

## LEGAL PROTECTION FOR GOVERNMENT'S EXTERNAL AUDITOR ON EXERCISING THE DUTY ON LAWSUIT AGAINST TORT

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### ABSTRACT

*Auditee partners erroneous understanding on implementing of auditing carried out by the government's external auditor would lead many lawsuit addressed to the auditor. Though, auditors in carrying out their duties under the mandate of the Indonesian Financial Audit Board (BPK, Badan Pemeriksa Keuangan). Therefore, it should be examined in regard to how the legal protection to the government's external auditor in a lawsuit of tort on auditing process on the construction of Sukorajo's City Market which in the later sued civilly by PT Ampuh Sejahtera. The method used is a normative juridical with legislative and analytical approach.*

Keywords: legal protection; government's external auditor; tort; auditing

### Introduction

A different understanding by the partner of auditee and the real condition on inspection would be very risky for government's auditor especially Auditor BPK of Central Java, Indonesia, in revealing the findings of inspection on this area (Central Java, Indonesia). At the time of audit, auditor should prepare with physical and psychological risks from auditee or the auditee's partner. The erroneous understanding of auditee's partner on auditing process conducted by BPK of Central Java if continuously maintained, it would lead many lawsuits directed to auditor of BPK Central Java. If such things happen, and then, when auditors can fulfil their duties? Based on this condition, it is necessary to do research related to the legal protection of auditor BPK of Central Java in carrying out an audit to local budget of construction of Sukoharjo's City Market on 2012 in a tort lawsuit proposed by PT Ampuh Sejahtera (PT AS).

### Concept of Theory

The government's external auditors in carrying out their duties based on the mandate of BPK. Article 1 (3) on Law No. 15 of 2004 and Article 1 (10) on Law No. 15 of 2006 stated that: "Investigators are people who carry out out inspections tasks management and responsible to State financial and on behalf of BPK." According to H.D. van Wijk/Willem Konijnenbelt, that "mandate occurs when the State organs permitting his authority run by other organs in his name." And the responsibility for final decision taken by *mandataris* (the mandated) remain on *mandans* (the mandate).<sup>1</sup> At the time of carrying out auditing, the auditor dealing directly with civil rights to auditee's associate. Auditing procedure with such condition sometimes make a auditee's associate be on the opinion that his civil rights violated by the auditor thereby potentially come up a lawsuit of tort to the auditor. Elements of tort according to Article 1365 of the Civil Code consist of any act in which the act should be against law or unlawful action, there should be an errors, and loss. The existence of a causal relation between act with a loss also should appear.

### Research Methods

The method used is a normative juridical with legislation and analytical approach. The research used secondary data which consist of primary, secondary and tertiary legal sources.<sup>2</sup>

### Result and Discussion

Upon completion of the audit conducted by a team of BPK of Central Java, which is also assisted by experts from the Center for Study of Engineering, University of Gajah Mada (PSIT, *Pusat Studi Ilmu Teknik* UGM) on Regional Budgets on construction of city market in Sukoharjo known that BPK released a Research Report (LHP, *Laporan Hasil Penelitian*) PDPT Construction of Sukoharjo's City Market TA. 2012 LHP No.01/LHP/BPK/XVIII.SMG/02/2014 on February 25th, 2014. While LHP submission was made on February 28, 2014. As for the LHP consist of:<sup>3</sup>

a. Findings of inspection:

- (1) Construction of Sukoharjo's city market unsupported with adequate budget
- (2) Bidding documents which presented by PT. AS on auctions not in accordance with actual conditions
- (3) Supervision of construction by supervisor in adequate

<sup>1</sup>H.D. van Wijk/willem Konijnenbelt on Ridwan HR, *Hukum Administrasi Negara*, Jakarta: Rajawali Press, 2014, p. 102.

<sup>2</sup>Mukti Fajar ND, Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, Yogyakarta: Pustaka Pelajar, 2013, pp.157-158.

