September 5th 2017

THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM** from SebelasMaret University, **Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discus views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,

Dr. AnisMashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THEDEANOF FACULTY OFLAW

As-*salamu'alaikum Wr. Wb.*

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: "**Legal Development in Various Countries**" which is held by Faculty of Law, Sultan AgungIslamic University (UNISSULA) Semarang, on September5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.

Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme " Legal Development in Various Countries" focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

Was*salamu'alaikum Wr. Wb.*

Semarang, September5th 2017

Dean,

Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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CONSTRUCTION WORK CONTRACT IN GOVERNMENT BASED VALUE OF BENEFIT

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ABSTRACT

Construction work contract is the entire document governing the legal relationship between Service Users and Service Providers in the implementation of construction work. Construction services law is a field of law with multidimensional special agreement status. The form of construction work contract can follow the development needs and it is implemented in accordance with the provisions of legislation applicable in Indonesia. Through the construction work done by the government as one of the economic activities, it has an important role in the achievement of various objectives in order to support the realization of national development goals to promote the general welfare.

The format used in construction contracts in Indonesia contains more or less in the form of contractual agreements, contractual terms (General and Special), attachments, technical specifications and contract drawings. In reality, there are facilities and infrastructures built that cannot be utilized by society as it should and even ignored. It adversely affects the community as beneficiaries of development results.

In solving the problem/dispute, it is preferable that future construction contracts in Indonesia can provide assurance to protect the public interest in order to continue receiving the benefits from the development.

Keywords: Construction Contract, Dispute, Benefit Guarantee

INTRODUCTION

Background

One of the national goals to be achieved by the Republic of Indonesia is to promote the general welfare. Construction service is one of the economic activities that have an important role in achieving various goals, in order to support the realization of national development goals[1]. National development aims to create a just and prosperous society based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia. Furthermore, the construction service sector is a community activity to realize a building that

[1]Abdulkadir Muhammad, 2010, **Hukum Perusahaan Indonesia**, Citra Aditya Bakti, Bandung, page. 586.

serves as a support or infrastructure of socio-economic activities to support the realization of national development goals. [2]

The field of construction services is regulated in Law No. 18/1999, which was enacted on 7 May 1999 and came into force one year later on 7th May 2000. [3] The implimitatiion of construction services shall ensure law and order of law, No. 18/1999 on Construction Services. It has not been able to meet the demand of good governance and the dynamics of the development of construction services. [4] Subsequently, Law No. 2 of 2017 on Construction Services was enacted on 12 January 2017 in lieu of Law No. 18 of 1999. The Construction Services Act is one of the most remarkable forms of national law-building products due to substances related to all aspects of construction services are regulated in full and detail in Law No. 2 of 2017.

The law of construction services is a field of law with multidimensional special agreement status. Multidimensional special agreements are defined as guidelines or may also serve as a protection against the various relevant laws. [5] Efforts that can be made by the government include providing legal certainty and protection to all citizens without discrimination, providing adequate public facilities that affect the welfare of the community and providing adequate infrastructure to support the economic level of the people. Through the construction work done by the government as one of the activities of the field economic, it has an important role in the achievement of various goals to support the realization of national development goals and to promote the general welfare.

Construction Services as stipulated in Law Number 2 Year 2017 covers construction consultancy services and/or construction works. There are two parties in the construction services that establish legal relationships, ie service users and service providers. Service users are owners or employers who use construction services. On the other and, service providers are providers of construction services. The relationship between service users and service providers is based on the law and set forth in the form of construction work contracts. Construction work contract is the whole document governing legal relationships among service users and service providers in the implementation of construction works.

