

Vertical Collusion And Re-Running Tender: A Study Of The Decision Of The Indonesian Business Competition Supervisory Commission (KPPU) NO: 17/KPPU-L/2022

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Abstract

This study was conducted to analyze the Business Competition Supervisory Commission's consideration of re-tendering as a vertical conspiracy, as well as to examine arrangements for the application of re-tendering that provide legal certainty for project owners and tender participants. This research uses qualitative normative methods involving steps such as statutory studies, case studies, and conceptual approaches. This research uses a statutory approach to examine related regulations, a case approach to analyze decisions related to tender conspiracy, and a conceptual approach to understand relevant legal ideas and concepts. The results showed that the Business Competition Supervisory Commission (KPPU) concluded that there was a tender conspiracy in the process of canceling and re-running the tender by PT Jakarta Propertindo (Perseroda). Where PT Jakarta Propertindo (Perseroda) is a company officially assigned by the Provincial Government of DKI Jakarta to plan, build, manage, and maintain the Jakarta Arts Center Taman Ismail Marzuki. The Commission Panel found that the Reported Party I, which canceled the tender without a valid reason and could not be accounted for, deliberately did so to facilitate the Reported Party II and the Reported Party III to win the tender. Changes in the assessment procedures, especially in the experience aspect of the technical assessment, proved the intent of the Procurement Team to increase the technical scores of the Reported Party II and the Reported Party III. Thus, it confirms the role of KPPU in prohibiting vertical conspiracy and re-tendering in the practice of goods and services procurement, which provides legal certainty for project owners and tender participants.

Keywords : Vertical Conspiracy, Retender, Kppu Verdict.

INTRODUCTION

Good governance and *clean government* are all aspects related to control and supervision of the power possessed by the Government in carrying out its functions through formal and informal institutions. To implement the principles of *good governance and clean government*, the Government must implement the principles of accountability and efficient resource management, realize them with good and impartial actions and regulations (independent), and ensure economic and social interactions between *stakeholders* in a fair, transparent, professional and accountable manner.

In this Law, an institution was also established that specifically oversees business competition conditions in Indonesia, namely the Business Competition Supervision Commission (KPPU) with all its duties and authorities that have been regulated in Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition.

Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition in Indonesia is in line with international standards represented by the provisions of the United States Sherman Antitrust Act and similar laws in other countries. The law expressly prohibits agreements that could lead to monopolistic practices or unfair business competition, regulates consumer pricing, exclusive agreements, and licenses, and prohibits mergers that could create market dominance or unfair competition. In addition, the law also

prohibits actions that harm consumers or others by exploiting market dominance, as well as deterring competitors through discriminatory actions in prices or terms of trade (Hansen, 2002).

Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, especially in its first point, regulates agreements that can trigger prohibited activities, including conspiracies that often have different interpretations. Conspiracy, or "conspiracy", is more associated with illicit agreements between businesses than abuse or oligopoly. Before the law was enacted, there was often a lack of transparency in the bidding process for large projects, where the winner of the tender was predetermined, although tenders were still conducted with several participants. This often makes business actors feel unfair. The presence of a conspiracy between the tender and the contractor is the main cause of this injustice. The act of conspiracy in competition law is considered an agreement, which can occur explicitly or implicitly. Evidence to assert the existence of an implicit agreement is often difficult to find, and additional evidence is needed to prove it substantially (Nugroho, 2014).

From the publication, it is stated that since the effective of Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, until 2023. From the beginning of 2000 to 2023, the Business Competition Supervisory Commission has decided about 80% of tender conspiracy cases. So it is said that the tender conspiracy case became "Prima donna" at the Business Competition Supervisory Commission. In practice, it is undeniable that there are many violations related to cases of conspiracy to win tender projects involving both State-Owned Enterprises and private companies. With so many tender conspiracy cases handled, the public considers the Business Competition Supervisory Commission as a tender settlement institution. This is indeed under the cycle of economic activity in Indonesia, naturally, tender conspiracy cases arise in Indonesia. As is known, the practice of conspiracy has been widespread in the business world, especially business actors who conduct business transactions with other business actors through conspiracy in tender activities.

The occurrence of conspiracies will eliminate competition between business actors, in a market economy system relying on the competition process, making producers must act efficiently and innovatively. But in practice, most business actors or producers avoid competition itself. Producers make market control by collaborating with business actors (Rokan, 2011).

