



## Sub Contractors in Government Procurement Contract of Goods and Services

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### Abstract

*This research aimed to review and analyze the position of sub contractors in government procurement contract of goods/services and how the legal relationship between sub contractors and contractors in government procurement contract of goods/services. The research method used normative juridical. The approach used are the statute approach and the conceptual approach. From the results of this research it was concluded that; (1) Subcontractors as subjects of contract law are regulated in various laws and regulations, especially those government procurement contract of goods/services. This subcontractors have legal standing in contractual relationships, especially in government procurement contracts of goods/services. (2) The subcontractor has a legal relationship with the Contractor as a service provider based on the subcontract but has no legal relationship with Commitment-Making Officer (CMO)/PPK as a service user.*

## 1. Introduction

Development is a strategic step to exteriorize these national goals, whether human development or physical development. In its implementation, the physical development in the form of procurement of facilities and infrastructure must be balanced with the role of procurement of good goods/services, but government procurement activities are not intended at producing goods/services that are *profit oriented*, but rather provide services to the community (*public service*). Therefore, the government needs goods/services in its efforts at all times to intensify public services.<sup>1</sup>

In terms of procurement of goods and /services, efforts to meet the rights and needs of proper and adequate public services require a strong legal foundation in the process. Government procurement activities must guarantee the accomplishment of legal certainty and provide protection for every citizen from a series of arbitrary actions and abuses of authority in the procurement of goods/services.

Presidential Regulation No. 54 of 2010 on Procurement of Government Goods/Services *juncto* Presidential Regulation No. 35 of 2011 On Changes to Presidential Regulation

<sup>1</sup> Badan Pembinaan Hukum Nasional, "Laporan Akhir Tim Naskah Akademik Rancangan Undang-Undang Tentang Organisasi Administrasi Penegakan Hukum," n.d.

No. 54 of 2010 Procurement of Government Goods/Services *juncto* Presidential Regulation of the Republic of Indonesia Number 70 of 2012 Concerning the Second Amendment to Presidential Regulation No. 54 of 2010 Concerning Procurement of Government Goods/Services *juncto* Presidential Regulation No. 12 of 2021 on Changes to Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, in detail has formulated all provisions related to the process of government procurement activities, but in its implementation there are still many problems because this presidential regulation is very technical and the regulations are separate, spread in technical instructions and instructions for implementation (*fragmentative*).

The government needs the fulfillment of the needs of goods or services in the framework of development and improvement of community welfare. By needing goods/services in carrying out government activities, the government carries out contracts for procurement of goods/services involving providers of goods/services. The contracts making for the providers of goods/services is a routine practice that is implemented to meet the needs of the government.<sup>2</sup> According to article 1 number 44 Presidential Regulation No. 12 of 2021 the procurement contract of goods / services is a written agreement between Budget User/Proxy of Budget User/Commitment-Making Officer with the Provider of Goods/Services or implementers of Self-Management.

The parties in the Government Procurement/Services contract are the government represented by Budget User/Proxy of Budget User/Commitment-Making Officer as service users on one side and on the other hand are contractors as service providers or self-management. In the implementation of Procurement of Goods/Services the Government also involved service provider partners such as subcontractors. Subcontractors (Law No. 2 of 2017 on Construction Services, Article 53 uses the term "subcontractor" with the term "sub service provider") in the procurement of government goods/services are regulated in Presidential Regulation No. 16 of 2018 on Government Procurement Contract of Goods/Services, in Article 65 (6) which reads: "Non-small business providers who carry out work can conduct business cooperation with small businesses in the form of partnerships, subcontracts, or other forms of cooperation, if there are small businesses that have the ability in the field concerned".

