



CASE ANALYSIS OF TENDER CONTRACTS IN VIOLATION OF LAW NUMBER 5 OF 1999 CONCERNING THE PROHIBITION OF MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

Tiffany Nur Yacub¹, Karina Hasiyanni Manurung², Syifa Nurfajriana³

Universitas Pembangunan Nasional Veteran Jakarta

¹e-mail: 2110611083@mahasiswa.upnvj.ac.id,

Keywords: *Abstract*

Riggin; tender; monopolistic practice. In Indonesia, rampant bid rigging has hindered economic growth. This study investigates business competition in Indonesia with a particular emphasis on bid rigging and the implementation of Law No. 5/1999 which prohibits monopolistic practices and unfair business competition. The issue raised is how effective law enforcement and supervision are against the practice of bid rigging. Normative or doctrinal research is conducted using statutory and conceptual approaches. The relevant laws and regulations and literature were studied before data was collected. The results show that tender rigging still occurs, especially in the procurement of goods and services by companies, although Law No. 5 Year 1999 establishes a legal framework to prevent monopolistic practices and unfair business competition. One of the solutions offered is to improve supervision through adequate infrastructure; stricter sanctions; raising awareness of the importance of fair business competition; and increasing the transparency of the tender process through e-procurement. This study concludes that to create a healthy working environment, concrete and integrated actions are needed. It is recommended that relevant agencies work better together and that there is consistent law enforcement.

Submit : 2024-05-30

Review : 2024-06-12

Received : 2024-07-15



A. Introduction

As a country founded in accordance with the ideals and mandate of the 1945 Constitution and Pancasila, Indonesia has set economic development goals to achieve a just, prosperous, safe and prosperous society. By prioritizing the values of justice, prosperity, peace and happiness in all aspects of social life, this goal reflects a commitment to realizing prosperity for all Indonesian people (Rendi Ardiansyah, 2021). The government has implemented various policies to realize equitable and sustainable national development for all Indonesian citizens. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition is one of these policies.

How to cite

Tiffany Nur Yacub, dkk, Case Analysis Of Tender Contracts In Violation Of Law Number 5 Of 1999 Concerning The Prohibition Of Monopolistic Practices And Unfair Business Competition, Volume 01, Issue 03 May 2024

Published by

Zhata Institut

Law Number 5 of 1999 was created with the main aim of creating a conducive business climate through regulating healthy business competition. This law aims to supervise and regulate economic activities to create fair and healthy competition in the market, as well as to maintain a balance between the interests of consumers and business actors and to encourage competitive and sustainable economic growth. The main aim of this law is to ensure equal business opportunities for large, medium and small businesses. By regulating healthy business competition, this law aims to avoid exploitation of consumers by certain business actors and supports the market economic system adopted by Indonesia. Through the implementation of this law, it is hoped that justice can be created in the business world and better protection for consumers, as well as encouraging business actors to innovate and compete in a healthy manner.

One of the main pillars of the economy is healthy business competition, which increases innovation and business efficiency. As stated in the preamble to the 1945 Constitution of the Republic of Indonesia, the aim of the Unitary State of the Republic of Indonesia is to improve general welfare (Ananda Rivaldo Pondiu Unggul, 2022). In the current era of globalization, national development is developing rapidly in an effort to advance general welfare, encouraging every business to be the best. However, advances over time, especially in the fields of technology and science, can change the way business people think, which can increase the risk of unfair competition.

Unfair business competition practices can include various activities such as monopoly, bid rigging, and other practices that violate the principles of fair competition. One real example is conspiracy in tenders, which is an activity prohibited in Article 22 of Law no. 5 of 1999. In the procurement of government goods and services, collusion in tenders occurs when companies collaborate with tender organizers to influence the results of the tender.

One method of bidding is a tender, which is used to determine the most suitable company to carry out a project or provide certain goods or services. Two main parties are involved in the tender process: the organizer and the business actor. Business actors submit bids with the hope of becoming providers of specified goods or services. To ensure healthy and fair business competition, the tender process must be transparent and follow applicable regulations. These principles not only ensure that the best providers are selected objectively, but also safeguard the interests of the general public and service users. Therefore, honesty and professionalism at every stage of the tender process are very important to achieve optimal and sustainable results for all parties involved.

In practice, Guild tenders often occur. Of the 147 decisions of the Business Competition Supervisory Commission (KPPU) from 2010 to 2018, 109 of them related to bid rigging. This shows that bid rigging is still a big problem in business competition in Indonesia. This practice is found in both the public and private sectors.

Strong law enforcement is one of the key elements in creating healthy business competition. For this reason, perpetrators of bid rigging must be given stricter and more consistent sanctions. Strict sanctions include hefty fines and imprisonment for those found guilty. If there is strong law enforcement, it will have a great deterrent effect and prevent others from committing similar violations. To ensure that the legal process is fair and transparent, the KPPU and judicial institutions must work together.

To maintain healthy business competition and prevent rigging in tenders, increasing supervision is a very important first step. The Business Competition Supervisory Commission (KPPU), an independent institution responsible for supervising business activities, requires adequate infrastructure. This infrastructure consists of advanced technology used to track transactions and interactions between business actors as well as human resources who are trained and experienced in monitoring business competition. In addition, KPPU must cooperate with related institutions such as the Financial and Development Supervisory Agency (BPKP), the police and the prosecutor's office to ensure quick and appropriate action against evidence of bid rigging.

