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### RESEARCH ARTICLE

#### RECONSTRUCTION OF LEGAL PROTECTION OF PRIVATE ENTREPRENEURS IN A DISPUTE OVER GOVERNMENT'S PROCUREMENT OF GOODS AND SERVICES BASED ON JUSTICE VALUE

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#### Abstract

Legal protection for private entrepreneurs as providers or sellers of government goods and services (Procurement) must receive attention for the avoidance of arbitrariness and injustice in the process of procuring government goods and services. Considering the position of the buyer in government procurement is the government itself, the author made a study that examines the weaknesses of legal protection for private entrepreneurs as providers or sellers of government goods and services and how its reconstruction. The study was done using the constructivism paradigm and the type of research is a qualitative study with a socio-legal approach. Research shows that the weaknesses in the legal protection of private entrepreneurs in goods / services procurement disputes in government where there are weaknesses in procurement regulations, namely: (1) there are no regulations that clearly regulate the legal protection mechanisms for resolving procurement disputes at all stages. (2) Dispute resolution still has no provision that gives legal certainty the competence of the Settlement Institution authorized to adjudicate. (3) Provisions for procurement which are still stipulated in legal products of Presidential Regulation must be subject to other existing laws. In addition to this, in the case of the Judiciary in Indonesia in dealing with procurement issues also still has many weaknesses, namely: (1) There is no judge who specifically handles the case of procurement of goods / services of the government with various training; (2) There has not been a special court for procurement, PTUN and PN authority disputes, Judges competence in the Procurement field, Court proceedings with ordinary procedural law require a long time and a large cost. Reconstruction of legal protection of private entrepreneurs in disputes over the procurement of goods / services in the government based on justice values by reconstructing the provisions of Presidential Regulation No. 16 of 2018 concerning Procurement of Government Goods / Services, Part 85, Article 85 in order to realize the procurement of respectable government goods / services and procurement objectives.

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**Introduction:-**

Government goods / services procurement occupies a very vital position in Achieving Vision 2045 aspired by the President, as stated by the Head of the National Development Planning Agency, one of the 5 (five) main directives is infrastructure development. Infrastructure development by the government is the biggest portion in government procurement of goods / services. Based on LKPP's head report that in 2019 the amount of procurement expenditure until November 2019 reached 1,133.4 trillion.

In the process of procurement of government goods and services the existence of private entrepreneurs who are providers of goods or services is very important in the success of the sustainability of the procurement of goods and services. More and more providers are involved to offer goods or services, the opportunity to obtain effective and efficient procurement results will most likely be realized. This can be understood based on the natural mechanism of the market, namely the more offers from sellers, the price of the goods or services offered will be very open with fair competition without monopolies or cartels from a handful of sellers. Likewise, the quality of goods and services offered by many buyers will create a healthy and guaranteed competition of products that have the quality that is in accordance with the existing budget for goods and services.

For the government as the buyer or as a user of goods and services, the risk of loss in the procurement process or the failure of private providers / entrepreneurs to fulfill their achievements has been anticipated and protected by laws and regulations made by the government itself. Both through the mechanism of determining the conditions in the procurement of government goods and services, guarantees that must be provided by the provider, sanctions given by users for irregularities of the provider.

For private entrepreneurs as providers of government goods and services, the legal protection provided by the laws and regulations relating to procurement is often not balanced with what is standardized for the government as a buyer of government goods and services.

In addition to the sanctions mentioned above, there is often a risk for disproportionate entrepreneurs due to government mistakes as a buyer, for example an unfair procurement process that contains acts of corruption, collusion, and nepotism (KKN), delays in payment by users and even deliberate not paying for various reasons. , to the threat of imprisonment for corruption against the private sector which is considered not to carry out its achievements perfectly as in the contract when the product has been received and utilized for a long time. One of the problems in procurement is that one of them arises as a result of the level of regulation in the procurement of goods and services in Indonesia, which is limited by Presidential Regulation, so that it often overlaps with regulations in the form of laws governing matters relating to government procurement, for example construction services laws, corruption criminal acts and other regulations. In addition, the problem also occurs because the substance of the regulations in the existing Procurement Regulations also overrides the interests of the private entrepreneur as the provider. Another issue that is also very important is the emergence of various disputes in the procurement of government goods and services starting from the selection stage of the provider, in the contractual relationship between the provider and the government, to the inspection of the results of the work. The process of resolving disputes that are uncertain about the forum of court or the judiciary or the lengthy dispute resolution will be very detrimental. Article 85 Paragraph (1) Perperes No.16, 2018 states: "Settlement of contract disputes between PPK and Providers in the implementation of the Contract can be done through the service of contract dispute resolution, arbitration, or settlement through the court". These provisions have not been able to provide legal certainty for private entrepreneurs in obtaining guarantees of legal protection in solving procurement problems as a whole, not only regarding contracts but also in the procurement process before the contract.

