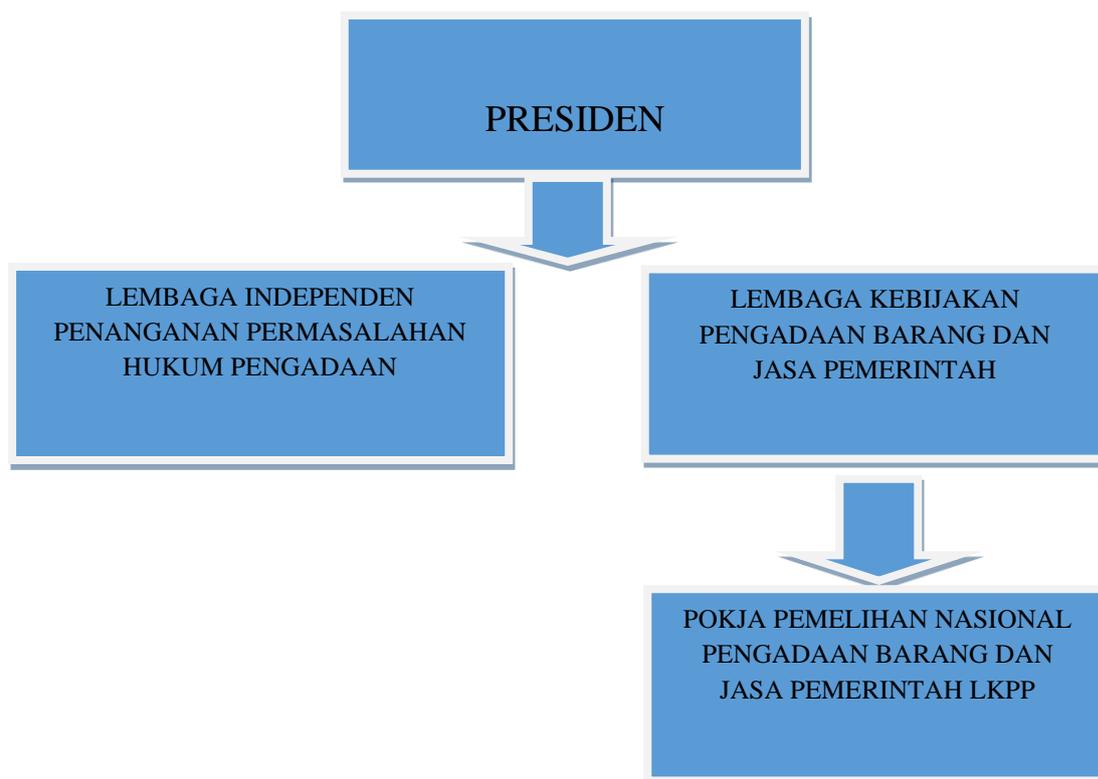
As has been explained that the Government Procurement of Goods/Services (PBJP) is an activity of Procurement of Goods/Services by Ministries/Institutions/Regional Apparatuses which is financed by the APBN/APBD whose process starts from the identification of needs, until the handover of the work. PBJP is closely related to the management of state finances sourced from the APBN/APBD or foreign loans/grants.

In an effort to improve people's welfare through national development programs, based on the Financial Notes of the State Budget of the Republic of Indonesia (APBN) every year. The government budgets costs for capital expenditures and goods expenditures which will be realized through government goods/services procurement activities.

Performance in the management of government procurement of goods/services will affect the effectiveness and efficiency of development implementation. So that it is necessary to implement good government governance in the procurement of government goods/services, in order to be able to get the real price of a procurement process and to improve the quality of goods and services, and to encourage the efficiency of the state budget in the Central Government or Regional Governments, as well as to prevent the practice of corruption, collusion, nepotism in the process. The government's policy of procurement of goods/services aims to achieve the purpose of procurement, where essentially the purpose of government procurement of goods/services is the goal of the state. So that the policy steps that will be taken by the government in the procurement of goods/services must be in line with the objectives of the state, as well as if there are legal problems related to the procurement of government goods/services.