<sup>3</sup>Examination to the document of research progress report on case Number 187/PDT.G/2014/PN.SMG, on January 4th, 2017, at 06: 42 WIB

- (4) Implementation of the joint calculation on the volume of construction of Sukarjo's city market or Manual Check (MC-0) do not on the early implementation contract and volume calculation process do not work together with between party planner, executive, supervisor and PPK
- (5) Implementation contract addendum I unsuitable conditions indicated mark up the volume and price on new work Item
- (6) Contractors cannot complete their works on this Sukorjaro's city market construction until the end of time limits contracts
- (7) There defectquality in multiple items and do notworkTesting & Commissioning on electricalworks
- (8) Electrical works volume unlisted in total contract volume of 383 and short a geoccupation worth Rp 4,085,187,222.81

b. Recommendation

BPK recommend to SukoharjoRegent to order the Head of Industry and Trade as budget user to:

- (1) Establish sanctions to supervisor (PT DA) such as a company or agent determination in the black list.
- (2) Ask for fine for delay of PT. AS Rp 1,242,950,000.00 and deposit it to the local treasury
- (3) Withdraw guarantee the implementation of PT. AS Rp 1,242,950,000.00 and depositing cash into the local treasury.
- (4) Taking into account the shortage of the volume of work, the cost of maintenance of the IMB, the lack of work volume of the rooster and the volume of work which was broken Rp 5,001,661,243.09 (Rp 3,511,329,564.61 + RpRp 439,071,595.20 134,786,063.00 + + Rp 916,474,020.28) in settlement payments to PT. AS
- (5) In the settlement payment of works to PT AS, PPK verifying proof of payment of the work to other service providers Rp 540,000,000.00 (360,000,000.00 USD + USD 180,000,000.00)
- (6) Establish PT. AS as a company in the black list
- (7) Establish sanctions to PPK according to applicable regulations and further in the future in accordance with the provisions set PPK and have sufficient competence on the job will be his responsibility.
- (8) Perform optimal control and supervision over the implementation of the agreement (contract).
- (9) Conduct research /analysis on results of work quality defects by using independent consultants for further analysis results are used to repair the work.

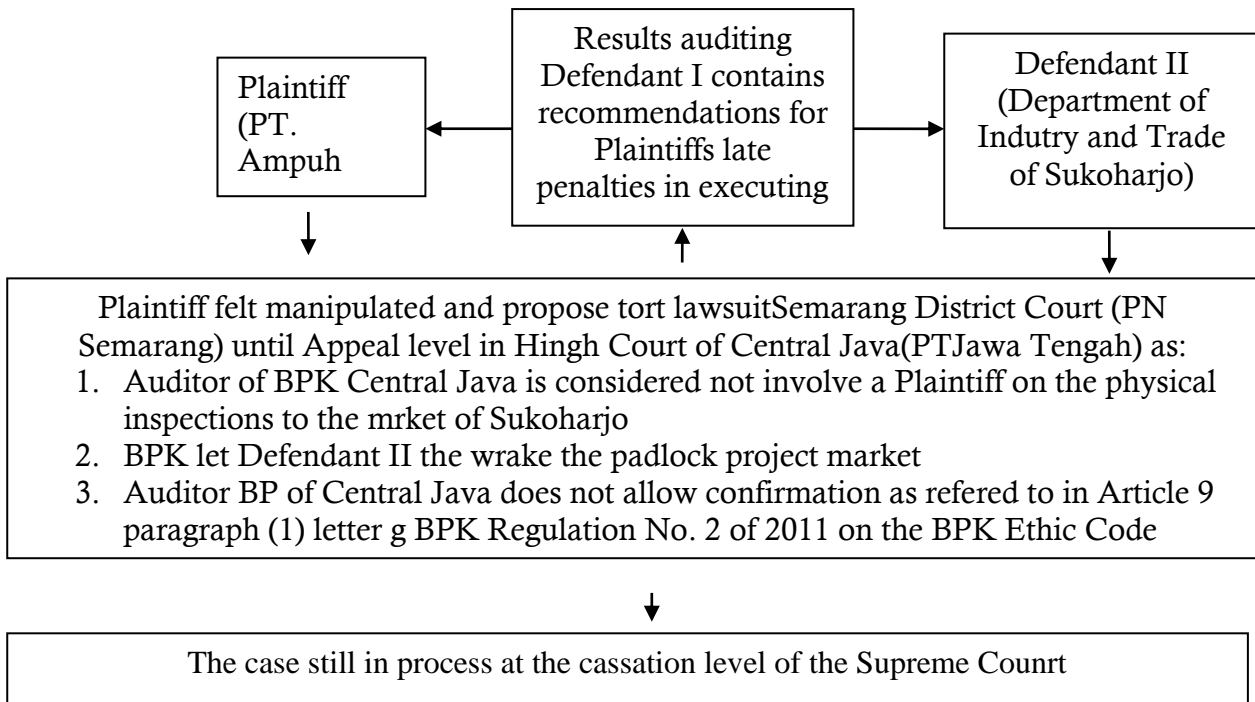
Based on the above, then when the report of examination (LHP) on regional budgets of Sukarjo's city market construction in 2012 with No. 01/LHP/BPK/ XVIII.SMG/2/2014 on February 25<sup>th</sup>, 2014 as a result of auditing Sukarjo's city market construction and then sued civilly by the plaintiffs then there are no legal consequences on the status of the enforceability of the LHP. LHP PDDT No. 01/ LHP/BPK/XVIII.SMG/2/2014 on February 25, 2014 is still generally applicable to information contained in it may be known by the public through the procedures established by the BPK of Central Java province. The legal consequences that occurred after the claim of the Plaintiff is precisely related to the implementation of the follow-up on test results that the presence of a change of state law implementing the recommendations contained in the LHP. These changes include the postponement of the implementation of the follow-up to recommendations in LHP until their permanent legal force (*inkracht*) against the Plaintiff's claim above.

