

## CONSPIRACY PROHIBITION OF TENDER IN COMPETITION LAW AND IMPROVING ECONOMY IN INDONESIA

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### ABSTRACT

*Prohibition of bid rigging is done because it can lead to unfair competition contrary to the objective of the tender. The purpose of the tender to provide equal opportunities to businesses in order to offer quality competitive price. The expected implementation of the prohibition of the tender will be efficient, the meaning is that assigned the lowest price with the best quality. Conspiracy in the tender may occur through agreements whether written or unwritten. The includes of conspiracy of a broad range of behaviors are production distribution business, trade association activities, manipulation of price fixing or collusion in the bidding auction (collusive tenders) which can occur through an agreement between businesses, between the owner of a job or between the two parties. The conspiracy can occur at any stage of the tender process, from planning the manufacturing requirements by implementing or tender committee, tender documents adjustments between bidders, until tender announcement. Where disputes arise concerning the implementation of the implementation of the completion of the tender bid rigging case made by the Business Competition Supervisory Commission in the enforcement of competition law, have been implemented. This is evident from the number of bid rigging cases received through the Business Competition Supervisory Commission report and all is well investigated and decided by that Commission. Cases that go to the Business Competition Supervisory Commission is 80 percent of bid rigging cases, so that in case handling of bid rigging, the Commission has been very understanding. Commission decided cases from 2005 until 2013 and the number of 166 cases involving bid rigging are a number of 110 cases, This shows that the offense is a lot going on in the Business Competition Supervisory Commission concerning bid rigging or the entry in the category of prohibited activities. And all the cases decided by the Commission properly so that it will improve competition law enforcement while increasing the nation's economy.*

Key words: The Business Competition Supervisory Commission, Conspiracy, Competition Law, Rule of Law.

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### Introduction

Article 30 paragraph (1) of Law Number 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (here in after referred UULPM) determines that the Commission oversees the implementation UULPM; Paragraph (2) specifies that the Commission is an independent institution free from the influence of government and other parties, and (3) determine that the performance of its duties the Commission is responsible to the President. Commission members are appointed by the President after obtaining the approval of Parliament.

Enforcement of competition law in Indonesia is UULPM implementation. In realizing competition law enforcement in Indonesia Business Competition Supervisory Commission (KPPU) is crucial in improving the quality and efficiency of the national economy as a basis for improvement of the nation's competitiveness in the international world. Economic development with higher added value through a number of efficiency and innovation are positive values resulting from the performance of the Commission. Intended law enforcement function aims to remove obstacles, competition in the form of business behavior that is not healthy. Commission was expected optimal performance for competition law enforcement and can be seen from the cases were resolved by the Commission.

### Problem Formulation

This study has a specific purpose to determine the completion of bid rigging case primarily on the following issues: How is the implementation of the settlement bid rigging carried out by the Business Competition Supervisory Commission (KPPU) in the enforcement of competition law.

### Review of Literature

#### A. The duties and authority of the Commission

Duties and authority of the Commission under Article 35 and 36 UULPM. The task of the Commission, among others; evaluate agreements that result in monopolistic practices, to assess whether there is any abuse of a dominant position which may mengakibatkan in monopolistic practices, the commission authority to take appropriate action, providing advice and consideration of

government policies related to monopolistic practices<sup>1</sup>. The authority of the Commission include; receive reports from the public and businesses about alleged or monopolistic practices and unfair business competition, doing research on these allegations, an investigation and / or examination of the cases of alleged monopolistic practices, summing up the results of the investigation, call businesses, produce witnesses, examining the evidence, decide and establish the presence or absence of loss on the part of other businesses and the public, the decision of the commission to notify businesses suspected monopolistic practices and / or unfair business competition, and impose sanctions in the form of administrative measures to businesses that violate the provisions of UULPM<sup>2</sup>.

