

BORROWING COMPANY NAMES IN THE PRACTICE OF PROCUREMENT OF GOODS AND SERVICES IN INDONESIA

Trisulo

Polytechnic of State Finance STAN, South Tangerang
trisula@pknstan.ac.id

Abstract

Normatively, regulations regarding the procurement of goods and services contribute significantly to the efficiency of state spending and the national economy. But in practice, there are still deviations that have the potential to violate the law. This article examines the borrowing of company names in the practice of procurement of government goods and services from the perspective of the applicable law, and the perspective of Dignified Justice. The research methodology used is normative legal research with a literature study using primary, secondary, and tertiary legal materials. As a theoretical basis, this research uses the Theory of Dignified Justice. This article shows that borrowing company names in the practice of procuring government goods and services are contrary to applicable legal norms, and can be a criminal element for providing false or fraudulent information. Existing regulations are not able to touch the practice of borrowing company names in practice. From the perspective of Dignified Justice, it is also identified as contrary to morals, nor does it meet the criteria of good faith in the agreement. To guarantee legal certainty, the practice of borrowing company names must be strictly prohibited by law, but it needs to be done without conflicting with the economic objectives referred to by the constitution.

Keywords: *Government procurement of goods/services; Borrowing company names; Dignified Justice*

1. INTRODUCTION

Government procurement of goods and services is an activity to obtain goods/services by the Ministry/Institution/Regional Apparatus/Institutional Work Unit which the process starts from planning needs until completion of all activities to obtain goods/services. Service.¹ The government's procurement of goods/services is also intended to achieve benefits that are economically beneficial not only for Ministries/Institutions/Regional Apparatuses as users but also for the community. Another goal is to significantly reduce the negative impact on the environment throughout its entire life cycle.

The ability to obtain goods and services using the principle with the least sacrifice of various alternatives.² These procurement efforts are carried out without ignoring the quality standards that have been set. These efforts become a benchmark for government agencies to innovate in the procurement process. In this procurement process, the government and the private sector meet in the form of an engagement. From the government side, it has the authority to choose and determine with whom to carry out transactions for the procurement of goods and services.

¹ Pemerintah Negara Republik Indonesia, *Peraturan Presiden Republik Indonesia Nomor 16 Tahun 2018 Tentang Pengadaan Barang/Jasa Pemerintah, Lembaran Negara Republik Indonesia No.33, 2018*. It is contained in Article 1 of Presidential Regulation 16 of 2018 concerning Government Procurement of Goods/Services.

² The principle of efficient procurement of goods and services as stated in Article 6 of Presidential Regulation 16 of 2018 concerning Government Procurement of Goods/Services.

An ideal government that is well managed will place competent, honest, and responsible employees in the unit that manages the procurement of goods and services so that transactions with providers do not harm the state. On the other hand, the provider (generally private) strives to fulfill the terms of the contract, as well as the provisions of the relevant laws (example: payment procedures or taxation).

Often found in the practice of procurement of goods and services, government providers of goods/services use other business entities to overcome administrative obstacles. The practice of borrowing a company name (in practice in Indonesia it is often referred to as "*flag*" borrowing) carried out in the procurement of government goods and services is common and commonplace.³ Borrowing the name of the company is carried out between other parties, both individuals and other companies as the borrower of the name with the company that owns the name. The agreement between the two companies is bound by a form of agreement that is carried out by involving a Notary, without a notary, even without a written agreement. In cases involving a Notary, the agreement that arises between the two parties is stated in the form of an agreement. The agreement is technical which clarifies the rights and obligations of both parties.

Two issues will be discussed related to borrowing company names in the practice of government procurement of goods and services. *First*, how to borrow company names in the practice of procurement of government goods and services from the perspective of the applicable law, and the *Second*, how to borrow company names in the practice of procurement of government goods and services from the perspective of Dignified Justice.

2. RESEARCH METHODS

This research is normative legal research with qualitative analysis that examines the rules or regulations of law as a system related to a legal event.⁴ This research was conducted to provide legal arguments as a basis for determining whether or not an event was true and how the event should be interpreted according to law and focused on examining the legal concept of a criminal act that violates comprehensive regulations or laws regarding applicable buildings. at the moment. Normatively, this legal concept has been regulated in the applicable law. However, the regulation still has many weaknesses, both in terms of substance and implementation.

The legal issue faced in this research is the emergence of the act of borrowing the name of the company in the process of procuring government goods and services. Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services only regulates subcontract work. Subcontracting arrangements are not able to touch the practice of borrowing company names, so the aspects of certainty, fairness, and legal benefits in these practices are not optimal or ineffective. The type of research used is normative legal

³ HRS, "Perusahaan Nazaruddin Kerap Pinjam Bendera," *Www.Hukumonline.Com*, last modified 2012, accessed February 20, 2019, <https://www.hukumonline.com/berita/baca/lt50c9d36340cd9/perusahaan-nazaruddin-kerap-pinjam-bendera>. This practice has attracted public attention and has become popular with the term "borrowing flags", especially since the bribery case involving Nazaruddin. Yulianis, one of the witnesses, explained that there were 25 loan companies. Each company is then paid a fee of one percent of the project value.

⁴ Mukti Fajar ND and Yulianto Ahmad, *Dualisme Penelitian Hukum*, Cetakan 1. (Yogyakarta: PT. Raja Grafindo Persada, 2010). p.34.

research. This legal research is conducted by examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. The materials are arranged systematically, studied, then a conclusion is drawn concerning the problem under study.⁵

3. ANALYSIS AND DISCUSSION

The term borrowing name in some cases is often referred to as a *nominee*. Referring to *Black's Law Dictionary*, explained from the *nominee* (borrow name) is⁶,

"one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in the representation of another, or as the grantee of another."

