



# Law of Obligation: State Losses Recovery to Prevent Corruption Based on Public Procurement Contract

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**Abstract.** In order to achieve recovery of state financial losses resulting from the implementation of the public procurement contract, the efficiency of the contract is needed as a medium for resolving state losses which can be maximized when the contract is able to provide protection for the injured party, namely the state. This study uses normative legal research methods using secondary data sources obtained through literature searches. Recovery of state losses can be carried out by fulfilling the achievements of service providers, whether accompanied or not accompanied by demands for compensation without any criminal proceedings in the future.

**Keywords:** states losses · prevent corruption · public procurement contract

## 1 Introduction

The implementation of the public procurement is prone to causing many problems which ultimately lead to corruption. One of the fundamental problems related to the problems as referred to previously is the emergence of state financial losses, the calculation of state losses which are then determined to be state losses, becomes the basis for an investigation into the existence of corruption in procurement sector.

The discourse on state losses as the basis for conducting investigations into criminal acts of corruption should be put aside, because recovering state losses is considered more important than only if the parties are criminally lawful. Recovery of state financial losses can be carried out in the form of compensation payments based on the calculation of state losses or the implementation of work that is deemed not in accordance with the contract.

The emergence of state losses in the implementation public contract procurement proves that there is a problem, but should these problems be left unchecked so that the state continues to suffer losses and the purpose of public contract procurement is not achieved? This is the main objective of this study, how state losses can be recovered based on a contractual relationship rather than punishing criminals criminally but state losses are still not recovered.

The exception of the settlement of criminal penalties for state losses is not without reason, the implementation of the procurement contract is part of a public contract that must be streamlined for the sake of its main goal, namely achieving development, not giving punishments that actually stop development. Based on this contractual relationship, parties who have harmed the state are required to recover them based on the law of obligation.

Law of obligation is an effort to support the recovery of state assets related to the program StAr (*Stolen Assets Recovery*) which is built on four pillars (Pangabeau, 2020):

1. Empowerment of legal instruments and state institutions in the field of recovering assets resulting from crime
2. Cooperation between governments, legislators, financial institutions and the public to foster collective responsibility and unity of action in preventing, detecting and recovering stolen assets
3. Develop innovations in techniques that can be used to trace and recover criminal assets
4. Encourage the strengthening of international standards in asset recovery efforts through the implementation of Chapter V UNCAC and other international conventions.

In essence, it is very important to recover state financial losses based on a starting point (Pangabeau, 2020):

1. Philosophical justification

Recovery of state losses will have a direct impact on the country's economy which ultimately leads to public welfare. If the starting point of the legislative policy is essentially the parties who have caused harm to the state have violated the social and economic rights of the wider community.

2. Sociological justification

Examined from the perspective of the provisions of the Law on the Eradication of Corruption Crimes, public aspirations to eradicate actions that can harm state finances and other forms of irregularities are increasingly widespread.

3. Practical juridical justification

The provisions of the anti-corruption law provide room for movement and a wider dimension both for law enforcement, which can be done through criminal and civil matters.

Based on the arguments above which are related to the purpose of implementing procurement contract in Indonesia, especially considering the current conditions, the recovery of state financial losses in a civil manner will be much more beneficial and can be directly felt by the community. The basis for recovering state financial losses refers to the law of liability in which any losses incurred under the contract are required to compensate for costs, losses and interest as referred to in Article 1243 of the Civil Code.

## 2 Research Method

A study cannot be said to be research if it does not have a research method because the purpose of research is to reveal a truth in a systematic, methodological and consistent manner (Ali, 2016) as legal research which is a process to find the rule of law, legal principles, and legal doctrines that are useful for answering legal issues (Marzuki, 2016). This research used normative legal research method which refers to the applicable laws and regulation. Sources of data used in this study are secondary data consisting of primary legal materials; laws or regulations, secondary legal materials; books, journals, and tertiary legal materials; dictionary, encyclopedia. The secondary data collection technique in this study uses a document study which means that the data obtained through library research is in the form of secondary data which is tabulated and then systematized by selecting legal instruments that are relevant to the object of research.