Transparency in the tender process is an effective solution to minimize the opportunity for collusion to occur. The use of information technology such as e-procurement can increase transparency and accountability in the tender process. The e-procurement system allows all tender stages to be carried out online, from tender announcements, document submission, to evaluation and determining the winner. With this system, the opportunity for fraud can be minimized because all data is recorded and can be audited at any time. In addition, the use of blockchain technology can also be considered to ensure that all transactions are recorded securely and cannot be changed.

A comprehensive and integrated solution is needed for this problem. Some important actions that can be taken include implementing strong laws, increasing transparency, and improving education. Additionally, information technology can be used to improve oversight and make the tender process clearer. In legal proceedings, the use of electronic evidence has several problems. On the other hand, electronic evidence may increase the efficiency and effectiveness of investigations and trials. On the other hand, there are concerns about the credibility and validity of the evidence, especially related to the data collection, storage and validation processes. This complexity is further increased because there is no comprehensive law governing the use of electronic evidence.

Creating healthy business competition in Indonesia is a difficult challenge, but it is very important to ensure sustainable economic growth. Even though there are several shortcomings and challenges that must be faced, the benefits of healthy business competition are much greater, not only for business actors but also for consumers and the national economy as a whole. With strong commitment from all relevant parties, the goal of creating a conducive and fair business climate can be achieved. The aim of this research is to identify methods that can be used to create healthy business competition

in Indonesia. It is only with a strong commitment from all relevant parties that a fair and pleasant business climate can be achieved. It is hoped that this research will provide significant understanding of business competition problems in Indonesia and solutions to these problems. This research will also provide practical solutions to increase the effectiveness of regulation and supervision in this area. From the background description explained above, the problems are what are the regulations regarding bid rigging in business competition law in Indonesia and how are tender rigging cases resolved in Indonesia.

B. Method

This study uses normative methods, or doctrinal legal research. This method centers on a thorough analysis of statutory regulations or laws that significantly influence people's lives. The main goal of doctrinal legal research is to obtain a deep understanding and explanation of the ideal method of applying the law. In addition, this method also aims to identify and explore relevant legal principles underlying various existing legal regulations and decisions. Therefore, the aim of this research is to encourage legal thinking and theory and increase our understanding of the structure and dynamics of law in an ever-changing social and cultural context (J Efendi, 2022). In this research, there are two main approaches used, namely the statutory approach (statute approach) and conceptual approaches. A statutory approach involves a thorough examination of all relevant rules and regulations relating to the legal issue being researched. Apart from the ontological and philosophical basis underlying the protection regulations for geographical indications, the aim is to find the *ratio legis*—or the reasons or objectives behind the enactment of a regulation. Meanwhile, the conceptual approach focuses on the interpretation of existing legal texts and efforts to understand their implementation in the context of practice (Rahayu, 2020). In addition, a conceptual approach is used to analyze legal concepts relevant to the research topic. This approach aims to clarify and examine various concepts that form the basis of existing laws and regulations, as well as to understand how these concepts are interconnected and applied in a broader legal context.

The method used to collect data in this research is literature study, which involves a systematic procedure for solving research problems by examining secondary data from various relevant literature. The data collection process was carried out by conducting an in-depth search and analysis of literature that was directly related to the core research discussion. The researched literature includes various sources such as specialized books, the latest scientific journals, related articles, relevant legal documents, as well as other written sources that substantially contribute to the understanding of the research topic being discussed. This literature study method was chosen to ensure that the data used in the research has a strong and detailed basis, as well as to provide an adequate theoretical basis for the analysis carried out. The data obtained from this literature is then analyzed to identify relevant legal principles and to understand how the law is applied in the context being researched.

C. Result & Discussion

1. Regulations regarding Tender Rigging in Business Competition Law in Indonesia

One of the principles of modern economics, namely creating an environment conducive to business competition, is truly a sign of Indonesia's economic development. This started with Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which was created to save the Indonesian economy from the monetary crisis that was ongoing at that time. Unfair business competition in supply arrangements is caused by an imbalance between the number of business actors and market opportunities. In business competition law, there are two approaches, namely the Per se Illegal approach and the Rule of Reason approach. The second method allows an agreement to be considered an unfair business practice. This method is applied to determine whether an exclusive action by a business actor violates the provisions of business competition law (Jihad, 2023).

Because it can result in unfair business competition, bid rigging is prohibited. According to Black's Law Dictionary, conspiracy is a combination or association between two or more persons intended to commit an unlawful act by joint effort, which becomes unlawful when carried out by the conspirators themselves, or to use criminal or illegal means to carry out something. actions that are not inherently unlawful. Articles 22 to 24 of Law Number 5 of 1999 in Indonesia regulate bid rigging (Prabawa, 2017).

According to Article 22, conspiring refers to cooperation between business actors and other parties to win certain tenders; this can lead to unhealthy competition. This suggests that at least two parties are working together to commit unlawful acts that could disrupt the country's economic growth. The practice of conspiracy in tenders can be carried out in various ways, such as openly or secretly. Changing bids before the tender process, creating pseudo-competition, or agreeing to actions that give exclusive advantages to certain parties are some examples of these methods. Business actors involved in collusion often know that this action aims to regulate tender results so that certain parties can win contracts, even though in a way that is not in accordance with the principles of fair competition. Thus, Article 22 of Law Number 5 of 1999 states that the practice of conspiracy in tenders must be prevented and completely eliminated to ensure that the process is transparent, fair and provides equal opportunities to all tender participants. To maintain market integrity and support the country's sustainable economic growth, this step is critical.

