

TENDER CONSPIRACY IN ELECTRONIC PROCUREMENT OF GOODS AND SERVICES (A STUDY OF CASE NUMBER 04/KPPU-L/2015)

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Abstract

This research studied and analyzed why there is still tender conspiracy on government projects and construction work contracts through the e-procurement system. This was a normative legal research which analyzed principles, norms, propositions of applicable regulations, described existing phenomena, and analyzed them systematically. Using a statute approach and a case approach related to the implementation of the laws and regulations concerning electronic procurement services (e-procurement) in a construction service work contract in government projects according to the positive law of the Republic of Indonesia. It is necessary to immediately enact laws and regulations which cover a wider scope in terms of procurement and strengthen law enforcement in relation to the procurement of goods and/or services by the government. It is intended to minimize abuse of power/authority of tender committee, business players, and tender participants to prevent unfair competition, where conspiracy still takes place in government project tender.

Keywords: Tender Conspiracy, Electronic Procurement of Goods and Services, Case Number 04/KPPU-L/2015.

A. Introduction

Government, as one of the main actors in the procurement of goods and/or services, should have the ability to implement procurement procedures for goods and/or services based on good governance systems and procedures which in turn will increase the

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efficiency and effectiveness of state expenditures. For business actors/entrepreneurs, the procurement of goods and/or services is a fully competitive activity, so business actors/entrepreneurs should have a sense of competition.²

It is, in fact, common that anti-competitive business practices that tend to contradict the principles of good governance³ are mushrooming in Indonesia. The practice of conspiracy to ensure winning in a tender is one of the many anti-competitive practices frequently encountered in business activities in Indonesia.⁴

Conspiracies between bureaucrats and entrepreneurs are usually very complicated. In its practices, the conspiracy can be in two forms, namely: 1) bureaucrats give references to entrepreneurs to get capital and provide production facilities; 2) bureaucrats give "magic letters" to monopolize production and its marketing areas⁵.

The issuance of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter abbreviated to the Anti-Monopoly Law) aims to enforce legal regulations and provide equal protection for every business actor as an effort to create fair business competition. As implied in Article 3 of the Anti-Monopoly Law, it has a purpose to correct the actions of a group of economic actors that monopolize the market. This is because, with a dominant position, they can abuse their power for their interests or benefits.⁶

Considering the fact that tender conspiracy brings a very significant impact on national economic development and fair competition, tender submission is not only regulated in the provisions on the procurement of goods and/or services but is also regulated in the Anti-Monopoly Law. Prohibition of tender conspiracy is regulated in the Competition Law (Anti-Monopoly Law) because there are 4 (four) categories of activities

² Budi L Kagramanto, *Larangan Persekongkolan Tender: Perspektif Hukum Persaingan Usaha* (Srikandi 2007).

³ Government Regulation Number 101 of 2000 on Education and Training for Civil Servants. In the Elucidation of Article 2 letter d, what is meant by good governance is governance that develops and implements the principles of professionalism, accountability, transparency, excellent services, democracy, efficiency, effectiveness, and rule of law, and it is acceptable to all people.

⁴ Rocky Marbun, *Persekongkolan Tender Pengadaan Barang/Jasa* (Pustaka Yustisia 2010).

⁵ *Ibid.* In the operation, (large) entrepreneurs do not run their business autonomously. Meaning that the entrepreneurs simply leave it to certain parties (subsidiaries, agents, or other parties) to sell their products. Entrepreneurs usually asked these "entrusted" parties to not mention their own names, as well as the names of bureaucrats involved in collusion. This aims to avoid law enforcement investigations if one day the collusion case is revealed.

⁶ *Ibid.* 21.

that are prohibited⁷, namely pricing, limitation of production or supply, market division, and bid-rigging/collusive bidding.

The Commission for the Supervision of Business Competition (KPPU) states that the mechanism for the procurement of goods and/or services through tenders is still full of conspiratorial practices that usually involve bureaucrats who have authority to award contracts.⁸ A rapidly increasing amount of government procurement of goods and/or services requires the government to improve the procurement system of goods and/or services to provide goods and/or services as needed. As a follow to of this matter, the government through the National Public Procurement Agency (LKPP)⁹ issued Circular Letter Number: 17/KA/02/2012 on the obligation to implement electronic procurement of goods and/or services¹⁰.

This arrangement is used to reduce state losses related to the procurement of goods and/or services. It is undeniable that tenders are carried out to get the best quality with the lowest possible price of goods and/or services. The tender process is conducted openly through an Electronic Procurement¹¹. Presidential Regulation Number 16 of 2018 on the Government Procurement of Goods and/or Services Chapter X Article 69 to Article 73 mandates that the government procurement of goods and/or services¹² should be electronic based. Such electronic procurement is intended to increase transparency and accountability, increase market access and fair business competition, improve the efficiency of the procurement process, support the monitoring and audit process and meet

⁷ Budi Kagramanto (n 2).

⁸ Ibid.