This article is then amended in Article 65 paragraph (7) of Presidential Regulation No. 12 of 2021 concerning changes to Presidential Regulation No. 16 of 2018 concerning the Government Procurement Contract of Goods/Services which reads; "Non-small business providers or cooperatives that carry out the work of doing business cooperation with small businesses and/or cooperatives in the form of partnerships, subcontracts, or other forms of cooperation, if there are small businesses or cooperatives that have capabilities in the field concerned"

The contracting company in carrying out its duties must also provide its own equipment necessary to handle the project charged to it, therefore, in carrying out its work the contracting company usually shares its work with other contracting

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<sup>2</sup> Y Sogar Simamora, "Hukum Kontrak; Kontrak Pengadaan Barang Dan Jasa Pemerintah Di Indonesia," 2013. p. 1.

companies that have the necessary expertise to complete a job that is not controlled by the contractor. Companies that carry out the work of contractors from other actors are commonly called subcontractors.<sup>3</sup>

In a project activity involvement in contracts that are directly or indirectly related is the project owner or service user, contractor and subcontractor in addition to the supervision consultant as a supervisor of the work. Contractually the contract relationship occurs in two different directions, one side of the contract between the contractor and the project owner and on the other hand the occurrence of the contract between the contractor and the sub contractor. From different sides the supervising consultant performs a contract bond with the project owner. The contract between the contractor and the sub contractor who does the specialist work is responsible for the work of the specialist given and between the project owner and the contractor doing all the work is responsible for all the work given, and from the different contracts it takes good cooperation so that there is a synergy to complete the project that oriented to cost, quality and time (CQT).

As with the specialist work carried out by subcontractors to support contractor settlement work, the subcontractor has special expertise in their field, and if carried out by the subcontractor the work can be completed in a relatively shorter and shorter time, the cost is cheaper and no less important is a more thorough quality. All this is because the subcontractor has a workforce, which is expert in its field, the equipment available fully and the materials available are more than sufficient, and with the working methods used meet the desired requirements and have been tested for reliability.

One of the reasons for the appearance of sub-contracts is to meet the requirements and standards in complex construction work. Thus the transfer of some work by the construction work provider to another party (subcontractor) must be with the approval of Commitment-Making Officer, this is due to the supply of construction work that has won the auction at the time of the selection of the service provider belongs to the category of providers who meet the qualifications, while subcontractors who are burdened with the transfer of jobs by the provider construction jobs do not necessarily comply the qualifications of such construction job providers. In order to the Commitment-Making Officer must know who the third party will be a subcontractor in construction work and at least meet the requirements and standards such as construction job providers so that the implementation of the work does not trigger state losses.

At the stage of implementation of the agreement, the parties shall carry out what has been promised and what has become its obligation in the agreement. The issue of liability in contractual relationships is the main focus in relation to sub-contracts. In the procurement contract arises the legal relationship between Commitment-Making Officer as users of goods/services with providers of goods/services, while in sub-contracts the legal relationship that arises is between the subcontractor and the contractor as a provider of goods/services. Liability in the contractual relationship

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<sup>3</sup> Mitha Miranda Sari, "Kedudukan Dan Tanggung Jawab Hukum Pihak Sub Kontraktor Pada Perjanjian Pengadaan Barang/Jasa Pemerintah," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 4, no. 2 (2018), <https://doi.org/http://dx.doi.org/10.28946/rpt.v4i2.163>. p. 5.

contained in the sub-contract is between the subcontractor and the contractor as a provider of goods/ services, in other words the subcontractor is not directly related to Commitment-Making Officer but with the contractor as a provider of goods/services including in terms of payment. Subcontractors cannot demand direct payment to Commitment-Making Officer but to the provider of goods/services even in this case Commitment-Making Officer is negligent in making payments. This is in accordance with the principle of privity of contract contained in Article 1340 BW which states that the agreements made only apply between the parties who make them.

Subekti, mentioned as the basis of personality.<sup>4</sup> With the result that the agreement will be binding and result in an engagement to an alliance for the parties who make it. Related to exist or not exist of approval from Commitment-Making Officer for the making of subcontracts between the contractor and the subcontractor raises a legal problem related to the validity of the sub-contract. Therefore, the next legal regulation that will be discussed is "Sub Contractor in Government Procurement Contracts of Goods/Services"

From the background and legal issues stated above, there are several problems, namely:

1. How is the Position of Sub Contractor in Government Procurement Contracts of Goods/Services.
2. How is the Legal Relationship Between Sub Contractor and Contractor in Government Procurement Contracts of Goods/Services.