The government procurement process for goods and services is one of the important issues in business competition law in Indonesia because it often allows conspiratorial practices in handling tenders. The principles and procedures regulated in Law Number 5 of 1999 and Presidential Decree Number 54 of 2010 concerning Government Procurement of Goods and Services are contrary to this practice. Tenders regulated by Law Number 5 of 1999 cover various things, such as choosing

the lowest price for contracting projects, such as construction or renovation of government buildings; purchasing goods, such as office supplies and stationery for government agencies; and providing services, such as cleaning services or financial consultancies for government agencies. On the other hand, the act of asking for the highest price, such as the auction of inventory items or government confiscated goods obtained illegally, also falls within this scope. It is alleged that business actors in the relevant field do not have healthy competition due to conspiracy practices during the tender process. This creates a business environment that is unfavorable for Indonesia's sustainable and competitive economic growth.

If we describe Law Number 5 of 1999 as the main basis for analyzing business competition law, there is an emphasis that improving community welfare and preventing monopolistic practices or unfair competition are the main objectives of enforcing business competition law. In addition, Presidential Decree of the Republic of Indonesia Number 75 of 1999 established the Business Competition Supervisory Commission of the Republic of Indonesia, which established a state institution to handle cases of violations of business competition law. The formation of the Business Competition Supervisory Commission, or KPPU, is based on Law Number 5 of 1999 Article 34 which regulates the organizational structure, duties and functions of the commission, which is determined through a presidential decree.

According to Law Number 5 of 1999, the Business Competition Supervisory Commission (KPPU) is required to make a decision within a maximum of 150 (one hundred and fifty) days from the time the case is filed to handle business competition violations, including violations of the prohibition on conspiracy in tenders. This decision will have permanent legal force if the business actor does not submit an objection to the District Court. The District Court must make a decision within 30 (thirty) days from the start of the examination following the KPPU's final decision. If you are not satisfied with the District Court's decision, you can still file an appeal to the Supreme Court. Because of this law, the KPPU can impose administrative and criminal sanctions on business actors who are proven to have committed violations in business competition, including rigging in tenders. Maintaining fairness, transparency and integrity in business processes and encouraging sustainable economic growth in Indonesia is the main goal.

In Article 47 paragraph 2 letter c of Law Number 5 of 1999, which regulates business competition, parties involved in bid rigging can be given administrative sanctions in the form of an order to stop activities that are proven to give rise to monopolistic practices or unfair business competition. Apart from that, in accordance with Article 47 paragraph 2 letter f, compensation payments may be imposed, and based on Article 47 paragraph 2 letter g, sanctions in the form of fines may also be imposed. On the other hand, the provisions of Article 48 paragraph 2 of the same Law give the court the authority to determine criminal sanctions for such violations. This article regulates that business actors involved in bid rigging can be subject to a minimum fine of Rp. 5,000,000,000 (five billion rupiah) and a maximum of Rp.

25,000,000,000 (twenty five billion rupiah), or substitute imprisonment for 5 (five) months. Apart from that, the court can also impose additional penalties based on the provisions of Article 49 of Law Number 5 of 1999, which includes additional sanctions in accordance with the level of the violation that occurred, with the aim of upholding healthy and fair business competition laws in Indonesia.

The many cases of bid rigging handled by the KPPU show that the KPPU's decision does not deter business actors, especially those who carry out bid rigging. As a result, bid rigging still occurs. However, the Law Prohibiting Monopolistic Practices and Unfair Business Competition was created to help prevent and eliminate monopolies and unfair business competition. It is hoped that this law will create an economic climate that supports business actors by providing them with legal protection and legal certainty.

2. Tender Conspiracy in Indonesia and Case Resolution

a) Analysis of Case Number: 04/KPPU-L/2018

This case began with an alleged violation of Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which was documented in Case Number 04/KPPU-L/2018. This happened during the 2017 Fiscal Year tender process for the maintenance, reconstruction and routine maintenance of the Palangka Raya-Bagugus-Bukit Batu Road in Central Kalimantan. Three parties were reported in this case: Working Group as Reported Party I, PT Jaya Wijaya Corporation as Reported Party II, and PT Margo Umega as Reported Party III. Further investigative steps are needed to clarify these allegations, in the hope of restoring fairness in the Indonesian tender system and upholding fair and transparent business competition rules. The alleged conspiracy between the three reported parties shows violations in the tender process, which should provide equal opportunities for all participants.

In February 2017, a tender with tender code 24040064 was announced with a Self Estimated Price (HPS) of IDR 34,131,220,000.00. PT Jaya Wijaya Karya (Reported II) and PT Margo Umega (Reported III) were participants in the tender. Then the Working Group (Reported Party I) carried out an evaluation of the incoming bid documents. In the evaluation process, it was found that there were similarities in the documents of PT Jaya Wijaya Cooperation and PT Margo Umega in terms of implementation methods, means of transportation, and bank support letters issued by the same bank with consecutive serial numbers. These similarities lead to suspicions that the two companies are involved in a conspiracy. Apart from that, it was proven that PT Jaya Wijaya Cooperation and PT Margo Umega were collaborating, because the IP addresses used by both companies when submitting tender applications were the same.