From this understanding, it can be concluded that a *nominee* is someone who is appointed to act on behalf of another party as a representative in a limited sense. *Nominees* only act as representatives of other parties or as guarantors of other parties.

Borrowing company names in business practice has become a common thing. The parties are jointly aware of and secretly taking legal actions that deviate from what should be.⁷ The parties to the loan agreement are aware and deliberately as if a certain legal action has occurred, while it is secretly agreed that no agreement will be formed or any legal consequences.⁸

In business practice, the loan agreement may only touch the civil aspect. New legal problems arise, for example when there is a default. However, in the practice of government procurement of goods and services, which are related to the scope of public law, problems have arisen since before the contract took place. In-state administration, legal relations between legal subjects cannot be equated with private law, but are part of public law. It refers to the actions of the basic state administration that is to protect the public interest.⁹

In several trials of non-corruption cases and special civil cases related to the procurement of goods and services, the term "borrowing flags" is often used by parties, including law enforcement to refer to the practice of borrowing company names. The following are some decisions of the Supreme Court related to borrowing company names/borrowing flags in government procurement of goods and services.

In the case of the Tresna Werda Nirwana Puri Social Home Development Project (Panti Nursing) Samarinda is supervised by a Supervisory Consultant, namely CV. PEC who "lent" the company to the defendant. Against this case, the Supreme Court with its decision Number 2356 K /Pid.Sus/2011 stated that the Defendant's actions as regulated and threatened with criminality in Article 3 of Law no. 31 of 1999 concerning the Eradication of Corruption

⁵ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (RajaGrafindo Persada, 2010). p.13-14.

⁶ Bryan A Garner, "Black's Law Dictionary With Guide to Pronunciation, Cet. 7" (West Publishing, St. Paul, 1999). p. 1072.

⁷ Habib Adjie, *Kompilasi 1 Persoalan Hukum Dalam Praktik Notaris Dan PPAT*, I. (Surabaya: Indonesia Notary Community, 2016). p. 54.

⁸ H Budiono, *Ajaran Umum Hukum Perjanjian Dan Penerapannya Di Bidang Kenotariatan* (Bandung: Pt.Citra Aditya Bakti, 2009). p.86.

⁹ S.F Marbun and Moh. Mahfud MD, *Pokok-Pokok Hukum Administrasi Negara* (Yogyakarta: Liberty, 2009). p. 69.

Crimes as amended and supplemented by Law no. 20 of 2001 concerning Amendments to Law no. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption in conjunction with Article 55 paragraph (1) 1 of the Criminal Code.

In the case of Procurement of Educational Quality Improvement Facilities in SD/SDLB, Procurement of ICT Facilities, and Procurement of Interactive Learning Media at the Education Office, Probolinggo Regency, East Java Province, in the Fiscal Year 2012 there was a practice of borrowing company names by the Supreme Court with Decision Number 758 K/Pdt. Sus-KPPU/2015 has been proven to have conspired in conducting a tender offer, which violates the provisions of Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This is reinforced by the criminal decision in the same case which has permanent legal force through the Supreme Court Decision Number 1727 K/Pid.Sus/2016 so that the defendants are considered guilty of committing the Corruption Crime as regulated in Article 2 paragraph (1) of Law Number 31 of 1999 *in conjunction with* Law Number 20 of 2001 *in conjunction with* Article 55 paragraph (1) of the 1st Criminal Code.

Previous research using the Theory of Dignified Justice can be mentioned here such as; Abdulajid in his research revealed that criminal sanctions for corruption have had a quantitative and qualitative impact in eradicating corruption in Indonesia. Dignified Justice Theory is used to parse solutions to weaknesses in the regulation of criminal sanctions for perpetrators of criminal acts of corruption.¹⁰ Dignified Justice Theory explains that efforts to realize justice are not solely carried out with a legal norm approach, but also need to enforce social-societal norms including ethical norms. Fradhana uses the Theory of Dignified Justice to unravel the conflict between legal norms and ethical norms in the case of the Election Organizing Honorary Council (DKPP) decision that dismissed Evi Novida Ginting as a KPU member.¹¹

Jeferson Kameo and Teguh Prasetyo's research discusses anxiety arising from the development of economic law (international). The theory of dignified justice (*the dignified justice theory*) as a pure legal theory becomes a *tool kit* to describe the concept of economic law (International) so as not to worry about conflicts with national law. Every country is free to receive approval before the rules and principles of law are applied and enforced. At the approval stage, screening is carried out by the legal values in the soul of the nation (*Volksgeist*) as a form of upholding the sovereignty of a nation and state as well as to select economic law (international).¹²

¹⁰ Syawal Abdulajid, "Rekonstruksi Sanksi Pidana Terhadap Pelaku Tindak Pidana Korupsi Berbasis Nilai Keadilan Bermartabat (Studi Terhadap Putusan Pengadilan Perkara Tindak Pidana Korupsi)" (Universitas Islam Sultan Agung, 2019). <http://repository.unissula.ac.id/17271/>

¹¹ Fradhana Putra Disantara, "Perspektif Keadilan Bermartabat Dalam Paradoks Etika Dan Hukum," *JURNAL LITIGASI (e-Journal)* 22, no. 2 (2021): 205–229. <http://dx.doi.org/10.23969/litigasi.v22i2.4211>

¹² Jeferson Kameo and Teguh Prasetyo, "Hakikat Hukum Ekonomi (Internasional) Dalam Perspektif Teori Keadilan Bermartabat," *Jurnal Hukum Ius Quia Iustum* 27, no. 2 (2020): 308–327. <https://doi.org/10.20885/iustum.vol27.iss2.art5>