## **2. Research Method**

In accordance with the legal issues set out in this research, the type of research used is normative research that analyzes the laws and regulations related to the issues raised, namely the position of subcontractors in government procurement contracts of goods/services and legal relationships between contractors and subcontractors in government procurement contracts of goods/services. The problem approach used is the statute approach and the conceptual approach with a view to answering legal issues in accordance with the problems raised in this article.<sup>5</sup>

## **3. Results and Discussion**

### **3.1 Government Procurement Contracts of Goods/Services.**

Government procurement of goods/services according to Presidential Regulation No. 12 of 2021 on Changes to Presidential Regulation No. 16 of 2018 on Government Procurement of Goods/Services, is: "procurement activities of goods/services by the Ministry/Institution/Regional Devices financed by The Indonesian Budget/Regional Government Budget whose process since the identification of needs, up to the handover of work results". (Article 1 point 1 Presidential Regulation No. 12 of 2021 on Government Procurement of goods/services)

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<sup>4</sup> Raden Subekti, *Hukum Perjanjian* (Intermasa, 1996). p. 33.

<sup>5</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Group, 2010). p. 33.

To receive the goods/services needed, users of Government goods/services that begin with the process of planning needs until the completion of all activities to obtain goods/services according to their needs through the implementer of goods and services procurement activities determine and confirm the Government's provider of goods/services, namely Business Entities or Individuals who provide Goods/Construction Work/Consulting Services/Other Services and Providers through Self-Management, specifically for procurement activities of goods/services whose work is planned, done, and/or supervised by ministry/institution/service/agency as the person in charge of budget, other government agencies and/or community groups (*vide: Article 1 No 12 and 20. Presidential Regulation No. 70 of 2012*).

Procurement of goods and services is one of the stages of the project cycle required by government agencies whose process starts from planning needs to the completion of all activities to obtain goods and services between two parties in accordance with an agreement or contract. A specific regulation that regulates the procedures for the procurement of government goods and services, which was originally Presidential Regulation No 54 of 2010 and its amendments, namely presidential regulation number 70 of 2012. This Presidential Regulation was then replaced with Presidential Regulation number 16 of 2018 on Procurement of Government Goods and Services and the change is Presidential Regulation number 12 of 2021 on Changes to Presidential Regulation number 16 of 2018 on Procurement of Government Goods and Services.

In the presidential regulation, it is regulated that the parties who are charged with the task of implementing government procurement of goods/services are: service users represented by officers namely Budget User, Proxy of Budget User, Commitment-Making Officer, Procurement Officer, Election Working Group, Procurement Agency, Self-Managed Organizer; and service providers.

Officers that involved in the procurement of government goods/services through a legal process, namely government goods/services procurement contracts called government service users (job owners) represented by the officers mentioned above as one of the parties and service providers who are usually referred to as contractors.

According to Agus Yudha Herneko, contracts or agreements are sometimes still ambiguously understood. Many business people mix the two terms as if they are different notions. *Burgerlijk Wetboek* (BW) uses the terms *overeenkomst* and *kontrak* for the same meaning. This can be clearly heard from the title of Book III of the second title on "Engagements Born from Contracts or Agreements".<sup>6</sup> This definition of understanding is supported by the opinions of many scholars, among others: J. Satrio,<sup>7</sup> Prawirohamidjojo and Marthalena Pohan,<sup>8</sup> Mariam Darus Badruzaman,<sup>9</sup>

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<sup>6</sup> Hernoko Agus Yudha, "Hukum Perjanjian, Asas Proporsionalitas Dalam Kontrak Komersial," Jakarta: Penerbit Kencana Prenada Media Group, 2010. p. 13.

<sup>7</sup> J Satrio, "Perjanjian Pada Umumnya" (Bandung: Citra Aditya Bakti, 1999). p. 19.

<sup>8</sup> Marthalena Pohan and R Soetoyo Prawirohamidjojo, "Hukum Orang Dan Keluarga," Sumbaya: Pusat Penerbitan Dan Percetakan Unair (AUP), 2008. p. 84.

Purwahid Patrik,<sup>10</sup> and Tirtodiningrat<sup>11</sup> who use contracts and agreements in the same terms.

Contracts that are basically included in the scope of private law make government procurement contracts attractive to discuss and provide their own problems. Private legal relations in procurement contracts remain influenced by the position of the government representing the public in order the government's procurement contract also maintains some applicable and binding procedural provisions of the government. Contracts made by the government are multi aspects and have a special character.