The contractual relationship between the government as the user of goods / services and the private entrepreneur as the provider of government goods / services should be a proportionally balanced relationship, between rights and obligations, between what is received and the risk that must be borne. The government as a party in procurement, on the other hand also as a regulator has made regulations that protect and secure the interests of the government. The imbalance of relations between the government and the private sector which in this case is very burdensome to the private sector with all risks that must be borne, and the lack of legal protection for private entrepreneurs will certainly reduce the interest of the private sector to compete in a healthy competition following the procurement of

government goods and services. Even though only with the existence of competitive competition will be able to realize the procurement goals of effective and efficient in the framework of "best value for money".

Legal protection for private entrepreneurs as suppliers or sellers of goods and services that are part of the people must receive attention for the avoidance of arbitrariness and injustice in the process of procurement of government goods and services. Given the position of the buyer in government procurement is the government itself. Protection of state finances used in government goods / service procurement activities should not rule out protection for private entrepreneurs who are the people who should also be protected by the state. Harmonization of interests and the balance of legal protection will drive the success of government procurement of goods / services in achieving the procurement goals that are shared.

John Emerich Edward Dalberg Acton (1834-1902) once said "Power tends to be corrupt and absolute power is corrupt absolutely", in this context it is necessary to contemplate the potential for arbitrariness and corrupt behavior that are very likely to occur in every process of procurement of government goods and services if full authority of the government in controlling procurement activities without a third party control mechanism as a court in maintaining procurement activities remain as its noble goal is best value for money.

Encouraged by this phenomenon, then to look for constructions that are in accordance with the principles of justice and legal certainty, the author was moved to make a research with the main issues as follows:

1. What are the weaknesses of the legal protection of private entrepreneurs in disputes over the procurement of government goods and services in Indonesia currently ?
2. How to Reconstruct the legal protection of private entrepreneurs in a dispute over the procurement of government goods and services in Indonesia based on the value of justice?

### **Method of Research:-**

The paradigm that is used in the research this is the paradigm of constructivism which is the antithesis of the understanding that lay observation and objectivity in finding a reality or science knowledge. Paradigm also looked at the science of social as an analysis of systematic against *Socially Meaningful Action* through observation directly and in detail to the problem analyzed.

The research in writing this dissertation is a qualitative research . Writing aims to provide a description of a society or a certain group of people or a description of a symptom or between two or more symptoms.

Approach ( *approach*) the research is to use the approach of *Socio-Legal*, which is based on the norms of law and the theory of the existing legal enforceability of a sociological viewpoint as interpretation or interpretation .

As for the source of research used in this study are :

1. Primary Data, is data obtained from information and information from respondents directly obtained through interviews and literature studies.
2. Secondary Data, is an indirect source that is able to provide additional and reinforcement of research data. Sources of secondary data in the form of: Primary Legal Material and Secondary Legal Materials and Tertiary Legal Material.

In this study , researchers used data collection techniques, namely literature study, interviews and documentation. In this study, the researcher is a key instrument that is the researcher himself who plans, collects, and interprets the data. Qualitative data analysis is the process of searching for, and systematically compiling data obtained from interviews, field notes and documentation by organizing data into categories, describing it into units, synthesizing, compiling into patterns, selecting important names and what will be studied and make conclusions..

### **Research Result and Discussion:-**

#### **Weaknesses Of The Legal Protection Of Private Entrepreneurs In Disputes Over The Procurement Of Government Goods And Services In Indonesia Currently**

Procurement of goods / services of the government when it is set in the Regulation of President. Based on the mandate in the Presidential Regulation, the relevant institutions and ministries make the implementing regulations. LKPP make Regulation Institute in order to regulate the procedure more details about aturan public procurement of

goods / services of the government. While the Ministry PUPR make the Regulation of the Minister of PUPR are set specifically regarding the procurement of services of construction.