In this case, the tender package with a total HPS value of IDR 34,131,220,000.00 uses the electronic Public Auction (e-Auction) method with Post-Qualification as the object of this case. This project is part of the government's efforts

to maintain and reconstruct road and bridge infrastructure in the Palangka Raya-Bagugus-Bukit Batu area. In this case, Article 22 of Law Number 5 of 1999 which prohibits business actors from conspiring with other business actors or related parties in arranging and/or determining tender winners so that it can result in unfair business competition is alleged to have been violated by the Reported Parties. This allegation is based on various findings indicating that there was illegal coordination between the Reported Parties to influence the tender results.

Conspiracy in the tender process is a complex phenomenon that can be classified into several types based on its nature and the parties involved. First of all, there is Horizontal Conspiracy. This type of conspiracy occurs when business actors or providers of goods/services collaborate with competitors or other business actors and service providers. This joint involvement can take the form of dividing markets, setting prices, or coordinating bidding strategies so that one particular party wins the tender. Next, there is Vertical Conspiracy. This type of conspiracy occurs when one or more business actors or service providers collaborate with the tender implementation committee, auction committee, or users of goods and services (such as the government or state-owned enterprises). Then, the third is Joint Conspiracy. This conspiracy is a combination of the two previous types, namely horizontal and vertical collusion. In this case, there is not only cooperation between business actors or service providers and their competitors, but also with parties who have the authority to regulate or determine tender results.

During the trial, several pieces of evidence were found that supported the alleged conspiracy between the respondents. The allegation of collaboration between PT Jaya Wijaya Karya and PT Margo Umega is further strengthened as expected by the similarity of the offer documents, including implementation methods and mobilization tools, which indicates an illegal collaboration. In addition, the bank support letters from the two companies were proven to be issued by the same bank with consecutive serial numbers. This coordination is also demonstrated by the similarity of the IP addresses used to log in and log out of the tender application. Reported Party II's admission that the bid price had been arranged with PT Margo Umega further strengthens the evidence of horizontal conspiracy.

This conspiracy is basically between business actors and the tender committee (Pokja). In the auction process, the Working Group did not disqualify the auction participants even though they found similarities in implementation methods and letters of bank support. PT Margo Umega was disqualified for reasons that were not in accordance with applicable regulations, while PT Ganisha Dwi Utama and PT Multi Karya Primas Mandiri were also disqualified for invalid reasons. The Working Group took action to win PT Jaya Wijaya Karya by organizing other tender participants. Based on this, the elements of vertical conspiracy are fulfilled.

The entity that wins the tender through the practice of conspiracy in this case is the business actor in question. The winner of the tender for the Road Reconstruction Preservation and Routine Maintenance of the Palangka Raya-

Bagugus-Bukit Batu Bridge project, PT Jaya Wijaya Coperation, is a limited liability company established in Indonesia and given company deed number 28 on April 14 2015. Construction of roads, highways, railways, and airport runways are the company's main business. The company collaborated with Pokja and PT Margo Umega to win this tender. Thus, the requirements for business actors as stated in Article 22 of Law Number 5 of 1999 have been fulfilled.

Another business actor involved in this case, namely Reported Party III, PT Margo Umegaa, admitted that they controlled the bids submitted by PT Margo Umega and PT Melindo Bhakti Persadatama in order to win the tender. PT Margo Umega, which operates in the construction services sector, was established based on the Company Deed with the latest amendment to Number 03 dated May 2 2014. PT Margo Umega acted as a companion company in this conspiracy. Based on this, the elements of other business actors in this case have been fulfilled. Another party involved is the Working Group, which acts as a legal subject responsible for its actions in this conspiracy. Constitutional Court Decision Number 85/PUU-XIV/2016 expands the meaning of "other party" so that the Working Group as a legal subject also fulfills this element.

The defendants in KPPU Decision Number 04/KPPU-L/2018 fulfill the requirements for horizontal and vertical conspiracy. Horizontal collusion occurs between business actors who work together to win tenders with the same price offer. The collaboration between PT Jaya Wijaya Cooperation and PT Margo Umega can be seen from the similarity in the metadata of the bidding documents and the similarity in IP addresses when accessing the Electronic Procurement Agency (LPSE) website. In addition, the same bank's certificate of support indicates the existence of a conspiracy. This evidence is strengthened by PT Jaya Wijaya Cooperation's acknowledgment of their role as leaders in this collaboration.

Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition strictly prohibits collusion in tenders which can cause unfair business competition. In this case, the elements of violation of Article 22 were clearly proven, namely the existence of business actors conspiring, the arrangement of tender winners, and the occurrence of unfair business competition. The legal basis used in this decision includes Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, especially Article 22. In addition, Presidential Regulation Number 70 of 2012 concerning Government Procurement of Goods/Services is also used to regulate indications of conspiracy. . Constitutional Court Decision Number 85/PUU-XIV/2016 expands the meaning of other parties in bid rigging to include parties related to business actors, which is also a reference in the analysis of this case. Presidential Regulation Number 54 of 2010 concerning Government Procurement of Goods/Services provides detailed guidelines regarding procurement procedures and criteria that must be complied with.

This ruling has a major impact on law enforcement and fairness in the tender process in Indonesia. The conspiratorial practices revealed in this case undermine public trust in the government procurement system and harm other business actors who participate in tenders honestly. In this decision, it is emphasized how important it is to maintain the integrity of the tender process to prevent monopoly and unfair business competition. Thus, it is hoped that this decision will serve as a warning to business actors and tender organizers to always comply with the rules and maintain integrity in every procurement process.

