



Non-Compliance Practices in Emergency Public Procurement Context of Handling COVID-19 Pandemic in Indonesia

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Abstract

This study aims to explore emergency provisions in regulations and policies of Indonesia's public procurement system, to examine non-compliance practices with regulations and procedures by procurement actors pertaining to COVID-19 emergency public procurement, and possible recommendations of overcoming its detrimental effects. This study uses normative juridical research by examining library materials and the main data source is secondary data including literature review, regulations, and the audit findings. The result showed that emergency public procurement speeds up the public procurement process, but it was found non-compliance practices with regulations and procedures by procurement actors in every stage of the emergency public procurement, so it creates inefficiency, increases the risk of wasteful spending of state finances and even more it may lead to financial losses. To address this, governments or LKPP can consider reviewing existing emergency public procurement regulation (LKPP Regulation 13/2018) by establishing the detailed emergency public procurement documents and procedures and regulating a list of reference prices or the maximum price limit of certain goods by a Circular Letter of the Head of LKPP to prevent and avoid wasteful spending of state finances or an indication of state financial losses.

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I. INTRODUCTION

The Coronavirus Disease (COVID-19) pandemic has paralyzed global community activities such as tourism, transportation, and other sectors. COVID-19 pandemic has also affected international businesses, where China is an exporting country with a contribution of 12.2 percent of total world exports; therefore, many countries lost access to vital goods once the Chinese government implemented a mandatory quarantine (Kaye et al: 2021, 295). For Indonesia, the impact of the COVID-19 pandemic is crucial on public procurement due to high demand both internationally and nationally, especially public procurement in medical devices. Medical devices such as diagnostic tests, ventilators, masks, and health support facilities are pivotal needs in handling COVID-19 patients.

The high demand on these vital products since the COVID-19 outbreak in 2020 has created high uncertainty for economic actors including both the central government and local governments in the context of procuring goods (as buyers) and providers or supplier as sellers. For example, Indonesian hospitals had already reported shortages of key equipment needed to care for critically ill patients, including ventilators and personal protective equipment (PPE) for medical staff in the early COVID-19 outbreak.

Based on data from the Directorate General of Treasury, Ministry of Finance (2020) as of October 16, 2020, the realization of spending on COVID-19 handling in several Ministries (Ministry of Health, Ministry of Defense, Police, National Disaster Management Agency) for the prevention and control of COVID-19, laboratory services, health services, pharmaceuticals, medical equipment health facilities, and infrastructure around at Rp17.73 trillion. In a regional scale, based on data from the Public Health Office of DKI Jakarta Government (2021), in conducting a massive tracing of Jakarta residents to detect the spread of COVID-19, has budgeted for the 2021 fiscal year at IDR 501,875,000,000.00. This budget is used to carry out the procurement of COVID-19 testing with laboratory providers using the RT-PCR method. The large budget allocation for public procurement in handling emergencies such as the COVID-19 pandemic should be accompanied by efforts for transparency and accountability in its use.

Based on the above background, two research questions are addressed:

Q1. How have Indonesia's public procurement regulations and policies applied as a result of a state of emergency during the COVID-19 pandemic?

Q2. What are non-compliance practices with regulations and procedures by procurement actors in conducting public procurement in a state of emergency during the COVID-19 pandemic?

The purposes of this study are:

1. To explore and understand how far the application of regulations and policies of Indonesia's public procurement in a state of emergency in the context of handling the COVID-19 pandemic;
2. To examine non-compliance practices with regulations and procedures by procurement actors in conducting public procurement in a state of emergency during COVID-19 pandemic.

Several previous empirical studies provide a starting point for this research. OCP (2020: 4) found that emergency procurement speeds up the procurement process, but also substantially reduces checks and balances, increasing the risk for procurement going wrong. World Bank Group (2020) conducted a survey between May and August 2020 and received 136 contributions covering 103 countries found that among others: (1) some countries rely on higher risk procedures than those considered essential for effective and efficient procurement; (2) lack of clarity on procurement needs and lack of coordination is a significant obstacle experienced by most of the countries surveyed; and (3) transparency and accountability standards during COVID-19 emergency procurement deteriorate.

UN-PRAC (2021: 9) stated that the use of emergency provisions for COVID-19 public procurement creates significant corruption risks, as many of these provisions include limited checks and balances. These issues are expected to be pivotal at this time and in the future because of the possible return of emergency conditions such as natural disasters, tsunamis and other dangerous diseases. To help the Indonesian government and National Public Procurement Agency Regulation (LKPP) in lessening and avoiding the risk of wasteful spending of state finances and even an indication of state financial losses of public procurement during a state of emergency such as handling the COVID-19 pandemic, therefore, this study is aimed to explore legal frameworks of Indonesia's public procurement in a state of emergency, examine non-compliance practices with regulations and procedures by procurement actors pertaining to COVID-19 emergency public procurement, as well as possible recommendations of overcoming detrimental effects of emergency public procurement in Indonesia.

