

Insynchronization Regulations of Construction Services and Public Procurement

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Abstract: Insynchronization of regulations between Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services with Law Number 2 of 2017 concerning Construction Services specifically relating to (1) Requirements for selection of providers especially regarding (a) obligations of work competency certificates; (b) limits on the ability to carry out work at the same time and business qualifications and (c) market segmentation of construction services; (2) Building failure especially regarding (a) building failure definition; (b) the period of time, failure of the building's liability and the authority to sue for crime; (3) The role of community participation; and (4) Dispute resolution. Insynchronization of these regulations results in legal uncertainty for stakeholders to carry out their duties so that they will have a negative impact on national procurement so that it can hamper the country's duty to provide services to its citizens. This research is a normative juridical research that is descriptive analysis by conducting regulatory synchronization on procurement of construction in Indonesia. The data used in this study are secondary data in the form of secondary legal materials. The method of data collection is done through library research. The data is analyzed qualitatively using a regulatory approach through the principles and principles of legislation in Indonesia. The principle of legislation used to anticipate the synchronization of regulations is through a combination of the superior lex principles of *legi inferior derogat* and *lex specialis derogat legi generalis*. Through these two principles, the provision of construction in Indonesia can be carried out in accordance with the objectives of Law Number 2 Year 2017 concerning Construction Services and Presidential Regulation 16 of 2018. Thus, Law Number 2 Year 2017 concerning Construction Services should be carried out with an amendment so that provisions regarding the procurement of construction using state / regional finance can be synchronized with the provisions of Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services.

Keywords: construction services, public procurement, synchronization, regulatory principles, procurement of construction

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I. INTRODUCTION

One of the tasks of the state in serving citizens is the provision of good infrastructure to citizens as stated in the Opening of the Indonesian Constitution at the 4th paragraph. The provision of infrastructure by the state is carried out through the mechanism of procurement of construction where all or part of the budget uses state finances and / or state finances. Therefore, the procurement of construction which all or part of the use is subject to public legislation in particular regulations relating to state finance and / or state finance and procurement using state finance and / or state finances.

On the one hand, any procurement that uses state finance and / or state finance is subject to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services and other laws and regulations. On the other hand, Law Number 2 of 2017 concerning Construction Services also regulates aspects of the procurement of construction services. Therefore, the procurement of construction which all or part of the budget uses state finances and / or state finance is subject to Law Number 2 of 2017 concerning Construction Services and Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods / Services. It is not a problem if there is a synchronization between Law Number 2 Year 2017 concerning Construction Services and Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services, but it becomes a problem if there are some things that are insynchronized between Presidential Regulation Number 16 Year 2018 concerning Procurement Government Goods / Services with Law Number 2 of 2017 concerning Construction Services.

In this case, there is an insynchronization of regulations between Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services with Law Number 2 Year 2017 concerning Construction Services specifically relating to (1) Requirements for selection of providers especially regarding (a) obligations of work competency certificates; (b) limits on the ability to carry out work at the same time and business qualifications and (c) market segmentation of construction services; (2) Building failure especially regarding (a) building failure definition; (b) the period of time, failure of the building's liability and the authority to sue for crime; (3) The role of community participation; and (4) Dispute resolution. Insynchronization of these regulations results in legal uncertainty for stakeholders to carry out their duties so that they will have a negative impact on national procurement so that it can hamper the country's duty to provide services to its citizens.

If regulatory synchronization only occurs in Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services with Law Number 2 of 2017 concerning Construction Services, the synchronization of these regulations can be resolved through the principles of legislation such as effective, efficient, open, transparent, fair and accountable. However, the synchronization of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services with Law Number 2 of 2017 concerning Construction Services is also related to other laws and regulations such as legislation related to state finance. Therefore, this study focuses on the discussion of the identification of insynchronization between Law Number 2 of 2017 concerning Construction Services and Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services along with other related regulations and seeking solutions to the insynchronization of these laws and regulations.

II. RESEARCH METHOD

This research is a normative juridical study because it discusses the legal norms of procurement of construction in various laws and regulations. This research is descriptive analysis by exposure to the regulatory synchronization of the procurement of construction in Indonesia and subsequently analyzed based on the principles and principles of legislation in Indonesia. The data used in this study are secondary data in the form of secondary legal materials such as Law Number 2 of 2017 concerning Construction Services, Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods / Services and other regulations. The method of data collection is done through library research. The data is analyzed qualitatively using a regulatory approach through the principles and principles of legislation in Indonesia.

