

Article history: Submitted 15 January 2025; Accepted 22 October 2025; Available online 24 October 2025.

How to cite: Galuh Puspaningrum, I Wayan Yasa, Linda Cristina Putri, 'A Legal Perspective Toward Unlawful Acts in Tender Collusion in Indonesia' (2025) 8 Media Iuris.

A Legal Perspective Toward Unlawful Acts in Tender Collusion in Indonesia

Galuh Puspaningrum¹, I Wayan Yasa², Linda Cristina Putri³

¹ Faculty of Law, Universitas Jember, Indonesia. E-mail: galuh.fh@unej.ac.id

² Faculty of Law, Universitas Jember, Indonesia. E-mail: wayan.fh@unej.ac.id

³ Faculty of Law, Universitas Jember, Indonesia. E-mail: lindacristina519@gmail.com

Keywords:

A Legal
Perspective;
Unlawful Acts;
Tender Collusion
in Indonesia.

Abstract

The research aims to compare and examine a case of tender conspiracy seeking similarities with or seen from the perspective of civil unlawful acts. Every business actor is prohibited from carrying out an activity that results in losses for other business actors and conducting fraudulent competition. The legal issues addressed in this research include reviewing one of the prohibited activities, namely the conspiracy of tenders stipulated in Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Anti-Monopoly Law), from the elements of unlawful acts based on Article 1365 of the Civil Code (Civil Code). The legal issues in this study are, first, does the practice of bid rigging contain elements of unlawful acts, and what is the legal perspective on it, and second, what are the legal consequences for business actors proven to have engaged in bid rigging. This paper uses normative legal research, supported by primary and secondary legal materials and legal approaches are relevant to the legal issues under study, such as the approach to legislation, conceptual approach and comparative approach. The findings and discussion showed that bid rigging actions can be classified as unlawful acts, based on the following elements. First, the act of collusion with the intention to manipulate and ensure who will win the tender. Second, the act qualifies as unlawful, consisting of the elements of collusion, manipulation, and ensuring a specific business actor wins the tender, along with the element of unfair competition. Third, the element of fault is fulfilled on the part of the reported parties, in this case, the tender participants. Fourth, the practice negatively affects other business actors, both materially and immaterially, particularly in their opportunity to win the tender. Fifth, there is a proven causal relationship and impact of the bid rigging committed by the reported parties, resulting in harm to other business actors. In conclusion, bid rigging practices can be classified as unlawful acts as long as the elements of such acts are fulfilled.

Copyright © 2025 Galuh Puspaningrum, I Wayan Yasa, Linda Cristina Putri.
Published in Media Iuris. Published by Universitas Airlangga, Magister Ilmu Hukum.



Introduction

Economic advancement is inseparable from sustainable technological development. Business actors, as one of the economic elements, must uphold the principle of economic democracy in their operations, by maintaining a balance between public interest and their own business interests.¹ The infrastructure and facilities provided by the government, such as road construction and public transportation, are part of national economic

¹ Mashur Malaka, 'Praktek Monopoli Dan Persaingan Usaha' (2014) 7 Jurnal Al-Adl.

development programs. However, when the funding of such infrastructure exceeds the government's financial capacity, alternative solutions are needed, such as innovative collaborations between the government, private sector, and society.

A Public-Private Partnership (PPP) scheme reflects an open opportunity for the private sector to participate alongside the government.² In seeking private sector partners, the government conducts a selection process in accordance with legal provisions such as Presidential Regulations No. 54 of 2010 and No. 54 of 2020 concerning Government Procurement of Goods/Services. The tender process serves as a selection mechanism where the government seeks business partners under standards and regulations set by the government. The major objective in business is to achieve maximum profit, which often encourages the use of various strategies. Business competition is allowed if it does not violate regulations or harm other parties. However, the tender process is vulnerable to violations of competition law, often referred to as Antitrust Law. A tender involves submitting price offers to carry out or prepare a certain job or service.³