[2]Undang-Undang Nomor 2 year 2017 on Construction Services
[3]Abdulkadir Muhammad,**Op. Cit.**
[4]Undang-Undang Nomor 2 year 2017 on Construction Services
[5]Abdulkadir Muhammad,**Op. Cit.**

In the execution of construction service contracts, it should also contain 3 (three) elements of the construction service contract stage[6]. The first stage is pre-contractual, in this stage the parties are exploring each other, they come into negotiations between the two parties, bargaining, demand and supply, until the consensus. Further, negotiation is the process of reaching agreement on a partnership in which the parties give each other concessions that can be in the form of negotiation, Memorandum of Understanding (MoU), feasibility study and negotiation (continued). The second stage is the Contractual Phase, this is the start of the agreement until the implementation of the agreement is completed. In this stage, the fulfillment of the validity of the contract is done and the implementation of the achievement until the end of the contract. In this stage, the two parties take the form of the initial script of the agreement, the improvement of the manuscript, the final script is written and signed. And the last is Post contractual phase, this is the stage after the agreement is completed, ie the maintenance period, the hidden defect guarantee, or warranty phase where in the contract agreement, the contractor will not stop its obligations after the construction is completed. Construction of the building is responsible for 5 years since submission.

The construction of a law on the implementation of the Construction Services Act on a contract of construction work contract involves the service providers and the public, it will lead to a more responsive public service policy regulatory process. Thus, such arrangements and policies are absolutely necessary to consider the social, economic and cultural conditions that develop in society. Moreover, it also considers the social local wisdom for justice and the welfare for society. In this case, the presence of the state is absolutely necessary to achieve the goals.

The construction of law and policy that draws closer to the above responsive legal characteristics is always open to be developed while it still opens the door to community participation. In line with demands of a more democratic, justice society and bring happiness to the people as Jeremy Bentham's ideals concept. So, the characteristic is become the Ultimate Public Service Paradigm. It is the ultimate/unlimited service that can be felt by many people for the achievement of happiness.

The State is obliged to serve every citizen to fulfill the people's basic rights and needs within the framework of public services constituting the mandate of the 1945 Constitution of

[6] https://alfanaikkelas.wordpress.com/2011/01/07/tahapan-penyusunan-kontrak/ downloaded at 25th November 2017 at 21.20 WIB.

the Republic of Indonesia. It states that, building public trust in public services by public service providers is an activity that must be carried out in line with expectations and the demands of all citizens in the improvement of public services, in an effort to reinforce the rights and obligations of every citizen and the realization of the responsibility of the state and corporation in the provision of public services. It is necessary that the legal norms provide clear regulation in order to improve the quality and ensure the provision of public services in accordance with the general principles of good governance and corporations and to provide protection for every citizen of abuse of authority in the provision of public services.

There are many facilities and infrastructure built by the government that cannot be utilized by the community as it should and even ignored. The problem solving step that leads to the corruption aspect becomes counterproductive, it does not result in facilities and infrastructure built with the state funds can be felt by the community.

Problem Formulation

The problem formulation in this paper is how the implementation of construction work contracts in the government based on the value of benefits.

Objective

The purpose of this paper is to find out how the implementation of construction work contracts in government based on the value of benefits.

LITERATURE REVIEW

To discuss the construction work contracts in government based on value of benefit, a theory or flow of ethics that has a very strong relevance is the value of usefulness, namely utilitarianism. In world of science, the theory occupies an important position as a means to summarize and understand the problem better. The things that originally appeared to be scattered and stand-alone could be unified and pointed to each other in a meaningful way. The

theory provides an explanation through how to organize and systematize the problems it addresses.

1. Utilitarianism Theory

The utilitarian theory pioneered by the English philosopher Jeremy Bentham (1748-1832) [7], and then utilitarianism was refined and reinforced by the great British philosopher John Stuart Mill (1806-1873), in his Utilitarianism (1864). According to Bentham's utilitarian principle, the greatest happiness is the greatest number of people. The principle of utility should be applied quantitatively, because the quality of pleasure is always the same while the quantity aspect can vary. In the view of classical utilitarianism, the principle of utility is the greatest happiness of the greatest number.

Bentham further explains that the principle of benefit underlies all activities based on the extent to which the action increases or diminishes the happiness; or, in other words, increases or combat that happiness. [8]

Thus, a wisdom or action is judged morally good if it is not only brings the greatest benefit, but also it brings the greatest benefit to many people. Conversely, if it turns out a policy or action cannot circumvent the loss then the wisdom or action is considered good if it brings little loss for few people.