⁹ A Government institution that becomes a regulator, namely the National Public Procurement Agency (LKPP) was established based on Presidential Regulation Number 106 of 2007. The government's commitment to minimizing and trying to reduce the practice of Corruption, Collusion and Nepotism (KKN) in the procurement of goods and services in Indonesia is proven by the issuance of Presidential Instruction Number 17 of 2011 on Measures to Prevent and Eradicate Corruption in 2012 Presidential Instruction Number 17 of 2011 on Measures to Prevent and Eradicate Corruption in 2012.

¹⁰ Rendra Setyadiharja, E-Procurement: Dinamika Pengadaan Barang Dan Jasa Elektronik (Deepublish 2017). Some of the explanations in Circular Letter No. 17/KA/02/2012, are: 1) starting in 2012 Ministries/Institutions (K/L) are obliged to carry out electronic procurement of goods and services through Electronic Procurement Services (LPSE) at least 75% of the total procurement values of K/L; 2) Starting in 2012, Regional Government is obliged to carry out electronic procurement of goods and services through the LPSE at least 40% of the total procurement values of the Regional Government. See- Achmad Nurmandi, What is The Status of Indonesia's E-Procurement? (2013) 4(2) <<http://journal.umy.ac.id>> accessed on May 15 2018

¹¹ Regulation of the Minister of Public Works Number: 207/PRT/M/2005 on Guidelines for Electronic Procurement of Goods and Services.

¹² Ade Maman Suherman, Pengadaan Barang Dan Jasa (Government Procurement): Perspektif Kompetisi, Kebijakan Ekonomi, dan Hukum Perdagangan Internasional (PT RajaGrafindo Persada 2017).

the needs for real-time access to information, including the process of announcing when the procurement of goods and/or services is conducted and who wins it.

APEC Procurement (2012)¹³ noted three shortcomings in the regulations for the procurement of goods and/or services in Indonesia. Nevertheless, the regulations do not address a number of procurement-related issues in Indonesia. First, these regulations cannot be implemented in state-owned enterprises, for example, oil and mining companies. Second, the regulations do not mention that the public has the right or authority to monitor the procurement process. Third, Presidential Regulations do not have an adequately high legal status to become a public standardization system¹⁴ in all parts of Indonesia. There are a number of aspects that allegedly have become weaknesses in the regulation of the government procurement of goods and/or services, including a) There are conflicts between regulations at each level of government; b) The procurement regulations are expired at the implementation of budget policies; c) There is no space for public participation in the procurement process; and d) The procurement service agency has limited authority to manage conflicts and the national procurement agency does not have the authority to resolve it.¹⁵

Overall, the e-procurement system was fully implemented in 2013. In its practice, however, there are a number of violation that can still be found in the e-procurement system, including: first, discriminatory requirements that prevent interested and eligible business actors from participating; second, technical or brand requirements tend to be met only by certain business actors, preventing other business actors to participate; third, there is unfair competition between business actors (those competing in the tender of goods and/or service procurement).

This research is aimed at examining and analyzing why there is still tender conspiracy in the implementation of electronic procurement of goods and/or services on government project construction work contracts.

B. Problem Formulation

Based on the above-mentioned description of problems, the problems to be examined can be formulated as follows: Why is there still tender conspiracy in the

¹³ Setyadiharja (n 10).

¹⁴ Law Number 25 of 2009 on Public Services (State Gazette of the Republic of Indonesia Number 2009 Number 112 and Supplement to State Gazette of the Republic of Indonesia Number 5038).

¹⁵ Ibid.

implementation of electronic procurement of goods and services (e-procurement) on government project construction work contracts?

C. Methodology

This used normative legal research¹⁶ by analyzing principles¹⁷, norms¹⁸ prevailing laws, and regulations and describing the existing phenomena, and analyzing them systematically. The normative legal research methods¹⁹ being studied were some literature or secondary data, consisting of primary and secondary legal materials. Normative legal research²⁰ is intended as a study that positions law as a normative system. The norm system is related to principles, norms, regulations, court decisions, agreements, and doctrine (teachings). Meanwhile, doctrinal legal research²¹ is a literature-based research, which focuses on the analysis of primary and secondary legal materials.

The approach in this legal research²² was a statutory approach²³ and case approach²⁴ related to the arrangement and implementation of laws and regulations of the electronic procurement of goods and/or services and the effect of tender conspiracy on government construction service work contracts according to Indonesia's positive law. This research used a descriptive juridical approach²⁵, by focusing on the types of literature that contain

¹⁶ Soerjono Soekanto and Sri Mamuji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Penerbit Rajawali Press, Jakarta 1990). Research is a scientific activity related to analysis and construction carried out methodologically, systematically and consistently. Being methodological means being in line with a certain method or technique. Being systemic means being based on a system, whereas being consistent means being absent from things that are contradictory in a certain framework.