## 3 Findings and Discussion

### 1. State Losses

#### a. The understanding of state losses

Act No. 15 of 2006 stated that State/Regional finances are shortages of money, securities, and goods, which are real and definite in amount as a result of unlawful acts, either intentionally or negligently. Meanwhile, based on Act No. 31 of 1999 stated that if the state financial loss is a calculated amount based on the findings of the authorized agency or appointed public accountant, it can be understood that the elements of state losses are as follows (Badan Pemeriksa Keuangan, 2018):

- 1) There is an actor/person in charge
- 2) Lack of money, securities, and goods
- 3) Losses that are real and definite
- 4) Actions against the law either intentionally or negligently
- 5) As well as the existence of a causal relationship between unlawful acts and the losses incurred

State financial losses can take the form of (Lumbanbatu, 2014):

- 1) Expenditure of a source/state/regional wealth (can be in the form of money, goods) that should not be issued
- 2) The expenditure of a state/regional resource/wealth is greater than it should be according to the applicable criteria
- 3) Loss of state/regional resources/wealth that should have been received (including receipts with counterfeit money, fictitious goods)
- 4) State/regional source/wealth receipts are smaller/lower than what should be received (including receipt of damaged goods, inappropriate quality)
- 5) The emergence of a state/regional obligation that should not exist

- 6) The emergence of a state/regional obligation that is greater than it should be
- 7) Loss of a state/regional right that should be owned/accepted according to the applicable rules
- 8) State/regional rights received are smaller than what should be received

After the Constitutional Court Decision Number 25/PUU-XIV/2016, state losses must be understood as losses that have occurred or have actually occurred (actual loss). The loss must be a loss whose amount can be calculated based on the findings of the authorized agency or the appointed public accountant. Thus, the offense must always be interpreted as a state financial loss that has actually occurred and is real.

Basically, the method of calculating state losses cannot be determined automatically standard to be used as a guide/reference in calculating state losses. This is because the *modus operandi*, cases of irregularities and forms of state losses can vary (Paeh, 2017). In carrying out the examination, the examiner can choose the method that is considered the most appropriate. Dividing the concept or method of calculating state financial losses into six concepts or methods (Paeh, 2017):

- 1) Total loss. This method calculates state financial losses by means of the entire amount paid is declared as state financial loss
  - 2) Total loss with adjustment. The total loss method with adjustments is like in the Total Loss method, only with an upward adjustment. Adjustments are required if the purchased item must be destroyed and its destruction costs money. State financial losses are not only in the form of expenditures for the procurement of these goods, but also the costs required or incurred to destroy the goods.
  - 3) Net loss. In the net loss method, the method is the same as the total loss method. Only with downward adjustments. Net loss is the total loss minus the net value of the goods that are considered to have value. The net value is the difference that is usually obtained minus the salvaging cost.
  - 4) Reasonable price. In this method of calculating state financial losses, the fair price becomes the comparison for the realized price. State financial loss where the transaction is not fair in the form of the difference between the fair price and the realized price.
- b. Calculating and Determining state losses

The Audit Board of The Republic of Indonesia as Act No. 15 of 2006 has function to examine the management and responsibilities of state finances carried out by the Central Government, Regional Governments, other State Institutions, Bank Indonesia, State-Owned Enterprises, Public Service Agencies, Regional-Owned Enterprises and other Institutions or Entities that manage state finances. The BPK's authority to calculate and determine state losses is under Act. No. 15 of 2006 *"BPK assesses and/or determines the amount of state losses caused by unlawful acts, whether intentionally or negligently committed by treasurers, managers of State-Owned Enterprises/Regional-Owned Enterprises, and other institutions or entities that manage state finances"*.

Meanwhile, the authority of Indonesia's National Government Internal Auditor (BPKP) to calculate state losses is regulated under Presidential Regulation No. 192 of 2014. In addition, in Government Regulation No. 60 of 2008, BPKP is a Government Internal Supervisory Apparatus (APIP). Furthermore, under same regulation stated that as the government's internal control apparatus conducts internal supervision through audits. Based on Presidential Regulation No. 192 of 2014, the functions of the BPKP include conducting investigative audits on cases of irregularities with indications of harming state/regional finances, audits for calculating state/regional financial losses, providing expert information, and efforts to prevent corruption.