III. FINDING AND DISCUSSION

3.1. Insinkronization Regulations of Construction Services with Construction Procurement Regulations

In 2017, the Joint Representative Council of the President of Indonesia ratifies Law Number 2 of 2017 concerning Construction Services. Law No. 2 of 2017 concerning Construction Services is motivated by the fact that the construction service sector is a community activity to realize a building that functions as a support or infrastructure for social economic activities to support the realization of national development goals. Therefore, the implementation of construction services must ensure order and legal certainty. However, Law Number 18 of 1999 concerning Construction Services has not been able to meet the demands of good governance needs and the dynamics of the development of the implementation of construction services. Then in 2018, the President of Indonesia signed Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services, which was the background of the dilator that the procurement of Government Goods / Services has an important role in the implementation of national development to improve public services and develop national and regional economies. However, Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods / Services has been amended several times, most recently by Presidential Regulation Number 4 of 2015 concerning Fourth Amendment to Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods / Services. the development of the Government's needs regarding the regulation of good Goods / Services Procurement.

In accordance with Article 2 of the Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services that the scope of Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services is (a) Procurement of Goods / Services within the Ministry / Institution / Regional Equipment that uses the budget expenditure from APBN / APBD; (b) Procurement of goods / services that use the budget from the APBN / APBD as referred to in letter a, including the procurement of goods / services whose funds are partially or wholly sourced from domestic loans and / or domestic grants received by the Government and / or the Government Area; and / or (c) Procurement of goods / services that use the budget from the APBN / APBD as referred to in letter a including the procurement of goods / services which are partly or wholly financed from foreign loans or foreign grants. Procurement of goods / services stipulated in Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods / Services is the procurement of goods, services, construction and other services. In carrying out the

procurement must refer to the principle of procurement, namely a. efficient; b. effective; c. transparent; d. open; e. compete; f. fair; and g. accountable.

Procurement of construction in part or in full using state / regional finance must be carried out in accordance with the principle of procurement as stipulated in Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods / Services. Thus, the procurement provisions regulated in Law Number 2 of 2017 concerning Construction Services should be in accordance with the provisions of Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services, but several provisions regarding the procurement of construction in Law Number 2 of 2017 concerning Construction Services are not in accordance with Presidential Regulation Number 16 of 2018 concerning Government Goods / Services Procurement such as:

1. Insynchronization of regulations relating to the selection of providers related to
 - a. The Work Competency Certificate

The Work Competency Certificate stipulated in Article 70 of Act Number 2 of 2017 concerning Construction Services states: (1) Every construction workforce working in the Construction Services field must have a Work Competency Certificate. (2) Every Service User and / or Service Provider must employ construction workers who have a Work Competency Certificate as referred to in paragraph (1). (3) Work Competency Certificates as referred to in paragraph (1) are obtained through competency tests in accordance with Work Competency Standards. (4) The Work Competency Certificate as referred to in paragraph (1) is registered by the Minister. (5) The implementation of the competency test as referred to in paragraph (3) is carried out by professional certification institutions. (6) Professional certification institutions as referred to in paragraph (5) must follow the provisions of the implementation of competency tests in accordance with the provisions of legislation. When compared with Presidential Regulation Number 16 of 2018 concerning Procurement of Goods / Services, the Government states that Effective and Efficient is the principle of procurement which is also implemented in selecting providers so that the process of selecting providers becomes simple and does not extend administration, but obtains providers that meet technical specifications for carrying out work . The selection of providers in procurement (including procurement of construction) is carried out to obtain providers that meet the required technical specifications, including labor competencies. One of the principles of procurement is effective and efficient, including in determining technical specifications for labor. Based on Article 70 of Law Number 2 Year 2017 concerning Construction Services, it is mandatory that every workforce in the construction sector is required to have a work competency certificate, but in Presidential Regulation Number 16 Year 2018 concerning Government Procurement of Goods / Services on Government Procurement of Goods / Services does not require all workers have work competency certificates with the consideration that workers can have work competencies through education and experience. Presidential Regulation Number 16 Year 2018 concerning Procurement of Goods / Government Services concerning Government Goods / Services Procurement requires workers to have competencies in accordance with technical specifications, both through certificates of competence, education, training and experience. The synchronization of the obligations of work competency certificates in the construction sector has caused uncertainty for providers and budget users to determine the technical specifications of the workforce. For example, workers who have had decades of experience being cement mixers or painters, but do not have a competency certificate. According to Article 70 of Law Number 2 of 2017 concerning Construction Services that the workforce cannot be employed because it does not have a competency certificate, whereas according to Presidential Regulation 16 of 2018 the Government Procurement of Goods / Services states that the workforce can be employed because it meets competencies according to specifications technical. In this regard, the procurement of construction must be carried out with a simple process to meet the needs and not to expand the bureaucracy. Fulfillment of workforce competency needs is not limited through fulfilled administrative requirements, but the workforce actually has competencies in accordance with technical specifications. Therefore, the researcher believes that the competence of the construction workforce can be proven through certificates of competence, education, training and work experience.