In the implementation construction work contracts in government, utilitarian ethics is also relevant in the concept of the value of benefit. Benefit principles emphasize that utilities built for the public benefit can be felt the greatest benefit by society. Benefits principle as the final target to be achieved is the greatest good for the greatest number. [9]

From the description above, the flow of Utilitarianism view that the goal of law is to give benefit to many people. Utilization here is defined as happiness, so the judgment of good or bad or fair whether a law depends on whether the law gives happiness to man or not. Thus it means that every preparation of legal products (laws and regulations) should always pay

[7]Robert Audi, 1995, **The Cambridge Dictionary of Philosophy**, United Kingdom: Cambridge University Press, page. 824-825.
[8] https://theodorusfredrik03.wordpress.com/2011/03/08/filsafat-utilitarianisme/ downloaded on 2th December 2017 at 13.30 WIB.
[9]**Ibid.**

attention to the purpose of the law that is to provide happiness as much as possible for the community.

2. Welfare State Theory

The concept of the State Welfare dates back to the eighteenth century, pioneered by Jeremy Bentham, who said that the government has a responsibility to ensure the well-being and happiness of the people. Jeremy Bentham uses the term utility or utility to explain the concept of well-being and happiness. According to him, government activities should always be directed to increase happiness as much as possible people. [10]

The duty of the state is to make people happy, not only revealed by Jeremy Bentham. Jeremy Bentham's predecessor, an ancient Greek philosopher, Aristotle assumed the same thing as Jeremy Bentham, the purpose of the state is also the same as that of man's goal, that man should gain happiness. The purpose of gaining happiness is eventually becomes the task of the state which the state is in charge of seeking the happiness of its people. [11]

Indonesia can be regarded as one of the countries that embrace the welfare system according to the 1945 Constitution of the Republic of Indonesia. In the preamble of the 1945 Constitution of the 1945 Constitution, the founders of the nation declared that the aim of the state is to promote the general welfare in which the state fulfills the needs of education, health, and public services for the community. The state provides prosperity and happiness for its people[12]. The main characteristic of welfare state is the emergence of the government's obligation to realize the general welfare for its citizens. In other words, the teaching of welfare state is a transitional form of staatsonthouding (limiting the role of the State and government to interfere with the economic and social life of the community) into a stance that requires the State and government to be actively involved in economic and social life as a means to realize the general welfare.

[10]Robert Audi, **Op. Cit.**

[11] https://theodorusfredrik03.wordpress.com/2011/03/08/filsafat-utilitarianisme/ downloaded on 2th December 2017 at 14.00 WIB.

[12]Hadi Wahono, dalam http://hadiwahono.blogspot.co.id/2013/06/negara-kesejahteraan.html, downloaded on 2th December 2017 at 16.00 WIB.

3. Development Management Theory.

Development is the process leading to change, the development of a difficulty towards ease. Development is also liberation from misery. So, development is a concept of human empowerment to achieve the goal of safe, peaceful, and prosperous for humanity. [13]

Recent development theories are not directed solely at the explanation of why there is no rapid growth among developing nations. The theory also investigates the basic factors that stimulate inter-sectorial and inter-period development and processes that cause the occurrence gathering and capital growth. In reality, in the end we are talking on the question of who is managing and what is managed. The government position is as managerial element. [14]

4. Theories based on the Contract Formation.

In legal science, there are four basic theories in the theory of contract formation, namely: [15]

a. Defacto contract theory. A de facto (implied in-fact) contract is a contract that is never stated firmly but it is in fact, in principle acceptable as a perfect contract.
b. Expressive contract theory. Any contract is expressly expressed by the parties either written or orally, insofar as they meet the terms of the legitimate contract, is regarded as a perfect bond for the parties.
c. Promissory estoppel theory. It is also called detrimental reliance, with the existence of a willingness of intentions between the parties if the opposite party has done something as a result of the actions of the other party which is considered to be an offer for a contractual bond.
d. Quasi-contract theory (ostensibly). It is also called quasi contract or implied in law, in certain cases if fulfilled certain conditions, then the law can be considered a contract between the parties with various consequences, even though in reality the contract never existed.

[13]Dadang Solihin, 2006, **Manajemen Pembangunan: Teori dan Praktek di Indonesia**, Bappenas, Jakarta, page. 23.
[14]**Ibid.**
[15]http://www.suduthukum.com/2016/04/teori-teori-tentang-kontrak.html, downloaded on 5th December 2017 at 19.00 WIB.

