

Legal Analysis of the Replacement of Retention Money with Retention Bond in Ongoing

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ABSTRACT

Purpose –This study aims to analyze the legal basis related to Retention Money and Retention Bond in construction contract practices and provisions regarding the implementation of the transition from Retention Money to Retention Bond in ongoing contracts.

Methodology/approach –This study uses a qualitative approach with analysis of contract documents, applicable legal regulations, and technical data related to the project. It also analyzes additional information obtained through previous literature reviews.

Findings –In Retention Money, the Owner will directly withhold payment for the work until an agreed amount is reached, but in the development of construction this will certainly hinder the investment capabilities of the party implementing the work.

Novelty/value –Considering the risks that may occur during the construction period, and ensuring the ability to carry out the work during the Defect Notification Period, retention is usually required. In its development, Retention Bond can be used to protect the Owner against the failure of the work implementer to perform after the work is carried out (Taking Over Certificate). Retention Bond can be constructed as an accessoir agreement, namely an additional or accompanying agreement and cannot stand alone without a preceding principal agreement.

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INTRODUCTION

In order to provide electricity access to the community, especially in the North Sumatra (Sumbagut) electricity system area, the Ministry of Energy and Mineral Resources (ESDM) is encouraging the optimization of Hydroelectric/Micro Power Plants (PLTA/PLTM) to replace the role of natural gas in the provinces of Aceh and North Sumatra. According to a press release by the Ministry of ESDM, there is still a lot of hydro potential in North Sumatra, in the Aceh and North Sumatra regions alone there is a potential of around 5 gigawatts. Potential, what has been accommodated in the draft of the General Plan for Electricity Supply (RUPTL) 2024-2033 is 586 MW for the North Sumatra region, taking into account the balance of supply and demand in the Sumbagut region. In addition to the quota for PLTA and PLTM in North Sumatra, in the draft RUTPL 2024-2033 there is a quota for PLTA spread across Sumatra with a capacity of 1,200 MW. The potential for PLTA and PLTM in the Aceh and North Sumatra regions can be developed

using the quota for PLTA and PLTM spread across Sumatra.

As for the 2024-2033 RUPTL draft, for the Aceh region, there is a potential for PLTA/PLTM of 3,507.95 MW, which is divided into priority 1 of 1,694.01 MW; priority 2 of 1,463.38; and others of 459.86 MW. In addition to the RUPTL draft, there is also a potential project from the proposal of a business entity (BU) of 1,719.21 MW for priority 1 projects; 969.95 MW for priority 2; 19.5 MW for priority 3; and 112.6 for other priorities, so that the total project potential is 2,836.46 MW¹

Of course, the development of the hydroelectric power plant greatly encourages the target of achieving Net Zero Emission, on the other hand, the implementation of the hydroelectric power plant project requires a more expensive investment value per kWh than other power plants and also requires a relatively long construction time among other types of power plants. Thus, the hydroelectric power plant development project certainly requires good endurance from the Construction Implementer and Developer side.

LITERATURE REVIEW

CONSTRUCTION WORK AGREEMENT

According to Law Number 2 of 2017 concerning Construction Services Article 1 Paragraph 8, the Construction Work Contract is the entire contract document that regulates the legal relationship between the Service User and the Service Provider in the implementation of Construction Services.

Nazarkhan Yasin in the book "Understanding Construction Contracts in Indonesia" states that related to the business of contracting services in the construction sector, it is commonly used by the community and the government in large-scale project work. The parties who have the work are bound by a contracting agreement regarding the creation of a work (*het maken van werk*). Development with the contracting agreement system is known as a construction contract with the classification as construction planning, work implementation and supervision of construction work.²

Construction Contract as a form of agreement is a legal product and therefore, as a legal product must follow the principles of law. In this case, the construction service contract cannot be separated from the principle of obligation, namely the occurrence of a legal event that binds the parties. The legal principles regarding construction service contracts contained in the Civil Code (KUHPerdata)³ is:

- Article 1601B of the Civil Code: Regulates contractual agreements, including performance, position of the parties, and method of payment.
- Article 1320 of the Civil Code: Regulates the conditions for whether a contract is valid or not.
- Article 1338 of the Civil Code: Regulates the principles of good contractual ethics

In addition, the general principles in contract law are: The principle of freedom of contract, The principle of consensualism, The principle of legal certainty (*pacta sunt servanda*), The principle of good faith, The principle of personality.