Tender conspiracy is a practice in which bidders attempt to win contracts through collusion, without regard to market structure or respect for the principle of fair competition. This often involves tacit agreements between bidders and parties related to the procurement of goods and services, including government agencies. This practice is considered detrimental to honest business actors because it hinders their participation in the market and can increase prices unreasonably. Although cases of tender conspiracy are increasing, law enforcement as stipulated in Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition is essential to ensure a fair and transparent tender process. For example, on July 17, 2023, the Business Competition Supervisory Commission announced a decision on Case Number 17/KPPU-L/2022 which determined that Reported Persons I, II, and III had violated the law. They were punished by paying fines and given certain orders to avoid similar practices in the future.

Three studies were conducted by M Deni Hegar from Sriwijaya University Palembang, as well as I Gusti Agung Ayu Istri Ngurah Intan Savitri D and I Made Sarjana from Udayana University, and M Afif Hasbullah from Darul Ulum Lamongan Islamic University, discussed the problem of tender conspiracy in the procurement of goods and services, especially related to the implementation of tenders for road construction work packages at the Satker of the Public Works and Spatial Planning Office of West Nusa Tenggara Province. Each study highlights the need for law enforcement against monopolistic practices and unfair business competition and emphasizes the importance of implementing laws prohibiting collusion in tender proceedings.

The findings of these studies point to collusions in the tender process that do not reflect fair competition and encourage the need for enforcement action to ensure transparency and professionalism in the tender process and to ensure fairness for all bidders.

In connection with the issues stated above, the author in this case will analyze the Business Competition Supervisory Commission Decision Number: 17/KPPU-L/2022. The analysis of the decision will be reviewed based on the provisions of the relevant Law therein. This study was conducted to analyze the Business Competition Supervisory Commission's consideration of re-tendering as a vertical conspiracy, as well as to examine arrangements for the application of re-tendering that provide legal certainty for project owners and tender participants. The benefits of this research include theoretical contributions in the development of legal principles, theories, and rules in business competition, as well as providing practical information to the public and business actors about the tender process under applicable laws and regulations, as well as input for related parties to prevent collusion in the process of winning tenders and for law enforcement officials in enforcing prohibitions on monopolistic practices and business competition that are not healthy.

RESEARCH METHODS

This research uses qualitative normative methods involving steps such as statutory studies, case studies, and conceptual approaches. Research methods provide a design framework that includes procedures, data sources, and steps for data collection and analysis. In this approach, law is understood as rules or norms that govern human behavior, both written in laws and regulations and those that develop in society. This research uses a statutory approach to examine related regulations, a case approach to analyze decisions related to tender conspiracy, and a conceptual approach to understand relevant legal ideas and concepts.

In collecting legal materials, this research relies on statutory studies and literature studies, focusing on primary legal materials such as laws, laws and regulations, and KPPU decisions, as well as secondary legal materials in the form of relevant legal literature and writings. Research analysis uses qualitative methods that allow a more comprehensive understanding of the research topic. The stages of analysis include data orientation, reduction, and selection to describe relevant and significant information from the data that has been collected, as well as arrange it logically and systematically to draw appropriate conclusions and provide appropriate suggestions.

RESULT AND DISCUSSION

Consideration of the Business Competition Supervisory Commission states that re-tendering includes tender conspiracy

The provisions of Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Business Competition as amended in Constitutional Court Decision Number 85/PUU-XIV/2016, state:

"Business actors are prohibited from conspiring with other business actors and/or parties related to other business actors to regulate and/or determine the winner of the tender so that it can result in unfair business competition."

To prove whether or not there was a violation of Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, it must consider the following elements:

Elements of Business Actors

Business actors based on the provisions of Article 1 point 5 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition are any individuals or business entities, whether legal entities or non-legal entities established and domiciled or carrying out activities within the jurisdiction of the Republic of Indonesia, either alone or jointly through agreements, organizing business activities in the economic sector.

Business actors referred to in Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition are business actors who conspire with other business actors and/or parties related to other business actors to regulate and or determine the winner of the tender resulting in unfair business competition.

PT Jakarta Propertindo (Perseroda) as Reported I is a business actor who has been legally assigned by the DKI Jakarta Provincial Government to plan, build, manage, and maintain the Jakarta Arts Center Taman Ismail Marzuki. In practice, I formed and/or assigned the technical procurement implementation to the Procurement Team so that *mutatis mutandis* became an integral part of the explanation of the fulfillment of this element (Rokan, 2011).