5. Principles of Contract Law in Indonesia

According to PaulScholten, the principle of law is the basic thoughts that lie within and behind the legal system, each formulated in the rules of legislation and judgments in respect of individual provisions and decisions that can be viewed as the translation[16]. In general, the principle of law is not poured in concrete form, for example, "principle of consensually" contained in article 1320 of the Civil Code is, "agree those who commit themselves." To find the principle of law is sought general traits in a concrete rules or rules.

Johannes Gunawan mentioned that there are Principles of Contract Law implicit in the Book of the Civil Code, namely Principle of Freedom of Contract, Binding Principles as Law, Principles of Consensually, and Good Faith Principle.

6. Legal Settings About Construction Contracts in Indonesia

The latest construction procurement provision in Indonesia has been specially regulated in Law No. 02 of 2017 on Construction Services. In terms of substance, except for the terms of contract law, this law is quite complete in the procurement of construction services.

In relation to the procurement of construction services, the procedures of procurement of goods and services for the interest of the Government, it has been regulated in Presidential Decree (Keppres) no. 80 of 2003 on Guidelines for the Implementation of Procurement of Government Goods/Services that have been enhanced through Presidential Regulation (Perpres) no. 54 of 2010. Then Presidential Regulation no. 54 of 2010 amended through Presidential Regulation (Perpres) no. 70 of 2012 on the Second Amendment to Presidential Regulation no. 54 of 2010 concerning Procurement of Government Goods/Services.

In Article 46 of Law No. 02 of 2017 on Construction Services:

a. The arrangement of working relationship between Service User and Service Provider shall be set forth in Construction Work Contract.

[16]J.J.H. Bruggink, 1999, **Refleksi Tentang Hukum**(alih bahasa : B. Arief Sidharta), Citra AdityaBakti, Bandung, P. 119.

b. Forms of Construction Work Contract can follow the development of needs and it is implemented in accordance with the provisions of legislation

In Article 47 of Law No. 02 of 2017 concerning Construction Services in which the Construction Work Contract shall at least include a description of:

a. The parties.
b. Formulation of work
c. Period of coverage
d. Equal rights and obligations
e. The use of construction labor
f. Payment method
g. Default
h. Dispute resolution
i. Termination of construction work contract
j. Circumstances force
k. Failure of building
l. Protection of workers
m. Protection against third parties other than parties and workers
n. Environmental aspects
o. Guarantees of risks arising from and legal liability to others in the performance of construction works or consequences of building failures
p. Choice of construction disputes settlement

DISCUSSION

Construction works, as granted under the Construction Services Act, constitute in whole or in part a series of planning and/or execution activities along with supervision covering the architectural, civil, mechanical, electrical and environmental work of each other and its accessories, for the realization of a building or another physical form. Each stage of work has interrelated sub-jobs in which failure of a stage of work can affect other stages of work that ultimately has the potential to cause what is called a building failure. With reference to the definitions given in the Construction Services Act, the failure of the building constitutes a state of the building, which upon handover by the service provider to the project owner

becomes ineffective in whole or in part and/or inconsistent with the provisions contained in the construction work contract or its benefactors who deviate as a result of the error of the service provider or the service user.

Performance-based contracts on construction work as an effort to ensure that the development can be perceived by the community. The definition of performance-based contracts is a contract that based on payment for management and maintenance costs of building construction or other physical establishment is directly linked to the performance of service providers in meeting indicators defined minimum performance. In other words, it may also be defined as the final product of a construction work that the achievement is wholly determined by the service provider and the payment of the contract is determined by the performance achievement set out in the performance and output specifications with a benchmark on minimum performance standards. This type of contract is integration from 3 processes, namely design, implementation and maintenance. Thus it will establish a condition that encourages construction service providers to be aware of the importance of quality. Failure of service providers in achieving quality will have a direct impact on the service provider itself.

In addition to the risk of building failure, other risks that may arise in a construction work are losses suffered by third parties due to the implementation of construction works. For example, guests visiting construction sites, not employees of service providers or service users, he/she slips on slippery areas. The area should be signed as a slippery area, so that the guest is injured. Risks may also arise from the possibility of damage or loss of goods in the delivery when goods are purchased by term of delivery ex-work or risk of loss of cash money stored at work locations that cannot be anticipated by using banking facilities due to the location of the occupation in areas that are difficult to access (remote area). These risks must be managed well by service users and service providers.