- b. Limits of Ability to Carry Out Work at the Same Time and Business Qualifications.

Article 20 of Law Number 2 of 2017 concerning Construction Services regulates the following: (1) Business qualifications for business entities as referred to in Article 19 consist of: a. small; b. medium; and c. big. (2) Determination of business qualifications as referred to in paragraph (1) shall be carried out through an evaluation of: a. annual sales; b. financial ability; c. availability of construction workforce; and D. ability in the supply of construction equipment. Explanation of Article 20 paragraph (1) is a business qualification to determine the limits of the ability of a Construction Services business to carry out Construction Services at the same time. The PBJ Regulation regulates the ability to (a) the provider of construction services through the Real Ability Remaining (SKN) mechanism in the form of financial capability and capital capacity to carry out the work package that is being / will be worked on and (b) the construction work provider refers to the regulations

in charge of construction. Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods / Services. Government Goods / Services Procurement regulates Provider qualifications divided into 2 (two) groups, namely (a) Small Business and (b) Non-Small Business. Limitation of the ability of a Construction Services business in carrying out Construction Services at the same time as stipulated in the Construction Services Law through the form of business entity qualifications; while the Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services Procurement of Government Goods / Services through Real Ability Remaining (SKN). Insynchronization of provisions regarding the limits of the ability to carry out work at the same time results in uncertainty in the selection of construction service providers. In addition, insynchronization is also found in the qualifications of business entities where the qualifications of business entities according to Law Number 2 Year 2017 concerning Construction Services consist of 3 (three) groups, namely Small Businesses, Medium Enterprises and Large Businesses; whereas according to Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services Procurement of Government Goods / Services consists of Small and Non-Small Enterprises.

c. Construction Services Market Segmentation.

Article 21 of Law Number 2 of 2017 concerning Construction Services divides the market segment for construction services, namely: a. Small businesses are at small risk, simple technology, and / or have a small cost; b. Medium Enterprises for medium risk, medium technology; and / or low cost c. Large businesses for large-risk, high-tech jobs; and / or large costs. Construction Services market segmentation according to Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services concerning Procurement of Government Goods / Services is divided into 2 (two) types, namely: a. Small businesses for work packages of at most 2.5 billion and technical capabilities can be met by small businesses; b. Non-Small businesses for a 2.5 billion work package and above and / or work require technical capabilities that cannot be met by small businesses. Law Number 2 of 2017 concerning Construction Services has divided the percentage of the construction services market into 3 (three) types, namely (a) Small Business; (b) Medium Business; and (c) Large Businesses. The Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services concerning the procurement of Goods / Services of the Government has also divided the percentage of the construction services market into 2 (two) types, namely (a) Small Business and (b) Non-Small Businesses. On the one hand, Law Number 2 of 2017 concerning Construction Services divides market segmentation by considering risks, technology and costs, while Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services on Government Procurement of Goods / Services divides market segmentation based on work value and technical capabilities of small businesses with the aim of encouraging the role of Small-scale Enterprises in Government goods / services procurement activities. Insynchronization of market segmentation impacts uncertainty for stakeholders (both business / providers and procurement organizations) to determine provider qualifications for construction work.

2. Regulations related to building failures

a. The scope of building failure.