The Procurement Team carries out the procurement process based on the assignment of Reported I so that their actions and/or actions are directly or indirectly carried out for and on behalf of and are the responsibility of Reported I. Thus, the elements of business actors have been fulfilled.

Elements of Conspiring

Article 1 point 8 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, what is meant by conspiracy or business conspiracy is a form of cooperation carried out by business actors with other business actors to control the relevant market for the benefit of conspiring business actors.

The collusion in question can be in the form of cooperation between two or more parties, overtly or secretly carrying out document adjustment actions with other participants, comparing tender documents before submission, creating pseudo-competition, approving and/or facilitating the occurrence of conspiracies, not refusing to take an action even though knowing or should know that the action is done to regulate to win the tender participant Certain are providing exclusive opportunities by tender organizers or related parties directly or indirectly to business actors who unlawfully participate in tenders.

PT Jakarta Propertindo (Perseroda) as Reported I approved and or facilitated a conspiracy with PT Pembangunan Perumahan (Persero) as Reported II, Tbk and PT Jaya Kontruksi Manggala Pratama, Tbk as Reported III to win the tender employing Reported I canceling the first tender and re-tendering to win Reported II and Reported III. The cancellation of the first tender was carried out by the Director of Human Resources and General Affairs of PT Jakarta Propertindo after the results of administrative, technical and price evaluations were released, in which the first tender ranked first was PT Wijaya Karya Bangunan Gedung (Persero), Tbk, the second rank was PT Adhi Karya (Persero), Tbk, and the third rank was Terlapot II and Reported III (Rokan, 2011).

The cancellation announcement made by the Procurement Team of Reported I only informed that the Director of Human Resources and General Affairs did not agree to the tender announcement stage and the tender was declared void without including the reason for the cancellation of the tender. For this disapproval, a re-tender was carried out which made the winning position of the tender change, namely Reported II and Reported III became the winner of the tender while PT Wijaya Karya Bangunan Gedung (Persero), Tbk became the second rank.

The reason for the cancellation stated by M. Taufiqurrachman as Director of Human Resources and General Affairs of PT Jakarta Propertindo (Perseroda) is an indication of unreasonable price slamming practices; and the existence of Procurement Team individuals who

are closed in carrying out their duties by not reporting the implementation of their duties periodically to Reported I as a user (User of Goods) and tends to one of the auction participants, therefore then the Board of Directors held a meeting and decided to cancel the auction. In this case, Construction Management (MK) is considered to have failed to translate the needs and concepts of Reported I at the canceled auction. Where the RfP of the void auction prepared by MK Consultant (PT Yodya Karya) is not under the needs and concepts of Reported I.

The reason for the cancellation of the tender as mentioned above can be considered as a justification for Reported I to justify the cancellation of the tender to follow up on indications of unfair business competition. However, the Business Competition Supervisory Commission Panel considers it necessary to consider the provisions and/or rules related to tender cancellation applicable in the procurement of goods and/or services as strengthened by the opinion of the Procurement Expert, namely Ir. Riad Horem, Dipl., H.E as the Goods and/or Services Procurement Expert presented by Reported II in his statement said that the Budget User (PA) or the Budget User Authority (KPA) can make the auction determination letter not continue when there is justification (basis for cancellation).

Investigators from the Government Procurement Policy Institute (LKPP) are Setya Budi Arijanta, S.H., KN. as an Expert in the Procurement of Goods and/or Services in his statement said, (Arijanta, 2022):

- a. Cancellation of tenders must be made on valid grounds;
- b. The reason for the cancellation of the tender must be under the rules and be acceptable, for example, KKN occurred, the upset was found, procedural violations were found, or *post-bidding actions were found*;
- c. When the grounds for cancellation correspond to the provisions and regulations of the law and that is permitted.

Based on the opinion of the Goods and/or Services Procurement Expert as described above, tender cancellation can be done as long as there is valid justification under applicable laws and regulations.

However, the justification of Reported I if there is a strong indication of a conspiracy between the Procurement Team to win PT Wijaya Karya Bangunan Gedung (Persero), Tbk is not sufficiently proven considering that Reported I never submitted additional evidence either written or unwritten during the trial process and Reported I did not conduct intensive evidence in the examination of M. Taufiqurrachman as Director of Human Resources and General Affairs of Reported I and Consultant Construction Management (MK), namely PT Yodya Karya both to Tri Wahyuedi, S.Sn, and Antariksa Artidi respectively as Head of the Settlement and Regional Development Division for the period before February 2022 and the period after February 2022 and Yofan Saman Agusta and Wolter N. Piri as MK consultant staff as parties directly related to the conspiracy in question. Even in the minutes of the Biweekly Project Progress Update agenda meeting on June 17, 2023, there was no discussion about replacing the Procurement Team and/or MK Consultants due to alleged conspiracy as stated by Reported I.