On the other hand, the Commission for Examining the Wealth of State Administrators, inspectors at the Ministry or Non-Departmental Government Institutions, Inspectorates/Regional Apparatus Work Units can also calculate state losses based on the Circular Letter of the Supreme Court Number 4 of 2016 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber of 2016 as Guidelines for the Implementation of Duties for Courts and Elucidation of Article 6 of Law No. 30 of 2002 concerning the Corruption Eradication Commission. Circular Letter of the Supreme Court Number 4 of 2016 states that: *"The agency authorized to declare whether or not there has been a loss of state finances is the State Audit Board which has constitutional authority while other agencies such as the Financial and Development Supervisory Agency/Inspectorate/Regional Apparatus Work Unit remain authorized to conduct examinations and audits of state financial management but are not authorized to declare or declare state financial loss. In certain cases, the judge based on the facts of the trial can assess the existence of state losses and the amount of state losses"*. The explanation of Article 6 Act No. 30 of 2002 stated that what is meant by 'authorized agencies' include the Supreme Audit Agency, the Financial and Development Supervisory Agency, the Commission for Examining the Wealth of State Organizers, inspectors at the Ministry or Non-Departmental Government Agencies.

The position of public accountants to calculate state losses can also be carried out as explained in the Explanation of article 32 of the Corruption Act which only states: *"State financial losses are losses that can be calculated based on the findings of the authorized agency or appointed public accountant"*. The element of the article 'authorized agency' can be translated as an authorized agency or has capacity in accounting or calculating state financial losses or can also be interpreted as an authorized institution in handling corruption cases. Meanwhile, the 'appointed public accountant' is the accountant appointed by the authorized agency, or in other words the public accountant acts for and on behalf of the agency authorized to determine state financial losses (Isnayanda, 2018).

Based on the explanation above, it can be understood that BPK has the position to be able to calculate and determine state losses. Meanwhile, the Commission for Examining the Wealth of State Organizers, inspectors at Departments or Non-Departmental Government Agencies, Inspectorates/Regional Apparatus Work Units and even public accountants only count state losses but do not determine state losses.

| No | Description             | The Audit Board of The Republic of Indonesia  | Indonesia's National Government Internal Auditor  | Inspectorate General/Ministry  | Province inspectorate   | District/city inspectorate  |
|----|-------------------------|---|---|--|---|---|
| 1  | Legal bases             | Act No. 15 of 2006  | Regulation of Government No. 60 of 2008   | Regulation of Government of 60 of 2008   | Regulation of Government of 60 of 2008  | Regulation of Government of 60 of 2008  |
| 2  | Institutional relations | Regional Representative Council, The House of Representatives of the Republic of Indonesia, Regional House of Representatives | Appointed and responsible to the President  | Appointed and responsible to the President   | Appointed and responsible to the President                                      | Appointed and responsible to the President                                    |
| 3  | Audit types             | - Financial audit<br>- Performance audit<br>- Audit with a specific purpose   | - Performance audit<br>- Audit with a specific purpose  | - Performance audit<br>- Audit with a specific purpose                                     | - Performance audit<br>- Audit with a specific purpose                          | - Performance audit<br>- Audit with a specific purpose                        |
| 4  | Object                  | Check management and responsibilities State finances (including regional finances)  | Supervise activities State General Treasury sourced from the state budget and special assignment from the President | Supervise activities certain ministries that sourced from the state budget in The Ministry | Supervise activities the provincial government sourced from the province budget | Supervise activities district/city government sourced from County/City budget |
| 5  | Character               | Government external   | Government internal   | Government internal  | Government internal   | Government internal   |