Researchers' findings on accountability for goods and services procurement actors both in HAN, civil and criminal terms can be seen from the legal substance, legal structure and legal culture through improving the quality of the law. Regulations for the procurement of government goods and services can be reviewed from the perspective of legal quality audits in the development of economic law, as stated by Tarsisius Muwardji, namely:

1. Development of Covenant Law in the Era of Regionalization
2. Human Resources Development Legal Sector
3. Reach Enforcement of Regulations
4. Corruption Prevention
5. Acceleration of Dispute Resolution through Peace in Courts Civil
6. Simplification of Law Enforcement Agencies



**EXPLANATION:**

The process of procuring government goods and services by using a series of red threads from chapter II of the literature review, in the concept of a state of law that adheres to the Pancasila state law, the Goods and/Services Procurement Policy Institute needs to undergo reformulation in line with Pancasila values. The Indonesian nation has recognized the Pancasila ideology as the life philosophy of the Indonesian nation. Even though the ideology of class conflict and the irrational and asymmetrical principles regarding legal concepts can still be justified as a mere academic discourse, the values and points of Pancasila must be attached to the soul of the Indonesian nation.

Pancasila always puts forward the best efforts for the welfare of the Indonesian nation and people because it animates the substance of Presidential Regulation Number 16 of 2018 concerning the Procurement of Government Goods and/Services. In addition to animating the substance of Pancasila, it becomes a guideline for the legal restructuring of LKPP and develops a progressive legal culture from the process of procurement of government goods and/services so that every implementer of government procurement of goods and/services always prioritizes the welfare of the nation and the people of Indonesia. Legal certainty for implementing government procurement of goods and/or services lies in transparency, publicity, justice, order, benefit, effectiveness and efficiency. So by using the opinion of Richard Posner, who is an adherent of normative directives who poked that the law should promote efficiency and use analysis *social wealth maximization* to find the theorem synthesis.

In his book entitled "*Frontiers of Legal Theory*", Posner also examines the heuristic and descriptive aspects of economic analysis in law. The heuristic aspect wants to examine the unity between legal doctrine and legal institutions. While the aspect *descriptive* seeks to find economic logic that influences legal doctrine and institutions to result in legal changes.<sup>38</sup>

Based on the theory of legal quality, the implementer of the government's procurement of goods and/or services ideally is as follows: The

1. President as head of government: is the executive who is responsible for making presidential decisions on LKPP;
2. The Government Goods and/Services Procurement Policy Institute is a Government agency tasked with developing, formulating and implementing the Government's Procurement of Goods/Services in Indonesia;

<sup>38</sup> Richard A Posner, *Cost-Benefit Analysis: Legal, Economic and Philosophical Perspectives*: The Journal of Legal Studies, 2000.

3. To prevent intervention from Regional Leaders, Heads of Ministries, State Institutions and for efficiency and effectiveness, the process of procurement of government goods and/services for all election methods is carried out centrally in LKPP with the apparatus of a national election working group for the procurement of government goods and services.
4. Independent Institution for Handling Legal Issues for the Procurement of Government Goods/Services: is a *quadro helix* institution under the President, in this case LKPP as an institution that provides administrative support to the Institution. The institution has the authority to handle government procurement of goods/services legal issues. This institution has investigators who have the authority to examine all irregularities in the procurement process of government goods/services and this institution also has the authority to make decisions, where the results of the decisions can be in the form of administrative aspects or civil aspects. Meanwhile, if the results of the investigator's examination involve aspects of criminal law, the settlement remains in the Corruption Court or the General Court.

In the *Quadro helix system*, the four elements must synergize, for implementation, the procurement of government goods and / services must be regulated through legislation at the level of the law and to maintain efficiency and effectiveness, for implementation instructions, it is sufficient to delegate in the form of LKPP regulations, it does not have to go through PP and Presidential Regulation. In the process of procurement of government goods and/services, the perpetrators of the procurement of goods and/services involved in the process can be held accountable both from state administrative law, civil law and criminal law. If there is a violation of state administrative law or civil law, it can be resolved through a permanent and internal dispute resolution institution and the decision is *final and binding*, except for criminal cases.

In relation to the theories and their implementation mentioned above, the implementers of the government's procurement of goods and services must be held accountable as a form of legal certainty in the process of procuring government goods and services. The concept of legal responsibility is closely related to the concept of rights and obligations. The concept of rights is a concept that emphasizes the notion of rights in pairs with the notion of obligations. The general opinion says that the rights of one person are always correlated with the obligations of others.<sup>39</sup>

A concept related to the concept of legal obligation is the concept of legal responsibility. That someone is legally responsible for certain actions or that someone is legally responsible, meaning that he is responsible for a sanction if his actions are contrary to the applicable regulations.<sup>40</sup>

The difference between the author's research and the previous author is that the object of research by other authors only concerns contracts for the procurement of goods and services, while the author's research is not on contracts for the procurement of government goods and services, but on legal responsibility for implementing government procurement of goods/services in Indonesia.