In the study of government contracts, the comprehension or understanding about who the government is referring to is an essential target, not only the special position of the government as a contract but also determines the area of legal application on the procurement of goods and services by government agencies.<sup>12</sup> Frequently the term of government is used as a synonym for state, or otherwise. Etymologically is not true, even though the function of the state is clearly visible from what the government does. Therefore, in the context of the study of government contracts the understanding of government should be understood in the sense of government organizations or groups of government units and not in the sense of governmental functions or governing activities.<sup>13</sup>

The government, both the central government and the local government as a public legal entity, can not only do legal acts that are public, but can also do a legal act in the field of civil.<sup>14</sup> One of the government's legal actions in the field of private law is to implement the Government Procurement Contract to meet the needs of public service infrastructure. Provisions regarding contractual relationships between the government and private parties are not regulated in BW so that they are included in the unnamed agreement (*innominaat*), which is agreements born based on the principle of freedom of contract, therefore, the Government Procurement Contract with the private sector as a Service Provider, applies the rule of contract law in general and also applies the provisions of legislation related to the Government Procurement of Goods/Services.

Contracts made by the government are multi-aspects and have a special character. As a consequence of the use of civil law instruments by the government, especially the Contract Law in the management of government affairs commonly referred to as

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<sup>9</sup> Badruzzaman Darus Mariam, "KUHPerdata Buku III, Hukum Perikatan Dengan Penjelasannya" (Alumni. Bandung, 1996). p. 89.

<sup>10</sup> Purwahid Patrik, *Dasar-Dasar Hukum Perikatan: (Perikatan Yang Lahir Dari Perjanjian Dan Dari Undang-Undang)* (Mandar Maju, 1994). p. 45.

<sup>11</sup> R. M Tirtodiningrat, *Prinsip-Prinsip Hukum Perikatan* (Bandung: Tarsito, 1985). p. 72.

<sup>12</sup> Simamora, "Hukum Kontrak; Kontrak Pengadaan Barang Dan Jasa Pemerintah Di Indonesia." . p.51.

<sup>13</sup> Ibid.

<sup>14</sup> H S Salim, "Perkembangan Hukum Kontrak Di Luar KUH Perdata," *RajaGrafindo Persada*, 2006, 196-97. p. 1.

*contractualization*, there is a mixture between private and public elements in the formed contractual relationship.<sup>15</sup>

Contracts made by the government therefore have different characteristics than private contracts in general. The existence of public color in the law of this contract is a characteristic that distinguishes from commercial contracts in general. If in commercial contracts the parties have a very broad freedom in regulating legal relations or regulating their contractual obligations, then in the Contract of Procurement of goods/services this freedom is not fully applicable because against this contract applies public law provisions that are coercive (*dwingendrecht*) namely various laws and regulations on State Finance and Procurement of Government Goods/Services.

### **3.2 The Position of Sub Contractor in Government Procurement of Goods/Services**

Subcontractors as legal subjects have *legal standing* in doing work based on contractual relationships with contractors. This the subcontractor has the right to enter into a contractual legal relationship with the contractor on the basis of the principle of freedom of contract. Subcontractors *legal standing* as legal subjects in contractual relations with government goods/services can be seen in various laws and regulations, especially those governing the procurement of government goods/services.

#### **3.2.1 Law No. 2 of 2017 on Construction Services**

Law No. 2 of 2017 on Subcontractor Construction Services as sub service provider is a construction service provider to service providers. The Service Provider is the construction service provider. Article 52 of Law No. 2 of 2017 service providers and sub service provider in the implementation of construction services must be in accordance with the agreement in the contract. The working relationship between the Service User and the Service Provider shall be outlined in the construction employment contract. The provisions regarding construction employment contracts apply also in construction employment contracts between service providers and sub service providers. Article 53 of Law No. 2 of 2017 in the implementation of construction services, the main work can only be given to a specialist sub service providers, including:

- a. installation;
- b. special construction;
- c. prefabricated construction;
- d. completion of the building; and
- e. equipment lease/rental.

The provision of the main job to the sub service providers that are specialist must get the approval of service users. The main job is the type of work that directly supports

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<sup>15</sup> H Purwosusilo and MH SH, *Aspek Hukum Pengadaan Barang Dan Jasa* (Prenada Media, 2017). p. 91.

the realization and functioning of a construction in accordance with its designation as stated in the Procurement document. (Regulation of the Minister of Public Works and Public Housing Number: 31/PRT/M/2015 on The Third Amendment of The Minister of Public Works Regulation No. 07/PRT/M/2011 on Standards and Guidelines for Procurement of Construction Work and Consulting Services).