Article 1 point 10 of Act Number 2 of 2017 concerning Building Failure Construction Services is a condition of building collapse and / or malfunction of buildings after the final delivery of the results of Construction Services. Article 6 Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services Procurement of Government Goods / Services applies the following principles: a. efficient; b. effective; c. transparent; d. open; e. compete; f. fair; and g. accountable. One of the principles of procurement is effective, which must be in accordance with the needs and targets that have been set and provide maximum benefits. Procurement of buildings that do not meet the needs and objectives is a violation of the principle of procurement. Both of these provisions indicate that synchronization is related to the validity of payments made to buildings that can function but not according to their needs and objectives. The Construction Services Law looks at the functioning aspects of a building and does not see whether the building is in accordance with the needs and objectives of the Budget User, while the PBJ Presidential Regulation pays attention to aspects of needs and objectives where the procurement of buildings must function according to the needs and objectives of Budget Users. If the building functions but does not match the needs and objectives of the Budget User, then (a) according to the Construction Services Law that this does not include building failure so that the Provider has the right to receive payment for work while; (b) according to the PBJ Regulation that this violates the principle of procurement so that payments cannot be made to jobs that violate the principle of procurement.

b. Duration, Failure of Building Accountability and Crime Demanding Authority

Article 65 of Law Number 2 of 2017 concerning Construction Services regulates the liability of the period and failure of buildings as follows: (1) Service Providers must be responsible for Building Failures

within the period specified in accordance with the construction age plan. (2) In the case of the construction age plan as referred to in paragraph (1) of more than 10 (ten) years, the Service Provider must be responsible for Building Failures within a maximum period of 10 (ten) years from the date of final delivery of Construction Services. (3) The User of the Service is responsible for Building Failures that occur after a predetermined period of time as referred to in paragraph (1) and paragraph (2). (4) Provisions for the period of liability for Building Failures as referred to in paragraph (1) and paragraph (2) must be stated in the Construction Work Contract. (5) Further provisions regarding the obligations and responsibilities of the Service Provider for Building Failures as referred to in paragraph (1), paragraph (2), and paragraph (3) are regulated in Government Regulations. Article 78 paragraph (1) of the Criminal Code regulates the period and expiration of the claiming authority as follows: (1) Authority demands criminal deletion due to expiration: a. regarding all violations and crimes committed by printing after one year; b. concerning crimes that are threatened with criminal penalties, imprisonment, or imprisonment for a maximum of three years, after six years; c. concerning crimes which are threatened with imprisonment of more than three years, after twelve years; d. concerning crimes that are threatened with capital punishment or imprisonment for life, after eighteen years. In accordance with Article 78 paragraph (1) number 4 of the Criminal Code stipulates that authority requires criminal offenses due to expiration in which crimes are threatened with capital punishment or imprisonment for life, after eighteen years. Provisions regarding the period and accountability stipulated in Article 65 of Law Number 2 of 2017 concerning Construction Services Insufficient synchronization of the period of accountability of providers and the prosecution of criminal acts of procurement of buildings that experience building failure results in corruption. The prosecution has expired after 10 (whole) years since the handover of the building so that the prosecution can be carried out against the provider but the provider is not responsible for the failure of the building due to corruption. In addition, those responsible for failing the building will be examined by the authorities, both the BPK, the BPKP, the relevant Inspectorate. The results of the examination will be used as one of the evidence in the court. Therefore, the party responsible for building failure after the age of the building ends cannot be determined limitatively due to various influencing factors such as building quality, building maintenance and etc.

3. Community Participation in Construction Services.

Article 85 paragraph (1) of Law Number 2 of 2017 concerning Construction Services regulates community participation as follows: (1) The public can participate in the supervision of the implementation of Construction Services by: a. access information and information related to construction activities that have an impact on the interests of the community; b. make complaints, claims, and efforts to get compensation or compensation for the impacts caused by the activities of Construction Services; and c. establish professional associations and business associations in the field of Construction Services in accordance with the provisions of the legislation. The public can make complaints, complaints, and efforts to get compensation or compensation for the impacts caused by the activities of Construction Services. Community participation in procurement in the form of public complaints through APIP. Article 77 paragraph (1) Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services. Government Procurement of Goods / Services regulates community participation as follows: (1) Communities submit complaints to APIP along with factual, credible and authentic evidence. Insynchronization of community participation in the procurement of construction services in the Construction Services Law and PBJ Presidential Regulation. In Law Number 2 of 2017 concerning Construction Services, the public can make complaints, claims, and efforts to obtain compensation or compensation for the impacts caused by the activities of Construction Services; while the role of the community in the PBJ Presidential Regulation is to provide complaints to APIP. Such synchronization results in uncertainty regarding the accountability of procurement organizations for losses suffered by the community due to construction services activities. In practice, the accountability of community organizations can be categorized into 3 (three) legal regimes, namely administrative law, civil law and criminal law. If the procurement organization commits an administrative violation, the procurement organization must be administratively responsible. If in the construction work there is a breach of contract, the party who violates the contract (Provider and / or PPK) must be responsible based on civil law. If the procurement results in a loss of state finances which is a criminal act of corruption, then accountability through criminal law.