The implementation of government procurement in Indonesia is still considered not to provide legal protection for entrepreneurs as providers of government goods / services. The presumption that not only emerge from the provider, but also based on the view outside of researchers alien as that are delivered by the Institute for Development of Freedom of Information (IDFI) in the report of Transparency procurement of government (Public Procurement Transparent Rating).

The Results of the report of research by Transparent Public Procurement Rating on Procurement of Government on 36 ( thirty six ) countries around the world. There are some things that become concentrated research such , namely : the framework of the working regulations of procurement, efficiency, transparency, accountability and integrity, competitive and do not take sides . The results of the study are in the year 2019 put Indonesia in rank 29 of the 36 countries studied .

Based on the results of the research were conducted by the author, the results as follows :

**Table 1:-** Weaknesses in the Law Concerning The Government's Goods and Services Procurement Dispute Resolution Mechanism.

NO	Procurement Stages	Dispute Resolution Mechanism	Weakness
1	Provider Selection	Rebuttal to the Election Working Group	<ol style="list-style-type: none"> <li>1. Objection submitted to the Working Group on the determination of the winner who issued the Working Group . So it is doubtful objectivity in assessing themselves alone and persevering of the decisions that have been made .</li> <li>2. There are no sanctions / liabilities whatsoever towards the Pokja that are wrong in determining the winner or rebuttal consideration</li> </ol>
2	Provider Selection	Appeal Rebuttals Submitted to KPA	<ol style="list-style-type: none"> <li>1. Providers must provide guarantees of appeal objections , which will be disbursed as state treasury;</li> <li>2. KPA objectivity in evaluating the work of the Election Working Group which is a fellow local government officials</li> <li>3. KPA knowledge competencies regarding the procurement of goods / services</li> <li>4. No sanctions / accountability for the KPA who was wrong in considering the objection appeal</li> </ol>
3	Contract Implementation	Arbitration is based on the Law of Arbitration and APS	<ol style="list-style-type: none"> <li>1. Arbitration fees are quite expensive</li> <li>2. Arbitration dispute resolution must be agreed by the parties .</li> <li>3. Arbiter are not experts in procurement .</li> <li>4. Arbitration Decisions can still be submitted for cancellation to the District Court and allow the appeal until appeal .</li> <li>5. Arbitration execution becomes a problem if it passes the fiscal year</li> <li>6. In normative still questionable whether the dispute in procurement of government can be examined and cut through arbitration .</li> </ol>
4	Contract Implementation	Arbitration were held LKPP	<ol style="list-style-type: none"> <li>1. Examination is open</li> <li>2. The verdict does not have a value of executorial , must be carried out by voluntary .</li> <li>3. LKPP is the Institute of Government that objectivity Institute of arbitrary were held dubious .</li> </ol>

			<ol style="list-style-type: none"> <li>4. Arbiter LKPP most big is the ASN;</li> <li>5. If the losing does not like be willing to implement , it should file a lawsuit again .</li> <li>6. The authority of the arbitral LKPP not in accordance with the generally Institute of Arbitration .</li> </ol>
5	Contract Implementation	Mediation	<ol style="list-style-type: none"> <li>1. No decisions are made by the mediators.</li> </ol>
6	Contract Implementation	Conciliation	<ol style="list-style-type: none"> <li>1. No decisions were made by the conciliator</li> </ol>
7	Contract Implementation	District Court	<ol style="list-style-type: none"> <li>1. Expensive fees , long process from PN, Appeal to Cassation</li> <li>2. Not all PN Judges understand the problem of government procurement of goods / services</li> </ol>
8	Provider Selection	State Administrative Court	<ol style="list-style-type: none"> <li>1. PTUN is only within the scope of procurement administration .</li> <li>2. PTUN authority to adjudicate disputes procurement is still not clear .</li> <li>3. The process of settlement of disputes cost high , long and storied</li> </ol>
9	Choice of provider / Contract Implementation	Ombudsman	<ol style="list-style-type: none"> <li>1. The results of the examination highs only in the form of recommendation .</li> <li>2. Not accomplishing loss right provider</li> </ol>
10	Provider Selection	KPPU	<ol style="list-style-type: none"> <li>1. The verdict resulted in laws on reported , the complainant did not provide advantages in directly .</li> <li>2. Commission Decision advantageous manner directly to the state</li> <li>3. The provider is actually threatened by the KPPU's ruling which is not a court but gives a heavy sentence .</li> </ol>
11	Choice of provider / Contract Implementation	Courts Acts Criminal Corruption	<ol style="list-style-type: none"> <li>1. Handling of corruption targeted at all who considered the loss of the country. Not differentiated fault procedure administrative or civil that without any intention of evil .</li> <li>2. Providers who only follow a tender one often participate regarded as perpetrators of corruption even if not have intentions of evil .</li> </ol>

