

# STANDARDIZATION OF GOOD FAITH PRINCIPLES IN PROCUREMENT GOVERNMENT GOODS/SERVICES IN INDONESIA

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**Abstract-** This paper examines how legal and court experts define the principle of good faith at the pre-contractual stage and how its matching in each level of procurement of government goods /services by various government procurement regulations in Indonesia. This study is normative legal research. This study uses a statutory approach, a conceptual approach, and a case-by-case approach. This study found that: first, the principle of good faith at the pre-contract stage is essentially prudence, where the parameters are exchanging information about the goods/services to be held and checking/examining the correctness of information exchanged between prospective providers and users; second, in principle, the principle of pre-contract iktikad has been established by various government procurement regulations at various levels of government procurement of goods/services, starting from the level of tender announcement, and explanation until finally the signing of the contract.

**Index Terms-** Principles of Good Faith, Pre-Contractual Stage, Procurement of Government Goods/Services

## I. INTRODUCTION

In order to improve the quality of public services and the administration, the government conducts procurement of goods/services. To obtain goods/services effectively and efficiently,<sup>1</sup> then the government cooperates with third parties in a contractual relationship. The government's entry into a contractual relationship has a juridical implication on the government's submission to the terms and principles of contract law.<sup>2</sup>

One of the principles in modern contract law<sup>3</sup> is in good faith. In Indonesia, the principle of good faith is also accepted as the legal foundation of national contracts. This is as stipulated in the provisions of Article 1338 paragraph (3) of the KUHPdata which states: "the agreement shall be executed in good faith." Because the principle of good faith in this provision is still abstract, the interpretation is submitted to the court. Unfortunately, the judge's interpretation of good faith in such

provisions is often fickle,<sup>4</sup> so that the blurring of the interpretation of it is still unresolved.

Other issues relating to the principle of good faith in the provisions of Article 1338 paragraph (3) of the KUHPdata are related to the reach of its validity, whether its validity only reaches the stage of implementation of the contract only as the norm editor reads or also reaches the pre-contract stage.<sup>5</sup> On this issue, judges in Indonesia have different views <sup>6</sup> so that there is no legal certainty.

In fact, according to J.M. van Dunne, good faith power covers the entire contract process, be it in the pre-contract phase, the contract until the post-contract phase.<sup>7</sup> In line with van Dunne, Antari Innaka <sup>8</sup> argues that because the provisions of Article 1338 paragraph (3) of the KUHPdata only state that the contract must be executed in good faith, but this provision does not explicitly determine the pre-contractual, contractual or post-contractual stage, it can be concluded that good faith must have existed from the pre-contractual to post-contractual stage. Ridwan Khairandy also argued that in the pre-contractual period there had been good faith. This means that good faith or honesty must have existed between the parties at the time the parties negotiated to reach a meeting point or agreement on the matters or substance they wished to pour into an agreement.<sup>9</sup>

In the context of procurement of government goods/services, this principle of good faith is often ignored by the actors of procurement of government goods/services at the stage before the government procurement contract is closed/created. The waiver can be demonstrated by the many practices of "borrowing the flag of other parties' companies to participate in tenders",<sup>10</sup> mark-up of goods/services prices, evaluation of qualifications and evaluation of unfair offers, unqualified contract signings, manipulated contract changes,<sup>11</sup>

<sup>4</sup> Ridwan Khairandy, *Principles of Good Faith in Freedom of Contract*, (Jakarta: Postgraduate Program, Faculty of Law, University of Indonesia, 2004), hlm. 205.

<sup>5</sup> P. L. Wery, *Legal Developments About Good Faith in the Netherlands*, (Jakarta: Percetakan Negara, 1990), hlm. 8.

<sup>6</sup> Ridwan Khairandy, *Op.Cit.*, hlm. 211.

<sup>7</sup> J. M. van Dunne, *Verbintenissenrecht, (Deel 1, Contractenrecht, 1e gedeelte)*, Kluwer-Deventer, 1993, hlm. 170

<sup>8</sup> Antari Innaka, dkk., "Implementation of The Principle of Precontractual Good Faith In Housing Sale and Purchase Agreement," in *Jurnal Mimbar Hukum*, Volume 24, Nomor 3, October 2012, hlm. 505

<sup>9</sup> *Ibid.*, hlm. 511

<sup>10</sup> This practice is considered to violate the principle of good faith because the borrower flags dishonestly provide information about his/her actual identity to the User. This attitude makes PPK fooled so sure that what he faced is really which company with him he wants to make a contract.