3.1. Borrowing Company Names in Applicable Legal Perspectives

Borrowing company names is an act that arises in the process of procuring government goods and services regarding several aspects including the occurrence of:

- 1) Conspiracy
- 2) Acts against the law

The process of borrowing a company name can be done with or without going through a notary. The company name loan agreement is an understanding between the company owner and the Individual/Business Entity. In many cases, borrowing the name of the company is done with an underhand agreement (*onderhands*). The legal subject of the agreement or both parties generally already know each other or are sub-employees/subcontractors of the company. In terms of sub-contract work, there are positive elements for the company owner to increase experience, income and develop the capacity of the company's sub-work.¹³

As in general contracts, there are provisions regarding the rights and obligations that must be fulfilled by the parties, namely between the Budget User Authorization (KPA)/Commitment Making Officer (PPK) representing the government/work unit as the executor of the procurement of goods and services, and the company winning the auction. or selected provider. The contract is then followed up with a work agreement, or it could be another form of the contract according to regulations.¹⁴ In addition, there is also an agreement between other individuals/business entities and the company as the winner of the auction or the selected provider in the procurement of goods and services as an agreement to borrow the name of the company. The pattern of this relationship can be described as follows.

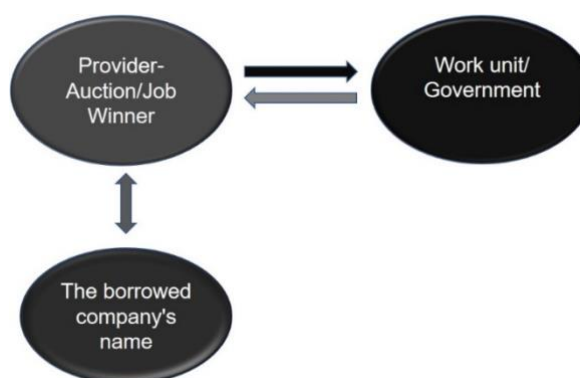


Figure 1. Borrowing the name of the company on the initiative of the Provider

¹³ Muhammad ; Ilyas ; Adwani Isra, "Perjanjian Pinjam Nama Perusahaan Dalam Pelaksanaan Lelang Pengadaan Jasa Konstruksi Pemerintah Provinsi Aceh," *AT-TASYRI'* X, no. 1 (2018): 1–8. <http://www.ejournal.staindirundeng.ac.id/index.php/Tasyri/article/view/128>

¹⁴ Pemerintah Republik Indonesia, *Peraturan Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah Republik Indonesia Nomor 12 Tahun 2021 Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Pemerintah Melalui Penyedia*, *Berita Negara Republik Indonesia Tahun 2021 Nomor 593* (Indonesia, 2021).

Formation of an agreement that binds both parties and perfectly fulfills the elements of Article 1320 of the Civil Code, agreeing with the law for the parties who bind themselves. This agreement becomes a necessity or law for both parties to carry out the rights and obligations that arise based on the agreement to be carried out reciprocally. From this scheme, the borrower of the company name is the party responsible for completing a work package. All workmanship/procurement of goods and services charged to the company becomes the responsibility of the borrower of the company name. This position is usually confirmed by a power of attorney so that the borrower can do everything on behalf of the company being borrowed. Thus, all risks of working/procuring goods and services are borne by the borrower of the name of the company, and losses arising from not completing the work, or the occurrence of default are the responsibility of the borrower of the name of the company.

The pattern as described above shows that there are 2 (two) forms of agreement. The validity of the first agreement between the KPA/PPK and the provider is unquestionable. However, it is necessary to question the position and status of the agreement between the provider/auction winner/recipient of the work order and the company lending the name whether it complies with the provisions of Article 1338 of the Civil Code. There are normative provisions of Article 1338 of the Civil Code that:

- 1) All contracts are made legally valid as law for those who make them.
- 2) The contract cannot be withdrawn other than by agreement of both parties, or for reasons which are stated to be sufficient by law.
- 3) Contracts must be executed in good faith.

Article 1338 Paragraph (3) of the Civil Code stipulates that the agreement must be executed in good faith. The implementation of the agreement in good faith means that the agreement is carried out based on justice and propriety. Subjectively, good faith can be interpreted as honesty, namely what intentions lie in someone when legal action is held. Meanwhile, in an objective sense, good faith is understood as the implementation of a legal agreement based on compliance norms or everything that is considered appropriate in society.¹⁵

In line with the above description, regarding simple contracts, William T. Major mentions several basic elements of simple contracts, namely¹⁶:

- 1) Agreement of
- 2) Intention (faith, intention, or meaning)
- 3) Consideration, in the form of a promise/reciprocal benefit based on an agreement.

William T. Major was of the view that intentions should be expressed in the terms of the contract. Besides the need to be clear in the contract that the benefits obtained by each party, because this is the essence of bargaining activity.¹⁷ The practice of borrowing the name of the company in the schematic image above is according to William's explanation, namely that there is a disconnected relationship between

¹⁵ R Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 1987). p.25

¹⁶ William T. Major, *Hukum Kontrak*, ed. Purwanto, 1st ed. (Bandung: Nuansa Cendikia, 2018). p.15-16

¹⁷ *Ibid.* p. 16

KPA/PPK (Government Party) and the company whose name is borrowed. In this condition, aspects of the agreement can still be identified, for example in a contract in the form of a Work Order, but the government's intention to borrow the name of the company whose name is borrowed by the auctioneer/winner is unknown. Likewise, the consideration between the government and the companies whose names are borrowed is not transparent or even does not appear at all.