The justification of Reported I if there is an unreasonable price slamming practice indicated by the low-price items for the overhaul of the star theater is not sufficiently proven considering that Reported I did not conduct intensive evidence in the examination of witnesses against Andy Faisal as Marketing Manager of Region 2 of PT Wijaya Karya Bangunan Bangunan, Tbk as the party who indicated the price slam.

The justification of Reported I if there are individuals of the Procurement Team who are closed in carrying out their duties which is shown by the absence of periodic reports from the Procurement Team to the Director of Human Resources and General Affairs is not sufficiently proven considering that Reported I did not conduct intensive evidence by not presenting the Procurement Team under the facts of the trial has been submitted as a witness of the Commission

Panel as a party directly related to the indication. Based on the examination of the Evidence Evidence also stated that the Procurement Team of Goods/Services, MK Consultant of PT Yodya Karya (Persero), and QS Consultant of PT Wolferstan Trower Indonesia proved that they had communicated and/or coordinated several times by submitting periodic reports to the Director of Human Resources and General Affairs during the tender process, this denied the allegations of Reported I about the existence of closed Procurement Team personnel during the tender process.

A Construction Management Expert from Parahyangan Catholic University Bandung, Dr. Ir. Anton Soekiman, M.T., M. Sc., stated as follows (Soekiman, 2022):

- a. Cancellation is done only if there is a very frontal change once, changing everything, the work changes frontally.
- b. Cancellation must have a technical justification that can be accounted for to prove that this must indeed be a frontal overhaul, both capabilities, participants, and so on.
- c. Cancellation should not be done suddenly if there is no justifiable reason, if there is no significant change then it is unnatural.
- d. Cancellation can be made if the change is significant to the value of money.
- e. Cancellation can be made if it can be proven that there was collusion.

Thus, the Commission Panel believes that the action of Reported I who canceled the tender without being based on valid and justifiable justification for the cancellation of the tender was deliberately carried out by Reported I as a form of action to facilitate Reported II and Reported III to become winners of the tender a quo.

Regulation of the Chairman of the Business Competition Supervisory Commission of the Republic of Indonesia Number 3 of 2023 concerning Guidelines for the Prohibition of Conspiracy in Tenders, indications of conspiracy at the time of evaluation and determination of tender or auction winners, among others, can be in the form of a committee tending to give privileges to certain bidders or auctioneers. Reported I discriminated in the form of accommodating the objections of Reported II and Reported III regarding the results of the technical evaluation and even followed up with the cancellation of the auction, but did not provide a substantial answer to the objections of PT Wijaya Karya Bangunan Bangunan, Tbk as the winner of the first phase of the tender which was carried out outside the rebuttal mechanism.

Reported II and Reported III as tender participants who in the technical evaluation results ranked first but in the technical evaluation results and bid prices ranked third, are known to have submitted Letter Number 002/Ext/VI/PP-JAKON/2021 dated June 12, 2021, regarding the Request for Detailed Data on Technical Assessment of the Work of the Taman Ismail Marzuki Art Center Revitalization Project Phase III (Tender Canceled) to the Procurement Team. The request for detailed data on technical assessment was submitted based on the simulation results of the technical evaluation conducted by Reported II and Reported III independently, which in the simulation results resulted in a value of 95.77 (Rokan, 2011).

Reported I am known to have submitted a decision on the Procurement process of PKJ TIM Phase III Revitalization Work to the Procurement Team Leader whose content was "the auction was declared void" and asked the Procurement Team to conduct a "re-tender" via email, which was then followed up by the issuance of Announcement of Auction Cancellation Number 013/PENG-PKT.18/VI/2021 to tender participants via *Procurement* email dated June 22, 2021 at 13.55 WIB (Rokan, 2011).

The cancellation made by Reported I made PT Wijaya Karya Bangunan Gedung (Persero), Tbk as the tender participant who ranked first in the technical evaluation and bid price then expressed its objections regarding the cancellation of the tender and the re-tender, where the cancellation of the tender and at the same time re-tendering was carried out by the Procurement Team before the announcement of the tender and/or after the process of clarification and price negotiation with PT Wijaya Karya Bangunan Gedung (Persero), Tbk.