Basically, the contract made by the parties applies as a law for those who make it. Thus, the contract made by the parties binds them as if they were obeying a statutory regulation. Therefore, to

¹Ministry of Energy and Mineral Resources, "Ministry of Energy and Mineral Resources Promotes Hydroelectric Power Plant/PLTM Projects in North Sumatra, Replacing the Role of Natural Gas", Press Release NUMBER: 416.Pers/04/SJI/2024, (2024).

²Nazarkhan Yasin, "Understanding Construction Contracts in Indonesia", Gramedia, Jakarta (2003) p. 1

³Civil Code

make a contract requires accuracy and precision from the parties who make an agreement or contract.⁴

In other literature, construction contracts can also be defined as follows:

PMBOK(Project Management Body of Knowledge): A document that legally binds a buyer and a seller. A contract is an agreement that binds a seller and a provider of a service, goods, or a result, and binds the buyer to provide money or other valuable consideration.⁵

FIDIC: Contract means the Contract Agreement, Letter of Acceptance, Letter of Tender, Conditions, Specifications, Drawings, Schedules, and other documents (if any) listed in the contract agreement or in the Letter of Appointment.⁶

RETENTION

Retention in construction is the practice of holding back a portion of payment to a contractor or subcontractor until the project is completed. Retention is usually in the range of 5–10% of the total contract price. Retention in construction is a portion of a project's expenditure that is held in reserve while the contractor is working on the project. This is used to ensure that the project is completed on schedule and to the required standards.

Retention is often described as a burden by contractors, although retention basically guarantees and ensures that the construction project will be completed. Usually the amount of achievement is stated as a percentage of the contract value. Often this method of payment is called progress payment and is not made for the entire achievement, usually 95%. With this method of payment when the service provider's achievement has reached 100% (work is completed) and has been well received by the service user (based on the minutes of the first handover of the work), the contractor receives 95% of the contract value, the remaining 5% of the achievement value is retained by the service user during the period of responsibility for defects (retention money) as a guarantee that the service provider will repair the defects/imperfections of the work during the first handover of the work.

After the second (final) handover, 5% of the contract price is paid to the service provider. Recently, this retention money has been changed to another method, namely the amount of progress payment of 100% with the provision that the service provider submits a bank guarantee of 5% x the contract value to the service user, the validity period of which is until the period of liability for defects ends and all defects have been repaired. The principle of freedom of contract allows contracts to be designed according to project needs, for example clauses related to local labor, security, or environmental protection, but contracts must not conflict with national regulations, such as the Electricity Law and the Construction Law.

Freedom of contract is submitting the contents of each contract and the assessment measures required to allow the implementation of the contract to the free will of the parties to the contract. Standard agreements or contracts are in principle contrary to the principle of freedom of contract, however standard agreements that fulfill the required elements of Article 1320 in conjunction with Article 1338 of the Civil Code are still considered valid.⁷ So that in choosing the alternative use of retention (either retention money or retention bond), the parties have the freedom to determine the contents of the contract in accordance with the principle of freedom of contract, the principle of

⁴Muhammad Noor, "Application of the Principles of Contract Law in Making Contracts", *Mazahib Journal of Islamic Legal Thought*, Vol XIV, No.1 (2015) pp.90-9

⁵PMBOK (Project Management Body of Knowledge).

⁶FIDIC (Fédération Internationale des Ingénieurs-Conseils)

⁷Muskibah, Lili Naili Hidayah, "Implementation of the Principle of Freedom of Contract in Standard Contracts for Procurement of Goods and Services of the Government in Indonesia", *Legal Reflection of the Journal of Legal Studies*. Vol.4. No.2 (2020). Pp. 175-194

consensualism; as long as it does not violate the law in its application.

METHOD

The type of research in this legal research is empirical legal research. Empirical legal research is one type of legal research that analyzes and studies how it works in society. According to Soerjono Soekanto and Sri Mamuji, empirical legal research is legal research that is conducted by examining primary data.⁸

CASE STUDY OF REPLACING RETENTION MONEY WITH RETENTION BOND IN ONGOING CONTRACT

The Peusangan 1&2 hydroelectric power plant project is located along the Peusangan River, precisely in Lut Tawar District, Bebesen District, Bies District and Silihara District, Central Aceh Regency, Aceh Province. The Peusangan 1&2 hydroelectric power plant receives water from Laut Tawar Lake in Takengon City with an altitude of 1,230 m above sea level. The Peusangan 1&2 hydroelectric power plant project is the first largest hydroelectric power plant project built in Aceh Province. The Peusangan 1&2 hydroelectric power plant is designed with a cascade/tiered system using a regulating weir and two powerhouses. The total drop from upstream to downstream is estimated to be 411.3 m. The installed generating capacity is 88.0 MW and is expected to produce up to 327.2 GWh per year. A 150 kV transmission will be built to connect the Bireun GI with the No. 2 power station and also the No. 1 power station with the Takengon GI.