Researcher found that who is responsible for auditing against the Sukaharjo's city market construction until the issuance of LHP No. 01/LHP/KPK/XVIII.SMG/02/2014 on February 25, 2014 is a BPK itself as State institutions. However, when the name of the auditor in particular the name responsible for the inspection of the construction of the city market Sukoharjo listed as first defendant in its lawsuit that should be analyzed further by juridical related legal protection acquired by Defendant I as an auditor BPK of Central Java in terms of running the authority, duties, and duty conduct an examination of the management and financial responsibility of the state.

The relationship of public law and civil relationship between Defendant I, Department of Industry and Trade (Diperindag, *Dinas Perindustrian dan Perdagangan*) of Sukoharjo, and the Plaintiff, illustrated as below.

**Figure 1. Legal Relationship between the Parties**

Agreement of construction for rehabilitation of rural market, Sukaorjo's market construction No. 602.3/638/VI/2012



In the framework of assisting the case to the auditor, according to researcher not only based on the results of the session of the code of conduct Honorary Council of Code BPK on allegations of violations of the code of conduct clauses 9 paragraph (1) letter g, but also must be based on the examination of the allegations has done an unlawful act addressed to the Defendant I at the time of auditing of the construction of the City Market Sukoharjo 2012. For more details the research would analyze whether the act has been done by the Defendant I currently perform auditing on the construction of the City Market Sukoharjo meet the elements in Article 1365 of the Civil Code or otherwise.

The elements of a tort under Article 1365 of the Civil Code include:

- a. deed
- b. The act is against the law
- c. an error
- d. their losses
- e. There is a causal relationship between the acts with loss

1. Deed

The element of deed as a first element can be classified into two parts, namely the deed is intentional (was active) and the deed that is omission (passive/not intend to do so).

According to my analysis, deed committed by the Defendant I is the deed done in the framework of the implementation of the duties as auditorBPK of Central Java in the conduct auditing on the construction market in 2012. Understanding Sukoharjo examiner pursuant to Article 1 paragraph 3 of Law No. 15 of 2004 concerning Management and Financial Responsibility of the State and of Article 1 point 10 of Law No. 15 of 2006 concerning the BPK stated that: "Investigators are people who carry out out inpection tasks management and responsible to State financial and on behalf of BPK." When doing a physical check of the market development of the above on Saturday, January 18th, 2014, Auditor team from BPK Central Java faced the obstacles whereis the market place is locked by the Plaintiff and the Plaintiff could not be reached. For the incident and then do follow-up meeting between Auditor Team BPK of Central Java with the Regent, and was attended by the Regent, Vice Regent, Secretary, PSIT UGM, PPK, Chief DPPKAD, PPHP, and the Inspectorate with the conclusion enter the front door to pick locks, and Pamong Praja Police (Satpol PP) had taken on the Market.

Efforts made by the Auditor Team BPK of Central Java together PSIT UGM that can still do a physical check of the market in Sukoharjo done by dismantling a key front entrance. This indicates that the acts committed by the Defendant I done deliberately.

2. Such actions Unlawful

Actions are said to satisfy the first element of the elements against the law if it meets the following conditions:<sup>4</sup>

<sup>4</sup>RidwanKhairandy, *HukumKontrak Indonesia dalamPerspektifPerbandingan* (Part I), Yogyakarta: FH UII Press, 2013, p. 300.

- a. Violating subjective rights of others: violating special powers granted by law to an individual. Subjective rights can be divided into two, namely: individual rights such as legality, honor, good name; rights of assets, rights of material and other absolute rights.