<sup>11</sup> Contract changes are often used by the Provider to reduce its contractual obligations and increase its financial benefits, for example by applying for

<sup>1</sup> Adrian Sutedi, *Legal Aspects of Procurement of Goods and Services and Its Various Problems*, (Jakarta: Sinar Grafika, 2008), hlm. 16

<sup>2</sup> Y. Sogar Simamora, *Contract law: Government Procurement Contracts in Indonesia*, (Surabaya: Laksbang Justitia, 2013), hlm. 41.

<sup>3</sup> M. W. Hesselink, "Pre-contractual Good Faith", In Hugh Beale (Eds), *Casebooks on the Common Law of Europe: Contract Law*, Oxford and Portland, Oregon, (2002).

unilateral, illogical termination of the contract,<sup>12</sup> and so on. Disregard for the principle of good faith in such practices can open wide opportunities for corruption and collusion that cause harm to the state<sup>13</sup> and poor quality of goods/services.<sup>14</sup>

## II. RESEARCH METHODS

This study is normative legal research. This study uses a statutory approach, a conceptual approach, and a case-by-case approach.

## III. DISCUSSION

### The Meaning of The Principle of Good Faith in the Pre-Contract Stage according to the Opinion of Legal Experts and Court Decisions in Indonesia.

Among the obligations of the parties at the pre-contractual stage is to negotiate and draft contracts in good faith. This obligation by Wirjono Prodjodikoro<sup>15</sup> related to the understanding of good faith as referred to in the provisions of Article 1963 and Article 1977 paragraph (1) of the KUHPerdata. Good faith in both of these terms works at the time of the entry into force of a legal relationship.

Good faith according to the provisions of Article 1963 of the KUHPerdata is the good will or honesty of the person at the time he begins to control the goods, in which he thinks that the conditions necessary to obtain property rights to the goods have been met. Similarly, the good faith in the provisions of Article 1977 paragraph (1) of the KUHPerdata, relating to the way a third party obtains an object (ownership) caused by ignorance about the defect of ownership is inexcusable, but with certain conditions.<sup>16</sup> The principle of good faith in the provisions of Article 1977 paragraph (1) is often interpreted as "not knowing and not having to know",<sup>17</sup> means that third party ignorance of this defect in ownership is inexcusable according to propriety and<sup>18</sup> and as a consequence the buyer is protected by law. It is logical because the buyer in good faith assumes that he is dealing with who is entitled to do free to sell the goods, although that is not always true.<sup>19</sup>

contrived work, inflating the volume of work, changing the work schedule, changing responsibilities unreasonably. Lihat [www.transparensi.org.rs/.../An%20Analysis%20of%20the%20Practice%20of%20A](http://www.transparensi.org.rs/.../An%20Analysis%20of%20the%20Practice%20of%20A), retrieved 15/05/2018 at 15:39

<sup>12</sup> In this context, ppk terminates the Contract without precedence with warning actions and other helpful actions in order to accelerate the completion of work that is subject to critical contracts. Lihat [www.sigmaxweb.org/publications/Public-Procurement-Policy-Brief-37-20011...](http://www.sigmaxweb.org/publications/Public-Procurement-Policy-Brief-37-20011...), retrieved 18/05/2019 at 10:52

<sup>13</sup> D. Y. Witanto, *Dimensions of State Losses in Contractual Relationships (A Review of Contract Risk in Government Agency Procurement Projects/Services)*, (Bandung: Mandar Maju, 2012), hlm. 56.

<sup>14</sup> Khi V. Thai & R. Grimm, "Government Procurement: Past and Current Developments," *Journal of Public Budgeting, Accounting & Financial Management*, 12 (2), (2000), hlm. 231.

<sup>15</sup> Wirjono Prodjodikoro, *Principles of Civil Law*, Bandung: Sumur, 1992, hlm. 39

<sup>16</sup> *Ibid.*, hlm. 56-62

<sup>17</sup> *Ibid.*, hlm. 63

<sup>18</sup> Agus Yudha Hernoko, *Treaty Law: The Principle of Proportionality In Commercial Contracts*, (Jakarta: Prenada Media, 2010), hlm.138

<sup>19</sup> *Ibid.*, 139

Subekti<sup>20</sup> liability at the pre-contract stage with various provisions surrounding bezit and the acquisition of property rights in the law of.<sup>21</sup> In the law of objects, a bezitter is said to be in good faith when a bezitter acquires an object in between ways to acquire property rights,<sup>22</sup> and he knew not the flaws of the reproach contained therein. That is, an honest bezitter is a bezitter who thinks he is the real owner of the object he controls.<sup>23</sup> On the contrary, bezitter is in bad faith if he knows that he is not actually the true owner of the object he is in possession of, but has someone else. Thus, it is said that the bezitter who is in bad faith when a person from the beginning bezit has known or at least should know that it harms others.<sup>24</sup>