In this case, the law shows the commitment of the Business Competition Supervisory Commission (KPPU) to guarantee healthy business competition and free from monopolistic practices. It is hoped that this decision will strengthen the government's procurement system for goods and services and prevent repeated rigging in tenders. To ensure that all businesses have an equal opportunity to compete, regulation and supervision must be strengthened. Overall, this decision shows how important it is to implement competition and anti-monopoly laws to ensure a fair and transparent tender process. This step is a positive effort to improve the country's economy through fair and efficient business practices. With this decision, it is hoped that the government procurement system for goods and services will improve.

b) Analysis of Case Number: 04/KPPU-L/2018

The case started with the construction of the Phase II swimming pool building in Hulu Sungai Selatan Regency (HSS) which was built in preparation for the Provincial Sports Week with the HSS host who is currently facing problems because it was reported and entered into trial by the KPPU. The trial took place in Banjarmasin, on Thursday, November 19 2020. The commission panel was chaired by Kodrat Wibowo and accompanied by Harry Agustanto and Ukay Karyadi.

This case relates to the KPPU's efforts to supervise the procurement of the Phase II Swimming Pool Building project in Kandungan, South Kalimantan. Several Reported Parties, including PT Cahaya Hikmah Jaya Pratama (Reported I), PT Karya Kandungan Nasional (Reported II), PT Diang Ingsun Mandiri (Reported III), and the Working Group (Pokja) of the South Hulu Sungai Regency Procurement Services Unit (ULP) on Implementation Work Of the three companies evaluated, PT Cahaya Hikmah Jaya Pratama, PT Diang Ingsun Mandiri, and PT Karya Kandungan Nasional, Fatimah, chairman of the Working Group, just learned that the three companies were involved in a conspiracy. In the Decision Reading Panel Session on January 28 2021, the KPPU decided that the business actors who were Reported Parties were guilty of committing acts of conspiracy through pseudo-competition. The Commission Council also proved that all the parties reported in the procurement carried out pseudo-competition and that the Committee made omissions.

From the case that has been explained, the Business Competition Supervisory Commission in Decision Number 5/KPPU-1/2020 dated 28 January 2021 judged that Reported Party I, Reported Party II, Reported Party III and

Reported Party IV, had legally and convincingly violated Article 22 of the Law. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, and punishes PT. Cahaya Hikmah Jaya Pratama, Reported Party I, with a fine of Rp. 1,350,000,000 (one billion three hundred and fifty million rupiah), and prohibited Reported Party II and Reported Party III from participating in procurement funded by the APBN/APBD for 2 (years). In addition, KPPU advised the Personnel Development Officer/Head of the South Hulu Sungai Regency Procurement Services Unit to impose administrative sanctions on Reported Party IV in the form of a ban on being involved in the Goods or Services Procurement Work Unit (UKPBJ) for 1 (one) year.

In addition, the Commission Council suggested that the Commission provide suggestions and considerations to the Personnel Development Officer/Head of the South Hulu Sungai Regency Procurement Services Unit regarding Reported Party IV. Members of the Hulu Sungai Selatan Regency ULP Working Group, Reported Party IV, will be subject to administrative sanctions in the form of a one year ban from participating in the Goods or Services Procurement Work Unit (UKPBJ). Member of the South Hulu Sungai Regency ULP POKJA, Reported Party IV, filed an objection to the KPPU Decision on February 23 2021. A trial was held at the Commercial Court of the Surabaya District Court. On April 5 2021, the Court issued Decision Number 1/Pdt.Sus-KPPU/2021/PN-Niaga Sby, which granted some of the objections, especially regarding the decision that Reported Party IV legally and convincingly violated Article 22 of Law Number 5 of the Year 1999.

After the KPPU filed a cassation appeal on April 19 2021, with a cassation memo received on May 3 2021, the Indonesian Supreme Court granted the KPPU's cassation request. The Supreme Court also annulled the Surabaya District Court Commercial Court Decision Number 1/Pdt.Sus-KPPU/2021/PN.Niaga Sby which had previously annulled the KPPU Decision Number 5/KPPU-I/2020. Supreme Court Decision Number 1265 K/Pdt.Sus-KPPU/2021, which was issued on 17 November 2021 and published in the case information system on 6 January 2022, stipulates that KPPU Decision Number 05/KPPU-I/2020 has legal force still. Thus, the Reported Parties are obliged to fully implement the decision in accordance with applicable regulations.

c) Analysis of Case Number: 07/KPPU-I/2017

With the ongoing changes in times, the practice of collusion in the tender process continues to develop with the introduction of various new systems aimed at deceiving and avoiding detection by law enforcement. One mechanism that is currently being developed is Bid Rotation, which is also known in Indonesia as a tender gathering. This mechanism involves a practice in which certain parties take turns underwriting the bidding process, thereby affecting what should be fair competition in the procurement of public projects.