In the implementation of construction services, service providers with medium and /or large qualifications prioritize to provide supporting work to sub service providers with small qualifications. Support/temporary jobs for example:

- (1). Making of a circumvention channel (*diversion channel*);
- (2). Large-scale job site drying (*dewatering/ unwatering*);
- (3). The manufacture of safety construction (*protection construction*);
- (4). Large-scale Traffic management;
- (5). Diversionary path/temporary bridge.

Service providers and sub service provider are obliged to fulfill the rights and obligations as stated in the construction work contract. In article 48 letter b of Law No. 2 of 2017, construction work contracts for the implementation of construction services can contain provisions on the sub service provider and suppliers of materials, building components, and/or equipment that must meet applicable standards. The subconstituency part of the job is the part of the job not the primary job, or the specialist job specified as stated in the election document. Along with the enactment of Ministry of Public Works and Housing No.07/PRT/M/2019, on Standards and Guidelines for Procurement of Construction Services Through Providers, the determination of subcontracts is determined in the election document. In terms of the implementation of construction services using regional revenue and spending budgets (Regional Government Budget) and meeting the criteria of small to moderate risk, simple to medium technology, and small to medium costs, provincial regional governments can make special policies.<sup>16</sup>

Special policies include the use of regional service of sub provider. In the implementation of construction services, service providers and/or sub service provider are obliged to submit the results of their work appropriately costly, appropriate quality, and on time as stated in the construction work contract. Service providers and/or sub service providers who do not submit their work results appropriately, appropriately, and/or on time may be subject to compensation in accordance with the agreement in the construction work contract. Service users are responsible for the cost of construction services in accordance with the agreement in the construction employment contract. From the description of Law No. 2 of 2017 on Construction Services, the forms of subcontracts between the main contractor and subcontractors are:

- a. The specialist main work;

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<sup>16</sup> Muhamad Azhar and Suhartoyo Suhartoyo, "Aspek Hukum Kebijakan Geothermal Di Indonesia," *Jurnal Law Reform* 11, no. 1 (2015): 123-38, <https://doi.org/https://doi.org/10.14710/lr.v11i1.15761>.



- b. The Supporting work;
- c. The suppliers of materials, building components, and/or equipments.

### **3.2.2 Government Regulation No. 16 of 2018 on Government Procurement of Goods/Services.**

Subcontractors in the government procurement of goods/services are regulated in Article 65 (6) of Presidential Regulation No. 16 of 2018 on Government Procurement of Goods/Services which reads:

"Non-small business providers who carry out work can do business cooperation with small businesses in the form of partnerships, subcontracts, or other forms of cooperation, if there are small businesses that have the ability in the field concerned"

The contracting company in carrying out its duties must also provide its own equipment necessary to handle the project charged to it, therefore, in carrying out its work the contracting company usually shares its work with other contracting companies that have the necessary expertise to complete a job that is not controlled by the main contractor. Companies that carry out the work of contractors from other contractors are commonly called sub contractors.<sup>17</sup>

Presidential Regulation No. 16 Tahun 2018 also alludes to the terms of payment of job achievement related to subcontractors. Article 53 paragraph (3) of Presidential Regulation number 16 of 2018 states that in the event that the provider submits some of the work to the subcontractor, the payment request must be equipped with proof of payment to the subcontractor in accordance with the realization of his work. In the Regulation of the Government Procurement Policy Institute/Government Services number 9 of 2018 on Guidelines for the Implementation of Procurement of Goods/Services through the provider is also explained for subcontracted work, payment requests are equipped with proof of payment to sub provider/subcontractors in accordance with the progress of subcontractor work results.

### **3.2.3 Presidential Regulation No. 12 of 2021**

Presidential Regulation No. 12 of 2021 on changes to Presidential Regulation No. 16 of 2018 on The Implementation of Government Goods/Services. In particular, the regulation of subcontractors in the procurement of government goods/services in principle has not undergone fundamental changes. This is seen in the subcontractor arrangements stipulated in Article 65 (6) of Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, which reads:

"Non-small business providers who carry out work can do business cooperation with small businesses in the form of partnerships, subcontracts, or other forms of cooperation, if there are small businesses that have the ability in the field concerned"

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<sup>17</sup> Sari, "Kedudukan Dan Tanggung Jawab Hukum Pihak Sub Kontraktor Pada Perjanjian Pengadaan Barang/Jasa Pemerintah." p.5.

