



Government Responsibility for Goods and Services Procurement Contracts Post-Application of the Presidential Decree 12/2020

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Abstract

The enactment of Presidential Decree 12/2020 concerning the Determination of Non-Natural Disasters the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster has an impact on the termination of procurement contracts by the government. During a pandemic, it is often encountered that the Government considers itself in a state of force majeure, so that it is free from its obligations in fulfilling its contracts. This is certainly very detrimental to the contractor. Therefore, there is a need for research related to the responsibilities of the government that are bound in the contract for the procurement of goods and services after the enactment of Presidential Decree 12/2020. Presidential Decree 12/2020 does not automatically abolish the government's responsibility which is bound in the contract for the procurement of goods and services. If the Covid-19 pandemic poses a permanent obstacle to the government from carrying out its achievements (absolute force majeure), then the government can apply for a termination of the implementation of the contract to the provider. Termination of the contract may be accompanied by the provision of compensation to the provider in the form and value agreed upon by the parties. In the event that the force majeure that occurs only creates a temporary obstacle to the fulfillment of achievements (relative force majeure), the government remains responsible for fulfilling its achievements.

Keywords: *Government Responsibility; Post Contractual E-Procurement; Force Majeure; Presidential Decree 12/2020*

Introduction

The determination of the Corona Virus Disease 2019 (Covid-19) as a global pandemic by the World Health Organization (WHO) has caused global instability in countries in the world.¹ Indonesia is

¹ John F. Sherman, 'Irresponsible Exit: Exercising Force Majeure Provisions in Procurement Contracts', *Business and Human Rights Journal*, 6.1 (2021), 127–34 <<https://doi.org/10.1017/bhj.2020.27>>. h.1.

no exception, which then the government issued Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as National Disasters (Keppres 12/2020). After the ratification of Presidential Decree 12/2020, various polemics and interpretations emerged, especially among business people.² There is an opinion that Presidential Decree 12/2020 is the basis for the implementation of force majeure on business contracts, including among others, contracts for the procurement of goods and services made by the government. As a consequence, debtors may immediately fail to fulfill their obligations to creditors on the grounds that a force majeure has occurred in the form of the Covid-19 pandemic.³

The enactment of Presidential Decree 12/2020 has an impact on the termination of the procurement contract by the government. This is certainly very detrimental to the contractor. Given that it is not uncommon in this condition the contractor has carried out his obligations as in the contract, but it is not followed by the government's obligation to make payments. The government considers itself in a state of force majeure, so it is free from its obligations. In addition, the act of terminating⁴ This contract is also contrary to the principle of the contract, namely the contract cannot be withdrawn other than by agreement of both parties, or for reasons which are stated to be sufficient by law.⁵

The enactment of Presidential Decree 12/2020 does not necessarily become the basis for the occurrence of force majeure due to the Covid-19 pandemic, thus eliminating the responsibility of the party experiencing it - in this case the government - but the parties need to research first, whether the force majeure that has occurred caused by Covid-19 on the implementation of the contract for the procurement of goods/services is permanent (absolute) or temporary (relative).

Therefore, an article on this issue is important in order to answer the provisions of Presidential Decree 12/2020 which is used as a force majeure argument and also to analyze the government's responsibilities that are bound in the contract for the procurement of goods and services after the entry into force of Presidential Decree 12/2020. This is considered important to ensure legal protection for contracting parties in the future.

Discussion

The contract for the procurement of goods and services is regulated in Presidential Regulation 12/2021 and Presidential Regulation 16/2018 concerning Government Procurement of Goods/Services. Article 1 number 44 of Presidential Regulation 12/2021 defines a contract for the procurement of goods and services as a written agreement between the budget user (PA) / budget user power (KPA) / commitment making official (PPK) and the provider or implementer of swakelola. Procurement of goods and services through providers is a way of obtaining goods and services provided by business actors (Article 26 of Presidential Regulation 12/2021).

In the fulfillment of a contract, rights and obligations apply to the parties at each stage of the contract, both at the pre-contract stage, contract implementation, and in the dissolution of the contract

² Moh. Mahfud MD, "Bencana Covid-19 dan Pembatalan Kontrak dalam Bisnis", Pidato, Webinar Perkembangan, Problematik, dan Implikasi Force Majeure Akibat Covid-19 bagi Dunia Bisnis, diselenggarakan oleh Asosiasi Pengajar Hukum Keperdataan (APHK), 22 April 2020.