The construction work of Lot I – Main Civil Work by Hyundai - PT. PP J/V began on May 2, 2011. The construction period of Lot I – Main Civil Work in the Original Contract is 57 months (1,734 days) from May 2, 2011 to January 29, 2016, but until December 2024 it has not been completed, making this project have been running for 12.5 years. The delay in the work that occurred was mainly due to the Underground Powerhouse work section, where this work and previous work are critical paths in the construction of the Peusangan 1&2 Hydroelectric Power Plant. Where the previously unpredictable geological condition factor is the main challenge in the project work, so that it requires massive design changes which of course have implications for the time and cost of the work.

BACKGROUND

The implementation of LOT I – Main Civil Work has been delayed due to unforeseeable physical conditions. For that, an agreement has been made to extend the time, considering the significant additional time and the absence of compensation for the prolongation cost, then of course the contractor's cash flow needs to be supported, for that an alternative is proposed. With the financial support that can be provided from the accelerated release retention, the implementing party can improve their financial condition and have a positive impact on the implementation of work in the field.

For that, review the alternative guarantees in accordance with Presidential Regulation Number 12 of 2021 concerning Government Procurement of Goods / Services. There are 3 (three) forms of guarantees, namely, Guarantees issued by the Bank in the form of Bank Guarantees, Insurance Companies in the form of Surety Bonds and Guarantee companies.

⁸Soerjono Soekanto, and Sri Mamuji, "Normative Legal Research: A Brief Review", in Ishaq, "Legal Research Methods (Writing Theses, Dissertations, and Dissertations)", CV. Alfabeta, Bandung. (2017) p. 70

BANK GUARANTEE

The function of bank credit has so far been the main form of banking business in addition to other bank service functions such as letters of credit or bank guarantees. In distributing its credit and or guarantees to customers, trust plays a very important role in providing credit and or bank guarantees. In an effort to ensure that the debtor will be able to repay his loan and or counter guarantee along with interest. As mentioned above, banks in providing guarantees use five factors to assess debtors as also given in providing credit. This is known in the banking world as the 5C principle⁹:

1. *Character*(personality or character). The personality, morals and honesty of the prospective customer need to be considered in order to find out whether he will be able to fulfill his obligations well arising from the agreement.
2. *Capacity*(ability or capability). The capability or capability of prospective customers to develop and control their business and the capability to use or run the facilities provided.
3. *Capital*(capital or wealth). Capital is the business capital of prospective customers that is already available or existing. The state of the structure and nature of capital determines the facilities provided.
4. *Collateral*(collateral or security). The collateral of the prospective debtor is additional to secure the facilities provided by the bank.
5. *Condition of economy*.The economic conditions within the prospective customer's business as well as the general economic conditions where the prospective customer's company is located.

Analysis of the capacity, condition, capital & character of the prospective debtor is believed to enable the bank to see to what extent the bank can trust that the prospective debtor is worthy of being given bank facilities. The trust built through the analysis of the principles above is apparently not enough because in banking practices that prioritize the principle of prudence, it is also required to back up and overcome the possibility or risk of the trust being given not being realized.

In other words, even though the prospective debtor is well trusted by the bank, banking law No. 7 of 1992 which was later refined by Law no. 10 of 1998 still requires that collateral be provided or in the form of collateral, either in the form of movable or immovable objects, which will be used as material collateral if the debtor fails (default).¹⁰.

Bank Guarantee is constructed as an accessory agreement, namely an additional or accompanying agreement and cannot stand alone without a preceding principal agreement. The principal agreement is the Construction Work Contract between the Service User and the Service Provider. So it can be seen that the Bank Guarantee guarantee agreement is a bond based on a triangular contract between the Service User, Service Provider, and Guarantee Issuer. The Service User is in the position of the party receiving the guarantee (Obligee), the Service Provider as the Guaranteed party (Principal), and the Guarantee Issuing Institution as the Guarantee Issuer.