The Commission Panel also considered that there was a fact of the trial in which the Director of Human Resources and General Affairs was known to have sent an email to the Constitutional Court Consultant on June 1, 2021, regarding the request for exposure to the results of the technical evaluation which was then discussed on June 3, 2021, to June 9, 2021, which in practice found differences in values in the results of the technical evaluation. The difference in values in the results of the technical evaluation was then also stated in the Discussion Report on the Announcement of the Results of the Technical Evaluation of the Procurement of the Jakarta-Taman Ismail Marzuki Phase III Art Center Revitalization Work dated June 10, 2021, the final result report of the Procurement Team dated June 11, 2021, and the Minutes of *the Biweekly Project Progress Update Agenda Meeting* dated June 17, 2021.

Comparison in the technical evaluation of the void tender and re-tender as a whole, it is known that there is an increase in value in the results of the technical evaluation of Reported II and Reported III, including 4 (four) elements, namely elements of company experience, methods of carrying out work, work implementation schedules, and specifications of the equipment used. The results of the technical evaluation of PT Wijaya Karya Bangunan Gedung (Persero), Tbk only show an increase in value in 2 (two) elements, namely elements of work implementation methods and work implementation schedules.

The increase in the experience element in Reported II and Reported III showed a significant increase from 83.33 to 96.09, whereas, in the same element PT Wijaya Karya Bangunan Gedung (Persero), Tbk experienced a significant decrease from 84.79 to 63.13. The value of Reported II and Reported III has proven to have increased in 3 (three) sub-elements, namely in interior work /fitting out of a hotel with a minimum class of 3 stars, interior work /fitting out office space min. 1000 m² (*main lobby*, workspace, and *meeting room*), and *equipment* work performance halls, auditoriums, and ballrooms (professional sound systems, audiovisual and theater lights). The value of PT Wijaya Karya Bangunan Gedung (Persero), Tbk showed a decrease in 4 (four) sub-elements, namely in *interior work / fitting out* of performance buildings, auditoriums and *ballrooms*, *interior work / fitting out* office space min. 1000 m² (*main lobby*, work room, and *meeting room*), *equipment* work of performance halls, auditoriums, and *ballrooms* (professional sound system, audiovisual, and theater lights), as well as *building equipment work or other spaces* (*furniture, fixture & equipment*). The decrease in the value of the sub-elements of PT Wijaya Karya Bangunan Gedung (Persero), Tbk in the re-tender is significant, especially in the sub-elements of *the work of performance building equipment*, auditoriums and *ballrooms* (professional sound systems, audio-visual and theater lights) which initially received a value of 100 (one hundred) in the canceled tender even only got a zero value in the re-tender.

The provision of zero value in technical evaluation is considered unusual considering that based on document evidence, PT Wijaya Karya Bangunan Gedung (Persero), Tbk has added a significant attachment to the list of experiences of the last 10 (ten) years in the document from 22 (twenty-two) experiences to 135 (one hundred thirty-five) experiences at the time of re-tendering, as also carried out by Reported II and Reported III from 31 (thirty-one) experiences to 106 (one hundred six) experiences experience at the time of re-tendering.

A zero value in a procurement assessment system for goods and/or services is usually used if the tender participant does not attach documents at all as required, especially in the results of the review conducted on the results of the technical evaluation, PT Wijaya Karya Bangunan Gedung (Persero), Tbk gets a value of 20 (twenty). Even if the addition of the experience list attachment to the re-tender does not meet the requirements, the experience list attachment can at least get a minimum value of 20 (twenty).

Based on the examination of document evidence, the Procurement Team in the re-tender is known to have different assessment procedures, where the zero value is not only given to bidders who do not attach the required documents but also to the submission of documents that are not

under the requirements. However, there are irregularities related to the assessment procedures in the re-tender considering that:

- a. The zero value on the submission of documents that are not under the requirements is only given to the elements of company experience, while the other six elements of technical assessment are still given an assessment of 50% (fifty percent) multiplied by the weight of the sub-elements.
- b. Reported II and Reported III with PT Wijaya Karya Bangunan Gedung (Persero), Tbk is known to attach the same experience.
- c. The provision of zero value for the submission of documents that are not under the requirements is only applied to re-tenders, which are known as void tenders, and are still given a value of 50% (fifty percent) multiplied by the weight of sub-elements.