Bid Rotation or tender gathering is a form of conspiracy where business actors participating in the tender take turns winning the contract. In this practice,

business actors agree to take turns winning certain tenders, while others submit deliberately uncompetitive bids or do not submit bids at all. In this way, they ensure that each participant in the conspiracy group gets a turn at winning, so that profits can be shared fairly among them. The Bid Rotation mechanism is very difficult to detect because at first glance, the tender process appears to be normal and competitive. However, behind the scenes, there is a hidden agreement between the bidders. This practice damages the integrity of the tender process and has a negative impact on healthy business competition. Projects that should be carried out by the most competent and efficient service providers, instead fall into the hands of those who conspire, so that the quality of work results and the value of benefits for society can decrease. Bid Rotation has various forms and methods. Some of these involve geographic divisions where each company in the group only bids in a specific region. Another method could be project type sharing, where companies in a group bid only for certain pre-agreed project types. Tender gathering refers to non-transparent and discriminatory procurement practices. In this scheme, the winner of the tender is determined in advance, usually through bribes to the committee or influential officials. As a result, unhealthy business competition and corruption occur. This modus operandi usually involves closed tenders that are not widely announced and have qualification requirements that favor certain parties. In Article 5 of Presidential Regulation Number 54 of 2010 concerning Guidelines for Implementing Government Procurement of Goods and Services, good procurement principles such as efficiency, effectiveness, transparency, openness, competition, fairness and accountability have been established. However, in the practice of tender gatherings, these principles are often ignored in the interests of corruption, collusion and nepotism (KKN). Bid Rotation with a conspiracy scheme is clearly part of Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition, where the element of conspiracy mentioned is "Cooperation carried out by business actors with other parties on anyone's initiative and with any means in an effort to win certain bidders." However, in both Law Number 5 of 1999 and the guidelines from the Business Competition Supervisory Commission, there is no specificity regarding Bid Rotation. Therefore, the mechanism for regulating bid rotation and its verification are not explicitly regulated in statutory regulations. In classifying Bid Rotation into the elements of conspiracy, all elements are met. However, the absence of specific guidelines governing its handling makes proving bid rotation difficult. As stated in Article 42 of Law no. 5 of 1999, proof requires witness statements, expert statements, letters and/or documents, instructions, and statements from business actors. This shows that even if the elements of conspiracy are met, proving Bid Rotation practices remains challenging without specific guidelines.

One example of a case that can be used as a reference regarding the practice of conspiracy in the tender process is in the KPPU case decision Number 07/KPPU-I/2017. This case concerns four road construction tender packages at the DBMTR or Road Construction Tender Packages at the Bina Marga Spatial Planning Service, Road

and Bridge Construction Sector, which were funded by the 2015 Fiscal Year APBD in Banten Province. The total Self Estimated Price (HPS) value for this project reached IDR 640,200,000,000.00 (six hundred and forty billion two hundred million rupiah). In the prequalification stage, 33 companies participated in this tender. Of this number, 12 companies registered to participate in the four tender packages offered. Of the 12 companies, only 4 companies passed to the next stage, namely PT Hutama Karya, PT Waskita Karya (Persero) Tbk., PT Adhi Karya (Persero) Tbk., and PT Brantas Abipraya (Persero). They proceed to the price offering stage. The results of the tender selection show that three state-owned companies won the tender with the following details: PT Adhi Karya won Package I (Jl. Pakupatan – Jl. Palima), PT Hutama Karya won Package II (Jl. Palima – Jl. Pasar Teneng), PT Brantas Abipraya won Package III (Jl. Sp. Muncul – Jl. Pamulang – Jl. Pajajaran – Jl. Otista), and PT Adhi Karya also won Package IV (Jl. Hasyim Ashari).

With questionable winning results, the Business Competition Supervisory Commission (KPPU) considers that there are suspicious indications in the tender process, which could potentially cause state financial losses of up to IDR 3,479,303,000.00 (three billion four hundred seventy-nine million three hundred three thousand rupiah). This evaluation encouraged the KPPU to take further steps by initiating an investigation into the running of the tender process, based on alleged violations of Article 22 of Law Number 5 of 1999 concerning Anti-Monopoly and Unfair Business Competition. The KPPU investigation was carried out with the aim of finding evidence that could support these allegations, as well as identifying possible monopolistic practices or unfair business competition that violate existing regulations. This step is part of the KPPU's efforts to maintain transparency, fairness and integrity in the tender process in the public sector, as well as to ensure that the state's interests are protected and properly safeguarded in every process of procuring goods and services.

In Indonesia, the prohibition against collusion in the tender process is strictly regulated in Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition. Juridically, the concept of business conspiracy or conspiracy is clearly defined in Article 1 point 8 of Law no. 5/1999. The article explains that conspiracy refers to "a form of cooperation between business actors and other business actors with the aim of controlling a particular market for the mutual benefit of the business actors involved in the conspiracy." This regulation aims to prevent practices that can harm fair competition and hinder access for bidders who have the right to compete fairly. Thus, Law no. 5/1999 is an important legal basis used to ensure that every tender process in Indonesia is carried out transparently, openly, and is not influenced by practices that violate business competition provisions. Efforts to implement and enforce the law against this prohibition are also part of the strategy to strengthen good governance and ensure the effective and efficient use of public budgets in the procurement of goods and services. This understanding is different from the definition of bid rigging in Article

22 of Law no. 5/1999, which states that "business actors are prohibited from conspiring with other parties to organize and/or determine the winner of a tender so that it can result in unfair business competition."

The main difference between the two articles is the legal topics they cover. The legal subject of Law no. 5/1999 are business actors who collaborate with other parties, according to Article 1 point 8 of the Law. On the other hand, Article 22 of the Law regulates cooperation between business actors and other parties as a whole. Article 22 Law no. 5/1999 regulates collusion related to tender activities, which is referred to as *lex specialis*. Meanwhile, Article 1 number 8 regulates conspiracies related to control of certain markets, which is referred to as *lex generalis*. This arrangement is important to ensure that every form of cooperation between business actors in the tender process must comply with existing regulations to maintain integrity, transparency and healthy competition in the market. With these differences, the law provides a clear basis for dealing with various situations that may occur in Indonesian business practices, both in terms of tenders and to prevent monopoly and unfair competition.