In the risk management, it can be done in several ways: risk avoidance, risk reduction, risk retention, risk sharing; and risk transfer. The form of risk transfer in construction works is through insurance. Insurance is an agreement between two parties, namely insurance companies and policyholders, which became the basis of premium revenue by insurance companies in return for:

1. Providing reimbursement to the insured or the policyholder for any loss, damage, expense arising, loss of profits, legal liability to third parties which may be subject to the insured or the policyholder due to an uncertain event;
2. Providing payments based on the death of the participant or payments based on the life of the insured with the benefits of which the amount has been determined and / or based on the results of fund management. [17]

Explicitly, the Construction Services Act states that construction service providers, construction planners, construction executors and construction supervisors, are responsible for the results of work where such liabilities can use the coverage mechanism. Constructions all risk insurance, professional liability insurance and professional indemnity insurance are the types the insurance described in the Construction Services Act. In practice, there are several other types of insurance that are tailored to the needs and characteristics of construction works such as but not limited to Cargo Insurance, Installation All Risk Insurance.

Black's law Dictionary provides the definition of construction all risk as a policy which includes all kinds of risks related to a building project. The professional liability insurance is given as a policy which allows a provision for paying compensation those of suffers, due to the negligence of a professional. From the book "Construction Contract Management: Practical Guidance In Managing Construction Projects, the Contractor All Risk (CAR) covers all risks of damage or loss to work occurring since the construction of the construction project until the first handover of the work[18]. Professional Liability Insurance is an insured risk is the legal responsibility for compensation for the injured party due to financial losses, bodily injury and property damage caused by negligence or mistakes made by the designer or engineer. [19]

In construction work contracts, the service provider's obligations are generally provided at their own expense to provide insurance related to the construction work that it is responsible for. The service user will determine the minimum type of insurance that the service provider must provide, including the period of protection and the minimum coverage. Not infrequently to ensure that the insurance company used has good credibility, the service

[17] Undang-undang Nomor 40 Tahun 2014 tentang Perasuransian
[18] Seng Hansen, 2015, **Manajemen Kontrak Konstruksi : Pedoman Praktis Dalam Mengelola Proyek Konstruksi**, Gramedia Pustaka Utama, Jakarta, page. 34.
[19]Nazarkhan Yasin, 2014, **Kontrak Kostruksi di Indonesia,** Gramedia, Jakarta, page. 64.

user has determined the insurance company used, or at least the used insurance company must obtain the consent of the service user first.

From a service provider's point of view, insurance should be maximally utilized, not only because the cost of insurance premiums is charged to the service provider. Therefore, in addition to ensuring the use of a reputable insurer, the service provider is also obliged to understand the terms of the policy, exclusions that are not covered by the insurance, the insurance period, the deductible fees incurred by the service provider and other related matters. Thus, it is expected that the use of insurance in the implementation of construction works not only fulfill the obligations in the construction contract, but can be functioned according to the purpose of procurement.

CONCLUSION

Based on the above description, it can be concluded that:

1. Construction contract is the entire document governing the legal relationship between the service provider and the service user in the construction work arrangement and the format used in contract construction in Indonesia in the form of Agreement/Contract, Contract Terms (General and Special), Attachments, Specification Technical and contract drawings.
2. The results of the implementation of construction work by the government as one of the economic activities has an important role in the achievement of various objectives in order to support the realization of national development goals to advance the general welfare. Therefore, the construction work contract in the government should be based on benefit.
3. Performance-based contracts on construction works as an effort to ensure that the development is perceived to be beneficial to the community.
4. Insurance of benefit through Insurance as an alternative risk mitigation of construction work that should be used maximally and in addition to ensuring the use of a reputable insurance company, the service provider is also obliged to understand the provisions contained in the policy.

Suggestion

Based on the above discussions, it is advisable that future construction contracts may use a performance-based contract type and include a Benefit Guarantee, which of course without violating statutory provisions.

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Undang Undang Nomor 02 Tahun 2017 tentang Jasa Konstruksi