Changes in assessment procedures in the technical assessment element, especially in the experience element, prove that there are deliberate actions taken by the Procurement Team to increase the technical value of Reported II and Reported III. Of the eight elements of technical assessment, the value of the experience element of the company owned by Reported II and Reported III is lower than that of PT Wijaya Karya Bangunan dan Gedung (Company), Tbk. Even the Procurement Team also deliberately changed the assessment procedure by eliminating the experience sub-element in similar locations (big cities) which was initially used as a justification for the cancellation of the tender by Reported I, considering that PT Wijaya Karya Bangunan Gedung (Persero), Tbk obtained a perfect score of 100 (one hundred) which is much higher than the value of Reported II and Reported III in the void tender.

Therefore, the Commission Panel believes that the request for exposure of the Director of Human Resources and General Affairs to the results of the technical evaluation to the MK Consultant, the request for detailed data on technical assessment from Reported II and Reported III to the Procurement Team which is then followed up by the fact of cancellation of the tender, and changes in the assessment procedures in the re-tender prove the exclusivity of Reported I in facilitating Reported II and Reported III to become winner of the tender *a quo*.

This form of exclusivity was strengthened by changes in assessment procedures which resulted in the technical evaluation scores obtained by Reported II and Reported III in the re-tender increasing significantly enough to obtain a fairly high percentage of technical evaluation values, where the evaluation values of Reported II and Reported III in the re-tender of 95.07 (ninety-five point seven) also matched and/or approached the results of the technical evaluation simulation of Reported II and Reported III in the void tender amounting to 95.77 (ninety-five point seventy-seven) which is known to be the basis for Reported II and Reported III submitted a request for detailed data on technical assessment to Reported I.

Elements of Other Business Actors

Other business actors are business actors based on the provisions of Article 1 point 5 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, namely business actors who actively participate in conspiring and/or receive or receive preferential treatment from the organizer and/or receive benefits from the conspiring act.

Other business actors in the *quo case* tender are PT Pembangunan Perumahan (Persero), Tbk as Reported II, and PT Jaya Kontruksi Manggala Pratama, Tbk as Reported III. Where in practice Reported II and Reported III made operational cooperation under the name PP-JAKON KSO to follow the Procurement of Work for the Implementation of the Jakarta Art Center Revitalization Project Taman Ismail Marzuki Phase III, so that *mutatis mutandis* became an integral part of the explanation of the fulfillment of this element.

Elements of Regulating and/or Determining the Winner of the Tender

Arranging and/or determining the winner of a tender is an act of the parties that aims to get rid of other business actors as competitors and/or to win over certain tender participants in

various ways. This is evidenced by the fact that the action of Reported I represented by the Director of Human Resources and General Affairs as the official authorized to oversee the procurement division sent an email to the MK Consultant on June 1, 2021, to request exposure to the results of the technical evaluation. Based on this request, MK Consultants finally made a presentation on June 2, 2021. The Director of Human Resources and General Affairs also sent an email from June 3, 2021, to June 9, 2021, to the MK Consultant to discuss the results of the technical evaluation that had been carried out, which in the discussion report on June 10, 2021, described the difference in value in the technical evaluation carried out by the MK Consultant on the void tender with interpretation according to the MK Consultant himself and review with interpretation according to the *user*.

The action of the Director of Human Resources and General Affairs who requested exposure and review of the results of the technical evaluation to the MK Consultant while the tender process was still in progress proved the intervention of the Board of Directors to the Procurement Team to influence the evaluation results to facilitate and/or determine Reported II and Reported III to be the winners of the tender. This is an unjustified action considering that the Board of Directors or *users* are prohibited from intervening with the Procurement Team, and can only monitor the process that is still running until the process of determining the winner.

The intervention of the Director of Human Resources and General Affairs in the technical evaluation conducted by the MK Consultant which then corresponds to the cancellation of the tender with the justification of different interpretations of the definition of interior and experience, request for detailed data on technical assessment by Reported II and Reported III, discussion and/or presentation of the results of the review to the technical evaluation which based on documentary evidence is more focused on the element of experience, adjustment of the bid documents of Reported II and Reported III through the addition of experience data which is then supported by an unbalanced assessment in technical evaluation. This proves that there was a regulatory action taken by Reported I to win Reported II and Reported III to be the winner of the tender *a quo*.

Elements can lead to unfair business competition

Unfair Business Competition based on Article 1 Number 6 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition is competition between business actors in carrying out production and/or marketing activities of goods and/or services carried out dishonestly or unlawfully or hindering business competition.