Regarding good faith, Subekti explained that Article 1338 paragraph (3) of the Civil Code is one of the most important aspects of a contract so that judges have the power to oversee the implementation of a contract so that there is no violation of propriety and justice. With this understanding, the judge has the authority to deviate from the contract if the execution of the contract violates the feeling of justice (*recht gevoel*) of one of the two parties. The principle of good faith requires the existence of propriety and justice, so the demand for legal certainty in the implementation of the contract must not violate the norms of propriety and the values of justice.¹⁸

Good faith as a legal principle contained in Article 1338 paragraph (3) of the Civil Code (BW) in several studies often leads to the conclusion that good faith only exists in the implementation of contracts. Understanding good faith as a rule of law and good faith as a principle of contract law is very important to answer differences of opinion regarding the obligation of good faith at the pre-contract stage.¹⁹ If good faith is interpreted as a concrete legal rule with grammatical interpretation, it means that it only exists at the stage of contract implementation.²⁰ In contrast to good faith, it is interpreted as the principle of contract law with the scope of application not only limited to the implementation of the contract but at all stages of the contract, namely the pre-contract stage, contract implementation, and dispute resolution.²¹

In contracts, good faith essentially means honesty and decency/fairness, this means that it contains elements of trust, transparency, autonomy, obeying norms, without coercion, and without deceit. As a concrete rule, honesty in positive legal rules is manifested in Articles 530, 531, 533, and 548 of the Civil Code concerning *beziter* with good intentions; Articles 1963, 1966, and 1977 of the Civil Code concerning ownership related to expiration; Article 1320 of the Civil Code as a condition of agreement and a lawful cause. Property/justice is embodied in Articles 1321, 1323, 1328 of the Civil Code concerning mistakes, coercion, and fraud in contract making; Article 1348 of the Civil Code concerning payments with intention.²²

¹⁸ Muhammad Syaifuddin, *Hukum Kontrak: Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik, Dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)* (Bandung: CV. Mandar Maju, 2016). p. 94.

¹⁹ Miftah Arifin, "Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian," *Jurnal Ius Constituendum* 5, no. 1-April (2020): 66–82. <http://dx.doi.org/10.26623/jic.v5i1.2119>

²⁰ Novran Harisa, "Asas Itikad Baik Dalam Perjanjian Arbitrase Sebagai Metode Penyelesaian Sengketa," *Aktualita* 1, no. 1-Juni (2018): 261–279. https://web.archive.org/web/20200506080634id/https://ejournal.unisba.ac.id/index.php/aktualita/article/download/3722/pdf_1

²¹ Ricardo Simanjuntak, *Hukum Kontrak-Teknik Perancangan Kontrak Bisnis* (Jakarta: Kontan Publishing, 2011). p.231.

²² Arifin, "Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian." Loc.cit.

According to Wirjono Prodjodikoro, good faith is more synonymous with the term "honesty" and distinguishes it from "property". Honesty must occur at the time of the entry into force of legal relations, such as honesty in holding goods as one of the conditions for obtaining ownership of the goods held in the past during "*verjaring*". Honesty is an estimation in one's heart that the conditions for starting a legal relationship have been met.²³ When applied to the practice of borrowing company names, it is quite clear that the practice of borrowing company names does not meet the criteria of good faith as stated by Wirjono.

The discussion on the status of good faith in the practice of borrowing the name of the company above will become clearer if the initiator of the name borrowing is carried out by KPA/PPK/Government Parties. Borrowing a company name with an initiator from the government can be described as follows.

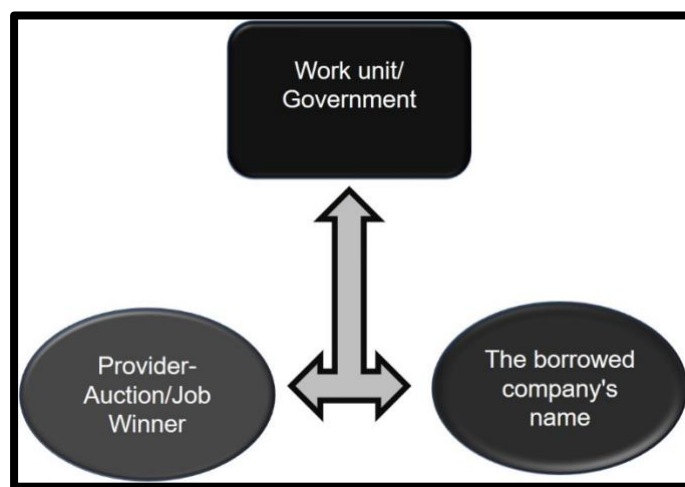


Figure 2. Borrowing Company Names on the Initiative of Government Officials

The above scheme depicts the government apparatus acting to regulate the entire process of borrowing company names. The normative provisions in Article 1338 of the Civil Code regarding the freedom to make contracts are also limited by the limitation provisions in Article 1337 of the Civil Code. This article prohibits contracts whose substance is contrary to the law, public order, and morality. So, every agreed contract remains valid if it fulfills the requirements determined by laws and regulations, public order, and decency. In this second scheme, government officials have violated the code of ethics as State Civil Apparatus (ASN) as referred to in Article 5 of Law Number 5 of 2014 concerning State Civil Apparatus.²⁴ In particular, he has violated discipline as a Civil Servant, at least has committed an act of abusing his authority, as well as being an intermediary for personal and/or other people's gain by using the authority of others as

²³ Wirjono Prodjodikoro, *Asas-Asas Hukum Perjanjian* (Bandung: CV. Mandar Maju, 2011). p.102-107.