A monopolistic condition above occurs largely because of the role that the state gives to a monopolistic state enterprise, state enterprises, private enterprises and cooperatives<sup>3</sup>. Kartasmita said there are four areas of strategic functions of the state associated with the occurrence of monopolistic practices and unfair business competition<sup>4</sup>. The four functions are:

1. Just law enforcement.
2. Creating healthy competition.
3. The role of redistribution.
4. Supporting the achievement of economic democracy in the field of meeting the basic needs of the people.

#### B. Prohibition Tender Conspiracy

Prohibition of bid rigging is done because it can lead to unfair competition contrary to the objective of the tender, which is to provide equal opportunities to businesses in order to offer quality competitive price. The expected implementation of the prohibition of the tender will be efficient, meaning that assigned the lowest price with the best quality.<sup>5</sup> Conspiracy in the tender may occur through agreements whether written or unwritten. This conspiracy includes a broad range of behaviors, among other production distribution business, trade association activities, and manipulation of price fixing or collusion in the bidding auction (collusive tenders) which can occur through an agreement between businesses, between the owners of a job or between the two parties. The conspiracy can occur at any stage of the tender process, from planning the manufacturing requirements by implementing or tender committee, tender documents adjustments between bidders, until tender announcement.<sup>6</sup> There are three (3) different terminology to describe the notion that tender contracting, procurement, supply, meaning a job in the tender include chartering, procurement, provision.<sup>7</sup>

Article 22 states UULPM prohibited businesses conspiring with others to set or determine the winning bidder so "may result in unfair business competition". Article 23 states UULPM Business agents are prohibited from conspiring with others to obtain information that competitors business activities classified as company secret so "may result in unfair business competition".

Conspiracy or conspiracy is a form of cooperative effort undertaken by businesses to other businesses with the intention of controlling the relevant market for the benefit of businesses that conspire<sup>8</sup>.

Conspiracy is a form of unfair competition in the business world that will damage competition. Conspiracy in the tender can be distinguished on the 3 types of horizontal conspiracy, conspiracy vertical, horizontal vertical combined conspiracy, conspiracy three types<sup>9</sup> are:

1. Horizontal Conspiracy
2. Vertical Conspiracy
3. Vertical Horizontal Conspiracy

Article 3 of Presidential Decree No. 80 of 2003<sup>10</sup> states to create fair competition, tenders or procurement of goods / services must apply the basic principles; Efficient; Effectively; Open competition; Transparent; Fair / non-discriminatory; Accountable.<sup>11</sup>

#### C. Indications Conspiracy in Tender

Conspiracy in Tender causing potential market barriers for participants who do not have the opportunity to follow. Tender is the potential to create unfair competition or anti-competition are:

<sup>1</sup> Pasal 35 UULPM

<sup>2</sup> Pasal 36 UULPM

<sup>3</sup> Nindy Pramono, 1997, op.cit, h. 350.

<sup>4</sup> Kartasmita, Ginanjar, 10 Juni 1994, *Agenda Pembangunan Ekonomi Nasional Sebagai Dasar Pembentukan Ekonomi Nasional*, Pelita No. XXI-6639, h.4.

<sup>5</sup> Laporan KPPU, 2007, h. 4.

<sup>6</sup> Angraini, A.M., Tri, 2009, *Sanksi Dalam Perkara Persekongkolan Tender Berdasarkan UU No. 5 Th. 1999 Tentang Larangan Praktek Monopoli Persaingan Usaha Tidak Sehat*, Untaian Pemikiran Hukum Persaingan Usaha, KPPU, Jakarta, h. 101.

<sup>7</sup> Adi Krisanto, Yakub, 2005, *Analisis Pasal 22 UU No.5 Tahun 1999 Karakteristik Putusan KPPU tentang Persekongkolan Tender*, Jurnal Hukum Bisnis Jakarta, Vol. 24 No.II. h. 66.

<sup>8</sup> Pasal 1 angka 8 UULPM.

<sup>9</sup> Media Berkala KPPU, 2007, h.1.