³ Muhammad Teguh Pangestu, Covid-19 sebagai Alasan Force Majeure dalam Perjanjian dan Implikasinya terhadap Perjanjian, <https://law.uii.ac.id/en/covid-19-sebagai-alasan-force-majeure-dalam-perjanjian-dan-implikasinya-terhadap-perjanjian/>, h.1

⁴ Anton Cahyono, Ninis Nugraheni, "The Liability of Unilateral Termination by Government on Goods and Service Procurement Contract", *Hang Tuah Law Journal*, Vol.2, Issue. 1, 2018, h.18.

⁵ Yohanes Sogar Simamora, *Hukum Perjanjian (Prinsip Hukum Kontrak Pengadaan Barang dan Jasa oleh Pemerintah)*, LaksBang PRESSindo, Yogyakarta, 2009.

(post-contract). Therefore, the principles of contract law apply, namely the universal principles of a contract, namely the principle of consensualism, the principle of legal certainty, the principle of personality, the principle of freedom of contract and the principle of good faith. In addition to these principles, the contract for the procurement of goods and services must also comply with the principles of transparency and the principle of proportionality.

The principle of transparency and proportionality in the contract for the procurement of goods and services is used as a protection mechanism for the parties. The principle of transparency applies as an effort to exercise control over the formation and execution of contracts and at the same time serves as protection.⁶ For suppliers, this principle provides protection from discrimination at the pre-contract stage, and provides protection to state finances to prevent collusive practices. Furthermore, in the implementation of the contract, the parties must have the appropriateness of sharing the burden of obligations or can be considered to have obligations that are proportional to each other.⁷

The issuance of Presidential Decree 12/2020 is a follow-up to the Covid-19 pandemic that hit Indonesia, because the existence of a pandemic is considered to have great potential to cause force majeure on contracts held by the government, especially contracts for the procurement of goods and services. So that the issuance of Presidential Decree 12/2020 becomes relevant to be used as the basis for the enforcement of the force majeure clause in the Covid-19 pandemic situation.⁸ However, the content of Presidential Decree 12/2020 does not regulate the responsibilities of parties in contracts who experience force majeure due to Covid-19, but indirectly, opens the possibility of force majeure in the implementation of contracts, especially contracts for the procurement of goods and services in Indonesia.

Please note that force majeure is divided into two, namely force majeure is permanent (absolute), and force majeure is temporary (relative).⁹ In the event that Covid-19 causes the government to experience permanent obstacles or absolute force majeure, the government is released from the responsibility to fulfill achievements. If the force majeure experienced by the government only provides a temporary (relative) obstacle to the fulfillment of achievements, then the government still has the responsibility to fulfill its achievements when the obstacle ends. On the other hand, if the existence of the Covid-19 pandemic does not pose an obstacle to the implementation of the contract for the procurement of goods/services, then the force majeure argument cannot be used and the government still has full responsibility to fulfill its achievements.

Based on the explanation above, it can be said that what is meant by force majeure in the contract for the procurement of goods and services is casuistic in nature and cannot be generalized, unless it has been stipulated in detail in the contract. Reviewing the government's efforts in handling Covid-19 such as the policy of Large-Scale Social Restrictions (PSBB) to the Implementation of Micro-scale Community Activity Restrictions (PPKM), tightening health protocols in public services, developing Covid-19 detection tools (such as Genose) and moreover, the existence of Vaccine development and vaccination programs are carried out on a massive scale, showing that the pandemic is not permanent. It should be

⁶ Yohanes Sogar Simamora, *Hukum Kontrak (Kontrak Pengadaan Barang dan Jasa Pemerintah di Indonesia)*, LaksBang Justitia, Surabaya, 2013.

⁷ Abdul Rahman, Annisa Khusnur Rosyida, and Nur Afifah Aminuddin, 'Principle of Proportionality as a Reflection of the Theory of Justice and Its Application by Judges in the Resolution of Business Contract Disputes', *DE LEGA LATA: Jurnal Ilmu Hukum*, 7.1 (2022), 163–69 <<https://doi.org/10.30596/dll.v7i1.7816>>. diakses pada 16 April 2022. Baca pula Agus Yudha Hernoko, *Asas Proporsionalitas Dalam Kontrak Komersial*, Laksbang Mediatama, Yogyakarta, 2008. Bertens, *Pengantar Etika Bisnis*, Kanisiun, Yogyakarta, 2000.