²⁴ Pemerintah Negara Republik Indonesia, *Undang-Undang Republik Indonesia Nomor 5 Tahun 2014 Tentang Aparatur Sipil Negara, Lembaran Negara Republik Indonesia No.5*, 2014.

referred to in Article 4 of Government Regulation Number 53 of 2010 concerning Civil Servant Discipline. Civil.²⁵

Referring to Article 1320 number (4) in *conjunction with* Article 1337 of the Civil Code, it is found that the parties are not justified in entering into contracts based on non-halal causes. Causes that are not lawful are those that are prohibited or contrary to the law, or contrary to public order and morality. Contracts made based on unlawful causes are invalid. Thus, borrowing the name of the company at the initiative of the PPK/government party (in the second scheme) above, because it violates several regulations related to the State Civil Apparatus can be considered to contain an illegal cause, or at least the level of honesty of the parties is doubtful.

The statement, “an agreement must be executed in good faith.” is part of the principle of *freedom of contract* as contained in Article 1338 Paragraph 3 of the Civil Code. The statement is interpreted that since the agreement is made and takes effect, it must not be intended to harm the interests of the parties. Article 1338 Paragraph 3 of the Civil Code is in line with Article 1339 of the Civil Code which states that an agreement does not meet the requirements of good faith and propriety, it is appropriate to be void and not binding.²⁶

Presidential Regulation Number 16 of 2018 has anticipated the practice of delegating work to other companies that do not participate in the auction through job subcontracting arrangements. *First*, in paragraph (5) Article 65 of Presidential Regulation Number 16 of 2018, it is stated that non-small business providers who carry out work can carry out 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 relevant field. *Second*, paragraph (3) Article 63 of Presidential Regulation Number 16 of 2018 which regulates foreign business entities participating in International Tenders/Selections are required to conduct business cooperation with national business entities in the form of consortia, subcontracts, or other forms of cooperation. *Third*, Article 53 paragraph (3) of Presidential Regulation Number 16 of 2018 which regulates the mechanism for payment of work performance, requires Providers who submit part of the work to subcontractors, to complete payment requests with proof of payment to sub-contractors following the realization of their work.

The provisions on subcontracting the regulation:

- 1) Delegation of work to small businesses, caused no major job/parent
- 2) Liabilities delegation of business entities nationwide for international tenders
- 3) All the activities of the subcontract should be known by the CO as representative of the government

while when compared to the activity of lending and the name of the company contains the following elements:

²⁵ Pemerintah Republik Indonesia, *Peraturan Pemerintah Nomor 53 Tahun 2010 Tentang Disiplin Pegawai Negeri Sipil, Lembaran Negara Republik Indonesia No. 74*, 2010.

²⁶ P Patrik, *Asas Iktikad Baik Dan Kepatutan Dalam Perjanjian* (Semarang: Badan Penerbit Undip, 1986). p.8.

- 1) Not merely delegating work to small entrepreneurs, but for several reasons, for example; does not have a company, the company does not meet the qualifications as a provider, avoids administrative obstacles related to payment terms and taxation, and others.²⁷
- 2) Not a job/auction is required for subcontracting.
- 3) The name borrowing agreement is unknown or has permission from the PPK/government party.

It is clear from this comparison that the subcontracting activities cannot be considered the same as the company name borrowing activities in the two schemes above. Mudjisantosa is of the view that borrowing a company name is more appropriately considered the same as a subcontract that is not permitted by law, or a subcontract that is not known to the PPK.²⁸ This means that borrowing the name of the company is contrary to Article 1320 Paragraph (4) *jo.* Article 1337 of the Civil Code. As stated in Article 1320 Paragraph (4) that one of the conditions for a valid agreement is if it is carried out for a lawful cause. Likewise, Article 1337 of the Civil Code states that a cause is prohibited, if it is prohibited by law, or if it is contrary to good decency or public order.

From the description above, when using the approach to the view that good faith means honesty as in Wirjono's view, borrowing the name of a company in the procurement of government goods and services does not meet the agreement with the criteria of good faith. Likewise, if using the approach used by Subekti which defines good faith as propriety, borrowing a company name is contrary to the norms of decency and fairness.

Every vendor/provider who will carry out the work of procuring goods and services is asked to make an integrity pact²⁹, as a consequence of this, the vendor/provider must fulfill honesty, commitment, and professionalism in the process of procuring goods and services. LKPP Regulation Number 12 of 2021 concerning Guidelines for the Implementation of the Procurement of Goods/Services Through Providers also requires that providers who will conduct consortium/operational cooperation/partnerships/other forms of cooperation must have a consortium agreement/operational cooperation/partnership/other forms of cooperation. Borrowing company names do not have the criteria as referred to in the LKPP Regulation 12 of 2021. The agreement to borrow the name of the company is carried out solely to fulfill the required qualifications by way of engineering in terms of formalities.

The legal relationship that occurs between the provider and the third party in the first scheme (Figure 1.) may contain elements of criminal fraud. The provider, bidder, or auction winner is present in front of PPK using the identity of another

²⁷ Isra, "Perjanjian Pinjam Nama Perusahaan Dalam Pelaksanaan Lelang Pengadaan Jasa Konstruksi Pemerintah Provinsi Aceh." *Loc.cit.*

²⁸ Mudjisantosa, "Pinjam Bendera Adalah Tipikor?," *Www.Mudjisantosa.Net*, last modified 2017, accessed June 24, 2021, <http://www.mudjisantosa.net/2017/05/pinjam-bendera-adalah-tipikor.html>.