¹⁷ Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, State Gazette of the Republic of Indonesia of 1999 Number 33 (Commission for the Supervision of Business Competition of the Republic of Indonesia). Principle is a general and abstract premise, idea or concept, and it has no sanctions. The principle of the Anti-Monopolistic Law is regulated in Article 2 that: "Business actors in Indonesia in carrying out their business activities are based on the principle of economic democracy by taking into account the balance between the interests of both business actors and the public"

¹⁸ Maria Farida Indriati, *Ilmu Perundangan-Undangan, Dasar-Dasar Dan Pembentukannya* (Kanisius ed, 1998). Norm is a concrete rule, the elaboration of ideas, and it has sanctions. Procurement of goods/services involves written and unwritten norms. Generally, unwritten norms are ideal norms, while written norms are operational ones.

¹⁹ Soekanto and Sri Mamuji (n 16).

²⁰ Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum* (Penerbit Fakultas Hukum Universitas Muhammadiyah Yogyakarta 2007).

²¹ Dyah O Susanti and A'an Efendi, *Penelitian Hukum: Legal Research* (Sinar Grafika 2015).

²² Bambang Sunggono, *Metodologi Penelitian Hukum* (Rajawali Pers 2003).

²³ Peter Mahmud Marzuki, *Penelitian Hukum* (Prenadamedia Group 2016). A statute approach is conducted by examining all regulatory laws that are related to the legal issues raised.

²⁴ Efendi Jonaedi and Johnny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris* (Prenadamedia Group 2018). 145-146. A case approach is to study the implementation of legal norms or rules in legal practices. Cases that have been decided as can be seen in the jurisprudence of the cases which are the research focus. Peter Mahmud Marzuki (n.22) 158-159. A case approach is an approach by referring to the ratio decidendi, namely the legal reasons used by the judge to make decisions.

²⁵ Soekanto and Sri Mamuji (n 16).

secondary data. This legal research used a qualitative data approach²⁶ which studied legal materials including primary and secondary legal materials.

The process of analyzing existing legal materials using a descriptive qualitative approach was by considering legal materials that were found in practice, to be compared with secondary legal materials or norms that should be prevailing. This then resulted in a clear overview and analysis of the existing problems concerning tender conspiracy in the e-procurement of goods and/or services in relation to the parties involved in government construction project contract.

D. Discussion and Results

1. Government Intervention in Business Competition

Business competition can affect policies related to trade and industry, a conducive business climate, certainty and business opportunities, efficiency, public interests, and public welfare.²⁷ Economists mention that competitive market mechanisms will encourage business actors to make innovations to produce varied products at competitive prices and will bring benefits for both producers and consumers.²⁸ Competition is expected to efficiently allocate scarce resources in accordance with their functions and to improve the welfare of the community.

Competition is determined by competition policy²⁹. Laws of business competition in various countries generally focus on public interests and consumer welfare. The need for a business competition policy and law is a factor that determines the course of the competition process. The Competition Law frequently mentions³⁰ that competition is more important focus than protection for business actors.

Competition policy is one form of government intervention in the market, in addition to issuing regulation. The difference lies in the target subject, where economic regulation intervenes in corporate decisions directly, for example, pricing and the

²⁶ Ibid. A qualitative approach is intended as a step in a research methodology that produces descriptive data, namely the respondents' written and spoken statement as well as real behavior.

²⁷ Law Number 5 of 1999 on Tenta Prohibition of Monopolistic Practices and Unfair Business Competition, State Gazette of the Republic of Indonesia of 1999 Number 33. Chapter II Principles and Objectives, Article 2 and Article 3

²⁸ FM. Scherer and David Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin Company 1990).

²⁹ Andi Fahmi Lubis, *Hukum Persaingan Usaha* (KPPU 2017).

³⁰ Ibid.

number of products to supply. Meanwhile, competition policy is a form of indirect intervention because it aims at corporate behavior.³¹

The objectives of competition policy can be achieved³² through a mechanism, namely by increasing the competitive process in the market. Nonetheless, being in a perfect competition market may lead to economic inefficiency³³ or reduced consumer welfare due to external intervention (government) and anti-competitive behavior demonstrated by economic actors within the market (producers).

Competition policy prefers mechanisms, in terms of 1) Anti-competitive behavior in the market should be limited; 2) Improving or changing the perfect competition market structure improves the market. Improvement in terms of the structure (for example limiting or prohibiting dominant ownership) will be able to reduce anti-competitive practices; 3) Limiting abusive behavior by companies, especially dominant companies; 4) Limiting and reducing barriers to entry into the market. Barriers can arise from dominant companies, markets, and government regulations. Therefore, competition policy³⁴ is expected to be a major concern for the government when it comes to enacting regulations that potentially bring impacts on the market.

One of the directions of development policies and strategies in the context of realizing economic independence³⁵ is to strengthen fair business competition values among economic actors, government, and society, to prevent monopolistic practices, which cause unfair business activities and inefficient economy through formal and non-formal education to encourage the internalization of fair business competition values, designing laws and regulations as a legal basis for policies, and establishing a mechanism for harmonizing fair business competition policies³⁶.

³¹ Ibid 52.