⁸ Ninis Nugraheni, dkk., "Public Procurement Contract For Goods And Services Following The Presidential Decree Number 12 Of 2020 On The Stipulation Of The Coronavirus Disease (Covid-19) Pandemic As A National Disaster", *Padjadjaran Jurnal Ilmu Hukum*, Vol. 7, No. 2, June, 2020, h. 241-242.

⁹ John F. Sherman, 'Irresponsible Exit: Exercising Force Majeure Provisions in Procurement Contracts', *Business and Human Rights Journal*, 6.1 (2021), 127–34 <<https://doi.org/10.1017/bhj.2020.27>>. Diakses pada 01 April 2022

noted that not all government sectors experience permanent obstacles in carrying out their operations. There are several sectors that actually experienced an increase during the Covid-19 pandemic, such as the medical equipment business sector. Therefore, based on the description above, the Covid-19 pandemic can be categorized into relative force majeure.¹⁰

In the event that the government experiences force majeure, then based on Article 1244 BW, the government is obliged to prove that it has an inability to carry out the achievements as specified in the BW. It is necessary to assess the relationship between force majeure and the government's inability to fulfill its achievements. Because it may happen that the government's inability to carry out achievements is not directly caused by force majeure, but due to technical factors or other negligence.¹¹

When the government is able to prove that it has experienced force majeure, then the provisions of Article 1245 BW apply, namely the debtor is freed from the responsibility to pay compensation and interest. On the other hand, if the government is unable to prove these things, the consequence is that the government is deemed to have defaulted (negligence) on the contract for the procurement of goods/services, and therefore the provider, as the aggrieved party, has the right to claim compensation.

In the event of force majeure, Article 55 of Presidential Regulation 16/2018 gives the parties the option to postpone or stop the implementation of the contract. If the implementation of the contract is continued, then the parties can make changes to the contract. Parties experiencing force majeure can apply for an extension of time to complete the contract and the extension of time can be granted beyond the fiscal year. The technical implementation of the contract due to force majeure is left to the parties and regulated in the contract.

The same thing is also regulated in Deputy I Decree No. 3/2018, part A concerning Standards for Post-Qualification Tender Selection for Goods, Chapter XI General Conditions of Contract point 34 that provides follow-up in the form of termination of contract execution. Termination of the performance of this contract may be: (a) temporary termination until the force majeure ends; or (b) permanent if due to force majeure it is not possible to continue/complete the work. Termination of the contract due to force majeure is stated in writing by the Contract Signing Officer accompanied by the reasons for the termination of work. The termination of the implementation of the above contract is carried out taking into account the effectiveness of the work and the budget year.

In the procurement of construction services as regulated in the Regulation of the Minister of Public Works and Public Housing of the Republic of Indonesia Number 14 of 2020 concerning Standards and Guidelines for Procurement of Construction Services through Providers (Permen PUPR 14/2020) the same thing is also regulated regarding termination of contracts due to force majeure. Article 119 states that the termination of the contract due to force majeure must be based on the agreement of the parties. Termination of the contract can be temporary or permanent. If a temporary contract termination is carried out, compensation can be given in the form of an extension of the contract period and/or reasonable compensation for real losses. In its implementation, the consequences of the temporary termination of the contract for the provider are:¹²

- a. The provider has the right to get payment for the work that has been done and the user (government) must make payment for the goods/services he receives; and

¹⁰ Kharisma, Dona Budi, "Pandemi Covid-19 Apakah Force Majeure?", Jurnal RechtsVinding Online, tanggal 08 Juli 2020, h. 3.

¹¹ Sahrudin, dkk., "Tanggung Jawab atas Risiko Musnahnya Objek Pengadaan Barang/Jasa sebelum Serah Terima Pekerjaan sebagai Akibat dari Terjadinya Force Majeure", Jurnal Risalah Kenotariatan, Vol. 1 No. 2, Desember 2020, h. 106.

¹² Dimas Tegar Paliling, "Perlindungan Hukum bagi Penyedia atas Penghentian Kontrak Pengadaan Barang dan Jasa", Jurnal Hukum Volkgeist, Vol. 2 No. 1, Desember 2017, h. 20.