<sup>10</sup> Telah diganti dengan Perpres No. 54 Tahun 2010 *Tentang Pengadaan Barang dan Jasa Pemerintah*.

<sup>11</sup> Pasal 3 Keppres No.80 Tahun 2003 *Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Pemerintah*.

1. Tender that are closed or transparent not widely publicized, resulting in businesses interested qualified cannot follow it;
2. Tender discriminatory cannot be followed by all businesses with the same competition;
3. Tender with the requirements of the technical specifications or brands that may lead to certain businesses that hamper other businesses to participate.<sup>12</sup>

To determine whether there has been a conspiracy in the tender, the following described various indications of a conspiracy that is often encountered in the implementation of the tender. It should be noted that, the following is an indication of a conspiracy, conspiracy or form or behavior whether or not the new conspiracy proved through inspection by the inspection team or the panel of the Commission. Indications of a conspiracy at the time of planning, among others, include:

- a. Selection of procurement method that avoids the implementation of the tender / auction openly;
- b. Inclusion of technical specifications, quantity, quality, / or time of delivery of goods to be offered or sold or auctions which can only be supplied by a particular business;
- c. Tender / auction on the package for only one or two particular participants can follow / implement;
- d. There is a link between the origin of the source of procurement of goods / services;
- e. Value auctions bail is set much higher than the base value of the auction;
- f. Determination of the time which is difficult to achieve auction followed.<sup>13</sup>

It is often the case, the tender offer was announced in various media only false, pretending to actually winning bidder already in the bag or is predetermined. Which, oddly enough, can the winning bidder has been determined by the bidders themselves collusion, or it could be determined by the provider of the tender, it should be avoided to realize good governance.<sup>14</sup> In the procurement process must satisfy the elements <sup>15</sup> namely :

- a. Organizer of the tender, the user of goods / or services; sellers of goods; tender committee.
- b. Bidders, namely entrepreneurs provider of goods / or services, or a buyer of goods, which meet the requirements to become a bidder.
- c. Tender requirements, including qualifications, classification, competence bidders; standard specification of goods / or services; guarantee that the bidder should be given; as well as other requirements specified in the tender documents procurement of goods / or services, / or sale of goods.
- d. Technical offers the best prices submitted by the provider of goods / or services, or offers the best price proposed by the buyer of goods.
- e. Quality of goods / or services, for the procurement of goods / or services.
- f. Certain time.
- g. The procedure for a particular method, including but not limited tendering procedures, how to notice the changes, additions, or reduction of the content of tender documents; the submission of bids, evaluation mechanism, the determination of the winning bidder; as well as the mechanism of rebuttal / or responses.

### Data analysis

The data has been collected as a result of both secondary data and primary data library study as a result of field studies were analyzed qualitatively with abstract theoretical approach. Abstract theoretical approaches have significance in normative legal research, given the logic of the law have a very strong structure. There is a close relationship between the laws of logic, even the nature of the special character of logical laws. The results of the analysis are then presented descriptively, where quantitative data are necessary will be presented in a tabular format for ease of understanding the analysis. Secondary data in the form of primary legal materials in the form of legislation the government policy as stated in the materials research approach, was analyzed by using the methods of legal interpretation as historical interpretation, the interpretation of systematic (logical).<sup>16</sup>

The result of this analysis is the conclusion which is basically the answer to the issues raised in this research. The analysis procedure can be obtained precise answer to the chain of relationships that emerge from the crisis situation into an existing policy or process at the same relation to the theories that have been known.

### Discussion

Implementation completion of bid rigging case made by the Business Competition Supervisory Commission (KPPU) in the enforcement of competition law.

A number of 8.6 Trillion, Value Tender Conspiracy <sup>17</sup>

<sup>12</sup> KPPU, 2005, *Pedoman Pasal 22 Tentang Larangan Persekongkolan Dalam Tender*, h. 12. Pedoman ini telah diganti dengan PerKom No. 2 Tahun 2010 Tentang Pedoman Pelaksanaan Pasal 22 UULPM.