Good faith at the pre-contract stage is referred to as subjective good faith. So-called because of the absence of good faith it can be judged by paying attention to the real attitudes and behaviors of the person (subject),<sup>25</sup> or because it is based on the honesty of the parties at the time of negotiation and drafting of the contract.<sup>26</sup>

Subjective good faith or good faith in the law of objects means honesty or clean at the time will make an agreement/contract,<sup>27</sup> so that the person in good faith puts his full trust in the opposing party that he considers honest and does not hide anything bad- which in the future will cause difficulties for him.<sup>28</sup> Honesty here refers to one's inner attitude when trying to make a covenant (negotiation). That is, one's mental attitude at the commencement of a covenant should be able to imagine the fulfillment of the necessary conditions.<sup>29</sup>

In the Netherlands, the principle of good faith has been recognized to have existed since before the contract was made. In fact, the Court in the Netherlands further gives the content or meaning of good faith itself. This is as shown in Arrest Hoge Raad dated November 15, 1957, NJ 1958, 67 in the case of Baris vs. Riezenkamp which ruled that the pre-contract relationship was a legal relationship that was also controlled by good faith.<sup>30</sup> Therefore, according to Hoge Raad, the parties are in the pre-contractual stage and are negotiating to obtain a word of agreement, on the basis of good faith each has an obligation to notify (mededelingsplicht) and to examine (onderzoekplicht).<sup>31</sup>

In this case, the prospective buyer is obliged to examine the official plan regarding the house, such as the plan of revocation of property rights. If he does not perform the obligation, it turns out that the property of the house is revoked, then he cannot demand the cancellation of the agreement for

<sup>20</sup> Subekti, *Law of The Covenant*, Jakarta: Intermasa, 1996, hlm. 41.

<sup>21</sup> Some provisions that are closely related to the principles of good faith here are Articles 531, 532 and 533 of the KUHPerdata.

<sup>22</sup> According to Article 584 of the Civil Code, there are 5 ways to obtain property rights, namely ownership / ownership / ownership, attachment / follow-up, dalwarsa (past time), inheritance, and submission.

<sup>23</sup> Widodo dkk, *Legal Protection for Buyers Who Have Good Faith In The Pluralism of Buying and Selling Land*, (Van Vollenhoven Institute-Universiteit Leiden), 2020, hlm. 87

<sup>24</sup> *Ibid.*, hlm. 92

<sup>25</sup> Soetojo Prawirohamdjojo dan Marthalena Pohan, *Alliance Law*, Surabaya: Bina Ilmu, 1978, hlm. 4.

<sup>26</sup> Ridwan Khairandy, *Indonesian Contract Law in Comparison Perspective (Part One)*, Yogyakarta, FH UII Press, 2013, hlm. 92

<sup>27</sup> *Ibid.*, hlm. 93

<sup>28</sup> Dikutip dalam Widodo dkk, *Well-Behaved Buyers*, *Op.Cit.*, hlm. 102

<sup>29</sup> Ridwan Khairandy, *Contract Law*, *Op.Cit.*, hlm. 150.

<sup>30</sup> *Ibid.* hlm. 15

<sup>31</sup> *Ibid.*, hlm. 17

reasons of error. On the other hand, the prospective seller also has an obligation to inform or explain all information that he knows and is important to the prospective buyer. If he has stated unequivocally that there is no such official plan, the prospective buyer can trust the statement, and the prospective buyer does not need to research again. Judges must consider those obligations with each other in good faith.<sup>32</sup>

According to Siti Ismiyati Jenie,<sup>33</sup> The above verdict becomes a very significant new milestone in the development of the use of the principle of good faith, where in the period before world war II occurred, good faith is still understood as the understanding of relationships (relatie begrip) that only applies in a contractual relationship as referred to in Article 1338 (3) of the KUHPerdata. However, after World War II, the use of the principle of good faith was understood as a legal obligation that also prevailed in pre-contractual relationships or outside of contractual relationships.<sup>34</sup>

In Indonesia, several court rulings have placed the principle of good faith in force at the pre-contract stage and its use of the principle of good faith at the pre-contract stage is approximately the same as Arrest Hoge Raad dated November 15, 1957, NJ 1958, 67 as described above.