³² Ibid 53

³³ Ibid. Inefficiency is where there is no maximum utilization, no increase in value or under value. Another function is the ability to reduce production costs incurred by the company. Inefficiency that is found in a monopolistic market is due to the costs to be borne by the economy (social costs). Economic inefficiency is known as market failure. In addition to imperfect forms of market, market failure also takes place due to externalities as well as asymmetric public goods and information. When there is a market failure, there is also rationality for the need for government intervention.

³⁴ Ibid. In general, competition policy consists of two elements, namely: a) competition law, and b) competition advocacy. Competition advocacy is also an important part of competition policy, particularly from all parties, including the government.

³⁵ Ibid 53-54. Strategic Planning (Renstra KPPU) 2015-2019. The National Medium-Term Development Plan (RPJMN) Phase III-Period 2015-2019, aimed to reinforce development in various fields by emphasizing the achievement of economic competitiveness based on natural resource advantages and quality human resources as well as continuously increasing science and technology.

³⁶ Ibid 103

The importance of institutions,³⁷ in fair business competition, particularly in national development planning, is also followed by institutional strengthening of the Commission for the Supervision of Business Competition (KPPU), where one of the priorities for the institutional strengthening to increase people's productivity and competitiveness in the international market is KPPU institutional strengthening as an effort of competition law enforcement as well as the internalization of business competition values, monitoring of business actors, policy harmonization and internalization of fair and healthy values among economic actors, governments and society.

KPPU has the authority to exercise investigative authority, law enforcement authority, and legal authority.³⁸ In carrying out its duties to supervise the implementation of the Business Competition Law, KPPU has the authority to carry out investigations and examinations of business actors, witnesses, or other parties due to reports (Article 39 of Business Competition Law) or to conduct examinations based on the initiative of KPPU itself (Article 40 of the Anti-Monopoly Law) to business actors who are suspected of conducting monopolistic practices and unfair business competition. For cases being examined due to the report, the format of the case number is Case Number/KPPU-L/Year. Meanwhile, for cases being examined based on the initiative of KPPU, the format of the case number is Case Number/KPPU-I/Year.

Concerning this, it is necessary to issue regulations to strengthen government intervention in business competition policy. Laws are regulations made by a competent authority, intended to regulate and maintain order among community life; these laws have the characteristics of giving order and prohibiting³⁹, imposing to be obeyed, and giving sanctions for those who violate them. To realize it as a step in the development of a fair law, it is necessary to have a (public) policy. Harold D. Laswel states that public policy is a program to achieve goals, values, and directed practices. In addition, David Easton considers that public policy is a process of forcibly internalizing values to the entire members of the community by competent authorities such as the

³⁷ Ibid 107

³⁸ Anita Afriana, Rai Mantili and Hazar Kusmayanti, 'Problematika Penegakan Hukum Persaingan Usaha di Indonesia Dalam Rangka Menciptakan Kepastian Hukum' (2016) 3 Padjadjaran Jurnal Ilmu Hukum.

³⁹ Muchsin and Fadillah Putra, *Hukum Dan Kebijakan Publik: Analisis Atas Praktek Hukum Dalam Pembangunan Sektor Perekonomi Di Indonesia* (Averroes Press 2015).

government.⁴⁰ Public policy is an attitude of the action-oriented government. This means that public policy is a concrete work of the so-called government organization.

The relationship between law and public policy (business competition policy) is a public policy that should be legalized, and law is the result of public policy. Law and public policy at the practical level are, in fact, inseparable, meaning that they complement each other. Rationally speaking, a law without any public policy process will lose its substantial meaning. On the other hand, a public policy without legalization from the law will certainly not have a strong operational dimension.⁴¹

2. Tender Conspiracy

The Anti-Monopoly Law is a law that determines how competition should be regulated. In addition, the Anti-Monopoly Law aims to prevent consumer exploitation by certain business actors to support the market economy system. The Anti-Monopoly Law does not define business competition, but it defines unfair business competition. Article 1 paragraph 6 of the Anti-Monopoly Law mentions that the definition of unfair business competition is competition among business actors in conducting both production and marketing activities of goods and/or services unfairly and/or unlawfully, thus obstructing fair competition. In other words, competition among business actors in carrying out their activities is done unfairly or against the law, of which the implication is to impede fair business competition. Competition is a characteristic that is inseparable from human life, but in terms of economics, it does not want economic power to be owned only by one party, which potentially harms others.⁴²

Article 22 of the Anti-Monopoly Law defines tender, i.e., submitting bid price to get a contract, to procure goods, or to provide services. Bids submitted by the project owner are based on effectiveness and efficiency because it is better to ask other parties who can perform a project/activity. Things that are included in the scope of the tender are: First, the (lowest) submitted bid price to get a contract. Second, the (lowest) submitted bid price to procure goods. Third, the (lowest) submitted bid price to provide services. In addition, there are three (3) different terms to explain the definition of tender, i.e. contracting activities (jobber), procurement activities, and provision

⁴⁰ Islamy, M.Irfan, Prinsip-Prinsip Perumusan Kebijakan Negara (Bumi Aksara 1984).

⁴¹ Scott Barclay and Thomas Birkland, 'Law, Policy Making, and the Policy Process: Closing the Gaps' (1998) 26 Policy Studies Journal.