<sup>13</sup> Ibid. h. 13.

<sup>14</sup> Alum, 2010, *Larangan Persekongkolan dalam Tender; Upaya Mewujudkan Good Governance, Wacana Indonesia*, Yogyakarta. h. 11.

<sup>15</sup> Anggraini (2), op. cit. h. 80.

<sup>16</sup> Ibid. h. 57.

<sup>17</sup> <http://www.kppu.go.id/id/2013/01/86-triliun-nilai-persekongkolan-tender>

Commission as the competition watchdog has a duty under the Act LPM of who oversee ban bid rigging as governed by Article 22: "Businesses are prohibited from conspiring with others to arrange and or determine the winning bidder so may result in unfair competition." In the perspective of the Commission, bid rigging is part of a four (4) types of hardcore cartel practices, ie conspiracy tender, zoning, supply arrangements, as well as price setting<sup>18</sup>.

To be understood, if it refers to the cases handled by the Commission during the period 2006 - 2012, of the 173 cases that have been decided, 56% or 97 cases of which are related bid rigging case of procurement of goods and services while 76 other cases related matters pricing and supply arrangements and abuse of dominant position<sup>19</sup>.

The total project value of 97 cases this tender is 12.35 Trillion Rupiahs, which is a combination of private projects, state enterprises, state and local budgets. 75 (seventy-five) of these 97 tender decision has proven conspiracy tenders worth a total of 8.6 Trillion Rupiahs. Of the 97 cases recorded 28 cases tenders from the state budget and 47 cases sourced funds from the budget. Noted that the value of the 28 cases the project budget is set at Rp.7,1 trillion where the Commission has proved conspiracy case 24 of them or 6.6 Trillion Rupiahs . As for the tender of district funds, the Commission has examined 47 cases worth 1.9 trillion where 36 of 47 this decisions proved to conspiring with a project value of 1.6 Trillion Rupiahs.

The value of the tender is proven by conspiring with 8.6 trillion rupiahs, 6.6 trillion rupiahs of which is sourced from the state budget and 1.6 trillion rupiahs comes from the budget shows the inefficiency of the project value of procurement of goods and services in the business world. Confronting this new Commissioner for the Commission for the period 2012-2017 was determined as early as possible to conduct prevention civilizing values of fair competition in the procurement of goods and services, especially in the procurement of government goods and services, "the Commission's vision is realized so that the behavior of economic efficiency effort this will lead to inefficiencies such as minimized "said A. Junaidi, Head of Public Relations and the Law Commission. Moreover, the data showed that of 212 written reports received by the Commission at this time range from 2006 to 2012, 77% or 164 reports on the alleged conspiracy among procurement (tenders), and 23% or 48 non-tender report. As the Commission states, the Commission will continue to process this report without prejudice to the Commission's oversight of the potential cartels in strategic commodities or basic needs of Indonesian society.