²⁹ Pemerintah Republik Indonesia, *Peraturan Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah Republik Indonesia Nomor 12 Tahun 2021 Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Pemerintah Melalui Penyedia*.

person/company. The provider who borrows the name of such a company must provide benefits or *fees* to the company whose identity is used/borrowed. Meanwhile, the company did nothing. Borrowing names carried out by providers like this is intended to trick the government/PPK to gain profit for him and the company whose name is borrowed. As Article 378 of the Criminal Code states:

"Whoever to benefit himself or another person by going against his rights, either by using a false name or false circumstances, either by reason and deceit or by making up false words, persuades people to give something, making debt or writing off a debt, is punished for fraud with a maximum imprisonment of 4 (four) years.³⁰

There are two objective and subjective elements related to fraud (*bedrog*) in Article 378 of the Criminal Code. Among the objective elements are to benefit oneself or others unlawfully, by using a false name or false dignity, by deceit, or by a series of lies. The definition of "false name or false dignity" here is a name that is not a real name but the name of another person, as well as dignity or position that is not by accordance with the actual situation.³¹ In the *Penal Code* French on fraud, the term "using" a false name is applied, not "using" a false name.³² Both Article 378 of the Criminal Code and the *Penal Code* French in viewing a "false name or false dignity" are not related to job performance, but the benchmark is to benefit oneself or others. In the agreement to borrow the name of the company in the practice of government procurement of goods and services (first scheme), at the same time the state should be able to pay less for the transaction. Likewise, if it is related to conspiracy or business competition, then other parties are harmed.³³ Thus, borrowing a company name in the first scheme above can be categorized using a fake name, as an element that is contrary to Article 378 of the Criminal Code.

One of the tools to move others in the objective element in deception (*bedrog*) is "a series of lies/deceit". As for the "series of lies" is an act that is not enough with one lie, but several lies that make other people affected or deceived.³⁴ In the second scheme, borrowing company names is an initiative of the PPK/KPA/Government Parties. The PPK/KPA in the scheme "moves" other people to commit a series of lies or fraudulent acts. In this second scheme, it is also clearer that there is an "intention" or goal desired by the perpetrator and the consequences that will occur are also known. This "intention" fulfills a subjective element in the form of intentional gain against the law.³⁵

³⁰ Tim Visi Yustisia, *KUHP: Kitab Undang-Undang Hukum Pidana*, I. (Jakarta: VisiMedia, 2016).

³¹ Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan* (Jakarta: Prenada Media, 2017). p.113.

³² Starting from a difference of opinion at the Hoge Raad June 19, 1855, W.1785 a man mobilized a messenger, who came to deliver a package to be handed over to a woman, claiming that he had a daughter with the name on the package, when in fact not so. The person is then convicted of fraud by means of using a false name and using false dignity.

³³ In comparison, there is insider trading in the capital market which is identified as market manipulation and fraud. The act of fraud due to the existence of information or circumstances that are not true will be able to harm other parties without having to have consequences for the manipulated market. (notice at Hatiwiningsih and Lushiana Primasari, *Hukum Pidana Ekonomi* (Tangerang Selatan: Penerbit Universitas Terbuka, 2015). p.1.10)

³⁴ Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan*. Op.cit. p.113-114.

³⁵ Ibid. p.121.

In the second scheme, PPK/KPA know their duties and are required to be accountable to the public. PPK/KPA is responsible to the people represented by the state/government, in this context it is responsible for the successful implementation of government procurement of goods/services. As a government apparatus, PPK/KPA knows and is bound by at least Law Number 28 of 1999 concerning State Administration that is Clean and Free from KKN and Law Number 5 of 2014 concerning State Civil Apparatus.³⁶

The PPK or the authorized apparatus that initiates the borrowing of the company's name in the process of procuring government goods and services, of course, knows the risks or impacts that their actions are contrary to the law. Moreover, if the motive for the initiative to borrow the name of the company contains the intention of gaining benefits for oneself or others so that it is included in a criminal offense of corruption. Can be an opportunity to be identified as fraud with intentional features as certainty (*Suchopzet bij zekerheidsbewustzijn*intention), or deliberate as a possibility (*opzet bij mogelijksheidsbewustzijn*) or often called *dolus eventualis*.³⁷

As a *dolus eventualist*, Moeljatno offers an approach with the "*inkauf nehmen*" theory or the "what can be done" theory.³⁸ Whatever the motive for the actions of the PPK or government officials in the second scheme is a deviation or non-compliance with the principles of the State Civil Apparatus such as professionalism, proportionality, and accountability. Similar principles are also contained in Law Number 17 of 2003 concerning State Finance and Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services such as: transparent, open, competitive, fair, and accountable. PPK/government representative who engineered borrowing a name in a condition at first may only intend to commit administrative violations, but he certainly knows the risks that will arise not only from the administrative aspect, it can be state losses, state losses, or conspiracy (vertical). In such a situation, the PPK/government representative must be brave enough to take the risk. This is by Moeljatno's opinion placing the condition that there is intentionality in the pattern *dolus eventualis* :

- 1) The defendant is aware of the possible consequences/circumstances that constitute an offense.
- 2) His attitude towards the possibility if it does arise, is what can be done, can be approved, and dare to take the risk.³⁹

³⁶ Abu Samman Lubis, "Akuntabilitas Pejabat Pembuat Komitmen (PPK) Dalam Proses Pengadaan Barang/Jasa Pemerintah," *Bppk.Kemenkeu.Go.Id*, last modified 2018, accessed July 3, 2021, <https://bppk.kemenkeu.go.id/content/berita/balai-diklat-keuangan-balikpapan-akuntabilitas-pejabat-pembuat-komitmen-ppk-dalam-proses-pengadaan-barangjasa-pemerintah-2019-11-05-eb0c9313/>.