According to researcher there is no subjective rights Plaintiffs infringed by the act of Defendant I, because it is precisely in order to respect the right of the Plaintiff as the executor of the work of market development, the DisperindagSukoharjo has asked Plaintiff to accompany the Defendant I in conducting physical checks market through written letters sent to Plaintiff.

- b. Contrary to the legal obligations of the perpetrator.  
Interpreted as a legal obligation obligations under the law, written or unwritten. Legal obligations Defendant I in order to carry out auditing of the construction of the City Market Sukoharjo covering during the planning stage of the examination, the examiner should communicate it to the audited entity and or the party requesting the examination on matters relating to the nature, timing, scope of testing and reporting, and confidence level as expected as well as possible restrictions on the report LHP associated with a level of confidence to decrease a risk on wrong interpretation of the results of the examination report.

The examiner should use professional judgment to determine the form, content and intensity of communication. Written communication is a better form. Examiner can communicate information that is necessary to load it in the inspection program. Communication is done examiner should be documented. Then liabilities Other liabilities Defendant I asked for confirmation on the audit findings and conclusions on the *auditing* market development in Sukoharjo to authorities examined in terms of this authority over such confirmation is Sukoharjo District Secretary. So in this case I act Defendant does not conflict with legal obligations.

- c. Contrary to the rules of decency  
Contrary to the rules of morality contradict moral values, all in people's lives is recognized as the legal norm. If it analyzed, Defendant I act in the form of entry into the market location is an asset belongings Sukoharjo District Government before and after their employment agreements Market development in Sukoharjo not transferable land tenure rights to the Plaintiff. The existence of agreement between DisperindagSukoharjo with Plaintiff merely a legal basis for the Plaintiff to execute a project on the land which is the Regional Property Asset Sukoharjo district. Plaintiff just only a *bezitter* but the rights of ownership legally held by Regency of Sukoharjo considering also no leveraging anything from Sukoharjo regency to the plaintiff. Therefore, it is appropriate that the Auditor Team before going to dismantle the entrance key first held meetings with the asset owner Regent Sukoharjo.
- d. Contrary to the propriety  
Contrary to propriety is contrary to propriety prevailing traffic in the community. Included in the category is contrary to propriety is: the act of harming another person without proper interests; and deeds useless pose a danger to others, which is based on the notion that normal note.

According to researcher, the act of Defendant I done to obtain precise data related to the physical condition of the market and the volume of work that has been completed Plaintiffs are beneficial to society, *i.e.*, with the intention that people know what the market conditions in the construction using local finance allocated in the local budget of Sukoharjo district in 2012.

3. Error  
Error element to denote that someone is declared responsible for the adverse effects that occur because of actions which wrong. Because, according to researchers acts committed by Defendant I was not in the elements against the law then Defendat I was not responsible for the damages suffered by Plaintiffs.
4. Loss  
In the legislation does not stipulate the compensation to be paid because of an unlawful act, while Article 1234 of the Civil Code contains provisions on compensation to be paid for breach of contract. For the determination of compensation for acts against the law can apply provisions similar to provisions on compensation for breach of contract.

It can be seen from the lawsuit, the Plaintiff felt as a result of acts committed by Defendant I harm him. Plaintiffs were required to pay a late fee of Rp. 1,242,950,000.00 and the inclusion of the name of the Plaintiff's company in the black list.

5. The existence of a causal relation between the act with Losses  
To determine whether the loss suffered by the plaintiffs is the result of acts committed by Defendant I in conducting physical checks to dismantle the front door key to enter the market and does not involve the plaintiff in the audit need to do an analysis of the causal relationship deeds and losses. According to the theory *adaequateVeroorzaking*(Von Kries) act should be considered because of the effect that arises is a balanced act with the consequent. Basic thing to determine actions that balanced is the calculation of a viable, *i.e.*, according to common sense should be assumed that such action could lead to a certain result.

According to the researcher their inspection findings and recommendations about the late penalties that should be paid to the Treasury Plaintiff Sukoharjo regency is derived from a series of formal audits of the data and the materially data on the

ground. Plaintiff's losses so precisely because Plaintiffs own mistakes and actions that do not conduct market development in Sukoharjo in a timely manner and according to the agreement. So it is appropriate if the BPK of Central Java recommends that Plaintiffs included in the company in the black list, it is in accordance with the provisions of SSUK figure 38.5 letter d and Article 93 paragraph (2) of Presidential Decree No. 70 of 2012 on the second amendment of Presidential Decree No. 54 of 2010 concerning Procurement of Government Goods/Services stated that "in the case of termination of the contract done in error, the provider of providers included in the black list."