This study will discuss the form of accountability for the perpetrators of the procurement of goods/services in the laws and regulations governing goods/services, the accountability mechanism for the implementation of the procurement of goods/services according to administrative, civil, and criminal law implemented in 2015-2018 which is associated with the principle of legal certainty.

Most of the Constitutional and State Administration Laws place the norm of criminal sanctions at the *primum remedium*. So what is being targeted is more mistakes, not the crime itself. Quoting Herie Purwanto's article, Doctoral Candidate for Legal Studies, who was then Head of Criminal Investigation Unit at the Magelang Police in 2015, which was published in *Suara Merdeka Daily*, "If every mistake is finally justified as a criminal act, in essence we will be far from a sense of justice".

Finally, the application of criminal law sanctions does not always solve the problem because it turns out that with criminal sanctions there is no restoration of justice damaged by a criminal act. Therefore, the concept of restorative justice needs to be considered in restoring justice to a criminal act. This includes legal handling in the area of government procurement of goods/services or more broadly in the area of state financial management.

Some conclusions can be drawn from the author's thoughts from this article, namely:

1. Laws related to the Management of State Finances still have a strong sense of criminality or place criminal sanctions on the *primum remedium*, even though in fact the criminal sanctions are the *ultimum remedium*.
2. The elements that make up the State Loss are a real and definite lack of money, securities, and goods as a result of unlawful acts, whether intentional or unlawful acts due to negligence.

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<sup>39</sup> Youky Surinda, Some Legal Theories About Liability, <https://yuokysurinda.wordpress.com/2018/02/24/some-theory-law-about-responsibility/>, downloaded at 16:40 WIB, on January 12, 2020.

<sup>40</sup> *Ibid.*

3. Lack of money, securities, and goods that are real and definite in number but not as a result of unlawful acts have not fulfilled the State Loss clause.
4. State losses are the cause, while state financial losses are consequences. Every state financial loss must be a state loss, but every state loss does not necessarily cause state financial losses. So far, efforts have been made to save state finances. As a last resort to save state finances is an effort to replace state finances.
5. State losses due to negligence resulting in state financial losses are subject to sanctions for replacing state finances.
6. State losses due to intentional sanctions are subject to criminal sanctions as well as sanctions for replacing state finances in the event of state financial losses.
7. To ensure the achievement of the objectives of efficiency and effectiveness of development implementation, the enforcement of criminal law norms in the area of government procurement of goods/services is more ideally using the *ultimum remedium* legal norm.

This was conveyed as the author's endeavor to open a positive discussion towards the ideal conception of law enforcement in the area of state financial management, especially the management of the procurement of goods/services.

## CLOSING

### A. Conclusion

1. Aspects of state administrative law and civil law are merged in the stages of government procurement of goods and/or services. thus forming a unique and special legal aspect. With its uniqueness and specificity, the handling of problems that occur in the process is also special. The juridical basis for the formation of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services is the State Treasury Law and Government Administration Law. As for the construction sector, there is Law No. 2 of 2017 which places a legal relationship between the parties in a civil relationship, unless otherwise stated by the Law, administrative law provisions apply. From this regulatory aspect, it can be stated that the procurement of government goods/services applies civil and administrative laws simultaneously in every stage of the procurement.
2. The process of procuring government goods and services with the concept of a state of law that adheres to the state of Pancasila law, the Institute for the Procurement of Goods and/Services Policy needs to undergo reformulation in line with the values of Pancasila. The Indonesian nation has recognized the Pancasila ideology as the life philosophy of the Indonesian nation. Pancasila always puts forward the best efforts for the welfare of the Indonesian nation and people because it animates the substance of Presidential Regulation Number 16 of 2018 concerning the Procurement of Government Goods and/Services. In addition to animating the substance of Pancasila, it becomes a guideline for the legal restructuring of LKPP and develops a progressive legal culture from the process of procurement of government goods and/services so that every implementer of government procurement of goods and/services always prioritizes.

### B. Suggestion

1. It is recommended that the government establish a centralized mechanism for the procurement of government goods and/or services for each selection method. In addition, an agency for handling legal issues regarding the procurement of government goods and/or services was formed.
2. It is recommended that the government and the House of Representatives form a Law on the Procurement of Government Goods and/Services so that the Perpres is increased in degree.

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