⁴² Ari Purwadi, 'Praktik Persekongkolan Tender Pengadaan Barang Dan Jasa Pemerintah' (2019) 2 Magnum Opus Fakultas Hukum Universitas Wijaya Kusuma Surabaya.

activities.⁴³ Therefore, the general definition of tender is a project that includes contracting, procurement and provision, in a sense that business actors who win the tender process will be engaged in a contract, procure or provide the goods and/or services as expected by the project owner, except otherwise stipulated in the agreement between the winning bidders and the project owner.

Tender conspiracy is prohibited because it may cause unfair competition, which is antithetical to the objectives of the tender, which is to provide equal opportunities for business actors to offer quality competitive prices. Tender aims to provide equal opportunity for all bidders, to gain the lowest possible price with the maximum possible quality. Each of the business actors who participate in a tender has an equal position to achieve their interests.⁴⁴ Tender conspiracy harms business competition because those who are involved in tender conspiracy arrange in a way that certain tender participants will win the tender. Meanwhile, winning bidders should ideally be determined through a process and procedure where the winner cannot have been predetermined and the process should comply with the rules of the tender. The state will face losses when there is price manipulation in the tender process for both development activities and procurement of goods and/or services of which the fund is taken from the State Budget (APBN) and Regional Budget (APBD⁴⁵).

Based on Article 22 of the Anti-Monopoly Law, procurement of goods and/or services through tenders potentially creates unfair business competition if the tender is neither open nor transparent. Lack of transparency in tenders could prevent interested business actors who have met the qualifications from being able to participate in such discriminatory tenders. This means that not all business actors with the same competence can participate in it. Tender conspiracy is illegal cooperation, so such conspiracy is an unlawful act according to business competition law because the goals are achieved by being engaged in unlawful actions.⁴⁶

A conspiracy is between two or more parties to commit crimes or unlawful actions. In other words, there are two (2) elements of conspiracy, namely first, the presence of two or more parties who jointly commit certain actions, and second, the

⁴³ Ibid.

⁴⁴ Enrico Billy Keintjem, 'Tinjauan Yuridis Praktek Persekongkolan yang Tidak Sehat dalam Tender Proyek menurut Undang-Undang Nomor 5 Tahun 1999' (2016) 4 Lex Administratum.

⁴⁵ Ari Purwadi (n 42). 102.

⁴⁶ Rachamadi Usman, *Hukum Persaingan Usaha Di Indonesia* (PT Sinar Grafika 2013). 484

conspiracy is against the law. The definition of conspiracy according to the Anti-Monopoly Law is regulated under Article 1 paragraph 8, i.e. a form of cooperation between a business actor and another business actor whose aim is to control the market that is relevant to the interests of the business actors being involved in the conspiracy. Conspiracy in the Competition Law is categorized as agreement.⁴⁷

Article 22 of the Business Competition Law was formulated according to the rule of reason, and as a consequence, business actors are allowed to be engaged in agreements with other parties to arrange or determine who wins a tender unless it causes unfair business competition. The use of the rule of reason by the court, before determining whether an action is illegal or not, must consider the factors and reasons for doing the action, the business reasons behind the action, and the position of the actors of the action in a certain industry.⁴⁸

The effects of tender conspiracy can arise from the project owner, government and other business actor are⁴⁹: a) A project owner will pay a higher price for the work; b) For the government, the project value for the tender for the procurement of services is higher because of the markup done by the parties engaged in a conspiracy. If the conspiracy involves government projects funded by the State Budget, then it potentially causes high economic costs and corruption; c) For both project owner or government, oftentimes the goods or services obtained have lower quality, quantity, time, and values than those gained from fair tender; and d) Other business actors, who have the qualifications as potential tender participants, will have to encounter barriers to participate in or win the tender.

Tender conspiracy harms business competition. This is because, in a tender conspiracy, the parties involved try to arrange for certain tender participants to win the tender. Some of the negative effects or losses arising from tender conspiracy are as follows⁵⁰:

- a. Creating barriers for other tender participants who are deemed to have more potential to win because the goods and/or services they offer are far better than

⁴⁷ Ibid.

⁴⁸ Revina Aprilia Dewantari and Munawar Kholil, 'Penerapan Teori Efisiensi Dalam Pendekatan Rule of Reason Pada Pembuktian Kasus Persaingan Usaha Tidak Sehat' (2018) 6 Privat Law.

⁴⁹ Ari Purwadi (n 42).

⁵⁰ Apectriyas Zihaningrum and Munawar Kholil, 'Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat' (2016) 1 Privat Law.

- the goods and/or services that the company predetermined to win the tender through the conspiracy.
- b. Causing state losses because the government procurement of goods and/or services uses the state budget.
 - c. Creating immaterial losses in the form of reduced market trust, particularly the trust of those who know about the tender, on the credibility of the government or government officials as tender committee.