Based on the description above, according to the researcher Defendant I did not do anything against the law in the execution of his duty conduct auditing on the construction market in Sukoharjo.

Legal protection can be categorized into two kinds, namely preventive legal protection as that given legal protection before disputes. And second category is the repressive legal protection as legal protection given after their dispute to resolving a dispute between the parties.<sup>5</sup>

1) Preventive Legal Protection

When the Defendant I and a team of *auditors* BPK of Central Java and team Studies Center of Engineering Science (PSIT) UGM impediment in the auditing process, especially in efforts to carry out physical checks Market Sukoharjo, then they held a meeting with the Regent, Vice Regent, Secretary, PSIT UGM KDP, Head of Department of Revenue, Finance and Asset (DPPKAD, *Dinas Pendapatan Pengelolaan Keuangan, dan Aset Daerah*), Official Receiver of Project Result (PPHP, *Pejabat Penerima Hasil Pekerjaan*), and Inspectorate. The meeting concluded that the auditor remains biased conduct physical checks on entering market withwrake the lock of front door, and Satpol PP Sukoharjo had taken on the Market. If the terms of Article 10 letter b and e of Law No. 15 of 2004 on Management and Financial Responsibility State mentions that "in carrying out the examination, the examiner can access all the data stored on various media, assets, locations, and all types of goods or documents in the possession or control of the entity that was the object of other examinations or entity is deemed necessary in the implementation of the audit task; and capturing, recording and/or take samples as inspection tools", such efforts have been appropriate as to obtain data related to the physical development of the City Market Sukoharjo, juridical auditor can access the location of the market.

It is known that there are no obstacles related discussion and consultation with the Law Department Sub BPK Central Java Representation, Article 550 paragraph (6) Decision of the BPK No.3/K/I-XIII.2/7/2014 About Implementing Organization and Work Procedure of the State Audit Board Subdivision law states that has the task of carrying out the provision of services in the legal field that includes legislation, consultancy, assistance and legal information related to the duties and functions of BPK Central Java. The decision to dismantle the lock is very risky and in contact with the legal aspects so that according to researcher that team of auditors BPK Central Java should consult with Legal Subdivision to prevent their tort claims of the Plaintiffs.

This is according to the reseracher caused by the absence of unequivocal statement about the obligation to ask for a legal opinion during the audit that are in the phase of auditing. The task team Sukoharjo market auditor under Section 552 Decision of the Audit Board of the Republic of Indonesia Number 3/K/I-XIII.2/7/2014 on Organization and Work Procedure Executor BPK, did not include the requested legal opinion to the Legal Subdivision related audit, there is only the task to evaluate the inspection activities conducted by the inspector BPK, examiner who works for and on behalf of the BPK, and public accountants under the provisions of the legislation mentioned in Article 552 as stipulated on letter a number 6.

Then the results of the examination which contains the audit findings and recommendations about the late penalties and the inclusion of the company name plaintiff in the black list there are no provisions that require the auditor asked for a legal opinion to the Legal Subdivision. Included in Article 545 CPC letter n Decree No. 3/K/I-XIII.2/7/2014 on Organization and Work Procedure CPC Implementing just preparing studies examination results that contain elements of a criminal offense and/or a loss of area to be submitted to *DitamaBinbangkum*.

Related setting preventive legal protection also includes the right of immunity BPK contained in Article 26 to Article 27 of Law No. 15 Year 2006 on the BPK. In Article 26, paragraph (1) states that "Members of the BPK cannot be prosecuted in court because of duty, obligation, and authority under this law. Based on the reseracher's analysis above that who is the responsible to the auditing conducted to the Market development in Sukoharjo is BPK as a State Institution not personal responsibility of Defendant I. As I stated Defendant did not breach the code of conduct Article 9 paragraph (1) letter g CPC Regulation No. 2 of 2011 on the Code BPK can mean the actions of Defendant I are in accordance with the procedures applicable audit, so that based on the theory of liability of legal persons, namely the principle of *Fiduciary Duty* stating that each of the Agency Law does not individually accountable to the Legal Entity. Each of the actions of members of the Agency Law which is outside the limits of authority granted in the Articles of Association of legal entities (the *act ultra vires*) will only bind the members of the Board who does it, and cannot bring the result to the members of the Board, other than that the latter expressly

<sup>5</sup><https://wirahipatios.wordpress.com/2015/02/25/perlindungan-hukum-penegakan-hukum-dan-pertanggungjawaban-hukum-dalam-hukum-administrasi-negara/>, *loc.cit.* accessed on November 14th, 2016 at 08:34 WIB.



agree action (*ultra vires*) and claimed himself bound to the action (*ultra vires*) of the BPK as a public legal entity responsible for the auditing of the construction market in Sukoharjo.