II. RESEARCH METHOD

This study uses normative juridical research as this study is conducted by examining library materials and the main data source is secondary data (Soekanto & Mamudji, 2003: 16). For this study, data will be first collected as far as relevant for the objectives of this study. The main types of methods of data collection that will be used for this study are as follows:

- a. Literature review: academic literature, official and non-official documents from the Directorate General of Treasury, Ministry of Finance, National Disaster Management Agency, and other secondary materials related to the problems under study;
- b. Laws, regulations, and policies relating to these issues;
- c. The BPK's audit findings Year 2021 relating to emergency public procurement in the context of handling the COVID-19 pandemic.

To analyse the data collected, qualitative research (Simion, 2016: 7) will be used to explore and understand how far the implementation of public procurement in the context of handling the COVID-19 emergency. First, literature review will be studied for this study to examine the literature on COVID-19 emergency public procurement. Second, regulations and policies relating to COVID-19 emergency public procurement will be reviewed to understand how far the application and changes of the procedures and policies of Indonesia's public procurement in a state of emergency in the context of handling the COVID-19 pandemic. Third, the data from the BPK's audit findings pertaining to COVID-19 emergency public procurement will be analysed to know whether the emergency public procurement practices aligned with regulations and policies in describing how public procurement in handling emergencies should occur, and what is happening in practice.

III. RESULTS AND DISCUSSION

3.1. Emergency Provisions in Regulations and New Policies

While the government and hospitals need medical devices fastly due to human safety reasons during the COVID-19 pandemic, there are critical supply shortages of these items in Indonesia; therefore, this is described as a state of emergency. Under Article 1 (point 19) Law Number 24 of 2007 on Disaster Management, the status of an emergency disaster is a condition determined by the government for a certain period of time that is based on the recommendation of the agency assigned the task of dealing with disasters. The status of an emergency is determined by the President at the national level, by the governor at the provincial level, and by the regent/mayor at the district/city level [Article 51 paragraph (2)]. If the status of a disaster emergency has not been determined by the government, National Disaster Management Agency (Badan Nasional Penanggulangan Bencana, BNPB) can determine the status of certain circumstances according to Article 3 paragraph (4) President Regulation Number 17 of 2018 ("PR 17/2018") on Implementation of Disaster Management in Certain Circumstances. In the COVID-19 pandemic situation, BNPB has determined the status of certain conditions through the following decisions: (1) Decision of the Head of BNPB Number 9.A Year 2020 on Determination of the Status of Certain Emergency Disasters due to Corona Virus Disease in Indonesia (this decision is valid for 32 days from January 28 - February 28, 2020); and (2) Decision of the Head of BNPB Number 13.A of 2020 on Extension of the Status of Certain Emergency Disasters due to Corona Virus Disease in Indonesia (this decision is valid for 91 days from February 29 – May 29, 2020).

In carrying out the management of the COVID-19 pandemic in a coordinated, planned and integrated manner, the government has established several policies, including: (1) Presidential Decree Number 7 of 2020 Concerning the Task Force for the Acceleration of Handling Coronavirus Disease (COVID-19) as amended by Presidential Decree Number 9 of 2020; (2) Regulation of the Minister of Home Affairs Number 20 of 2020 concerning Acceleration of Handling Corona Virus Disease 2019 in Regional Governments; (3) Presidential Instruction Number 4 of 2020 concerning Refocussing of Activities, Reallocation of Budgets, and Procurement of Goods/Services in the Context of Accelerating Handling of Corona Virus Disease (COVID-19); (4) Circular Letter of the Head of LKPP Number 3 of 2020 concerning Explanations on the Implementation of the Procurement of Goods/Services in the Context of Handling Corona Virus Disease 2019 (COVID-19); and (5) Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters Spreading Corona Virus Disease (COVID-19) as National Disasters.