The legal consequence in the form of sanctions for violating Article 22 of the Anti-Monopoly Law is, in addition to administrative penalties (Article 47), there are also principal criminal penalties and aggravating criminal penalties. The principal criminal penalties are regulated in Article 48 and the additional criminal penalties are regulated in Article 49 of the Anti-Monopoly Law. The aggravating criminal penalties for violating Article 22 of the Anti-Monopoly Law are in the form of 1) Revocation of business licenses or 2) Prohibition for business actors who have been proven to have violated this law from holding positions as directors or commissioners for at least 2 (two) years and for a maximum of five (5) years, or the cessation of certain activities or actions that cause losses to other parties.⁵¹

In addition, Presidential Regulation Number 16 of 2018 on the Government Procurement of Goods and/or Services in Article 78 paragraph (1) also regulates legal consequences, stating that the actions of tender participants who are subject to sanctions in the implementation of tender selection include: letter b "allegedly being involved in a conspiracy with other participants in the form price-fixing." The provisions of Article 78 paragraph (4) of Presidential Regulation Number 16 of 2018 on the Government Procurement of Goods and/or Services regulate that the actions that are indicated as tender conspiracy are subject to sanctions in the form of a) being disqualified from the selection; b) refunded bid security; c) blacklist; d) paying compensation; and/or e) fine. Article 78 paragraph (5) letter a of Presidential Regulation Number 16 of 2018 on the Government Procurement of Goods and/or Services also regulates sanctions for any actions included as tender conspiracy, namely sanctions of being disqualified from the selection, returned bid securities, and blacklisting for two (2) years.⁵²

⁵¹ Ari Purwadi (n 42). Regarding tender conspiracy involving Government Employees or Officials (Civil Servants or assistants working for BUMN, BUMD, or private companies), in order to enforce competition law, the Commission for the Supervision of Business Competition (KPPU) submits information about the conspiracy to the employee's supervisor or the officials concerned or the Prosecutor's Office, or to the Corruption Eradication Commission (KPK), for them to take legal actions in accordance with the applicable legislation.

⁵² Ibid.

3. Tender Conspiracy and Its Elements

Tender conspiracy is often associated with government procurement of goods and/or services. Nevertheless, the Anti-Monopoly Law can cover not only activities carried out by the government but also activities carried out by the private sector.

Article 22 of the Anti-Monopoly Law states:

"Tender conspiracy means that business actors are prohibited from being involved in a conspiracy with other parties to arrange and/or predetermine who wins the tender, which may result in unfair business competition.

As mentioned in Article 22 of the Anti-Monopoly Law, conspiracy is done by business actors and another party (third party). Whether or not the provisions of the article are applicable depends on 2 (two) elements: the presence of related parties who should or have the ability to show the characteristics of participating, and an agreement has been made to carry out activities that are mutually beneficial and collusive⁵³.

A number of factors that contribute to the occurrence of tender conspiracy, which usually takes place together with corruption, collusion, and nepotism (KKN) are:

- a. Inconsistent law enforcement because law enforcement is only used as temporary political "makeup". There are quite many regulations related to tender for government procurement of goods and/or services that always change, even the regulations change every year along with the change of government.
- b. Abuse of power and authority, usually many business actors try to win a project tender through unfair selection (not transparent, full of discrimination) and by abusing the power or authority that they have, they can affect the progress and implementation of the tender;
- c. Limited anti-corruption environment, because tender conspiracy and corruption and nepotism are like the two different sides of a coin, where there is a tender conspiracy, there are also corruption and nepotism;
- d. Low income, because of low-income paid to state officials;
- e. Poverty and greed, usually poor people are less able to commit corruption because financially they find it difficult to do so;
- f. The culture and character of the nation, since the old times in Indonesia, tribute-paying culture had long existed in exchange for services and gifts and this has been carried out over generations;
- g. Greater profits from corruption, because tender conspiracy serves as a medium for business actors to obtain more profits illegally through corruption.

⁵³ Budi Kagramanto (n 2).

4. Legal Effectiveness Theory

Several reasons were proposed by Allott⁵⁴ concerning laws that frequently seem to be ineffective. First, the law weakens itself at its enactment. This is punishment for the legislator's ambition and a provision is required to create an effective law, such as adequate survey, communication, acceptance, and a team of execution.⁵⁵ Second, laws can become ineffective, even when these laws successfully achieve their object because there is a change in the context of social attitudes and behavior. An important point of this is to identify the result of changes that cause inefficiencies and take measures to make the necessary improvement to make the laws more effective, or to repeal outdated and irrelevant laws.⁵⁶

Allot gave two reasons as a solution in overcoming community problems that arise due to limited legal capacity, namely a moral approach and a pragmatic approach as the best ways to make laws effective.⁵⁷ Furthermore, he emphasized that the use of consensus-based customary law supported by social sanctions is considered to be more effective in the implementation of the law. Antony Allot stated that effectiveness is⁵⁸:

“Law will be effective if the purpose of its existence and its implementation can prevent unwanted actions (eliminate chaos). Effective law, in general, can help realize what has been designed. If there is an error, then it is easily fixed. If there is an obligation to implement the law in a different atmosphere, the law will have the ability to resolve it.”