- b. The Provider is entitled to financial compensation, at the same time the User must provide financial compensation for late payments;
- c. The inclusion of a contract amendment clause to determine the period until when the contract is terminated and the payment mechanism.

Furthermore, if the parties agree that the contract is terminated permanently, then the contract termination is enforced. The provisions of Article 120 of the PUPR Ministerial Regulation 14/2020 emphasized that the termination of the contract carried out by the parties must be based on the completion of the rights and obligations of the parties. From the sound of the article, it can be interpreted that the termination of the agreement does not eliminate the obligations of the parties who are still indebted to the other party before the agreement is terminated, so that even though the parties agree to terminate the agreement due to force majeure, the parties are still obliged to settle all obligations that have not been completed to the other parties arising under the agreement. In other words, the provisions of the agreement remain in effect until the achievements that are still owed by the parties are fulfilled.

In the Joint Circular Letter of the Minister of Home Affairs and the Head of the Government Goods/Services Procurement Policy Institute Number 119/3039/SJ and Number 11 of 2020 concerning the Follow-Up on the Contract for the Procurement of Goods/Services to Adjustment of the 2020 Regional Revenue and Expenditure Budget (APBD) as an Impact of the Circumstances Public Health Emergency as a Covid-19 National Disaster, the government conveys in point 3 that for the procurement of goods/services for which the contract signing has been carried out, the regional government carries out policies based on Article 55 of Presidential Regulation 16/2018, including:

- a. For work that is included in the priority program according to the APBD in 2020, especially to ensure the continuity of the fulfillment of basic public services which cannot be delayed, the contract will continue until all work is completed and payments are charged to the 2020 or 2021 budget;
- b. Optimizing contracts by adjusting the scope of work to the available budget in 2020;
- c. Termination of the contract permanently for work that can be delayed completion; and
- d. Temporary termination of contracts for work that can be delayed in completion.

Looking at the descriptions above, the laws and regulations, especially those that regulate the procurement of goods and services, have actually provided sufficient options to accommodate the interests of the contracting parties in the event of force majeure. determine the follow-up. The thing to note is that the parties must be careful in assessing an event as force majeure, either absolute or relative.

Negotiation as one of the main alternatives for dispute resolution is a means for the parties to discuss the settlement without the involvement of a third party mediator who is not authorized to make a decision (mediation), as well as a third party decision maker (arbitration and litigation). For this reason, in order for dispute resolution through negotiations to run effectively, it is required:

- a. The parties are willing to negotiate voluntarily based on willingness;
- b. The parties are ready to negotiate (preparedness);
- c. Have the authority to make decisions (authoritative);
- d. Have a relatively balanced power so as to create interdependence (relatively equal bargaining power);
- e. Have the will to solve problems (willingness to settle).¹³

¹³ M. Zaidun, Mekanisme Alternatif Penyelesaian Sengketa (MAPS)", Workshop of Marketing Law & Management for Law Consultant and Entrepreneur, held in cooperation with Directorate General of PDN of Departement of Marketing and

The current doctrine of contract law stipulates that a person must be held responsible for the harm caused to the other party, if he terminates the negotiation without a just cause. This doctrine is in line with the concept contained in the Nieuw Burgerlijk Wetboek (NBW) which states three conditions related to the termination of negotiations. First, the contracting parties are free to terminate negotiations without paying any compensation as a consequence. Second, based on the principle of propriety and fairness, one party is allowed to stop negotiations by paying compensation to the other party. Third, based on the principle of propriety and fairness, one party no longer has the right to stop negotiations and when that party violates this rule, the other party has the right to demand certain expenses and interest.¹⁴

The renegotiation step can be more easily achieved if the parties prioritize common interest based. The good faith and willingness of the parties to renegotiate with the principle of give and take to share risks and responsibilities in solving problems is the first step that needs to be instilled in this process. If in this process there is no bright spot in renewing the contract, it will lead to a dispute which can be resolved through court or arbitration.¹⁵ In the event that it is resolved through arbitration, there must be a written agreement between the parties which is stated in the arbitration clause or arbitration agreement. The judge or arbitrator through his decision will assess the reasons for the occurrence of a force majeure situation in relation to the existence of the contract by stipulating the rights and obligations of the parties.¹⁶