The legal relationship between the Service Provider and the Service User is in the form of a principal agreement, namely the Construction Work Contract, the legal relationship between the Service Provider and the Guarantee Issuer, namely the issuance of a performance guarantee, and the legal relationship between the Service User and the Guarantee Issuer, namely the disbursement of the guarantee.¹¹

⁹Aman, EP "Banking credit in a legal review". Yogyakarta: Libert. (1989)

¹⁰Ade Hari Siswanto. "Legal Characteristics and Implementation of Bank Guarantee in Construction Service Contract Guarantee". Jakarta. (2017).

¹¹I Gusti Yesi Triastiti, Candra Irawan, and Emelia Kontesa. "Implementation of Bank Guarantee in Construction Contract", Justisia Journal Vol. 7 No. 1 (2022) pp. 206–207.

CONTRACTUAL AND SECURITY ASPECTS OF RETENTION BONDS

Considering the risks that may occur during the construction period, and ensuring the ability to carry out the work during the Defect Notification Period, retention is usually required and the retention value in the contract is generally taken from the progress value in the field.

With the plan to make retention payments before the Taking-Over Certificate, a guarantee is required from the work implementer to still be able to guarantee the ability to carry out the work during the Defect Notification Period with the same value and level of security. By exchanging the existing retention value with an unconditional on demand guarantee. PT PLN (Persero) can still maintain its security level against the Contract Conditions - General Conditions Clause 11 [Defects Liability], which allows for withholding payments against the estimated costs required to carry out the defects work until the issuance of the Performance Certificate.

In its development in banking and construction, Retention Bond can be used to protect the Owner against the failure of the work implementer to perform after the work is carried out (Taking Over Certificate). In Retention Money, the Owner will directly withhold payment for the work until an agreed amount is reached, but in the development of construction this will certainly hinder the investment capacity of the work implementer.

Meanwhile, in Retention Bond, it is an agreement between the executor of the work and the Owner using a third party, namely the Bank (or Bond Provider) who will act as the guarantor of the executor of the work. In its implementation, it is reasonable if the availability of such guarantee then the Owner does not need to make retention of the costs required due to the risks of failure of the executor of the work that occurs after the construction period (the cost of rectifying defective works), this is because the Bank will make payments to the Owner up to the amount of retention money required or agreed upon.

Then based on the contract document Volume I, Section VII General Conditions, Clause 14.9 Payment of Retention Money, Para 5 “Unless otherwise stated in the Particular Conditions, when the Taking-Over Certificate has been issued for the Works and the first half of the Retention Money has been certified for payment by the Engineer, the Contractor shall be entitled to substitute a guarantee, in the form annexed to the Particular Conditions or in another form approved by the Employer and provided by an entity approved by the Employer, for the second half of the Retention Money”.

According to the provisions above, after receiving the Taking-Over Certificate, the implementing party can submit a Bank Guarantee against the remaining retention value. Referring to the mechanism and considering the same level of securities, it can be stated that the addition of contract conditions to make retention payments with the inclusion of a Bank Guarantee does not conflict with the initial contract conditions, but the addition of the mechanism still requires a change to the contract.

Based on the FIDIC Red Book document – Guide to Preparation of Particular Conditions, clause 14 - Contract Price and Payment, sub-Clause 14.9 Payment of Retention Money. “If part of the Retention Money is to be released and substituted by an appropriate guarantee, an additional sub-clause may be added. The acceptable form(s) of guarantee should be included in tender documents, annexed to the Particular Conditions: an example form is annexed as annex F”

Reviewing the above, then in accordance with the FIDIC Red Book - Guide to Preparation of Particular Conditions can accommodate retention payments with the inclusion of a Bank Guarantee. Thus the addition of contract conditions as a retention payment mechanism with the inclusion of a Bank Guarantee can be done.

However, it should be noted that as an accessory agreement, the existence of a Retention Bond is determined by the existence or absence of the main agreement, namely an agreement whose fulfillment

is guaranteed by a guarantee agreement. The accessory nature of the guarantee can give rise to certain consequences as follows¹²:

1. The existence and termination of a guarantee agreement depends on and is determined by the predecessor agreement;
2. If the predecessor agreement is void, then the guarantee agreement automatically also becomes void;
3. If the preliminary agreement is changed or transferred, then the guarantee agreement automatically changes;
4. If the preliminary agreement is transferred due to cession, subrogate, then the guarantee agreement is also transferred without special delivery; and
5. If the guarantee agreement expires or is terminated, the preliminary agreement does not automatically terminate or terminate as well.