This article has undergone a change in Article 65 paragraph (7) of Presidential Regulation No. 12 of 2021 concerning changes to Presidential Regulation No. 16 of 2018 concerning the Government Procurement of Goods/Services which reads;

"Non-small business providers or cooperatives that carry out the work of doing business cooperation with small businesses and/or cooperatives in the form of partnerships, subcontracts, or other forms of cooperation, if there are small businesses or cooperatives that have capabilities in the field concerned"

The change from Presidential Regulation No. 16 of 2018 on Government Goods/Services to Presidential Regulation No. 12 of 2021 on changes to Presidential Regulation No. 16 of 2018 on Government Goods/Services regulations only competent or accommodates cooperative business entities in carrying out construction work and procurement of government goods/services in the form of subcontractors.

The basis of the philosophy of change from Presidential Regulation No. 16 of 2018 on Government Goods/Services to Presidential Regulation No. 12 of 2021 on changes to Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services is to implement the provisions in Law No. 11 of 2020 on Work Copyright to prioritize the use of micro and small business products/services and cooperatives and regulations procurement of construction services whose financing is sourced from the Indonesian Budget/Regional Government Budget in government procurement of goods/services. Considering Presidential Regulation No. 12 of 2021 on changes to Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services. "that to implement the provisions in Law No. 11 of 2020 on Work Copyright to prioritize the use of micro and small business products/services and cooperatives and construction services procurement arrangements whose financing is sourced from the State Budget in the Procurement of Government Goods/Services need to establish presidential regulations on changes to Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services.

Government procurement contract is a written agreement between Commitment-Making Officer as a representative of the government and the provider of goods/services that are usually called contractors. Based on this understanding, the contractual relationship that arises due to government procurement contracts is a legal relationship between Commitment-Making Officer and the provider of goods/services or contractors. Only these two parties are legally bound by each other's contracts. Transferring work or subcontracting in the procurement contract of goods/services is permissible when it meets certain conditions. Subcontract procurement of government goods/services is a written agreement that contains the transfer of work from the provider of goods/services to third parties or subcontractors.

### **3.2 Legal Relationship between Contractor and Subcontractor**

A legal relationship (*rechtbetrekkingen*) is a relationship between two or more legal subjects regarding the rights and obligations on one side dealing with the rights and obligations of the other party.<sup>18</sup> Legal relationships can occur between fellow subjects

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<sup>18</sup> Raharjo Soeroso, "Pengantar Ilmu Hukum," 2002. h. 269.

of law and between legal subjects and objects. Relationships between fellow legal subjects can occur between persons, persons with legal entities, and between fellow legal entities. The legal relationship between the subject of law and the object in the form of what rights are controlled by the subject of the law over the object, whether tangible object, movable object, or immovable object.<sup>19</sup>Legal relations have conditions, namely the existence of a legal basis and the existence of legal events.<sup>20</sup>

How is the legal relationship in a contractual relationship? Government procurement contract is a written agreement between Commitment-Making Officer as a representative of the government called service users with providers of goods/services that are usually called contractors. Based on this understanding, the contractual relationship that arises due to government procurement contracts is Commitment-Making Officer as a government representative called service user with the provider of goods/services or contractors. Only these two parties are legally bound by each other's contracts.

Transferring work or subcontracting in the procurement contract of goods/services is permissible when it meets certain conditions. Subcontract procurement of government goods/services is a written agreement that contains the transfer of work from the provider of goods/services to third parties or subcontractors.

The legal relationship between the parties in the procurement of government goods/services in which involving subcontractors will indeed tend to cause legal problems, especially in terms of legal protection for subcontractors. Government Procurement of goods/services involving subcontractors will produce a new legal relationship between the provider of goods/services with subcontractors. With the produce of the new legal relationship, in the procurement of government goods/services involving subcontractors there are 2 (two) legal relationships in one job as referred to in the main contract or procurement contract.