Antony Allot's concept of legal effectiveness focuses on realization. In general, effective laws allow for what has been designed to be realized in social life, but this view does not examine the concept of legal effectiveness theory.

Legal effectiveness theory is a theory that studies and analyzes the success, failures, and factors that affect the implementation and application of the law. There are three focuses of the study of legal effectiveness theory, including⁵⁹ 1) success in law enforcement; 2) failure in its implementation; 3) the factors that affect it.

⁵⁴ Antony Allot, *The Limits of Law* (Butterworths 1980).

⁵⁵ Agus Raharjo, 'Model Hybrida Hukum Cyberspace : Studi Tentang Model Pengaturan Aktivitas Manusia Di Cyberspace Dan Pilihan Terhadap Model Pengaturan Di Indonesia' (Universitas Diponegoro 2008).

⁵⁶ *Ibid.*

⁵⁷ *Ibid* 288

⁵⁸ *Ibid* 302

⁵⁹ Salim and Erlies Septiana Nurbaini, *Penerapan Teori Hukum Pada Penelitian Disertasi Dan Tesis* (PT RajaGrafindo Persada 2014).

Like other aspects of law, the effectiveness of the implementation of business competition law cannot be easily seen in the field. In business competition law, most of the regulations are formulated utilizing a rule of reason,⁶⁰ so regulated actions or behaviors are not an action or behavior that is absolutely or automatically prohibited. Business actors are allowed to take the action or behavior as regulated in the articles of the rule of reason, provided that the action or behavior will not cause monopolistic practices and unfair business competition.

5. Analysis of Case Number 04/KPPU-L/2015

Tender conspiracy cases are still found in the government procurement of goods and/or services. For example, cases which have been examined by KPPU and declared guilty due to violating the law, which resulted in unfair business competition. One of the legal decisions was in Case Number 04/KPPU-L/2015 on Alleged Violation of Article 22 Number 5 1999 on West Java Province-Patimuan-Sidareja Road Widening Package and Sidareja-Jeruklegi Road Widening Package, Region I Central Java, Central Java Province in Fiscal Year 2013.

a. As the Reported Party

Bali Working Group of the Procurement of Goods/Services for the Implementation of National Road V, Central Java Province, the Procurement of Construction Goods and Works Region I, Central Java Province (Reported Party I), PT Melisa Karya (Reported Party II), PT Panca Darma Puspawira (Reported Party III), PT Agung Darma Intra (Reported Party IV), PT Cahaya Sempurna Sejati (Reported Party V), and PT Bumi Redjo (Reported Party VI).

There, violations of Article 22 No. 5 of 1999 were alleged on the West Java-Patimuan-Sidareja Road Widening Package and the Sidareja-Jeruklegi Road Widening Package, Region I Central Java, Central Java Province in Fiscal Year 2013.

b. Subject matter of Case

The subject matter of case number 04/KPPU-L/2015 were 2 (two) packages of Procurement of Construction Goods and Services conducted by the Ministry of Public Works, the Directorate General of Highways, the Service Unit of the Center for the Implementation of National Road V, the Working Group for the Procurement of Construction Goods and Services for Region V of which the Selection Method was through Public Tender for which the post-qualification and bid submission are full e-procurement.

c. Elements of Conspiracy

Considering that to prove there has been a violation of Article 22 of Law Number 5 of 1999, namely based on the Guidelines for Article 22, conspiracy can take place in three (forms) namely horizontal conspiracy, vertical conspiracy, and a combination of horizontal and vertical conspiracy.

⁶⁰ Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia, Dalam Teori Dan Praktek Serta Penerapan Hukumnya* (Prenadamedia Group 2014).

Horizontal Conspiracy includes 1) The fact that there was a joint agreement on January 25, 2013, served as undeniable evidence of a written agreement that was the result of a special meeting outside the meeting agenda. It was known as a follow-up to a joint meeting with AMP in Banyumas region, signed and sealed by the leaders of the companies; 2) The fact that there was a joint agreement on January 25, 2013, signed by more than 2 (two) companies for the division of leader members to 2 (two) different tender objects. The fact that this was done not only for the tender in 2013 but also for the one in 2014 proved that there was a division of packages conducted by the Reported Parties; and 3) The fact that the Reported Parties made price-fixing arrangement showed their participation in tender *a quo* as a part of the leader strategy in realizing the joint agreement signed and sealed on January 25, 2013. This was strengthened by evidence in the field, where PT Agung Darma Intra that was positioned as the leader won the Bts. Jabar-Patimuan-Sidareja package. This company had a joint operation with PT Panca Darma Puspawira and PT Melista Karya that were also conditioned as leaders. These two companies won the Sidareja-Jeruklegi package. This proved that there were some actions taken to create unhealthy and unfair business competition which prevented other business actors from accessing fair competition.