According to L. Budi Kagramanto (cited in Alya Anindita Maheswari), market-standard economic competition is inherently linked to business competition, as businesses freely strive to gain customers for the expected results. This highlights the need for fair competition. Different countries use different terms; for example, the United States uses the term "antitrust law", while in Indonesia the term "business competition law" is considered more appropriate in reflecting the content of the relevant legislation.⁴

Indonesia, like other countries, aims to create an anti-monopoly economic climate, although the enforcement of competition law still faces challenges. The responsible authority, the Indonesia Competition Commission (KPPU), has not fully optimized its role, leading to both practical and interpretive legal problems. The KPPU's authority spans investigation to decision-making, but legal constraints and barriers significantly

² Maduseno Dewobroto, 'Persekongkolan Tendar Pada Proyek Kerjasama Pemerintah Dan Swasta Dalam Perspektif Hukum Persaingan Usaha: Studi Kasus Putusan KPPU Perkara Nomor 15/KPPU-L/2007 & Perkara Nomor 23/KPPU-L/2007' (Universitas Indonesia 2008).

³ Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

⁴ Alya Anindita Maheswari, 'Batasan, Wewenang Dan Keterlibatan KPPU Dalam Kasus Persekongkolan Tender Menurut Hukum Persaingan Usaha' (2020) 3 Jurist-Diction.[1582].

affect the implementation and enforcement of the law. The enforcement of KPPU decisions is hampered by weaknesses in the current Anti-Monopoly Law.⁵

The positive impacts of economic growth and prosperity as well as healthy competition in a country include: (1) protecting economic actors from exploitation and abuse; (2) encouraging resource allocation based on consumer needs; (3) promoting efficient use of resources; and (4) fostering innovations in products, services, production processes, and technologies.⁶

In economic activities, people often do not know who will need their services or what resources will be utilized. Everything works without a master plan. Individuals provide services to strangers, enabling mutual survival. Institutional frameworks such as norms, morals, and the economy help maintain order by encouraging behavior based on the established rules. According to Adam Smith, the market exists in organizing these activities.⁷ This represents how a market mechanism works. Nevertheless, the market mechanism may fail due to information asymmetry and monopolies, which is why the Anti-Monopoly Law exists—to protect the legal interests of business actors and ensure fairness.⁸ In the construction sector, businesses frequently participate in government tenders by submitting price offers. Sometimes, a parent company may involve its subsidiaries in tenders, but, without strict selection, this can lead to collusions in winning the tender.

Indonesia is a country that continues to develop dynamically but along with this it faces increasingly complex challenges in the era of globalization. One of the important pillars that can spur economic growth and innovation is resource development procurement of goods and services. In this context, procurement is increasingly important as a manifestation of the role of policy strategy and management implementation. In their article Desi Nurhikmahyanti, Yunus argued that the procurement of goods and

⁵ Gloria Damaiyanti Sidauruk, 'Kepastian Hukum Putusan Komisi Pengawas Persaingan Usaha Dalam Penegakan Hukum Persaingan Usaha' (2021) 6 Jurnal Lex Renaissance.

⁶ Thomas J Anderson, *Our Competitive System and Public Policy* (South Western Publishing 1958).

⁷ Rhido Jusmadi, *Konsep Hukum Persaingan Usaha : Sejarah, Kaidah Perdagangan Bebas Dan Pengaturan Merger-Akuisisi* (Malang Setara Press 2014) <<https://pustaka.unimal.ac.id/opac/detail-opac?id=16635>>.

⁸ Tarmizi, 'Analisis Hukum Persaingan Usaha Di Indonesia Dalam Undang-Undang Nomor 5 Tahun 2019' (2022) 8 Shar-E Jurnal Kajian Ekonomi Hukum Syariah.[154].

services is not only as a transaction, but a decision that could change the fate of the nation. Related to this, power competitiveness of a country depends not only on its natural potential but also on the ability in manage procurement of goods and services. In this case, the resource development strategy procurement becomes crucial to ensure that a country can compete effectively in the global market.⁹

According to Anna Maria Tri Anggraini (cited in Ginanjar Bowo Saputra et al.), tender collusion involves covert agreements between businesses and tender organizers to unfairly win the tender, disadvantaging other bidders and causing harm to end users due to unreasonable pricing.¹⁰ Typically, colluding participants arrange outcomes so that one member wins the tender.