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|----|---|--|--|--|--|----------------------------|
| 6  | <p>Authority and function</p> <ul style="list-style-type: none"> <li>- Carry out inspections and request information and/or documents regarding financial management and responsibility country</li> <li>- Setting financial audit standards country</li> <li>- Fostering the functional position of Examiner</li> <li>- Giving consideration to the Standard</li> <li>- Government Accounting and design Government internal control system Central/Local Government</li> <li>- Assess and/or set amount state loss</li> <li>- Monitor the settlement of compensation country/region</li> <li>- Provide expert testimony in the process judiciary regarding state/regional losses</li> </ul> | <ul style="list-style-type: none"> <li>- Provide early warning and increase effectiveness risk management</li> <li>- Maintain and improve quality of agency governance</li> <li>- Government Provide reliable reassurance adequate for compliance, efficiency, and effectiveness.</li> </ul> | <ul style="list-style-type: none"> <li>- Provide early warning and increase effectiveness risk management</li> <li>- Maintain and improve quality of agency governance</li> <li>- Government Provide reliable reassurance adequate for compliance, efficiency, and effectiveness.</li> </ul> | <ul style="list-style-type: none"> <li>- Provide early warning and increase effectiveness risk management</li> <li>- Maintain and improve quality of agency governance</li> <li>- Government Provide reliable reassurance adequate for compliance, efficiency, and effectiveness.</li> </ul> | <ul style="list-style-type: none"> <li>- Provide early warning and increase effectiveness risk management</li> <li>- Maintain and improve quality of agency governance</li> <li>- Government Provide reliable reassurance adequate for compliance, efficiency, and effectiveness.</li> </ul> |                            |

Sumber: <https://aceh.bpk.go.id/10955/>

c. State losses arising from contractual relationships are not criminal acts

Article 1965 of the Civil Code can be used to explain if the parties bound in an agreement are considered to be parties with good intentions, “*Good faith must always be considered to exist, while whoever points to a bad faith is obliged to prove it*”. Even if it is true that there are parties who have bad intentions in an agreement, they are still parties who have good intentions. It is different if it can be proven that the bad faith is not good, then based on the evidence it can be used to hold the person responsible for the material loss issued if it is true that the bad faith caused the loss.

State financial losses arising from contractual relationships do not always have to be caused based on someone’s bad faith, sometimes an unpredictable situation occurs and creates obstacles in the implementation of the contract. Negligence in managing finances is also one of the factors that can allow an entity to be unable to continue the contract for a while, not permanently, but the entity can ensure that it will complete the contract only given additional time to fix financial problems.

Furthermore, the occurrence of state financial losses is also not a criminal act of corruption because it can be recovered by way of compensation based on what the treasurer does based on the BPK Decision as regulated under Act 15 of 2006. BPK also monitors the compensation process to ensure the implementation of payments. The follow-up to the compensation is regulated in the Regulation of the Audit Board of Act No. 3 of 2007.

In addition, the Circular Letter of the Supreme Court Number 4 of 2016 concerning the Implementation of the Formula for the Results of the Plenary Meeting of the Supreme Court Chamber of 2016 as a Guide to the Implementation of Duties for the Court stated that:

*“The time limit of 60 days for returning state losses on the recommendation of the State Audit Board/Financial and Development Supervisory Agency/Inspectorate in accordance with the provisions of Article 20 paragraph (3) of Act No. 15 of 2004 does not apply to Defendants who are not officials (Private) which returns the loss of the State within the grace period, this provision only applies to Government Organizers. However, it is non-binding, when the State Administration for refunds of state losses is carried out after the 60-day deadline, it is the investigator’s authority to carry out legal proceedings if an indication of a Corruption Crime is found”.*

Based on the circular letter above, it appears that the recovery of state losses is more important than the legal process. 60 days is the length of time for the return of state losses, if the time has passed, it becomes the authority of the investigator. This circular letter is only an affirmation of Act No. 15 of 2005.