First, the Decision of the Supreme Court of The Republic of Indonesia No. 663 K/Sip/1971 dated August 6, 1973 between Soeparman aka Slamet versus Notodiwirjo aka Ngatman and R. Soetarno Hadisoemarto that the sale and purchase of land despite having fulfilled the procedures of agrarian legislation, but must be declared null and void because it was preceded and accompanied by unnatural faith or dishonest faith (buyers know that the land has been sold to others).<sup>35</sup>

Second, the Decision of the Supreme Court of the Republic of Indonesia No. Register 1816K/PDT/1989 dated October 22, 1992 that the buyer cannot be qualified as a buyer in good faith, because at the time of purchase the buyer does not carefully examine and investigate the rights and status of the sellers on the disputed land. Means the purchase is done carelessly so that it can be assessed the purchase was carried out in bad faith. Therefore, Buyer does not deserve to be protected in such trade transactions.<sup>36</sup>

Third, Supreme Court Decision No. 3699 K/PDT/1996, dated March 1, 2000 in the case of Christine Kadiman vs Liem Jade Lian cs. In this ruling, the Supreme Court held that pelawan (Christine Kadiman) before buying the house and land was aware of the process of issuing certificates on behalf of Liem Hwie Kiong aka Danu Surjadji. At that time, Liem Hwie Kiong was still immature.

Pelawan before buying the land from Liem Hwie Kiong, he should conduct research or at least suspect the validity of the

HGU certificate on behalf of Liem Hwie Kiong. Is it possible that someone who is not old enough and has never made a living alone has bought a piece of HGU land on which stands a house. In addition, pelawan has learned that the one who bought the land is Liem Hwie Kiong's father who is named Liew Hwie Kiong, while there are still 6 other children.

Because the Pelawan has been aware of the legal defects, then pelawan should not be a buyer in good faith. In connection with this, Article 532 of the KUHPerdata states that a person is in a bad position while he/she learns that the person holding the material is not the owner of the material.

Fourth, the decision of MA No. 4340/K/pdt/1986 dated June 28, 1988, in the case of Fatimah cs vs. M. Saleh. In this case, in addition to imposing the seller's obligation to explain the material facts, the Supreme Court also imposes an obligation on the buyer to examine the material facts relating to the sale and purchase agreement.

Looking at some of the court's decisions above, it appears that good faith at the pre-contract stage is approached of good faith that is subjective (honesty). In other words, the judge defines good faith at the pre-contract stage as honesty (subjective good faith). This view corresponds to the doctrinal opinion, as outlined at the top of this chapter, which approaches or understands subjective good faith as honesty at the pre-contract stage.

Furthermore, referring to some of the above court rulings as well, it appears that the measure applied by the judge to test the honesty (subjective good faith) of the parties at the pre-contract stage is from the actions/actions of the parties inform each other (mededelingsplicht) openly and transparently and check each other (orderzoekplicht) appropriately regarding the material facts of the contract to be made until finally able to weigh with full confidence to bind themselves in a contract.

The obligation to research and inform is a manifestation of the principle of prudence in conducting transactions or negotiations. This is as stated by Urip Santoso<sup>37</sup> and Ridwan Khairandy.<sup>38</sup> Thus, the obligation to research and notify is nothing but the principle of prudence (duty of care), and the parameters for measuring the principle of prudence are mededelingsplicht and orderzoekplicht.

### **Standardization of The Principles of Good Faith at the Pre-Contract Stage in government procurement regulations**

In the context of procurement of government goods and services, the pre-contract stage is the tender stage or the selection stage of the provider up to the signing of the SPPBJ (Letter of Appointment of The Provider of Goods/Services).<sup>39</sup> At this stage, the principle of subjective good faith that arises in the form of an obligation to notify (mededelingsplicht) and examine (orderzoekplicht) is incorporated in various activities.

The obligation to notify (mededelingsplicht) arises in the form of the obligation of the Electoral Commission to make tender announcements to the public. The obligation is contained in Presidential Regulation No. 16 of 2018 concerning Procurement of Government Goods/Services Article 37 and

<sup>32</sup> Ibid., hlm. 18

<sup>33</sup> Siti Ismiyati Jenie, *Iktikad Baik: The Development of a Special Legal Principle Into a Common Legal Principle in Indonesia*, Inaugural Speech of Professorship at the Faculty of Law, Gadjah Mada University, 10 September 2007, hlm. 9

<sup>34</sup> Ibid.

<sup>35</sup> <http://jdih.mahkamahagung.go.id/v2/beranda/database/3.-Yurisprudensi/Perdata/Tahun-1971/orderby,1/page,3/>, Access date December 10, 2011

<sup>36</sup>

<http://jdih.mahkamahagung.go.id/v2/beranda/database/Yurisprudensi/Perdata/Tahun-1989/>, diakses tanggal 10 Desember 2011

<sup>37</sup> Urip Santoso, *Acquisition of Land Rights*, Jakarta: Prenadamedia Group, 2015, hlm. 170

<sup>38</sup> Ridwan Khairandy, *Op.Cit.*, hlm. 119

<sup>39</sup> Y. Sogar Simamora, *Op.Cit.*, hlm. 87.