Based on the facts of the trial, it is known that there were changes in the technical assessment procedure, which in the implementation of the assessment proved to be inconsistent so that the action was deliberately carried out to provide an exclusive opportunity for Reported II and Reported III to win the tender *a quo*. Reported I am also known to have compiled weights and assessment criteria quantitatively, however, the inconsistencies of Reported I in technical evaluation prove that the weight and assessment criteria in the RfP tender *a quo* document have not been defined explicitly and/or in detail to provide room for Reported I to carry out the evaluation process subjectively and tend to benefit Reported II and Reported III.

The inconsistency of Reported I in the technical evaluation proves a violation of the principles and ethics of procurement of goods and/or services. Violations of the principles and ethics of the procurement of goods and/or services are also strengthened by the Review Results Report of PT Jakarta Propertindo (Perseroda), Review of the Procurement of Construction Services for the Construction of the Jakarta Arts Center (PKJ) Taman Ismail Marzuki Phase III Revitalization Project Number LHR-06/UT1000/IX/2021 dated September 21, 2021, carried out by the Internal Supervisory Unit of Reported I which in one of its opinions states "related to the application of Governance principles Good Company, there is a principle of transparency that has not been fully implemented, namely the absence of adequate explanations regarding the

definition of "interior" in the Terms of Reference so that there are differences in interpretation which result in changes in technical assessments that have already been announced".

Reported I as a BUMD whose majority shares are owned by the Government of the Special Capital Region of Jakarta should be more careful in carrying out the procurement of goods and/or services by taking into account the principles of procurement and *Good Corporate Governance* under applicable rules and regulations. The opinion that the lack of transparency principles in the tender *a quo* proves that the implementation of corporate governance in the procurement of goods and/or services in the environment of Reported I has not run well, which can have an impact on the potential to harm state finances considering that the source of funds in the tender *a quo* is financed from the budget of the Special Capital Region Government of Jakarta through regional capital participation.

Re-Tender Implementation Arrangements that Provide Legal Certainty for Project Owners and Bidders

In the Procurement of Goods and Services, things that must and need to be considered in the preparation of technical documents include the completeness of documents and conditions that must be met by tender participants in preparing and submitting bids and for the Committee to prepare procedures and assessment weights that will be used to assess the Participants. In addition, drawing documents and specifications are also a reference for bidders to submit their bid documents, because from the drawings and specifications participants can know the complexity of the work.

Implementation of a project, the Committee must make detailed and complete planning to avoid changes, but in the implementation in the field, there are often unexpected things so that changes must be made (design revisions) or changes can also occur due to requests from the *owner* (job owner) or specific rules that require changes, but these changes require technical justification that can be accounted for.

In the tender process, drawings, specifications, and guidelines must be complete because they are tender requirements, so that tenders can be carried out *fairly*, efficiently, and effectively. Changes to technical documents can be made before the tender process if there is a very significant design change. However, if the tender process is already running, and there are changes caused by unexpected things, then the changes are enough with the CCO (*Contract Change Order*) or Addendum.

If in the tender process, there is a design change that is not specific, then the change is simply done with the CCO, for example in a project there is a change then the change can be made with the CCO, unless changes occur in all work it must be changed as a whole. For example, in 2005 an underwater tunnel infrastructure will be made as a link between Sumatra and Java, but later converted into a bridge. The change changed all skills and specifications. If the work does not change significantly, then the change is enough with an Addendum or CCO.

There are no specific rules regarding the limits of changes that can be made with the CCO, but usually, the CCO is carried out on changes plus 10% (ten percent) of the project value, which is considered minor work that can be done by the CCO, so there is no need to re-tender or do it from scratch, just with the CCO for both additional and less work.

If the tender is canceled, there must be a technical justification that can be accounted for to prove that a significant change has occurred. Justification for tender cancellation can be obtained from experts both internal and external who accompany the Tender Committee.

If the tender process has been carried out and there is no justifiable reason, the tender should not be canceled and re-tendered, because it violates the provisions of procurement. After all, the procurement of goods and services must be carried out fairly, efficiently, and effectively. So if it is suddenly canceled, whether there is still something lacking in the tender document. Usually, if there are no significant changes, the cancellation of the tender is not reasonable.