Referring to the laws and several regulations above, it is very clear that the state losses that occur do not have to be followed up in the realm of process but rather to refund or compensation for state financial losses whose purpose is to recover state losses. The affirmation for this needs to also include the existing jurisprudence in Indonesia, namely the Supreme Court Decision Number 49 K/Pid.Sus/2016, The rule of law regulated in the jurisprudence is that project payments before the project is completed are not a loss to the state and do not meet the elements of being against the law or abusing authority, if the conditions are met:



- 1) There are compelling circumstances so that the work cannot be done
  - 2) Completed by the contractor/provider of goods/services on time
  - 3) The time extension addendum has been made
  - 4) There has been a determination of late fees
  - 5) The project implementer has paid the late fees
  - 6) Project completed on time based on time extension, and
  - 7) The project has been accepted by the project giver.
2. Public contract for the Procurement is Source of Law of Obligation to Recover Loss of State Finances

In general, government procurement contract is part of a public contract which has a contract definition which is partially or wholly controlled by public law, because one of the parties acts as the government (AZ, 2016). While the meaning public procurement contract derived from Presidential Regulation Number 16 of 2018 stated that the goods/services procurement contract, hereinafter referred to as the Contract, is a written agreement between PA/KPA/PPK and the Goods Provider. /Services or implementing self-management. PA is an acronym for Budget User, KPA is an acronym for Budget User Authorization and PPK is an acronym for Acting Commitment Maker. If the definition of the contract for the procurement of goods/services above is related to Article 1601a of the Civil Code which has a definition “*A charter agreement is an agreement in which the first party, namely the contractor, binds himself to complete a job for another party at a predetermined price* (Witanto, 2012) specifically regulated mechanisms, including:

- a. Charter contract in procurement must be made in writing (contract)
- b. The parties who are the subject of the agreement are the Goods/Services Provider and the Commitment Making Officer (PPK) or Self-management Implementer (Witanto, 2012).

It is undeniable that the word contract with agreement has a difference in understanding the consequences because contracts are made to have legal consequences and agreements can be made to have and have no legal consequences (Simanjuntak, 2011). However, the contract law in Indonesia as regulated in Chapter III concerning Obligation (Perikatan) (translated from *Burgerlijk Wetboek voor Nederlands-Indisch* by R. Subekti and R. Tjitrosudibio), the term of contract is not known but when referring to the translation of *Burgerlijk Wetboek voor Nederlands-Indisch* in 1891 using Betawi language, the meaning of *overeenkomst* is not only defined by the term agreement but also contract.

Apart from the use of different terms between agreement and contract, contract law related to property law is an agreement that has legal consequences. Based on the context when it is regulated in CHAPTER III concerning Obligation in the Civil Code, the meaning that arises is the law of obligation closely related as regulated in The Institute of Justinian. The law of obligation arises because of the *contractus* and *delicta* (Thomas Collett Sandars, 1865). It is the same as regulated in Article 1233 of the Civil Code which provides an understanding of the engagement arising from the existence of agreements and laws.

With regard to contracts for the procurement of government goods/services in Indonesia which cannot be separated from the arrangements based on the Civil Code, the agreed agreement applies Article 1338 of the Civil Code, in the sense that the agreement must be implemented and it is stated that the agreement must be carried out in good faith.

The obligation to carry out the agreement that has been agreed is not only limited to what is written in the contract but also to what is not written. Contracts are binding for everything which according to the nature of the agreement is required by propriety, custom and law, this is as regulated in Article 1339 of the Civil Code.

Losses that arise as a result of negligence on the part of one of the parties for not carrying out the contract for the procurement of goods/services properly will result in an obligation to compensate for losses. Parties who have been declared negligent as regulated in Article 1238 of the Civil Code are required to reimburse costs, losses and interest for not carrying out their obligations based on an agreement, this is regulated in Article 1243 of the Civil Code.

Recovery of state financial losses can no longer be identified and can only be done when a criminal legal process occurs (Yulia, 2020),<sup>1</sup> because the purpose of procurement contract is to become an instrument for solving problems due to the emergence of state financial losses. Therefore, if the state financial losses can be determined when the contract implementation is still running, at that time the recovery of state financial losses will be carried out.

During the contract period, the service recipient is given the right to receive work progress reports from the service provider, weekly or monthly reports:

- a. The weekly report consists of:
  - 1) Daily report summary
  - 2) Contains the results of the physical progress of work in a one week period
- b. The monthly report consists of:
  - 1) Weekly report summary
  - 2) Contains the physical progress of work in a one month period

The progress report also contains usage tests and trial operations. Comparison of actual progress with the plan, with details of any events or circumstances that could adversely affect the completion of work according to the program and date of submission of work, and steps taken to overcome delays.