AuditorBPK of Central Java duty, obligation, and authority for and on behalf of the BPK. According to the authors, based on the theory of the mandate, the implementation of the audit assignment performed by the auditor BPK of Central Java implemented as mandated authority of the Member V BPK, should therefore Defendant I cannot serve as First Defendant in a lawsuit against the law proposed by the Plaintiff.

Article 26 paragraph (2) of the BPK stated that in carrying out its duties and authorities, members of the CPC, examiner, and others working for and on behalf of the BPK given legal protection and security guarantees by the relevant authorities. This provision has not been explained clearly and in detail about any legal protection acquired by the examiner before, in time and/or after the examination.

However, Article 27 states that in the event of another lawsuit in the execution of its duties and authorities, BPK is entitled to legal aid with the cost of the State in accordance with the legislation. This provision confirms that their repressive protection.

## 2) Repressive Legal Protection

According to researcher, the repressive protection given when there is a claim from the other party. As is the case against Defendant I also got repressive protection. When torts lawsuit filed by the counterparty auditee to the auditor BPK of Central Java, then *DitamaBinbangkum* BPK together with Subdivision Legal Representative BPK Central Java will undertake repressive legal protection in the form of:

### a. Provides the legal studies

The study contains analysis of the law related to the lawsuit addressed to the BPK Central Java review of aspects of the existing law. The study of law is very important, because with the study of the law will be known directions and stages in addressing lawsuit incoming tort. Efforts to address the tort lawsuit includes a facility that would be given legal assistance related to the auditor BPK of Central Java in the court and outside the court in Court. Form of legal representation outside of court one is to educate *auditors* related to legal aspects in litigating civil including the disclosure of facts made by the auditor during the inspection should be communicated to the team's Attorney Defendants comprised of staff *DitamaBinbangkum* BPK RI and also staff in subsection Legal Representative of the BPK Central Java.

### b. Legal Assistance in Trial

The status of the Defendant I caused by tort lawsuit by the plaintiffs, the auditorBPK Central Java will be accompanied by a legal team that will represent for and on behalf of BPK RI *cq.* Representatives of BPK Central Java province *cq.* Bernadetta Arum Dati, SE, MM, Ak. in the court.

In the trial, Attorney team will provide legal protection in the form of things that need to be addressed in civil proceedings in accordance with the provisions of the law of civil procedure applied. Repressive legal assistance are given starting from the initial lawsuit, appeal, appeal, up to Reconsideration(PK, *Peninjauan Kembali*). Legal efforts taken by Attorney team of auditor BPK Central Java adjusted to the facts and the proceedings established by judges who examine and decide the case filed by the Plaintiff. Until recently when the Defendant I filed a cassation to the Supreme Court, the Defendant I still get legal protection repressive legal team.

## Conclusion

Legal protection for *auditor* BPK Representative of Central Java in carrying out auditing of the Budget for the Regional Market development Sukoharjo in 2012 include the right of immunity not to be sued in the courts listed in Article 26 paragraph (1) of Law Number 15 of 2006 regarding BPK, Article 10 letter b and e of Law Number 15 of 2004 concerning Management and Accountability of State Finance that describes relevant ways auditors obtain data auditing, as well as Article 9 paragraph (1) of the BPK No. 2 of 2011 on the BPKCode explain the obligations related BPK auditor in performing audit engagements. While the legal protection provided in Article 26 paragraph (2) of Law Number 15 of 2006 regarding the BPK has not explained clearly and in detail regarding the protection of any law obtained by the auditor BPK Representative of Central Java province well before the audit, at the time of auditing, and/or after an audit. However, in a lawsuit against the law filed by the Plaintiff, the Main Directorate of Promotion and Development Law of BPK together Subdivision Law of BPK of Central Java as the attorney Defendant I give protection repressive laws as contained in Article 27 of Law Number 15 of 2006 on the BPK to the Defendant I as auditor BPK of Central Java.

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