Based on the data mentioned above it can be found that there are many weaknesses in the law both in the substance of the rules prevailing as well as in the structure of the law in terms of the protection of the law for employers privately in dispute procurement of goods and services then from that required the reconstruction of the protection of the law protection for private companies in the dispute over procurement of goods and services of government in Indonesia based on the value of justice.

### **Reconstruction Of The Legal Protection Of Private Entrepreneurs In A Dispute Over The Procurement Of Government Goods And Services In Indonesia Based On The Value Of Justice**

Settlement of procurement disputes is a form of legal protection measures that are repressive to private companies in government procurement. Settlement of procurement disputes can be interpreted as a way to resolve differences of opinion in the implementation of government goods / service procurement activities. Settlement of procurement disputes must be carried out based on the principle of justice. Settlement of procurement disputes must be carried out with the approach of administrative law and civil law. Criminal law efforts are *ultimumremidium* and are only applied to deviant behavior in procurement that meets the actus reus element, namely fulfilling the objective element of violating the rule of law and there is also the mens rea, which is the inner attitude of evil intentions. Procurement disputes are tested based on procurement regulations, procurement contracts and procurement principles and ethics. To realize a fair procurement dispute resolution, an organizing body that is independent and credible is needed.

The dispute resolution board in carrying out its authority must be based on general principles of good governance (AUPB). The dispute resolution body checks for alleged irregularities in the whole set of government goods / services procurement activities.

Therefore Chapter XII of the sixth part of the Presidential Regulation on Procurement of Goods / Services of the Government which reads: "Settlement of Contract Disputes", must be reconstructed by changing the title in the sixth part to "Settlement of Procurement Disputes".

Article 85 Perpres Procurement of government goods / services which constitutes Article in the sixth part are mutatis mutandis with the change of the title of the sixth section, the contents of the article must also be substantially altered. And at the same time gave rise to the existence of a proposed new dispute resolution agency called the Procurement Dispute Settlement Agency. The body is defined as a group of people who are a unit to do something. Like bodies that have been established by the government such as the Supreme Audit Board (BPK), the Financial and Development Supervisory Agency (BPKP), or the National Nuclear Agency (BATAN) BPSP, it is hoped that they can consistently, professionally and focus on overseeing the implementation of Procurement in accordance with applicable law . Therefore, the issuer with the title in the sixth part, namely Procurement of Settlement, is this body called the Procurement Dispute Settlement Agency (BPSP). So Article 85 Paragraph (1) with the same argument as the change in title of the sixth part, so that reconstructions of Article 85 paragraph (1) can be formulated as : "Settlement of procurement disputes submitted to the Procurement Settlement Settlement Agency (BPSP)".

The practice of resolving disputes over government procurement of goods / services internationally can be a reference and input for adoption of sections containing positive values. Such as procurement in France which does not form a special Institution to handle procurement disputes but rather maximizes the role of the administrative court under judicial authority. Another case in Georgia which formed a special body to resolve procurement disputes, the Dispute Review Board (DRB) under the Government Regulatory Agency, the State Procurement Agency. Albania has a Public Procurement Commission chosen by the Council of Ministers on the recommendation of the Prime Minister. While in Chile there is a Public Procurement Tribunal chosen by the President from the community element who has a term of office for 5 (five) years.

Seeing the conditions of procurement activities that occur many irregularities both procedural and corruption bribery and other irregularities, in Indonesia it is necessary to establish a dispute resolution institution that can be trusted by the procurement actors. This trust can grow if the institution to be formed has independence and impartiality, and cannot be intervened by any party. To be able to form a special judicial institution must be by law, therefore for the temporary solution step it is necessary to establish a non-judicial institution that performs the function of procurement dispute resolution filled by independent people from the professional community appointed by the President for a period of 5 (five) ) years and is responsible to the President.