Indonesia's public procurement in emergency conditions has been regulated by Presidential Regulation Number 16 of 2018 ("PR 16/2018") on Government Procurement of Goods and Services as amended by Presidential Regulation Number 12 of 2021 ("PR 12/2021") and National Public

Procurement Agency Regulation Number 13 of 2018 (“LKPP Regulation 13/2018”) on Government Procurement of Goods and Services in Handling Emergency Situations. Additionally, LKPP has issued a Circular Letter of the Head of LKPP Number 3 of 2020 (“Surat Edaran Kepala LKPP 3/2020”) concerning Explanations on the Implementation of the Public Procurement in the Context of Handling Corona Virus Disease 2019 (COVID-19). The COVID-19 pandemic, a disease that has resulted in human casualties and occurred almost all over the world and Indonesia, is a non-natural disaster and one of the criteria for emergencies according to Article 59 paragraph (2) PR 16/2018 (as amended by PR 12/2021). Under Part VIII of PR 16/2018 (as amended by PR 12/2021) on Government Procurement of Goods/Services, public procurement in handling an emergency is called a special procurement. Pursuant to Article 59 paragraph (1) PR 16/2018 (as amended by PR 12/2021), the handling of emergencies is carried out for the safety or protection of the community or Indonesian citizens residing in the country and/or abroad whose implementation cannot be delayed and must be carried out immediately. Pursuant to President's Instruction Number 4 of 2020 (“Instruksi Presiden”) on Refocussing Activities, Reallocating Budgets, and Public Procurement in the Context of Accelerating Handling of COVID-19, the Indonesian government need to accelerate public procurements of medical devices to support acceleration in handling COVID-19 by involving National Public Procurement Agency (LKPP) and Finance and Development Supervisory Agency (Badan Pengawasan Keuangan dan Pembangunan, BPKP).

Public procurement for a state of emergency such as handling the COVID-19 pandemic is not only carried out by self-managed procurement but also through providers. The selection of providers in a state of emergency (such as during the COVID-19 pandemic) must be distinguished between public procurement for handling the COVID-19 pandemic and public procurement not for handling the COVID-19 pandemic. Public procurement whose designation is not for the handling of COVID-19 even though it is carried out during the COVID-19 pandemic still refers to the regulations of the public procurement that apply in general.

The mechanism of public procurement in handling emergencies cannot be equated with the implementation of public procurement in a normal situation, including in the selection of providers. The selection of providers for public procurement in handling emergencies (such as COVID-19 pandemic) is carried out by: (1) the Commitment Making Officer (“PPK”) appoints the closest provider who is carrying out the procurement of similar goods/services or other business actors who are considered capable and meet the qualifications to carry out the procurement of similar goods/services [Article 59 paragraph (5) PR 16/2018]; or (2) PPK appoints providers who, among others, have provided similar goods/services in government agencies or as providers in Electronic Catalogs [Surat Edaran Kepala LKPP 3/2020].

The stages of public procurement become simpler and faster so that outputs and outcomes are more optimal in handling the COVID-19 emergency. However, procurement actors keep to apply procurement principles, including being efficient, transparent and accountable [Article 6 letter (a), (c), (g) PR 16/2018 as amended by PR 12/2021]. Under Article 6 paragraph (1) LKPP Regulation 13/2018, there are three stages of public procurement in handling emergencies including procurement planning, implementation of procurement; and payment settlement.

Budget User/Proxy of Budget User ("PA/KPA") or PPK carry out procurement planning which includes: (1) identification of needs; (2) analysis of resource availability; and (3) determination of the method of public procurement. The implementation of procurement according to Article 6 paragraph (3) LKPP Regulation 13/2018 is carried out with the following stages: (1) issuance of Letter of Appointment for Provider of Goods/Services (Surat Penunjukan Penyedia Barang/Jasa, SPPBJ); (2) joint examination and preparatory meeting; (3) field handover; (4) issuance of Work Start Orders (Surat Perintah Mulai Kerja, SPMK)/Shipping Orders (Surat Perintah Pengiriman, SPP); (5) execution of work; (6) calculation of work results; and (7) handing over the work. Finally, the payment settlement for the emergency public procurement is carried out in the following stages: (1) contract; (2) payment; and (3) post audits [Article 6 paragraph (6) LKPP Regulation 13/2018].

In an emergency such as the COVID-19 Pandemic, the price of goods/services related to the handling of COVID-19 has increased significantly due to increased global demand and limited producers. This causes abnormal market conditions. Under PR 16/2018 as amended by PR 12/2021, fairness of price is formed with the stipulation of the Owner's Estimated Price (Harga Perkiraan Sendiri, HPS). Under Circular Letter of the head of LKPP Number 3 of 2020 concerning Explanations for the Implementation of the Procurement of Goods/Services in the Context of Handling Corona Virus Disease 2019 (COVID-19), PPK is not required to make HPS. However, to ensure the fairness of prices, the PPK asks the provider of goods to prepare a proof of the reasonable price of goods, and for procurement other than goods, the provider prepares a proof of the reasonable price for the procurement of construction work/other services/consulting services. Furthermore, pursuant to LKPP Circular Letter Number 3 of 2020, in ensuring the fairness of the price after payment has been made to the Provider, PPK must request to be audited by the Government Internal Supervisory Apparatus (Aparat Pengawas Intern Pemerintah, APIP) or the Financial and Development Supervisory Agency (BPKP). To avoid an indication of state financial losses, according to the principle of freedom of contract [Article 1338 paragraph (1) Civil Code], in the order letter of goods (Surat Pesanan Barang) and contracts of construction or service work are necessary to stipulate a clause that the provider is willing to return the excess price if there is an unreasonable price after an audit by APIP or BPKP.