Submission of a force majeure claim is highly dependent on several factors, including the type of agreement and the character of the business actor. Therefore, the claims for implementing force majeure from one case to another may differ (case by case basis). Please note that there are several considerations in filing a force majeure claim, including:¹⁷

- a. Claims must be submitted in good faith. Parties claiming force majeure must in good faith try to do things that are considered appropriate and reasonable to continue to carry out their obligations or at least make efforts to mitigate risks that result in non-fulfillment of obligations under the agreement.
- b. Claims are based on proper legal references. The party submitting a claim must first examine whether a disaster, pandemic or government action that imposes certain rules is included in the scope of force majeure accommodated in the agreement. If the force majeure claim is based on a government action, then the claiming party is obliged to prove that the government action has a real impact on its business activities/activities.
- c. Prioritize settlement by deliberation and remain subject to the dispute resolution mechanism regulated in the agreement. In conducting negotiations, the parties must as much as possible prioritize a peaceful settlement and avoid settlement through litigation.
- d. Consult with legal practitioners or consultants about legal options that can be done. Of course, the implementation of the agreement is not only related to the business aspect, but also the legal aspect. Therefore, it is important to consult with legal practitioners/consultants who are believed to be able to provide legal options that suit the conditions of the parties.

Industrial Affairs, east java Regional Office, together with Zaiden & Partners Law Firm, Hotel Sahid, Surabaya, November 18 -December 10, 1998. h. 7.

¹⁴ Yohanes Sogar Simamora, Lock.Cit.

¹⁵ Patrick Leonard, Hayley O'Donnell, 'Arbitration in Derivatives Contracts', (2022), 39, Journal of International Arbitration, Issue 1, pp. 61-78, <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/39.1/JOIA2022003>, diakses pada 01 April 2022

¹⁶ Basuki Rekso Wibowo, "Bencana Nasional Covid-19 sebagai Alasan Force Majeur terkait Eksistensi dan Pelaksanaan Kontrak Bisnis", <https://wartapenilai.id/bencana-nasional-covid-19-sebagai-alasan-force-majeur-terkait-eksistensi-dan-pelaksanaan-kontrak-bisnis>, diakses 12 Juni 2021

¹⁷ Putra PM Siregar dan Ajeng Hanifa Zahra, "Bencana Nasional Penyebaran COVID-19 sebagai Alasan Force Majeure, Apakah Bisa?", <https://www.djkn.kemenkeu.go.id/artikel/baca/13037/Bencana-Nasional-Penyebaran-COVID-19-sebagai-Alasan-Force-Majeure-Apakah-Bisa.html>, diakses 12 Juni 2021.

Departing from the arguments above, the mechanism that must be taken by the contracting parties in following up on force majeure conditions is to renegotiate or renegotiate to make adjustments, in order to determine the follow-up to the implementation of the contract which can be in the form of:

- a. suspend/stop the execution of the contract temporarily or terminate it permanently (termination of the contract);
- b. termination of the contract may be accompanied by the provision of compensation in the form and amount of which is left to the agreement of the parties;
- c. termination of the contract must be based on the completion of the rights and obligations of the parties.

After understanding the things as described above, the government experiencing force majeure can use follow-up alternatives as described above in accordance with the obstacles experienced in each contract for the procurement of goods/services and based on mutual agreement between the parties. contracted.

Conclusion

It can be concluded that the enactment of Presidential Decree 12/2020 does not automatically eliminate the government's responsibility which is bound in the contract for the procurement of goods and services. If the Covid-19 pandemic poses a permanent obstacle to the government from carrying out its achievements (absolute force majeure), then the government can apply for a termination of the implementation of the contract to the provider. Termination of the contract may be accompanied by the provision of compensation to the provider in the form and value agreed upon by the parties. In the event that the force majeure that occurs only causes temporary obstacles to the fulfillment of achievements (relative force majeure), the government remains responsible for fulfilling its achievements. As a follow-up, the government renegotiated with the provider to propose a delay or extension of time to the provider until the government can fulfill its obligations, accompanied by adjustments (change of contract). Delays by the government that result in losses to the provider must be accompanied by compensation for the loss suffered by the provider. However, if the Covid-19 pandemic does not affect the implementation of the ongoing goods/service procurement contract, then the government still has full responsibility to fulfill its achievements and the government is obliged to bear the risk in the event of a violation of its obligations.

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