Table 1: Commission Decision of the Year 2011

No	Item Case	Principal Case
1	No. 01/KPPU-L/2011 :	Capital Expenditure Procurement Auction Tools Medicine Hospital Prof. Dr. Tanuwijaya Soekarjo, Navan
2	No. 02/KPPU-L/2011 :	Road Construction Project Bidding Tenggara-Samboja, Border with Balikpapan
3	No. 03/KPPU-L/2011 :	Tender for Development and Improvement of Irrigation Network Jangkang Complex in the Department of Public Works Sanggau District, West Kalimantan Province
4	No. 04/KPPU- L/2011 :	Bankrupt Boedel auction Tapin PT Anugerah Persada (in Bankruptcy) in South Kalimantan Province
5	No. 05/KPPU- L/2011 :	Tender Demolition Main Raw Material In PT Indonesia Asahan Aluminium Kuala Tanjung district. North Sumatra Coal Year 2010
6	No. 06/KPPU-I./2011	About the alleged violation of Article 19, paragraph d of Law No. 5 of 1999 relating to the State Electricity Company (Persero) in the Electricity Supply Services for Business Customers (B-3) and Industrial (I-2, I-3 and I-4 ) during the period January 2010 to June 2010 in the area of Java and Bali
7	Nomor 07/KPPU-I/2011	About Tender Samboja Seaport Development, Integrated Port Development in Sub City Builds on Integrated Port Development Package Build Sub City Department of Transportation in Kutai regency of East Kalimantan Province Kertanegara the Fiscal Year 2009
8	No. 08/KPPU-I/2011 :	Tender for Construction of Sea Ports Samboja, Integrated Port Development in Sub City Build At Work Package Companion Events Department of Transportation Integrated Port Development Kutai regency of East Kalimantan Province
9	No. 09/KPPU-I/2011 :	Alleged violation of Article 22 of Law Number 5 Year 1999 in the Tender Seaport Development Work in the Department of Transportation Samboja Kertanegara Kutai in East Kalimantan Province Fiscal Year 2009

<sup>18</sup> Diunggah oleh: andriyanto, Kategori: Berita, Headlines, Press Release, Jan 28, 2013

<sup>19</sup> Ibid.

10	No. 10/KPPU-L/2011 :	Tender for Road Improvement in the Public Works Department of Mines and Energy, North Lombok West Nusa Tenggara Province Fiscal Year 2010
11	No. 11/KPPU-L/2011 :	Auction Services Technical Services 3 Year Pattern 2011-2012 Zone I (UPJ Jember City, UPJ Kalisat, UPJ Ambulu) Zone II (UPJ Embankment, UPJ Kencong, Rambipuji UPJ), Zone III (UPJ Lumajang, UPJ Klakah, Tempeh UPJ) in PT .PLN (Persero) APJ Jember Fiscal Year 2010
12	No. 12/KPPU-L/2011 :	Re-Tender for Procurement of Seed Packs Cocoa Somatic Embryogenesis (SE) Source of Funds with the State Budget through DIPA section 999 Fiscal Year 2010 Budget Task Force West Sulawesi Plantation Office
13	No. 13/KPPU-L/2011 :	Alleged Violation of Article 22 of Law Number 5 of 1999 on Road Construction Work Package Bidding Sp. Pearl-South Coastal Environment Public Works Department Karimun regency of Riau Islands Province Fiscal Year 2011

Table 2: Decision of the Commission in 2012 on Tender Conspiracy

No	Item Case	Principal Case
1	No. 01/KPPU-L/2012 :	Building Tender Ma'had Al Jamiah II School of Islamic Studies (STAIN) Samarinda, East Kalimantan, Fiscal Year 2011
2	No. 02/KPPU-L/2012 :	Tender for Work in Environmental Performance Development Unit Water Management in West Sumatra Province Fiscal Year 2011
3	No. 03/KPPU-L/2012 :	Tender Application Identity Card-Based NIK Nationwide (Electronic KTP) of 2011 s / d 2012
4	No. 05/KPPU-I/2012 :	Export Pipeline Tender Front End Engineering and Design Contract (No. C732791) in the Chevron Indonesia
5	No. 06/KPPU-L/2012 :	Tender for Construction of Terminal ALBN Sei Ambawang Phase XI Fiscal Year 2012
6	No. 07/KPPU-L/2012 :	Public Auction Agency for Development Cooperation Law Partners Semi Traditional Market To Build Modern Pattern Serah (Build Operate Transfer - BOT) in Sukabumi in 2011
7	No. 08/KPPU- M/2012 :	Alleged Violation of Article 29 of Law No. 5 of 1999 relating to the Acquisition of Shares Notification Delay Doing PT mainstay Satria Kencana Lestari PT Bumi Sejahtera Eka
8	No. 09/KPPU- M/2012 :	Doing Notification Delay Takeover Shares of PT Austindo Nusantara PT Mitra Jaya Rent By Pinasthika Mustika
9	No. 04/KPPU-L/2012 :	In Tender Care and Maintenance Building Class I and VIP Hospital of Southeast Sulawesi Fiscal Year 2011