³⁷ Exemplified by Moeljanto, someone wants to shoot a wild boar. But at the same time he understood that around the location there were many villagers who were chasing the pig. As a result, the one who was shot was not only the wild boar, but also one of the villagers (or the wild boar was not hit at all), so the death of that person is said to be intentional. If he is conscious and aware of the certainty that the shooting of the person was intentional, then the result is called intentional as certainty. But if it is realized only as a possibility, it is called intentional as a possibility. (Moeljatno, *Asas-Asas Hukum Pidana*, 7th ed. (Jakarta: Rineka Cipta, 2009). p.178.)

³⁸ *Ibid.* p.175.

³⁹ *Ibid.* p.76.

3.2. Borrowing Company Names in the Perspective of Dignified Justice

Dignified justice as a legal theory was put forward by Teguh Prasetyo. The concept of Dignity Justice contains several previous thoughts such as the Theory of Natural Law proposed by St. Thomas Aquinas. Such as the attempt to translate the "mind" of God. It's just that there is a difference in the Theory of Dignified Justice separating the period of God's mind before the existence of the state and after the existence of the state.⁴⁰ Teguh Prasetyo also explained that there was a wedge of thought with Thomas Aquinas earlier, such as the conception of *divine law* and *eternal law*, up to the third layer which still places divinity when a contract occurs and is known as the contractual sanctity principle.⁴¹

Regarding the statement that *human law, is supported by reason, and enacted for the common good*, Dignified Justice views that what is meant by common good is justice.⁴² In summary, it can be described, The Theory of Dignified Justice states that the source of law comes from thought (*reason*), and *reason* uses a conception that is by the spirit of the Indonesian nation or *volkgeist*, namely Pancasila.⁴³

Implementation of the Dignified Justice in the legal system can be explained as the application of Pancasila in the national legal system. The philosophy of dignified justice views that the national legal system is the result of systemic philosophical thinking. The legal system that is formed is undeniably a compromise of the legal system of civilized countries. This does not mean that the Indonesian legal system imitates the laws of other countries. Indonesian law grows from the soul of the *nation* and from within Indonesia itself. The similarity that occurs is solely due to the objective and universal similarity by the values in Pancasila.⁴⁴

Borrowing company names (or borrowing flags) that occur in the procurement of government goods and services needs to be analyzed with a more dignified approach, in this context not as an ordinary engagement, because it is faced with the public sphere. The view on the practice of borrowing company names is given proper direction and placement in the legal system on issues related to the procurement of goods and services, at least related to:

- 1) The concept of the Indonesian economy is the indirect goal of government procurement of goods and services,
- 2) views on-state losses, and
- 3) views on honesty and good faith in the implementation of the procurement of goods and services.

As an element of fiscal policy, the procurement of goods and services aims to drive the economy by creating jobs, increasing competitiveness, and increasing economic

⁴⁰ Teguh Prasetyo, *Legal Reform: Perspective of Dignified Justice Theory* (Malang: Setara Press, 2017). p.18.

⁴¹ Teguh Prasetyo, *Dignified Justice: Legal Theory Perspectives*, Issue II. (Bandung: Nusa Media, 2019). p.26-27.

⁴² Ibid.

⁴³ Teguh Prasetyo, *Legal Reform: Perspective of Dignified Justice Theory* (Malang: Setara Press, 2017). p.15.

⁴⁴ Teguh Prasetyo, *Keadilan Bermartabat: Perspektif Teori Hukum*, Cetakan II. (Bandung: Nusa Media, 2019). p.81-82.

growth.⁴⁵ The procurement of government goods and services is in a series of processes to realize state goals. At the end of the process, due to the relinquishment of rights and obligations, namely payment and delivery of work/goods, it will be crucial in the event of fraud.

The economy in the constitution of the 1945 Constitution of the Republic of Indonesia contains the concept of a family system. The country's economic system is expressed as a form of joint business carried out in a family way.⁴⁶ With this concept, the regulation of the government's procurement of goods and services should be appropriate if it favors the business entities referred to in Article 33 of the 1945 Constitution of the Republic of Indonesia, namely Micro, Small Business, and Cooperatives.

State losses according to Article 1 paragraph (22) of Law Number 1 of 2004 concerning the State Treasury are a lack of money, securities, and goods *real* and *definite* as a result of unlawful acts, whether intentional or negligent. The explanation of the word "shortage" means a reduction in the amount of money that has been allocated for certain benefits. The phrase state loss in Law Number 1 of 2004 should not be compared with the understanding of "profit" or an increase in state money.⁴⁷

Understanding state losses should also be interpreted as optimizing the value of the benefits of money and not the value of money. Value *for money* means performance, namely the efforts of every rupiah issued by the government to provide maximum benefit in achieving public welfare. The state's understanding of the calculation of profit and loss, as happens in business, needs to be avoided so that it does not become a "price" calculation. Thus, the perception that the state "trades" with its people can be avoided.⁴⁸

In terms of good faith in contracting, the practice of borrowing company names in the procurement of government goods and services does not guarantee the validity of the contract status under these conditions. Because of the classical theory of contract law, it can be applied to situations where the agreement has fulfilled certain conditions. This doctrine does not protect those who suffered losses in the pre-contract stage or stages of the negotiations, because in this phase of the agreement there have not been to meet certain conditions.⁴⁹

Wirjono Prodjodikoro's view of good faith is related to "honesty" and is distinguished from "property". Wirjono explained that honesty must occur at the time

⁴⁵ Maria Avilla Cahya Arfanti, "Pelaksanaan Sistem E-Procurement Dalam Pengadaan Barang Jasa Pemerintah Untuk Mencegah Terjadinya Persekongkolan Tender (Studi Di Dinas Pekerjaan Umum, Perumahan, Dan Pengawasan Bangunan Kota Malang)," *Jurnal Universitas Brawijaya* (2014): 1–22, <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/374>.