3.2. Non-Compliance Practices in COVID-19 Emergency Public Procurement

COVID-19 pandemic has created integrity challenges for governments in public procurement. This challenge occurs because the government procures goods and services urgently and in large quantities, such as hospital equipment, medical ventilators, hand sanitizers, face masks, and health services to meet the needs of people affected by COVID-19. To overcome this, the Indonesian government through LKPP enforces emergency public procurement procedures by LKPP Regulation 13/2018 on Government Procurement of Goods and Services in Handling Emergency Situations. These emergency procurement provisions are without going through standards and lengthy mechanisms in the public procurement process. These increase the risk of procurement integrity because they do not meet the proper public procurement mechanisms and standards (OECD, 2020a: 2).

As a form of supervision over the COVID-19 emergency public procurement, under Article 7 paragraph (2) LKPP Regulation 13/2018 mandates APIP to audit based on reports and/or complaints from the public pertaining to irregularities or abuse of authority in the emergency public procurement. A public procurement system will only function well when it operates with integrity (i.e. is fair, transparent, and credible). Supervision is also available for the independent control from external supervisors such as the Audit Board of The Republic of Indonesia (Badan Pemeriksa Keuangan Republik Indonesia, BPK RI) based on authorities given by Law Number 15 of 2006 on BPK RI.

From BPK's audit findings, it is found non-compliance practices with regulations and procedures by procurement actors in every stage of the public procurement in the context of handling COVID-19 pandemic as described in the table 1.

Table 1
Non-Compliance Practices in COVID-19 Emergency Public Procurement

Emergency Public Procurement Stages	Provisions in Regulations	Practice (Audit Findings)
procurement planning	- PA/KPA/PPK carry out procurement planning which includes identification of needs, analysis of resource availability, and determination of the method of public procurement [Article 6 paragraph (2) LKPP Regulation 13/2018] - Public procurement applies the principle of efficiency [Article 6 letter (a) PR 16/2018 as amended by PR 12/2021]	Identification of the need for goods/services does not pay attention to real needs in the field, causing a wasteful spending of state finances or public funds
	PPK in determining the type of contract must pay attention to the principles of efficiency, effectiveness and do not conflict with the provisions of the regulation [Article 27A paragraph (2) PR 16/2018 as amended by PR 12/2021]	In determining the types of contracts in the public procurement has not applied the principle of efficiency
procurement implementation	- PPK appoints the closest providers who are carrying out the procurement of similar goods/services or other business actors who	PPK appoints providers of goods/services who is incompetent or has no experiences

	are considered capable and meet the qualifications to carry out the procurement of similar goods/services [Article 59 paragraph (5) PR 16/2018 as amended by PR 12/2021] - PPK also can appoint providers who, among others, have provided similar goods/services in government agencies or as providers in Electronic Catalogs [Circular Letter of the Head of LKPP Number 3 of 2020]	
	After the public procurement process in a state of emergency, PPK records the procurement package on application of the Electronic Procurement System [Circular Letter of the Head of LKPP Number 20 of 2020]	The implementation of emergency public procurement is not recorded in the Electronic Procurement System (Sistem Pengadaan Secara Elektronik, SPSE)
	All parties involved in the procurement of goods/services avoid and prevent wasteful spending and leakage of state finances [Article 7 paragraph (1) letter (f) PR 16/2018 as amended by PR 12/2021]	- Proof of price reasonableness for procurement of goods/services is invalid and indicates an overpriced price. - There are items bought at a higher price in comparison to previous purchases. For instance, procurement of the Covid-19 Rapid Test twice for the same brand and in almost the same time but at different prices, in which the latter is more expensive.
payment settlement	All parties involved in public procurement: (f) avoid and prevent wasteful spending and leakage of state finances; (g) prevent abuse of authority and/or collusion [Article 7 paragraph (1) letter (f), (g) PR 16/2018 as amended by PR 12/2021]	There is a payment for public procurement to the parties not participating in the procurement process
	Implementation of non-cash transactions on the local Governments [Circular Letter of Minister of Home Affairs Number 910/1867/SJ]	Payments to providers of goods/services are partially made in cash.