The procurement dispute resolution agency evaluates the request for dispute inspection in the administrative framework evaluating the validity of the actions of officials both in terms of procedures, substance, and authority based on the principles, ethics and regulations of the procurement and procurement contract. Whereas in the aspect of contracting, the Institution will judge based on the substance of the contract, procurement regulations and related laws and regulations. Procurement Principles and Ethics need to be a measure in assessing the actions of the government as the actors in procurement in managing the procurement of government goods / services because ethics is a standard of behavior. In its function as a behavioral control, ethics controls moral commitment and the capacity of expertise in carrying out community service tasks.

Regarding ethics and legal structure, Soetandyo said, as follows:

*"If the law can no longer be controlled from the substantive domain, then it must be controlled from the structural realm." So in this law enforcement structure, professionals are born who feel called by a mission to be able to apply the law as part of the realization of virtue values which are held in high esteem in society and are not simply degraded into mere instruments of self-interest. It is hoped that based on this ethics of professionalism the law can still be utilized to advance the benefit and welfare of human beings. "*

The government as the user of the goods does not have too much interest in urging a forum to settle procurement, arbitration or court disputes. This is because the laws and regulations are sufficient to provide legal protection for government interests.

The legal protection starts from the provisions of the obligation of the provider to surrender guarantees, retention, termination of the contract unilaterally, put the provider on a blacklist to impose a fine. On the other hand the entrepreneur as the provider is subject to all these obligations without being given equal rights. Therefore the Procurement Settlement Institution, although not absolutely necessary, is very important to protect the private sector's legal interests in order to realize justice.

LKPP based on the Perpres Procurement order to conduct contract dispute settlement services (LPSK). The effectiveness of dispute resolution in LKPP contract settlement services is still very low. This can be caused by several things. First, LPSK LKPP is only related to contract securities. Second, there is nothing in the regulation that requires the process of resolving contract disputes through LPSK LKPP. Third, the lack of trust level of the provider in its independence and impartiality. As an institution tasked with developing and formulating Government Goods / Services Procurement policies in accordance with the Presidential Regulation on Procurement, it is better if LKPP focuses on improving regulations and innovations in procurement. The issue of supervision and assessment in the event of a dispute must be carried out by a separate professional institution that is given special authority for dispute resolution, which the researcher has proposed under the name Procurement Settlement Agency (BPSP).

Article 85 paragraph (2) which currently states: "LKPP provides contract dispute settlement services as referred to in paragraph (1)." It is not enough to provide legal protection for private entrepreneurs in disputes over procurement of government goods / services in all stages of procurement. Therefore paragraph (2) remains the closing paragraph in Article 85 which is amended to: "BPSP members come from experts and professionals in the field of examining who are appointed and dismissed by the President based on a Presidential decree."

Examination of procurement disputes must be based on clear benchmarks used as a test stone for mistakes or irregularities in the procurement of government goods / services. In administrative law, the validity of government actions is known as measured by procedures, substance and authority. It also measures based on general principles of good governance (AUPB). Whereas in the realm of civil law, especially contracts are measured by the presence or absence of breach of contract and contract violations of the law called Acts Against the Law. Based on the aforementioned matters, the size of the audits carried out by the dispute resolution Agency can be formulated by regulations, procurement principles and ethics, legal principles, and procurement contracts. So that an insert can be formulated in the form of Article 85 paragraph (2) as follows: "BPSP adjudicates procurement decisions based on legislation, procurement principles and ethics, legal principles, and / or procurement contracts."

In the case of the dispute examination process, the dispute resolution agency must use the principle of cheap, fast, simple. Cheap is an important requirement in the business world. The rules of an inexpensive inspection method, even as far as possible at no charge, can increase the legal awareness of providers who are aware of irregularities to submit corrections.

Procurement disputes must be resolved quickly, the use of state budget is limited by the fiscal year and for businessmen speed is important to doing business. The speed of the process can be supported by the use of technology. Such is the case with the Georgia Dispute Review Board, which requests for objection checking can be submitted online and in Indonesia has implemented an electronic procurement system, which can be adopted with modifications to the procurement dispute resolution process. This simple principle can also be assisted with the application of an electronic system, so that starting from the petition, the verification to the decision as far as possible is done without the presence of a direct physical hearing. The procedural law of the examination must also be made simple and easy to follow with the shortest possible time.