Competition law regulates business activities to ensure healthy competition.¹¹ Government-imposed restrictions on collusion in tenders are part of this regulatory framework. Over the past four years, there have been more than 103 tender collusion cases adjudicated. One such case is KPPU Decision No. 30/KPPU-I/2019 involving the Public Works and Spatial Planning Office in North Halmahera for projects under the 2018–2020 regional budget.¹² The reported parties were found to engage in unfair competition, including producing and marketing goods/services using fraudulent practices, erecting entry barriers, violating legal provisions, and acting unlawfully. From a civil law perspective, this falls under Article 1365 of the Indonesian Civil Code, which stipulates that any act that causes harm to another due to fault must result in compensation.¹³

⁹ Desi Nurhikmahyanti, 'Strategi Pengembangan Sumber Daya Pengadaan Barang Dan Jasa Untuk Meningkatkan Daya Saing Indonesia: Tinjauan Terhadap Kebijakan Dan Implementasi Manajemen' (2024) 3 Jurnal Pengadaan Barang dan Jasa 46.

¹⁰ Andryan Dwi Prabwa and Hernawan Hadi, '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' (2018) 6 Jurnal Privat Law 168.

¹¹ Galuh Puspaingrum, *Hukum Persaingan Usaha: Perjanjian Dan Kegiatan Yang Dilarang Dalam Hukum Persaingan Usaha Di Indonesia* (Aswaja Pressindo 2013).

¹² Decision of the KPPU Number 30/KPPU-I/2019 concerning Alleged Tender Collusion for the Construction of the Ngajam. Apulea Road Segment III (Ngajam – Apulea Village Segment) at the Work Unit (Satker) of the Public Works and Spatial Planning Agency (Dinas Pekerjaan Umum dan Penataan Ruang) of the North Halmahera Regency Regional Government, Regional Budget (APBD) Fiscal Year 2018-2020 2019 (KPPU No 30/KPPU-I/2019).

¹³ Munir Fuady, *Konsep Hukum Perdata* (Rajawali Press 2015).

This study is an original work by the authors, referencing various reputable journals. To maintain originality, previous studies were used for comparison. Previous research has mainly focused on the forms of tender collusion without exploring the element of unlawful acts. For example:

1. Intania Az Zahra's article "Legal Review of Collusion Practices in Tenders (A Study of KPPU Decision No. 24/KPPU-I/2016)", published in *Private Law Journal* Vol. 11 No. 1, Jan-June 2023, pp. 91-103), discusses the legal considerations prioritizing justice over economic aspects.
2. Siti Anisah and Trisno Raharjo's article "Limits of Unlawful Acts in Civil and Criminal Law in Tender Collusion Cases" (*Ius Quia Iustum Journal*, Vol. 25, No. 1, Jan 2018, pp. 23-48), examines shifts in understanding of unlawful acts in criminal law and civil criteria.
3. Eka Putri Fauziah Ikromi's article "Non-Subcontract Tender Collusion in the Perspective of Competition Law" (*Al Qalam Journal*, Vol. 17, No. 2, Mar-Apr 2023, pp. 1361-1378), explores unlawful acts in tender collusion from a criminal law perspective.

This research differs by aiming to identify and classify elements of unlawful acts under Article 1365 of the Civil Code in tender collusion practices. It compares regulations by examining whether elements of unlawful acts exist in collusion practices from a civil law perspective. Tender collusion harms fair participants who offer competitive pricing and quality work but are disadvantaged due to manipulated processes. For instance, Respondent V's failure to continue the tender process hindered fair competition and violated Article 1365 of the Civil Code.¹⁴

Based on the aforementioned background, this research formulates two main problems 1). Does the practice of bid rigging contain elements of unlawful acts, and what is the legal perspective on it? 2). What are the legal consequences for business actors proven to have engaged in bid rigging?

¹⁴ Decision of the KPPU Number 30/KPPU-I/2019 concerning Alleged Tender Collusion for the Construction of the Ngajam.