Commission Decision of 9 In 2012 a number of decisions, and decisions concerning bid rigging 7, it appears that many cases of bid rigging that occurred in this country. Here will be described one of the summary judgment as follows: the Commission's Decision 05 / KPPU / I / 2012 on Alleged Violations of Law No. 5 of 1999 relating to the Export Pipeline Tender Front End Engineering and Design Contract (No. C732791) in Environmental Chevron Indonesia conducted by Chevron Indonesia and PT Worley Parsons Indonesia , the Assembly Commission the Commission decided the case.

Council Conclusions on the Commission;

Considering that the judgment and the above description, the Assembly Commission to the following conclusion: That the practice proved the existence of discrimination committed by Party I in the Tender Export Pipeline Front End Engineering and Design Contract (No. C732791) in Environmental Chevron Indonesia Company;

That no evidence of conspiracy was committed by Reported Party I and II in the Tender Export Pipeline Front End Engineering and Design Contract (No. C732791) in Environmental Chevron Indonesia Company;

About Considerations Before Deciding Assembly Commission;

Considering that before deciding, the Commission considers matters as follows; Reported that the Party I and II have been cooperative during the investigation process ongoing.

About dictum Verdict and Conclusion:

Considering that based on the facts, assessment, analysis and conclusions above, and in view of Article 43 paragraph (3) of Law Number 5 Year 1999, the Commission Deciding:

1. Stating that the Party I proven legally and convincingly violated Article 19, letter d of Law Number 5 Year 1999;
2. Stating that the Party II has not proven to have violated Article 19 letter d Act Law No. 5 of 1999;
3. Stating that the Reported Party I and II are not proven to have violated Article 22 Law Number 5 Year 1999;
4. Order Party I, pay a fine of 2.500.000.000.00 rupiahs (two billion five hundred million rupiahs) to be paid to the State Treasury as income deposit fine of violations in the field of business competition Unit Business Competition Supervisory Commission through government banks with revenue code 423755 (Breach Fines Revenue in Business Competition) .

Commission's Decision 05 / KPPU / I / 2012 is one that shows the credibility of the Commission's decision would dare carry out their duties without hesitation in case handling competition. So with all issued verdict shows that the Commission in handling cases in the enforcement of competition law has been run, and the case competition at entry and at the Commission is in the process concerning bid rigging, this indicates that in our country are still so many actors businesses and stakeholders to conspiracy. It is to be avoided then the Commission must remain careful in handling the bid rigging cases and other cases that go to the Commission. Eliminating bid rigging in this country will further improve the economy of Indonesia, so that all goes well and the people will prosper, with healthy competition and the welfare of society is achieved national objectives as outlined in the preamble of the Constitution of 1945, reaching a fair and prosperous society.

## Conclusion

Implementation completion of bid rigging case made by the Business Competition Supervisory Commission (KPPU) in the enforcement of competition law has been implemented. This is evident from the number of cases received by the Commission bid rigging through all the reports properly investigated and decided by the Commission. And the case is entered into the Commission's 80 percent is the case of bid rigging, so that in case handling of bid rigging, the Commission has been very understanding. Commission decided cases during the period 2006 - 2012, of the 173 cases that have been decided, 56% or 97 cases of which were related to bid rigging case of procurement of goods and services while 76 other cases related matters pricing and supply arrangements and abuse of dominant position.

This shows that the offense is a lot going on in the KPPU concerning bid rigging or the entry in the category of prohibited activities. And all the cases decided by the Commission as well. It is recommended that the Commission also conducts its own investigation without waiting for the report from the public especially melakukan alleged bid rigging, which is called the initiative cases.

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