4. Dispute Resolution

Construction service contract dispute resolution is also regulated in Article 85 of Presidential Regulation No. 16 of 2018 concerning Procurement of Government Goods / Services where disputes between PPK and Providers in the implementation of Contracts can be carried out through contract dispute resolution, arbitration, or settlement services through a court. The Government Goods / Services Procurement Policy Institute organizes dispute resolution services through mediation, conciliation and arbitration where the services are carried out in stages. The dispute resolution is excluded from disputes originating from the procurement contract being carried out by the authorities; and / or dispute that has been or is being tried in a Court and / or

other Arbitration Institution. On the other hand, dispute resolution in the procurement of construction can occur due to problems of corruption or other criminal acts, problems of business competition or conspiracy so that not all construction procurement disputes are resolved through contractual mechanisms.

3.2. Principles of Legislation in the Regulation of Construction Services with Procurement of Construction

In forming and implementing a law, several principles are held: First, higher regulations defeat lower regulations or the *lex superior* principle derives from inferior rules, if there is a conflict or conflict between high and low legislation, then the higher must take precedence. Second, newer regulations outweigh longer rules or *Lex posterior legi priori derogat* is the principle of legal interpretation which states that the newest or posterior law overrides the old law or prior. This principle is usually used both in national and international law. Third, Regulations governing special problems over general regulations or *Lex specialis derogat legi generali* are principles of legal interpretation which state that special laws or *lex specialis* override general law or *lex generalis*.

The hierarchy or order of laws and regulations in Indonesia refers to Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation Regulations consisting of: (a) 1945 Constitution of the Republic of Indonesia; (b) Decree of the People's Consultative Assembly; (c) Substitute Government Laws / Regulations; (d) Government Regulations; (e) Presidential Regulation; (f) Provincial Regional Regulations; and (g) Regency / City Regional Regulations. The law has a higher position than the Presidential Regulation so that it is in accordance with the *lex superior* principle of *legion derogat inferiori*. In accordance with the principle of *lex superior* legal resistance, the Act overrides the Presidential Regulation. However, the provisions of Presidential Regulation Number 16 Year 2018 concerning Government Procurement of Goods / Services constitute procurement provisions relating to other laws and regulations such as state finance laws, laws concerning financial audit bodies, corruption laws, laws business competition, banking laws and various other laws. Therefore, the *lex superior* principle of *legion* inference is not automatic can be used to anticipate the synchronization between Law Number 2 Year 2017 concerning Construction Services and Presidential Regulation Number 16 Year 2018 concerning Government Goods / Services Procurement. If there are procurement provisions in Presidential Regulation No. 16 of 2018 concerning Government Procurement of Goods / Services supported by various other laws such as state finance laws, laws on financial audit bodies, corruption laws, laws business competition, banking laws and various other laws, then the principle that applies is *lex specialis derogat legi generali* where the general provisions regarding construction services are regulated in Law Number 2 of 2017 concerning Construction Services but special provisions regarding the procurement of construction are partially or entirely using state / regional finance, the provisions refer to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods / Services supported by various laws and regulations. If the procurement of construction services does not use state / regional finance, the procurement provisions refer to general provisions as stipulated in Law Number 2 of 2017 concerning Construction Services.

IV. CONCLUSION

The regulation on the procurement of construction services of Law Number 2 of 2017 concerning Construction Services is a regulation that is synchronized with various provisions for the procurement of construction that are partially or entirely using state / regional finance. These provisions relate to (1) Requirements for selection of providers, especially regarding (a) obligations of work competency certificates; (b) limits on the ability to carry out work at the same time and business qualifications and (c) market segmentation of construction services; (2) Building failure especially regarding (a) building failure definition; (b) the period of time, failure of the building's liability and the authority to sue for crime; (3) The role of community participation; and (4) Dispute resolution. The principle of legislation used to anticipate the synchronization of regulations is through a combination of the superior *lex* principles of *legi inferior derogat* and *lex specialis derogat legi generalis*. Through these two principles, the provision of construction in Indonesia can be carried out in accordance with the objectives of Law Number 2 Year 2017 concerning Construction Services and Presidential Regulation 16 of 2018. Thus, Law Number 2 Year 2017 concerning Construction Services should be carried out with an amendment so that provisions regarding the procurement of construction using state / regional finance can be synchronized with the provisions of Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods / Services.

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