Legal relationship between *Commitment-Making Officer* as a user of goods/services with the contractor as a provider of goods/services based on the procurement contract of goods/services, while the legal relationship between the subcontractor and the contractor based on the subcontract and subject to the restrictions agreed in the parent contract/procurement contract. Legal relationships are based on *bargaining theory*. This theory is a development of the theory of "equal value" (*equivalent theory*). This equality theory teaches that a contract is only binding as far as what is negotiated (bargaining) and then approved by the parties. This theory in accordance with article 1340 BW is also known as the principle of *privity of contract* which can simply be understood that the agreements made by the parties are only binding and cause legal consequences for the parties who make it alone. With the principle of *privity of contract*, it clarifies the legal relationship create from the government's procurement contract with subcontracts, where in the principal contract that is bound only *Commitment-Making Officer* as a user of goods/services and providers of goods/services or contractors only while subcontracts there is only a legal relationship between providers of goods/services or contractors with subcontractors.

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<sup>19</sup> Peter Mahmud Marzuki and MSSH, *Pengantar Ilmu Hukum* (Prenada Media, 2021). h. 254.

<sup>20</sup> Soeroso, "Pengantar Ilmu Hukum." p. 271.

The existence of 2 (two) legal relationships in one work procurement of government goods/services basically only has a relationship in the context of its work but does not have a legal relationship from the context of the agreement between the parties. The legal relationship of the parties in the procurement of government good/services involving subcontractors is very complicated and tends to harm subcontractors. A subcontracting agreement between a contractor and a subcontractor will not have any impact on the main agreement or procurement contract, but the main contract may have legal consequences on the subcontractor. This is what tends to be considered detrimental or cause injustice for subcontractors. With the subcontractor, the subcontractor is not directly related to the user of goods/services but with the contractor even though the terms and conditions contained in the main contract (*prime contract*) must be applied to the subcontract.<sup>21</sup>

Regarding the legal relationship that created from the subcontracting agreement between the provider of goods/services with the subcontractor will raise new questions, namely regarding the provisions in the parent agreement applicable in the subcontracting agreement and the existence of Commitment-Making Officer agreement as a condition in the making of the subcontracting agreement. The terms in the main agreement applicable in the subcontracting agreement is indeed a necessity that cannot be avoided by subcontractors and contractors. There are 2 (two) things that cause the provisions in the main contract to apply in the subcontracting agreement, namely the contractor is bound by the provisions in the main contract and the object of the agreement in the main subcontract is part of the main agreement object. Subcontracting agreements also cannot break away from the main contract because the object of the agreement in the main subcontract is part of the main agreement object.

Against work with the same object of agreement it is impossible if the provisions are different. Commitment-Making Officer approval as a condition in the making of subcontracting agreements by some people is also considered as a form of self-binding of Commitment-Making Officer to subcontracting agreements so that Commitment-Making Officer should also have a legal relationship with subcontractors. This view is a mistake because the agreement is only a procedural condition that must be passed by the provider of goods/services who get a job from Commitment-Making Officer. Commitment-Making Officer as an employer certainly has an interest in knowing to whom the provider of goods/services diverts some of his work. This is only as a means of control or supervision given to Commitment-Making Officer so that the transfer of work does not cause harm to Commitment-Making Officer. In addition, in the procurement of government goods / services involving State budget so that the supervision carried out by Commitment-Making Officer must also be maximal. The main thing is, Commitment-Making Officer does not have rights and obligations in subcontracting agreements between providers of goods/services with subcontractors so there is no reason to declare the agreement as a form of statement of the create of the legal relationship between Commitment-Making Officer and subcontractors.

The subcontracting agreement basically also provides an advantage for the subcontractor because the Commitment-Making Officer cannot impose sanctions

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<sup>21</sup> Simamora, "Hukum Kontrak; Kontrak Pengadaan Barang Dan Jasa Pemerintah Di Indonesia." p. 257.

against him if he makes a mistake. Responsibility for the implementation of procurement of goods/services to Commitment-Making Officer remains with the provider of goods/services or contractors even though there is a subcontract. If there is negligence committed by the subcontractor during the implementation of the work is the responsibility of the provider of goods/services or contractors. On this consideration, in the subcontract, the contractor wherever possible imposes *back to back* provisions so that the subcontractor is in a negligent state if it violates the terms and conditions contained in the principal contract.<sup>22</sup> To perform a contract of employment agreement between the contractor and the subcontractor performed by both the contractor and the sub-contractor must fulfill at least 10 (ten) steps and procedures in the following order of activities:<sup>23</sup>