Based on these considerations, Article 85 needs to be inserted paragraph (3) of the provisions regarding the principle of procurement dispute inspection by BPSP are that: "*BPSP examination is carried out quickly, simply and free of charge based on procedural law made with BPSP regulations.*"

The main problem in LPSK LKPP is the lack of certainty in the implementation of the decision. As stated in the LKPP Regulation regarding Contract Settlement services, it is stated in Article 1 number 13 to : "*Verdict is the Arbitration award of a Procurement Contract Dispute Settlement Service which is final and has legal force to be carried out by the parties voluntarily.*"

Ideally, the decision of the Settlement Institution is final and binding. Therefore, although BPSP is not the same or equal to the existing judicial institutions based on the Law. However, BPSP is a part of Government institutions appointed by the President and under the President directly, then the decision of this Institution will be strong enough to be adhered to by the functional Procurement Officers and procurement actors in general who submit to the procurement contract clause. Based on this, the insertion of Article 85 paragraph (4) is proposed as follows: "*The decision of BPSP is final and binding.*"

As a consequence of the amendment to the provisions of Article 85 concerning the establishment of a Procurement Conflict Resolution Board and removing the provisions on dispute resolution services, the provisions in the Perpres governing dispute resolution services as regulated in Article 91 paragraph (1) letter x must be removed..

### **Conclusion:-**

Weaknesses in the legal protection of private entrepreneurs in goods / services procurement disputes in government are namely: (1) there are no regulations that clearly regulate the legal protection mechanisms for resolving procurement disputes at all stages. (2) Dispute resolution still has no provision that gives legal certainty the competence of the Settlement Institution authorized to adjudicate. (3) Provisions for procurement which are still stipulated in legal products of Presidential Regulation must be subject to other existing laws. In addition to this, in the case of the Judiciary in Indonesia in dealing with procurement issues also still has many weaknesses, namely: (1) There is no judge who specifically handles the case of procurement of goods / services of the government with various training; (2) There has not been a special court for procurement, PTUN and PN authority disputes, Judges competence in the Procurement field, Court proceedings with ordinary procedural law require a long time and a large cost.

The Reconstruction of legal protection for the procurement of private entrepreneurs in disputes over the procurement of goods / services based on justice is needed because there is an urgency for reconstruction based on philosophical, juridical and sociological considerations. The philosophical consideration in this matter is the issue of fairness in the form of equality and granting of rights to employers as providers in resolving government procurement disputes. Juridical consideration in this case is because the Procurement Regulation does not cover the resolution of procurement disputes in all stages of procurement and there are no independent, trusted and professional institutions. Sociological considerations in this case are the uncertainty of resolving disputes, making the public, especially providers, reluctant to actively supervise and raise objections for deviations. Reconstruction of legal protection of private entrepreneurs in disputes over procurement of goods / services in the government based on justice values by reconstructing the provisions of Presidential Regulation No. 16 of 2018 concerning Procurement of Government Goods / Services in Part Six Article 85. : (1) Procurement dispute settlement is submitted to the Procurement Dispute Settlement Agency (BPSP). (2) Procurement Settlement Board (BPSP) has the authority to adjudicate disputes at each stage of procurement based on principles, statutory regulations, ethics, or procurement contracts. (3) BPSP examination is carried out quickly, simply and free of charge based on procedural law made with BPSP regulations. (4) BPSP decisions are final and binding (5) Members of BPSP are balanced from government, business and expert / professional elements in the administration sector who are appointed and dismissed by the President based on the President's decision. The reconstruction of legal substance can have positive implications for the legal structure and legal culture of society. Structural implications in this case include the presence of BPSP as an independent, trusted and professional dispute resolution agency, thereby reducing dispute resolution both through the judiciary and the Criminal Justice System. Implications in the legal culture with the existence of BPSP will increase the participation of the community, especially procurement actors in the supervision and complaints of suspected procurement irregularities so as to minimize the opportunity for irregularities to occur and in the end the realization of procurement of government goods / services is respectable and procurement objectives..

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