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<sup>1</sup> The case that occurred in Lebak, corruption in the construction of the Gajrug Market worth 20 billion. The stalled market conditions indicated that there had been a state financial loss of Rp. 700,000,000,-. At the investigation stage, state losses are returned by winning the auction to the Lebak District Prosecutor's Office to be handed over to the state treasury (Department of Industry and Trade). The investigation did not continue because it was considered insufficient evidence, the recovered state losses became no longer elements of state losses.

Not only passively as described above, service recipients through the technical team can carry out inspections while the work is being carried out by checking, confirming and testing materials, equipment and work skills and even the technical team also checks the progress of the work. The service provider must notify the technical team when the material, equipment or work is ready for testing. For the realization of the contents of the work progress report and/or the visible results when the inspection is carried out, the service provider must provide all tools, document guidance and other information to carry out the test.

If there is a discrepancy with what the service provider has done with the bidding document (not of the same quality as what is being offered) when the service recipient receives a report on the progress of the work or during an inspection, of course it will be detrimental to the state's finances. The potential for state financial losses can occur, and if the assessment of the quality of work is not in accordance with what has been offered by the service provider, the service recipient can calculate material losses. The calculation of this material loss will later be used as the basis for asking the service provider to be held accountable whether it will be replaced in the form of money or repair the road according to its quality.

The action of the service provider as mentioned above is a form of not carrying out its obligations properly/carrying out its obligations but not properly. The actions of this service provider can be categorized as default, which means non-performance by the debtor (Widjaja, 2007). Correcting negligence based on an offer from a recipient or service provider is not a problem, because if the offer comes from the service recipient, of course the approval comes from the service recipient and the service recipient wants to resolve the negligence that occurs as quickly as possible. The offer to correct the negligence of the service provider is a necessity because it is caused by his fault unless the negligence is caused by force majeure so that his obligations are released as regulated in Article 1245 of the Civil Code. Negligence that causes losses is then corrected by returning money or repairing roads, provided that it is based on the approval of the creditor who in this case is the recipient of the service (Satrio, 2012).

Upon the offer from the service provider, the service recipient can make choices:

- a. Continue to ask for the fulfillment of achievements from the debtor, whether accompanied or not accompanied by a claim for compensation
- b. Demand cancellation, whether accompanied by or without a claim for compensation (Satrio, 2012)

If the service recipient has stated that he demands the cancellation of the contract or in the contract it has been determined if half the work is carried out not in accordance with the contents of the contract, then the service provider cannot correct the negligence (Satrio, 2012). However, if the possibility is still open for the service provider to correct the negligence, then it is limited to:

- a. Before the service recipient expresses his attitude towards the service provider's default
- b. Unless the service provider only demands fulfillment

Because the procurement contract is indeed aimed at national development in the context of improving public services and developing the national and regional economy, and if the procurement of goods and services is stopped, let alone can no longer be carried out, the losses will not only be in the form of material but also immaterial. The community will not enjoy national development in the context of improving public services and national and regional economic development will fail to be implemented. Therefore, correcting the negligence is correcting the work which after being evaluated and tested is not in accordance with the contents of the contract.

Furthermore, state losses can occur when the contract has been implemented. As has been explained previously, if there is a state loss due to a discrepancy in the implementation of the work carried out by the service provider, what can be done is to improve what has been done or pay an amount of money in accordance with the amount of the state financial loss.

## 4 Conclusion

Recovery of state financial losses refers to philosophical justification, sociological justification and practical juridical justification. The efficiency of the contract as a medium for resolving state losses can of course be maximized when the contract is able to provide protection for the injured party, namely the state. Therefore, based on the law of obligations based on the existence of a contract, parties who have incurred losses, especially in the form of default, are required to pay fees, losses and interest. Since the procurement contract is aimed at national development in the context of improving public services and developing the national and regional economy, the state financial losses arising as a result of a default can be made by recovering state losses by demanding the fulfillment of an increased contract accompanied or not accompanied by compensation.

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