In general, based on its accessory nature, with the cancellation of the main agreement, the guarantee agreement is also cancelled, except for what is stated in Article 1821 paragraph (2) of the Civil Code. The guarantee can remain in force even if the main obligation is cancelled with a rebuttal that only concerns the debtor personally, for example in the case of minors.¹³

RESULT AND DISCUSSION

Regarding the Replacement of Retention Money with Retention Bond in Ongoing Contract, it is also necessary to review it based on the laws and regulations in the field of construction services, namely Law Number 2 of 2017 (Law 2/2017) Concerning Construction Services as a replacement for Law Number 18 of 1999 concerning Construction Services (Law 18/1999). Regarding its implementing regulations, although Law 18/1999 has been revoked and declared no longer valid, its implementing regulations are still in effect as long as they do not conflict with the provisions of Law 2/2017 as stated in Article 104 of Law 2/2017, which in this case refers to Government Regulation Number 29 of 2000 concerning the Provision of Construction Services and its amendments.

Based on the explanation of Article 24 of Law 2/2017 which is also stated in the Explanation of Article 24 of PP 29/2000, it is regulated that:

"In the implementation of construction work at the planning stage and the implementation stage along with its supervision, preparation, execution and termination activities are carried out which involve interaction and/or working relationships between service users and service providers which include, among others:

...

g. In the termination activity, the service user:

...

- 8) using retention money or in the event that a guarantee is agreed upon for the quality of the work results, confiscating and liquidating the guarantee to finance the maintenance of the final work results if the construction implementer does not carry out his obligations in

¹²Salim H. "The Development of Guarantee Law in Indonesia", Rajawali Pers. Jakarta. (2014) p. 86

¹³R. Subekti. "Various Agreements", Bandung. (2014) p. 164

accordance with the provisions of the construction work contract during the guarantee period for the quality of the work results."

The phrase "or" in the provisions above indicates that the retention money has an optional nature that can be converted into another form of guarantee as long as it aims to provide certainty to the service user (in this case PT PLN (Persero) as the Service User) that the Contractor is able to complete all work according to the agreement.

Furthermore, the provisions regarding bank guarantees are regulated in the Decree of the Board of Directors of Bank Indonesia Number: 23/88/KEP/DIR dated March 18, 1991 concerning the Provision of Bank Guarantees by Banks and the Circular of the Board of Directors of Bank Indonesia Number: 23/7/UKU dated March 18, 1991 concerning the Provision of Guarantees by Banks.

In construction projects, bank guarantees can be requested at every phase of the project, both at the tender/bidding stage (bank guarantee tender bond / bid bond), the work implementation stage (bank guarantee performance bond), the maintenance period stage (bank guarantee for maintenance period / maintenance bond). In addition to referring to the project phase, bank guarantees can also be associated with payment provisions such as bank guarantees for advance payment (advance payment bond) and bank guarantees to replace payments withheld / retention (retention bond).

Based on Article 1 paragraph (3) letter (a) of the Decree of the Board of Directors of Bank Indonesia No. 23/88/KEP/DIR dated March 18, 1991 concerning the Provision of Bank Guarantees by Banks, in essence a bank guarantee is a guarantee in the form of a document issued by a bank which results in an obligation to pay to the party receiving the guarantee if the guaranteed party defaults (default). In fact, a bank guarantee is a derivative agreement (accessoir) in the form of a guarantee agreement (borghtocht) as regulated in Book Three Chapter XVI Articles 1820 to Article 1850 of the Civil Code (KUHPperdata). Considering this, it can be understood that retention money and bank guarantees have the same purpose as a guarantee of the Contractor's performance as debtor to the Work Owner as creditor.

LEGAL PROTECTION FOR SERVICE USERS IN SETTLEMENT OF BANK GUARANTEE DISBURSEMENT

Legal Protection for Service Users if the guarantee is not disbursed is in accordance with the theory of responsibility, namely the theory of legal responsibility (legal liability) has been developed by Hans Kelsen, Wright, Maurice Finkelstein, and Ahmad Sudiro. Hans Kelsen put forward a theory that analyzes legal responsibility, which he called the traditional theory. In the traditional theory, responsibility is divided into two types, namely Responsibility based on error; and Absolute Responsibility. Responsibility based on error is a differentiated responsibility that is imposed on the legal subject or perpetrator who commits an unlawful act due to an error or negligence (negligence or negligence). Negligence is a condition in where the legal subject or perpetrator is negligent, less careful, does not heed his obligations¹⁴

In the implementation of legal protection, a place or container is needed in its implementation which is often referred to as a means of legal protection. The means of legal protection are divided into 2 (two), namely Preventive legal protection and Repressive legal protection. The implementation of these two forms of legal protection in the process of settling the disbursement of Bank Guarantees can be described as follows¹⁵:

¹⁴I Gusti Yesi Triastiti. "Implementation of Bank Guarantee in Construction Contracts between the Government and Contractors at the Public Works and Spatial Planning Service of Bengkulu City", (2022).