Attachment to Regulation of The Government Procurement Policy Institute No. 9 of 2018 concerning Guidelines for The Implementation of Procurement of Goods/Services through Number Providers 4.1.1.

The tender announcement was made twice. First, an announcement about the general procurement plan by the Budget User that at least contains information about the name and address, the package of work to be carried out, the location of the work, and the estimated value of the work.<sup>40</sup> Second, the announcement of the procurement implementation plan by ULP/Procurement Officer containing more detailed announcement materials, containing the name and address of the ULP working group (Procurement Services Unit) that will hold the auction, a brief description of the work to be carried out, the total value of HPS (Self-Estimated Price), the terms of the auction participants, as well as the place, date, day and time of collection of procurement documents.<sup>41</sup>

Both forms of announcement above are made through the official website of the Ministry/Institutions/Local Government/Agencies (K/L/D/I) respectively, official bulletin boards for the community, national procurement portals through LPSE, and or by inviting or notifying providers believed by users to have the qualifications and capacity to work on the goods/services needed. In addition, the announcement of the auction can also be done through the international community website if from the results of identification as stated in the Framework of Reference (KAK) it turns out that no domestic provider is able to work on it.<sup>42</sup>

Thus, Tender Announcement is a means for Users to provide clear and open information to the public about the goods/services they need. Auction announcement is a mechanism provided to users to provide opportunities to the entire public, especially businesses that are eligible to participate and compete in the provision of government goods/services so as to produce quality goods/services.<sup>43</sup> Thus, good faith in the announcement of tenders is an instrument to realize the principle of transparency and openness to the public.

The obligation to notify (*mededelingsplicht*) also appears in the form of the obligation of the Electoral Pokja to distribute Procurement Documents to tender participants. Procurement Document contains information provided by electoral Pokja regarding the user's desire or need for a goods/services following with a certain quality and quantity, who he wants and wants to invite to offer the goods/services he wants, how the rule of the game in negotiating, interacting and communicating during the selection process. In more detail, the Procurement Document contains information on the procedure of choosing a provider, the schedule of election activities, the total Self-Estimated Price (HPS), specifications of both the quality and quantity of goods/services required by the User.<sup>44</sup>

Procurement Document consists of Selection Document and Qualification Document. The Qualification Document contains the minimum competency requirements of the "Provider", which consists of administrative qualifications and technical qualifications. The Qualification Document aims to assess eligibility as a provider.<sup>45</sup> If the provider is deemed eligible for the Qualification Document (both administrative qualifications and technical qualifications), then that provider is considered eligible as a provider. However, although the Provider has been considered worthy as a Provider, but not necessarily the Provider is eligible to carry out a job (goods/services). Therefore, to know if the Provider is eligible as the executor of a job, he must be eligible for the "Election Document". The Electoral Document aims to assess eligibility as an executor of the work.<sup>46</sup>

Procurement Document is very important for tender participants because the information contained in the Procurement Document becomes the initial reference for tender participants to understand the substance, purpose and purpose of procurement of goods/services so that it can be considered by the Provider to conduct subsequent negotiations through the submission of the offer.

The basic matching of good faith at the next pre-contract stage is reflected in the obligation of the Electoral Commission to conduct an Explanation (*Aanwijzing*). The obligation of the Electoral Pokja to conduct *aanwijzing* is contained in the Attachment to the Regulation of the Government Procurement Policy Institute No. 9 of 2018 Number 4.2.4. According to this provision, *aanwijzing* is a media/question and answer forum between Tender Participants/Selection with electoral Pokja regarding the scope of the procurement package and the terms and conditions listed in the Election Document, so that there is a common understanding between the electoral Pokja and Participants, as well as to get suggestions or suggestions for improvement and changes to the document.

The implementation of *aanwijzing* is carried out at the latest 3 days from the date of the tender announcement.<sup>47</sup> There are several things explained to the Tender Participants, namely: the scope of work, the method of selection, the way of submitting the offer document, the completeness that must be attached with the offer document, the deadline for the entry of the offer and the opening of the offer document, the procedure of opening the offer document, the evaluation method, the things that cancel the offer, the type of contract to be used, the terms and procedures of evaluation relating to price preferences for the use of domestic production (if dip requirements), provisions on pricing, provisions on how to sub-contract some jobs, provisions on guarantees and insurance, etc. that are deemed necessary such as further explanations by means of field reviews.<sup>48</sup> The results of the implementation of *aanwijzing* should be poured in the form of News Event Explanation (*aanwijzing*).