This case is the result of the efforts of the Business Competition Supervisory Commission (KPPU), which found evidence of conspiracy in the tender process for road construction in Banten Province. This case attracted attention because every business actor involved was a well-known state-owned construction company throughout Indonesia. The commission panel stated that this road construction project was one of the first projects implemented by the Banten Province regional government to use an open tender system. Prior to this, local construction companies usually carried out this type of work. Because of these changes, investigators became suspicious about how the project was running. However, there are strong grounds for such suspicions. With this allegation, the KPPU took investigative steps to collect the necessary evidence to assess whether there were any legal violations that occurred in the tender process. This step is important to ensure that each tender process is carried out transparently, fairly and in accordance with applicable legal provisions, in the interests of society and fairness in business competition in Indonesia.

In the decision of KPPU Case Number 07/KPPU-I/2017, which relates to alleged violations of Article 22 of Law Number 5 of 1999 (Antimonopoly Law), it was decided that there was no evidence of conspiracy in the form of bid rotation in the case of four tender packages for road construction in Banten Province. The author agrees with the decision made by this commission panel for several important reasons. First and foremost, it is difficult to find clear evidence about the practice of bid rotation in Indonesia. The process of compiling data from various cases of procurement of goods and services throughout Indonesia before and after is needed to prove the existence of bid rotation. This task is complex and takes a long time. Business competition law also requires strong and in-depth evidence to prove violations. To ensure fairness in law enforcement, this process must be carried out

carefully and not be speculative. Therefore, to ensure that tender procedures and business competition in Indonesia follow fair and transparent principles, a careful and comprehensive approach is needed to handle similar cases.

In addition, it is very difficult to find direct evidence of conspiracy because the KPPU does not have the authority to conduct free investigations and searches. The investigation process becomes less effective because of this limited authority. Apart from that, in the organizational structure of the reported parties, there is no similarity between the board of directors and the board of commissioners. Because this kind of conspiracy usually involves relationships or similarities in the leadership of the companies involved, this dissimilarity is an important factor in disproving allegations of bid rigging.

In addition, it is important to note that the assessment of bid rigging cases is not only based on mere conjecture and suspicion, but must be supported by strong and concrete evidence. In this context, the difficulty in collecting sufficient evidence led the commission panel to decide that no violation had occurred. Therefore, the author considers that this decision is appropriate and based on careful consideration.

Nevertheless, this case shows the need to increase the KPPU's capacity and authority in conducting investigations and collecting evidence. With broader authority, it is hoped that the KPPU can be more effective in monitoring and taking action against business competition violations, including the practice of bid rigging. These steps are important to ensure that the principles of healthy business competition can be realized more optimally in Indonesia.

D. Conclusion

In the discussion above, the author can draw the conclusion that economic development in Indonesia is directed at creating a climate of healthy business competition. This effort is realized through Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This law emerged as a response to the monetary crisis that hit Indonesia in 1998, with the main aim of preventing market imbalances and minimizing unfair business competition practices. This law marks a significant step in improving Indonesia's economic structure, by establishing clear rules to maintain market integrity. In business competition law, there are two main approaches used to assess whether a business agreement violates legal provisions, namely the *Per se Illegal* and *Rule of Reason* approaches. The *Per se Illegal* approach considers that certain types of business agreements are automatically considered unlawful without the need for further proof. Meanwhile, the *Rule of Reason* approach requires a more in-depth analysis of the impact and purpose of the business agreement to determine whether the practice violates the law or not.

One form of violation regulated in Law Number 5 of 1999 is tender rigging. Tender conspiracy is regulated in detail in Articles 22 to Article 24 of Law Number 5 of 1999. However, there are still many cases of tender conspiracy that occur in Indonesia,

which shows that the implementation and enforcement of law in this sector still requires more attention. Several prominent cases related to bid rigging are Decision Number 04/KPPU-L/2018, Decision Number 05/KPPU-I/2020, and Decision Number 07/KPPU-I/2017. These cases show that unfair business competition practices are still widespread, and are proof that there is a need for increased supervision and stricter and more effective law enforcement to create a truly healthy business competition climate in Indonesia. Thus, handling and preventing monopolistic practices and unfair business competition is very crucial in order to create a fair and efficient market. The government and related institutions need to continue to strengthen the capacity and effectiveness of supervision and law enforcement so that the principles of healthy business competition can be realized optimally. It is also hoped that the application of strict sanctions for violations can be a strong deterrent to avoid unfair practices in the business world.