⁴⁶ Teguh Prasetyo and Arie Purnomosidi, *Membangun Hukum Berdasarkan Pancasila*, II. (Bandung: Nusa Media, 2018). p.53.

⁴⁷ For example, in the condition that the certificate of guarantee for the performance of the work cannot be disbursed (due to non-fulfillment of the contract or other reasons), cannot be immediately included in the clause on reduced state money or state losses. Moreover, it makes the potential for disbursement of guarantees a profit/income factor for the state. What is at issue here is not the validity of state revenues for the disbursement of the guarantee, but the perception of the state's "benefit" derived from job failure or non-fulfillment of contracts.

⁴⁸ Samsul Ramli, *Bacaan Wajib Mengatasi Aneka Masalah Teknis Pengadaan Barang/Jasa Pemerintah*, Cetakan 1. (Jakarta Selatan: Transmedia Pustaka, 2014). p.102.

⁴⁹ Suharnoko, *Hukum Perjanjian Teori Dan Analisis Kasus* (Jakarta: Prenada Media, 2015). p.5.

of the entry into force of legal relations, such as honesty in holding goods as one of the conditions for obtaining ownership of the goods held in the past during "*verjaring*". This honesty is in the form of estimation in one's heart that the conditions for starting a legal relationship have been fulfilled.⁵⁰ Wirjono's view is very clear that the practice of borrowing company names in the procurement of government goods and services does not meet the criteria of good faith.

Good faith in contracting, which is discussed in the practice of borrowing company names, is described based on a dignified justice perspective starting from the initial thought that all positivism must be based on God Almighty (Natural Law perspective).⁵¹ The moral element is the main concern in legal relations based on the view of the theory of dignified justice. In this case, dignified justice is in line with the opinion of Domat and Pothier as adherents of the teachings of Roman natural law which dominate the thought of the substance of the contents of the *Civil Code*. The French do not agree with the distinction between *iudicia stricti iuris* and *iudicia bonae fidei*. Domat and Pothier stated that natural law and customary law dictate that every contract is *bonae fidei*, because honesty and integrity must always exist in all contracts that require the fulfillment of the contract by the following propriety.⁵²

Polemics about the meaning of good faith and the existence of different benchmarks from the perspective of time, place, and person, are generally often associated with *fairness, reasonable standards of fair dealing, decency, reasonableness, a common ethical sense, a spirit of solidarity, and community standards*.⁵³ Against these views, Dignified Justice tends to mean the meaning of good faith as the terms mentioned above are conditions that must exist before the occurrence of a contract.

Belief in Dignified Justice that law must be based on morals, and morality is the law itself.⁵⁴ Thus, borrowing the name of the company in the procurement of goods and services in the perspective of Dignified Justice is an act that does not show honesty, is inappropriate, and or does not have good intentions, while also violating several principles of the procurement of goods and services themselves, namely openness, competition, and transparency.⁵⁵

4. CONCLUSION

Borrowing the name of the company as one of the issues that occur in the process of procurement of goods and services, is an act of procurement actors so that administratively they can meet procurement requirements or qualifications. Borrowing a company name does

⁵⁰ Prodjudikoro, *Asas-Asas Hukum Perjanjian*. p.5.

⁵¹ Prasetyo, *Keadilan Bermartabat: Perspektif Teori Hukum*. Op.cit. p.117

⁵² Ridwan Khairandy, *Iktikad Baik Dalam Kontrak Di Berbagai Sistem Hukum*, 1st ed. (Yogyakarta: FH UII Press, 2017). p.129.

⁵³ Agasha Mugasha, "Good Faith Obligations in Commercial Contracts," *International Business Law* 27 (1999): 355. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ibl27&div=83&id=&page=>

⁵⁴ Prasetyo, *Keadilan Bermartabat: Perspektif Teori Hukum*. p.179.

⁵⁵ Pemerintah Negara Republik Indonesia, *Peraturan Presiden Republik Indonesia Nomor 16 Tahun 2018 Tentang Pengadaan Barang/Jasa Pemerintah*. It is contained in Article 6 Presidential Regulation of the Republic of Indonesia Number 16 regarding the Principles of Procurement of Goods/Services.

not meet the requirements of good faith in terms of the agreement, and can be a criminal element for providing false information, or hiding your true identity, or as an act of fraud. Borrowing company names also do not uphold the principles of transparency, openness, competition, and fairness. Current regulations do not explicitly prohibit the practice of borrowing company names, only appearing in the prohibition of subcontracting. Meanwhile, the regulation on subcontracting in Presidential Regulation Number 16 of 2018 does not touch the practice of borrowing company names.

From the perspective of the Theory of Dignified Justice, the view of borrowing company names in the practice of procurement of government goods and services refers to and is consistent with the intent of the constitution. The legal system in the theory of dignified justice puts something in its place. The moral is law, the law is moral, a person is punished for violating morals, and vice versa cannot be punished if he does not violate morals.

Borrowing the name of the company in the view of Dignified Justice is against the honesty and disclosure of the true dignity of the parties. Thus, borrowing a company name is seen as unfair, disgraceful, and should be strictly prohibited by law in the field of government procurement of goods and services. Simultaneously, the application of sanctions and law enforcement needs to be carried out carefully so as not to interfere with economic objectives. The core interest of the targeted economic regime is the economy based on joint and family business, so regulations must continue to support small, micro, and cooperative businesses. Likewise, the interpretation of the definition of state losses must be returned to its basic understanding, including the application of the criminal act of corruption that must be carried out consistently by its basic philosophy

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