<sup>40</sup> Appendix I Presidential Regulation No. 16 of 2018 letter F number 3

<sup>41</sup> *Ibid.*, huruf B angka 1

<sup>42</sup> *Ibid.*

<sup>43</sup> Purwosusilo, *Legal Aspects of Procurement of Goods and Services*, Jakarta: Kencana, 2017, hlm. 415

<sup>44</sup> Attachment to LKPP Regulation No. 9 of 2018 concerning Guidelines for The Implementation of Procurement of Goods/Services through Providers, Chapter VII point 7.18.

<sup>45</sup> <https://samsulramli.net/2015/08/10/dokumen-kualifikasi-bukan-dimasukkan-dalam-penawaran-apendo-rhs/>, diakses tanggal 20 Juni 2020, pukul 14.11

<sup>46</sup> *Ibid.*

<sup>47</sup> Purwosusilo, *Op.Cit.*, hlm. 268

<sup>48</sup> Attachment to Government Procurement Policy Institute Regulation Number 9 year 2018 Number 4.2.4.



In the event that the results of the explanation and/or written question submitted by the Participant result in the change of the Election Document, the change shall be set forth in the Electoral Document Addendum. In the event of changes in Election Documents related to Technical Specifications/KAK, HPS or Contract Draft, such changes must be approved by the PPK. If the changes are not set forth in the Electoral Document Addendum or are not approved by the PPK, then the changes are considered non-existent and the applicable provisions are the initial Election Documents.

Furthermore, the obligation to notify (*mededelingsplicht*) also manifests in the obligation of the Tenderer to submit the Offer Document.<sup>49</sup> Bid Documents are created by prospective bidders by referring to the information contained in the Procurement Document and *Aanwijzing Event News*. The offer document is essentially the provider's response to the Procurement Document from the User, which consists of 2 main things, namely, the Qualification Document is responded with the Provider Qualification Field and the Selection Document is responded with the Offer Document. The Offer Document essentially contains information on the technical and price of goods/services submitted by the Tender Participant, while the Provider Qualification Field contains information about the qualifications and capacity to meet the needs of users of such goods/services.

Thus, both the Procurement Document made by the User and the Bid Document submitted by the prospective Bidder are the means of the parties to give each other and receive accurate information about the eligibility as a Provider, as well as the quality and quantity of goods/services to be transacted. All information submitted by prospective bidders in the Bid Document must be submitted honestly, transparently, without any element of fraud, or forgery.

In short, the Offer Document contains information that really describes the circumstances of the Tender Participant and the rationality of the offer price for the goods/services submitted by the Tender Participant so that the information can be used as a consideration for the User (*Pokja Pemilihan*) to choose the most viable Tender Participant and the cheapest but also rational offer price.

With this system, the tender participants are given full confidence to independently describe their qualifications as a Provider, as well as calculate and take into account the costs or costs that will be incurred to hold or purchase a goods/services that are needed by the User. Trust in the participants of the tender is certainly not given for granted. User/*Pokja Pemilihan* has a safety valve to monitor whether the tender participants are really honest in conveying the information provided in the Offer Document. The safety valve is the obligation of the Electoral Commission to conduct Qualification Evaluation and Evaluation of Offer Documents.

Qualification Evaluation is the process of assessing competence and business capability as well as the fulfillment of certain other requirements of the provider of goods/services.<sup>50</sup>

Qualification requirements consist of administrative/legality, technical, and financial capability requirements.<sup>51</sup>

Qualifications are done postqualification or prequalification. Postqualification is the process of evaluating qualifications conducted after the submission of an offer. The qualification evaluation is conducted in conjunction with the implementation of administrative evaluation. Qualification evaluation using the pass and fail method).<sup>52</sup> While Prequalification is a qualification evaluation process conducted before the submission of the offer.<sup>53</sup>

Qualification evaluation is performed on the data listed (not the original data) by the provider of goods/services in the qualification form. This condition is particularly vulnerable to data manipulation practices by providers of goods/services with the aim of passing qualifications.<sup>54</sup> To prevent this, the provider of goods/services is required to make a statement about the correctness of the data in the qualification form. In addition, the Electoral Commission must prove its qualifications.<sup>55</sup> Proof of qualification is the ultimate step that must be taken by the procurement committee to believe the existence and validity of the documents on the qualification form.<sup>56</sup>