Provisions for the procurement of goods and services in general, if the procurement of goods and services that partially or fully use funds from the APBN / APBD must be subject to Presidential Regulation No. 12 of 2021 if the procurement of goods and services whose funds come from SOEs, the procurement is regulated by the Decree of the BUMN Board of Directors guided by the Regulation of the Minister of SOEs and if the procurement of BUMD goods and services, the procurement rules are regulated by the Regional Head, Furthermore, Regional Heads may delegate to the Directors of their respective BUMDs to make more technical procurement rules. All procurement of goods and services for construction work, whether the APBN/APBD or BUMN/BUMD budget, must refer to the Construction Services Law (must not conflict).

The government in this case LKPP has made tender document standards both for the type of work (construction, consultants, goods, and other services), the assessment stage (pre-qualification / post-qualification), the assessment system (value system or knockout), and others. In principle, in drafting tender documents it must be *fair*, and must not make discriminatory requirements (requirements that lead to certain tender participants. This is under the Theory of Justice put forward by Aristotle's view divided into two kinds of justice, namely *distributive* justice and *commutative* justice. *Distributive* justice is justice that gives each person a portion according to his achievements. *Commutative* justice is to give equal value to each person without discriminating against his achievements.

Before the bidding deadline, the tender documents can indeed be changed. However, if it passes the deadline for submitting bids, the tender documents must not be changed. If there is a change in tender documents after the bid submission period expires, it is *post-bidding*. Changes to tender documents are possible, because:

1. There is a proposal from the tender participant at the time of *Aanwijzing*, which will then be stated in BA *Aanwijzing* and an addendum to the tender document will be carried out.
2. There is a user's decision to change the tender document because there are found shortcomings/errors. If the change is made after *Aanwijzing*, then *Aanwijzing must be redone*.

All requirements stipulated in the tender document must be quantitative so that whoever assesses the result will be the same.

According to Ahli Setya Budi Arijanta, S.H., KN., tender construction work should not be carried out with a value system, except for *Design and Build* construction work (integrated), and EPC (*Engineering, Procurement and Construction*) work (integrated more broadly than DB). For tenders for conventional construction work (for which there are already drawings and *designs*) must be done by knockout (Arijanta, 2022).

For tenders that use a value system, the assessment of variables must be quantitative, complete (detail), and transparent. The committee may not add/change/subtract criteria when conducting evaluations. Evaluation must be carried out according to what is stipulated in the tender document. In tenders that use a value system, each bidder can already measure his or her capabilities. In the *Design and Build job tender*, the *design proposal item* must be assessed. If the proposal is not assessed, then it is very fatal.

If it turns out that the Committee is unable to evaluate the participant's offer (due to the increase in the scope of work), then to avoid the existence/occurrence of *post-bidding*, the tender should be canceled. Similarly, if irregularities or errors are found in the tender documents, the tender must be canceled first, after that improvements are made to the tender documents, then participants are invited back and re-tendered.

Cancellation can also be done if there are shortcomings in tender documents that result in *output*. The Committee / User must add criteria so that the tender output can be achieved. Justification for whether or not the *output is* achieved in the tender process is carried out by the

Technical Consultant (KT). Cancellation can be done as soon as the indication of cancellation is known, without having to prove it.

The clause regarding tender cancellation is usually stated in the tender document. However, tender cancellation must be accompanied by valid reasons and under the rules, such as indications of Corruption, Collusion, and Nepotism (KKN), indications of *post-bidding* (there are errors in tender documents or there are violations of tender procedures), or indications of conspiracy. Tender cancellation must be communicated to all bidders accompanied by the reason for cancellation. The follow-up of the canceled tender is to re-tender (the tender process is carried out from the beginning).

The committee may include a clause stating that "if this auction is canceled, the bidder agrees not to make any claim in any form to the tender organizer" in the tender document, as long as the reason for cancellation is under the laws and regulations. However, the tender document must also stipulate that the bidder has the right to accept or reject the reason for the cancellation of the tender. If the bidder is not allowed to accept or reject the reason for the cancellation of the tender, then the Committee has behaved arbitrarily and violated *Good Corporate Governance* (GCG). This is under the Theory of Legal Positivism according to Hans Kelsen which states that everyone must conform to what is determined by *Grundnorm* in the sense that everyone must obey the applicable laws and regulations.

CONCLUSION

The Business Competition Supervisory Commission concluded that the cancellation and re-implementation of the tender by PT Jakarta Propertindo (Perseroda) was a form of tender conspiracy, with Reported I facilitating Reported II and Reported III as the winning bidders. The author suggests that business actors can compete fairly, increase their ability and creativity, and contain tender conspiracy as an element that must be fulfilled under Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, with certain specifications to facilitate the identification of re-tenders as tender conspiracies.

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