Vertical Conspiracy, including 1) The Working Group or Committee facilitated the joint operation between PT Panca Darma Puspawira –PT Agung Darma Intra as the winning companies of Bts. Jabar–Patimuan-Sidareja package by disqualifying PT Galih Medan Persada based on a reason that this company was blacklisted according to a letter and the result of consultation with LPJK; 2) The Working Group or Committee’s decision to disqualify a blacklisted tender participant should be based on data from LKPP, as regulated in Article 124 of Presidential Decree Number 54 of 2010. This was confirmed by a statement from an LKPP expert, stating that "LKPP is the only institution that can issue a blacklist for procurement funded by the APBN (State Budget) and/or APBD (Regional Budget); 3) In addition to disqualifying a potentially winning tender participant, the Working Group or Committee did not conduct proper and formal document evaluation, as evidenced by the fact that the Working Group or Committee approved qualification documents related to the administrative data, i.e. clarification of Permit for Construction Services (IUJK) and Certificate of Enterprises (SBU). Based on the statement given by Reported Party III during the examination, they did not upload these data. Combination Conspiracy, i.e. a combination between horizontal and vertical conspiracy.

- d. The element of arranging and/or determining who wins the tender guidelines for Article 22 of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition to regulate and/or determine tender winners are:

"An act of the parties involved in a tender conspiracy of which the purpose is to impede other business actors as competitors and/or to win certain tender participants by using whatever means. The arrangement and/or determination of the tender winner is done by determining the criteria for winners, technical requirements, finance, specifications, tender process, etc."

The determination of the tender winner was carried out in the following ways:

- 1) The Working Group or Committee did not carry out an evaluation properly because they approved documents that listed core personnel whose names were

- different from those written on the certificate of expertise and diploma; 2) The Working Group or Committee did not carry out the evaluation properly by disqualifying PT Galih Medan Perkasa as a potential winning tender participant, by only considering the blacklist letter from LPJK, without any efforts to clarify to LKPP as the only institution that is allowed to legally announce the blacklist throughout Indonesia. This proved that the Working Group or the Committee deliberately allowed the joint operation between PT Panca Darma Puspawira - PT Agung Darma Intra to win the West Java-Patimuan-Sidareja package.
- e. The element of causing potential unfair business competition
Article 1 paragraph 6 and Guidelines for Article 22 of Law Number 5 of 1999, states that unfair business competition is:
“Competition between business actors in conducting production and/or marketing activities of goods and/or services which is carried out unfairly or against the law or obstructs business competition.”
- The actions that resulted in the unfair business competition were 1) There was a special meeting to agree on January 25, 2013, with the division of leader members of which the aim was to distribute packages for the tenders in 2013 and 2014. This was strengthened by the fact that the winning bidder was the same as the result of the agreement, where PT Agung Darma Intra, who was positioned as the leader in the agreement, won the West Java-Patimuan-Sidareja Bts package. It had a joint operation with PT Panca Darma Puspawira and PT Melista Karya that were positioned as the leader in the agreement and won the Sidareja-Jeruklegi package; 2) There was a horizontal conspiracy committed by the reported parties, which then created unfair competition, thus obstructing more competitive business competitors to enter the competition.

The Commission Council considered that government procurement of goods and/or services of which the implementation was full of conspiracy was a form of violation of Law No. 5 of 1999 as applicable law and regulation in Indonesia's positive law.

Being in line with the provisions in Presidential Decree No. 54 of 2010 *jo.* Presidential Decree No. 70 of 2012 on the Second Amendment to Presidential Decree No. 54 of 2010 on the Government Procurement of Goods and/or Services, the Government Institutions shall provide training, especially in the procurement of goods and/or services, namely by disseminating and providing intensive technical guidance to all the officials (planners, implementers, and supervisors) working at the relevant institutions to make it possible for Presidential Decree No. 54 of 2010 *jo.* Presidential Decree No. 70 of 2012 on the Second Amendment to Presidential Decree No. 54 of 2010 on the Government Procurement of Goods and/or Services to be understood and implemented properly and correctly, following the principles of procurement to achieve good governance by considering the principles of fair business competition.

Furthermore, the Commission Council recommended to the Head of the National Road Implementation Center V, the Directorate General of Highways, the Ministry of

Public Works, to impose administrative sanctions to the Working Group for the Procurement of Goods and/or Services of the National Road Implementation Center V, Central Java Province, the Procurement of Construction Goods and Work Region I, Central Java Province as Reported Party I, because they were proven to have violated Article 22 of the Anti-Monopoly Law.

E. Conclusion

Based on the discussion and analysis above, a conclusion can be drawn that there is still tender conspiracy in government procurement of goods and/or services due to abuses of power and authority by business actors who try to win the project tender unfairly and due to extensive communication/cooperation between the tender committee and business actors in preparing the bidding documents, resulting in unfair competition, although e-procurement has been applied.

This study offers two important recommendations, such as: first, it is necessary to facilitate supervised coordination in the field and conduct procurement activities by using equipment with technology that can detect various forms of tender fraud. This way, it could minimize unlawful actions such as KKN (Corruption, Collusion, and Nepotism). In addition, it is necessary to immediately issue laws and regulations on government procurement of goods and/or services that cover more aspects of the procurement process.

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