Furthermore, through the Evaluation of The Offer Document, the Electoral Commission conducts an assessment of all offers entered by the Tender Participants, based on the terms and conditions stipulated in the Election Document, without any deviations of an important/essential nature.<sup>57</sup> Evaluation of the Offer Document includes administrative, technical and price assessments, referring to the criteria, methods and procedures set out in the Selection Document.<sup>58</sup>

The Offer is declared to meet the administrative requirements, if: a) the offer letter meets the following conditions: (1) the validity period of the offer letter shall not be less than the specified time; and (2) dated; and (b) the existence of the Offer Guarantee. Furthermore, a technical evaluation is conducted on the offer that passed the administrative evaluation. From the technical aspect, the winner of the auction is the provider that offers the technically qualified goods that are: a. The number of goods offered is sufficient. b. Technical specifications are met. c. The completion time of the work is not late. d. The method of completion of the work is correct. Next, a price evaluation is conducted on offers that pass technical administration. The offer price is said to be reasonable if the offer price is lower than 80% (eighty percent) of HPS. In terms of cost, auction winners are providers that offer jobs at the lowest

<sup>51</sup> Ibid., angka 3.4.

<sup>52</sup> Ibid., angka 3.3.1.

<sup>53</sup> Ibid., angka 3.3.2.

<sup>54</sup> Mustofa Kamal, "Effective Qualification Proof (*tinjauan Best Practice*)," see [https://pusdiklatwas.bpkp.go.id/asset/files/post/a\\_38/PEMBUKTIAN\\_KUALIFI\\_KASI\\_YANG\\_EFEKTIF\\_tinjauan\\_best\\_prctice.pdf](https://pusdiklatwas.bpkp.go.id/asset/files/post/a_38/PEMBUKTIAN_KUALIFI_KASI_YANG_EFEKTIF_tinjauan_best_prctice.pdf), retrieved 1 December 2020, at 12:31

<sup>55</sup> Attachment to Government Procurement Policy Institute Regulation Number 9 of 2018, number 3.3.1.

<sup>56</sup> Mustofa Kamal, *Op.Cit.*

<sup>57</sup> Important/principal discrepancies/irregularities or conditional offers are: 1) Discrepancies/deviations from the Election Document affecting the scope, technical specifications/KAK and results/performance of the work; and/or 2) offers from participants with additional terms outside the terms and conditions in the Election Document that will lead to unfair and/or unfair business competition.

<sup>58</sup> Y. Sogar Simamora, *Op.Cit.*, hlm. 143

<sup>49</sup> Ibid., Angka 4.2.5.

<sup>50</sup> Ibid., angka 3.3

prices and are technically accountable. After the evaluation of the Offer Document is conducted, the Electoral Commission shall make a conclusion, to be further stated in the News of the Results of The Auction (BAHP).

Thus, the obligation of the Electoral Pokja to conduct Qualification Evaluation and Evaluation of Offer Documents is a match of the principle of good faith, namely the obligation to check (*orderzoekplicht*).

Furthermore, the obligation to check (*orderzoekplicht*) also manifests 100%, in the obligation of the Commitment Making Officer (PPK) to hold a Preparatory Meeting for the Appointment of Providers. This obligation is stipulated in the Attachment to the Regulation of the Government Procurement Policy Institute No. 9 of 2018 number 7.1. The Preparatory Meeting for Provider Appointment is held by PPK before establishing SPPBJ (Letter of Appointment of Goods/Services Provider). Through this Meeting, PPK conducted a review of the report of the selection results of the Provider from the Electoral Pokja/Procurement Officer to ensure: a) that the Provider selection process has been carried out based on established procedures; and b) that the winner of the selection/candidate of the Provider has the ability to carry out the Contract.

Based on the results of the review, ppk decided to accept or reject the results of the selection of the Provider. In the event that the PPK does not approve the results of the Provider election, the PPK submits the rejection to the Electoral Pokja/Procurement Official accompanied by reason and evidence. Furthermore, PPK and Pokja Pemilihan/Procurement Officials conducted a joint discussion regarding differences of opinion on the selection results of providers. In the event that no agreement is reached, the decision-making shall be submitted to the PA/KPA (Budget User/Budget User Power) no later than 6 (six) business days after no agreement has been reached. The PA/KPA decision is final.

In the event that the PA/KPA does not approve the selection result of the Provider, the PA/KPA orders the Electoral Commission to re-evaluate, re-offer, or re-tender no later than 6 (six) business days after the provider's election result is received.<sup>59</sup> Conversely, if the PA/KPA approves the selection result of the Provider, the PA/KPA instructs the PPK to issue the SPPBJ no later than 5 (five) business days.