Source: BPK's audit findings that have been analysed based on emergency public procurement stages

Based on audit findings, there are violations of provisions stipulated in PR 16/2018 as amended by PR 12/2021 and associated subordinate regulations in conducting public procurement by local governments or public bodies in a state of emergency (in handling COVID-19 pandemic). it is found that procurement actors are reluctant to comply with procurement principles of efficiency, transparency, and accountability, among others: (1) identification of the need for goods/services does not pay attention to real needs in the field; (2) the implementation of emergency public procurement is not recorded in the Electronic Procurement System; and (3) the determination of the type of contracts has not applied the principle of efficiency. The result of this study also has similarities to a study conducted by World Bank Group (2021: 9) that found that transparency and accountability standards deteriorated for COVID-19-related procurement relative to standard procurement. As a comparison in

another country, Paraguay's government implemented emergency procedures to buy goods more quickly. However, this creates the perfect conditions for inefficiency and potential corruption in the procurement procedure (OCP, 2020: 41).

Organizations and academics have warned the government or the public early about the risks of increased corruption in public procurement during the COVID-19 pandemic (Khasiani et al 2020: 1). Based on audit finding, it is found public procurement that cause a wasteful spending of state finances and even an indication of state financial losses, among others: (1) there are items bought at a higher price in comparison to previous purchases; and (2) there is a payment for public procurement to the parties not participating in the procurement process. One of the findings by OCP (2020: 42) also has a similar problem in public procurement, namely there are items bought at a higher price in comparison to previous purchases. In one of the Indonesian local governments, it was found public procurement of the Covid-19 Rapid Test twice for the same brand and at almost the same time but at different prices, in which the latter is more expensive. This result also is similar to cases of overpriced public procurement by competition authorities that can be found throughout Europe and the US, but also in developing countries such as Indonesia, Brazil, Thailand, Kenya and South Africa (OECD, 2020b: 8). This is caused by procurement actors do not comply with procurement principles, including (1) avoid and prevent wasteful spending and leakage of state finances; and (2) prevent abuse of authority and/or collusion as mandated in Article 7 paragraph (1) letter (f), (g) PR 16/2018 as amended by PR 12/2021.

Another audit finding, PPK appointed incompetent and unqualified providers or providers who have no experiences. This is caused by PPK does not comply with the proof stage of qualification requirements in the provider selection process. Although it is difficult to find collusion in the audit process, the appointment of the incompetent and unqualified providers also could happen because there is an indication of collusion with the providers or "bid-rigging" in public procurement. This finding is also similar to the finding by OCP (2020: 6) that found half of the covid emergency spending awarded for emergency contracts in Georgia, from March 22 to June 30, given to companies with no previous experience in public procurement.

IV. CONCLUSION

Indonesia's public procurement in emergency conditions has been regulated by PR 16/2018 on Government Procurement of Goods and Services as amended by PR 12/2021 and LKPP Regulation 13/2018 on Government Procurement of Goods and Services in Handling Emergency Situations. These regulate a simpler and faster stage of public procurement so that outputs and outcomes are more optimal in handling states of emergency. Additionally, LKPP has issued a Circular Letter of the Head of LKPP Number 3 of 2020 concerning Explanations on the Implementation of the Public

Procurement in the Context of Handling Corona Virus Disease 2019 (COVID-19). The issuance of this Circular Letter shows that the LKPP Regulation 13/2018 has not detailed yet in regulating public procurement in a state of emergency. According to Law Number 12 of 2011, as amended by Law Number 15 of 2019 on the Establishment of Laws and Regulations, Circular Letters in the Indonesian legal system are not recognized as a type of regulation in Indonesia. This will have an impact on legal uncertainty for procurement actors in carrying out procurement during the COVID-19 emergency.

This study found that emergency procurement speeds up the procurement process, but also it was found non-compliance practices with regulations and procedures by procurement actors in every stage of the public procurement in the context of handling COVID-19 pandemic so that substantially creates the perfect conditions for inefficiency, increases the risk of wasteful spending of state finances and even results in an indication of state financial losses. To address this, governments or LKPP can consider reviewing existing emergency procurement regulations (LKPP Regulation 13/2018) by establishing the detailed emergency public procurement documents and procedures and regulating a list of reference prices (OCP 2021: 5) or the maximum price limit of certain goods by a Circular Letter of the Head of LKPP to prevent and avoid wasteful spending of state finances or an indication of state financial losses.

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