Bibliography

- Ardiansyah, R., & Pura, M. H. (2021). Tinjauan Hukum Persaingan Usaha dalam Praktek Persekongkolan Tender (Studi Putusan Nomor: 04/KPPU-L/2018). *Wajah Hukum*, 5(1), 344–353.
- Arifin, Z., Amirullah, M., & Nugroho, T. (2024). Praktik Persaingan Usaha Tidak Sehat dalam Pengadaan Barang/Jasa Pemerintah di Sektor Jasa Konstruksi. *JURNAL USM LAW REVIEW*, 7(2), 757–767.
- Djulaeka & Rahayu, D (2020). *Buku Ajar: Metode Penelitian Hukum*. Scopindo Media Pustaka.
- Efendi, J., & Rijadi, P. (2022). *Metode Penelitian Hukum Normatif dan Empiris: Edisi Kedua*. <http://eprints.ubhara.ac.id/2047/>
- Irma, F., & Gunadi, A. (2023). Tinjauan Yuridis Persaingan Usaha Tidak Sehat Terhadap Usaha Besar dengan UMKM dalam Perspektif UU No. 20 Tahun 2008 (Studi Kasus Putusan Perkara Nomor 02/KPPU-K/2020). *UNES Law Review*, 6(2), 4172–4180.
- Jihad, S. S. (2023). Persekongkolan Tender Dengan Pinjam Bendera Perusahaan Pada Proyek Lelang Pengadaan Barang/Jasa Dalam Perspektif Hukum Persaingan Usaha. *Jurnal Justitia: Jurnal Ilmu Hukum dan Humaniora*, 5(2). Hlm 210-219.
- Juwita, Y. (2012). *Larangan Persekongkolan Tender Berdasarkan Hukum Persaingan Usaha, Suatu Perbandingan Pengaturan di Indonesia dan Jepang*. Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia.
- Lisa, U. S., Azhar, M., Sembiring, K., & Maharani, S. (2024). Analisis Kinerja Tender dengan Sistem Penilaian Kualifikasi “Nilai Pengalaman Tertinggi” pada Perusahaan Konstruksi. *Jurnal Ilmiah Universitas Batanghari Jambi*, 24(1), 497–502.
- Maulidya, A. P., Santoso, B., & Budiharto, B. (2019). Analisis Yuridis Terhadap Praktik Dugaan Persekongkolan Tender Pembangunan Jalan (Kasus Putusan Perkara Nomor 07/KPPU-I/2017). *Diponegoro Law Journal*, 8(4), 2475–2491.
- Natanael, A. R., Angelina, R. M., Dewi, F. P., Aryasa, P. N. D., & Cahya, E. A. (n.d.). TANTANGAN PEMBUKTIAN BID ROTATION DALAM PERSEKONGKOLAN TENDER DI INDONESIA (STUDI KOMPARASI HUKUM NEGARA INDONESIA DAN JEPANG). Retrieved June 24, 2024, from https://www.researchgate.net/profile/Alroy-Nathanael/publication/381282693_TANTANGAN_PEMBUKTIAN_BID_ROTATION_DALAM_PERSEKONGKOLAN_TENDER_DI_INDONESIA_STUDI_KOMPARASI_HUKUM_NEGARA_INDONESIA_DAN_JEPANG/links/6665584ede777205a31c33a5/TANTANGAN-PEMBUKTIAN-BID-ROTATION-DALAM-PERSEKONGKOLAN-TENDER-DI-INDONESIA-STUDI-KOMPARASI-HUKUM-NEGARA-INDONESIA-DAN-JEPANG.pdf

- Putusan Nomor: 04/KPPU-L/2018 Tentang Dugaan Pelanggaran Pasal 22 Undang-Undang Nomor 5 Tahun 1999 Pada Lelang Preservasi Rekonstruksi Jalan Dan Pemeliharaan Rutin Jembatan Palangka Raya-Bagugus-Bukit Batu, Kalimantan Tengah, Satker Pelaksanaan Jalan Nasional Wilayah III, Tahun Anggaran 2017. (Komisi Pengawas Persaingan Usaha Republik Indonesia April 8, 2019). https://www.kppu.go.id/docs/Putusan/2018/Putusan_04-KPPU-L_2018_Up29042019.pdf
- Prabawa, A. D., & Hadi, H. (2017). Analisis Kedudukan Hukum Panitia Tender dalam Kasus Persekongkolan Tender di Indonesia Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat. *Jurnal Privat Law*, 6(2), Hlm 168-172.
- Prabawani, R. D., & Kholil, M. (2017). Analisis Yuridis Penegakan Hukum Persekongkolan Tender Menurut undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat. *Jurnal Privat Law*, 5(2). Hlm 77-83.
- Rachmadi Usman, S. H. (2022). Hukum persaingan usaha di Indonesia. Sinar Grafika. https://books.google.com/books?hl=id&lr=&id=3uxXEAAAQBAJ&oi=fnd&pg=PA1&dq=UU+No.+5+Tahun+1999+hadir+dan+dibentuk+dengan+tujuan+untuk+menciptakan+iklim+usaha+yang+kondusif+dengan+mengatur+persaingan+usaha+yang+sehat.&ots=KFPyB2zw8k&sig=0Pt9_Mlmcmh4zPqS2-F17NTteIM
- Rezky, Y., & Gultom, E. (2022). "Unfair Business Competition Practices In Tenders For Government Procurement". *Syiah Kuala Law Journal*, 6(2). Hlm 185-199.
- Silalahi, N. A. (2022). Pembentukan Perangkat Kepatuhan Persaingan Usaha sebagai Strategi untuk Meningkatkan Kepatuhan Persaingan Usaha. *Jurnal Persaingan Usaha*, 2(1), 30–42. <https://doi.org/10.55869/kppu.v3i-.50>
- Sirait, R. A. M. (2020), Larangan Tindakan Persekongkolan Dalam Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat. *Tanjungpura Law Journal*, 4(2). Hlm 178-190.
- Unggul, A. R. P., Ajati, D. T., Saputra, R. W., & FITRIONO, R. A. (2022). Pancasila Sebagai Dasar Negara. *Jurnal Ekonomi, Sosial & Humaniora*, 4(04), 25–31.
- Yasin, R. (n.d.). Tender Arisan—Riau Pos. *Tender Arisan - Riau Pos*. Retrieved June 24, 2024, from <https://riaupos.jawapos.com/opini/2253676774/tender-arisan>