In construction work, this Meeting is held to ensure the Provider meets the following conditions:<sup>60</sup>

- a. the validity of the qualification field data;
- b. proof of competency certificate;
- c. proof of competency certificate as referred to in letter b shall be implemented without presenting the relevant personnel;
- d. changes in the period of implementation of work due to the schedule of work implementation set earlier will exceed the budget year limit;
- e. certify operators, technicians, or analysts who have not been certified at the time of the work; and
- f. implementation of the transfer of experience/expertise in the field of construction through the system of practical work/internship, discussing at least the number of

participants, duration of implementation, and type of expertise."

If the winner meets the provisions of Article 112 paragraph (1) above, then PPK issued SPPBJ. On the other hand, if the winner does not meet it, then PPK conducts a Preparatory Meeting on The Appointment of Providers with the winner of reserve 1, and so on. However, if none of the winners or winners of the reserve meet the provisions of Article 112 paragraph (1), then PPK does not issue a Warrant for the Appointment of a Provider of Goods/Services (SPPBJ) and report to UKPBJ. Winners who are invited to the preparatory meeting for the appointment of a Provider who cannot meet the provisions as referred to in Article 112 paragraph (2) letter a and letter b will be subject to Blacklist Sanctions and guarantees the offer will be disbursed.<sup>61</sup>

If analyzed from a good faith perspective, through the Preparatory Meeting of The Provider Appointment Through this mechanism PPK examines, examines and re-examines the feasibility and fullness of the terms as determined by the Procurement Document and the applicable provisions in the tender. The examination conducted by the User through the Preparatory Meeting of the Provider Appointment is very important meaning as a form of prudence (duty of care) PPK before establishing a Letter of Appointment of The Provider of Goods/Services (SPPBJ) so that the Provider to be appointed later actually has the qualifications and competencies that are expected to do the work as stated in the Procurement Document.

The obligation to inspect (*orderzoekplicht*) is also incorporated in the obligation of the PPK to hold a Contract Signing Preparation Meeting. According to the provisions of the Attachment to the Regulation of the Government Procurement Policy Institute No. 9 of 2018 number 7.2.1., this Meeting discusses the following:

- a. finalization of the draft Contract;
- b. completeness of contract supporting documents, such as Guaranteed Implementation has been received before the signing of the Contract, insurance, and so on;
- c. the plan of signing the Contract; and/or
- d. matters that have been clarified and/or confirmed at the time of evaluation of the offer."

In the preparation meeting for the signing of the Construction Work Contract, PPK is assisted by the supervisor of work, supervisory consultant, or construction management consultant. If the Provider does not meet the provisions of article 114 paragraph (2) of the PUPR Candy above, then the SPPBJ is canceled and the PPK then conducts a preparatory meeting on the appointment of the Provider to the Reserve Winner, if there is a.<sup>62</sup>

#### IV. CONCLUSION

Based on the description above, it can be concluded several things as follows: (1) Legal experts define the principle of good faith at the pre-contract stage within the framework of Book II of the KUHPerdata on the law of objects, as subjective

<sup>59</sup> *Ibid.*

<sup>60</sup> Regulation of the Minister of Public Works and Public Housing No. 14 of 2020 concerning Standards and Guidelines for Procurement of Construction Services through The Provider of Article 112 paragraph (2)

<sup>61</sup> *Ibid.*, Pasal 112 ayat (3, 4, 5, 6 dan 7)

<sup>62</sup> Attachment to Government Procurement Policy Institute Regulation Number 9 of 2018 number 7.2.1

good faith which means honesty. By the court's decision, honesty is then interpreted as duty of care, where the parameters are the obligation to inform (mededelingsplicht) honestly and the obligation to properly examine (orderzoekplicht) regarding the material facts of the contract; (2) In principle, the principle of subjective good faith (the principle of pre-contract good faith) has been established in various government procurement regulations. Announcement of tender, distribution of procurement documents, explanation (aanwijzing), submission of offer documents, opening of documents, evaluation of qualifications and proof of qualification, evaluation of offers, denial and denial of appeal, Preparatory Meeting of Appointment of Providers, Preparatory Meeting for signing of contracts, until finally signing of contracts is a mechanism for exchanging information (mededelingsplicht) on goods / services to be held and checking / examining the truth of information (orderzoekplicht) exchanged between prospective providers and users. Seen from the user side (government), the principle of good faith essentially serves as a legal instrument to protect users from fraudulent and dishonest acts on the part of tender participants. On the contrary, judging from the Tender Participants, good faith essentially serves as a legal instrument to protect the Tender Participants from arbitrariness or abuse of power from the User.

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