- 1) Contractors must be aware first of the announcement, registration and invitation of procurement of goods/services by the project owner to contractors who have qualified requirements.
- 2) The contractor registers in accordance with the predetermined time, which is accompanied by proof of administration and engineering in accordance with the requirements desired by the project owner.
- 3) The contractor gets the auction documents and within the specified time the contractor gets an explanation (anweizing) about the scope of work, work location and others related to the explanation for the bidding material.
- 4) Contractors devise strategies to win auctions through efforts ranging from checking job volumes, surveying local material prices and wages, and establishing potential subcontractors for specialist work.
- 5) The contractor assigns potential subcontractors to carry out the desired specialist work (the procurement piles, piling tools, and execution of piling).
- 6) The contractor asks the subcontractors to submit an offer for the desired specialist work in accordance with his field of expertise (the procurement piles, piling tools, and execution of piling).
- 7) The contractor agrees a mutual of under-standing-MOU agreement, with the subcontractor of the offer that has been declared approved, this is done before the employment contract between the contractor and the project owner.
- 8) The contractor is declared the winner of the auction by the project owner, then if the administrative requirements are met, the employment contract agreement is signed by each contracting party and the project owner.
- 9) The contractor clarifies with the subcontractor about the specialist work to be carried out, about the specified time, expected quality, and costs that have been set.
- 10) The contractor contracts the employment agreement with the subcontractor and then makes an agreement on the schedule of the start of the work, about the

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<sup>22</sup> John Uff, *Construction Law* (HeinOnline, 2013). p. 287.

<sup>23</sup> Wateno Oetomo, "Kajian Terhadap Resiko Kualitas Hubungan Kontraktual Antara Kontraktor Dan Subkontraktor Berkaitan Dengan Pekerjaan Spesialis Pada Proyek Konstruksi," *Extrapolasi* 8, no. 01 (2015), <https://doi.org/https://doi.org/10.30996/exp.v8i01.980>.

end of the implementation of the work, the schedule of payment of work performance.

In the implementation of the work, the provider of goods/services must carry out the work in accordance with the contract that has been signed with Commitment-Making Officer. The provider of goods/services that have been appointed as the executor of the work including the main work based on the contract must maintain its commitment in completing the main work, so that when the provider of goods/services transfers the main work to the subcontractor through the subcontractor then the provider of goods/services is considered not committed to his work. The main job in this case also means that the part is the most important part in the procurement of government goods/services so that the provider of goods/services that have been appointed is the only competent party to carry out the work. If the main job is transferred to a third party then there is a possibility that the government will be harmed because the third party does not necessarily understand the desire of the government or the third party has the same capacity as the provider of goods/services to complete the main work.

#### **4. Conclusion**

Subcontractors as subject to contract law are regulated in Law No. 2 of 2017 on Construction Services and Presidential Regulation No. 16 of 2018 on Government Goods/Services and Presidential Regulation No. 12 of 2021 on changes to Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services. This subcontractor have *legal standing* in contractual relationships, especially in government procurement contracts.

Subcontractors or sub-service providers have a legal relationship with the Contractor as a service provider based on the subcontract but have no legal relationship with Commitment-Making Officer as a Service User. On the other hand, the Contractor has a legal relationship with Commitment-Making Officer based on the Government Procurement of Goods/Services contract.

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### **Laws and Regulations**

- Law Number 2 of 2017 on Subcontractor Construction Services
- Presidential Regulation No. 54 of 2010 on Procurement of Government Goods/Services
- Presidential Regulation No. 35 of 2011 On Changes to Presidential Regulation No. 54 of 2010 Procurement of Government Goods/Services
- Presidential Regulation of the Republic of Indonesia Number 70 of 2012 Concerning the Second Amendment to Presidential Regulation No. 54 of 2010 Concerning Procurement of Government Goods/Services
- Presidential Regulation No. 12 of 2021 on Changes to Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services
- Regulation of the Minister of Public Works and Public Housing Number: 31/PRT/M/2015 on The Third Amendment of The Minister of Public Works Regulation No. 07/PRT/M/2011 on Standards and Guidelines for Procurement of Construction Work and Consulting Services