¹⁵In Hidayah Nawir, Rembrandt, M. Hasbi. "Legal Protection of Service Users in the Settlement of Disbursement of Performance Bonds for Government Construction Work Contracts". Padang. (2023).

1. Preventive Legal Protection aims to prevent disputes as regulated in laws and regulations or in agreements, namely by requiring that the guarantee be unconditional; easy to liquidate; must be liquidated 14 (fourteen) working days after the claim; and issued by the Guarantee Issuer recommended by the OJK; inclusion of a clause releasing the privileges of the Guarantee Issuer; confirming the validity of the guarantee to the Guarantee Issuer; imposing a prohibition on the Guarantee Issuer to take any action that can delay or slow down the guarantee disbursement process with the threat of sanctions for the Guarantee Issuer who violates it; and strengthening supervision and consumer protection by the OJK; and
2. Repressive legal protection is the final protection that aims to resolve disputes, namely legal issues regarding guarantees that are not disbursed by the Guarantee Issuer. Handling of legal protection through litigation or non-litigation processes is included in this category of legal protection. In addition, repressive legal protection can also be in the form of imposing sanctions or fines on the Guarantee Issuer. Based on information from the Directorate of Financial Services Sector Development of the OJK, against Guarantee Issuers who intentionally take actions that can delay the settlement or payment of claims or do not take actions that should be taken or do not disburse the Performance Bond in accordance with what is agreed in the Surety Bond/Bank Guarantee issued, the OJK can impose administrative sanctions in stages in accordance with the provisions of Article 67 paragraph (1) POJK No. 2/POJK.05/2017 in the form of Written Warnings, Freezing of Business Activities, and Revocation of Business Licenses. Repressive Legal Protection aimed at resolving disputes can be done in 2 (two) ways, namely through Non-Litigation by utilizing Alternative Dispute Resolution, OJK Complaint Services, and SJK LAPS; and through Litigation by filing a default lawsuit with the District Court.

Referring to the Peusangan 1&2 Hydroelectric Power Plant Project, because JICA as the Lender requires that the contract between PT PLN (Persero) and Hyundai E&C and PT. PP (Persero) Tbk. J/V; be subject to the provisions of FIDIC, which regulates the form of guarantee including retention money or Bank Guarantee (BG) and is supported by the legal basis in Indonesia through Law 2/2017 in conjunction with PP 29/2000 which states that the guarantee of the quality of the work results can use retention money or other forms agreed in the contract, then if PT PLN (Persero) will return/release money to the Contractor, PT PLN (Persero) is required to request a replacement guarantee in another form agreed in the contract in the form of a bank guarantee with a value equivalent to the retention money that was returned to the contractor first.

CONCLUSION

In short, the granting of a Bank Guarantee is a legal process for the transfer of obligations as required in a previous agreement or contract. A study of the categorization of the Civil Code side of the Bank Guarantee in the guarantee clause in Articles 1820 to 1850. Article 1820 states that a Guarantee is an agreement in which a third party for the benefit of the creditor, binds himself to fulfill the debtor's obligation, if the debtor does not fulfill his obligation. Then Article 1821 explains that there is no guarantee if there is no principal obligation that is valid according to law.

The contract between PT PLN (Persero) with Hyundai E&C and PT PP (Persero) Tbk. J/V is subject to FIDIC provisions that regulate the existence of forms of guarantees other than retention money, namely bank guarantees. In addition, based on Law 2/2017 in conjunction with PP 29/2000, guarantees for the quality of work results can use retention money or other forms agreed upon in the contract. Thus, the plan to change retention money to a bank guarantee as in the case study above can be implemented. PT PLN (Persero) is required to request a replacement for other forms of guarantees agreed upon in the contract (in the form of a bank guarantee) with a value equivalent to the retention money that is returned to the contractor in advance.

The aspect of fairness in determining the benchmark for payment of retention money which still refers to the initial contract (before the amendment). Considering the value of the work that has experienced a significant escalation after the amendment, in order to fulfill the principle of fairness for the Parties, the benchmark for the bank guarantee that will be the guarantee for PT PLN (Persero) as the Work Owner should be adjusted to the value of the work after the amendment.

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