Research Method

This article is based on normative legal research. The object is tender collusion analyzed through elements of unlawful acts in civil law. The study uses statute, conceptual, and comparative approaches. The statute approach involves analyzing regulations relevant to the legal issue; the conceptual approach reviews applicable legal theories; and the comparative approach examines tender collusion regulation in the U.S. and unlawful acts in the Netherlands. Primary, secondary, and non-legal materials were used, gathered through library research. Data analysis applied qualitative legal analysis, focusing on theoretical and practical aspects of tender collusion in competition law.

Case Analysis of Bid Rigging from the Perspective of Unlawful Acts

In tender processes, bid rigging may occasionally occur – a practice that is strictly prohibited due to its negative consequences, such as eliminating fair opportunities for other participants. Under the Indonesian Anti-Monopoly Law,¹⁵ a monopoly is defined as “control over production accompanied by distribution and use of goods/services conducted by a business actor or group of business actors,” where such control results in harm to public interest.

In practice, there are two forms of bid rigging: *horizontal collusion* (between tender participants) and *vertical collusion* (between a participant and the tender organizer). Another concept commonly found is the “borrowed flag” scheme, where a company name is misused for participation.¹⁶ Horizontal collusion creates an illusion of competition among tender participants and is considered unlawful. According to Article 83(2)(e) of Presidential Regulation No. 70 of 2012, collusion among service providers must meet at least two indicators to be considered a violation. Vertical collusion, on the other hand, typically involves the tender committee or project owners. Common types of vertical bid rigging include: a) facilitation of collusion, b) failure to

¹⁵ Muskibah, ‘Larangan Persekongkolan Dalam Tender Perspektif Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat’ (2013) 6 Inovatif: Jurnal Ilmu Hukum 60.

¹⁶ Muhammad Yasirni Bilhikam Ardani, ‘Penerapan Justice Collabolator Dalam Reposisi Penegakan Hukum Indonesia Pada Kasus Persekongkolan Gabungan Tender’ (2024) 12 Jurnal Privat Law 272.

meet essential tender requirements resulting in unfair competition, and c) providing exclusive opportunities to certain business actors—either directly or indirectly—to participate in the tender unlawfully.¹⁷

Fundamentally, bid rigging is a prohibited practice. However, the classification of this offense varies across jurisdictions.¹⁸ For instance, in the UNCTAD framework, bid rigging is treated as a form of prohibited agreement rather than merely a prohibited activity. This approach is aligned with the U.S. system, where both written and oral collusive agreements are strictly prohibited—regardless of whether they are legally binding. Illegal contracts are inherently unlawful and frequently form the basis for bid rigging practices. A key distinction between “prohibited agreements” and “prohibited conduct” lies in the number of actors involved. For example, if a monopoly is executed by a single business actor, it is classified as prohibited conduct. Conversely, if carried out by two or more actors, it is treated as a prohibited agreement.

The general objective of establishing anti-monopoly laws is to create a stable business competition climate and to prevent exploitative practices by business actors against consumers. Furthermore, the law ensures that the national economic system operates properly through the cooperation and compliance of business actors. The Anti-Monopoly law is focused not only on achieving results but also on fostering ethical behavior within the business system. It emphasizes protection for Indonesian consumers—not only in the form of legal safeguards but also through government policy aimed at achieving justice.¹⁹ Plato once emphasized the strong link between law and justice, arguing that the law is a product of the state, which acts as the lawmaker. Therefore, the state is considered the sole source of law.²⁰

In the United States, the application of antitrust law reveals that not everyone perceives antitrust enforcement from a positive-effect analysis. In fact, the U.S. President

¹⁷ Erwin Suryoprayogo, ‘Keabsahan Kontrak Kerja Konstruksi Yang Terbukti Dibentuk Dari Persekongkolan Tender’ (2022) 7 *Journal Lex Renaissance*. [22].

¹⁸ Dave David Tedjokusumo, ‘Praktik Persekongkolan Tender Dalam Pengadaan Paket Pembangunan Revetment Dan Pengurungan Lahan Di Pelabuhan’ (2023) 8 *Jurnal Ius Constituendum*. [348].

¹⁹ Maheswari (n 4).

²⁰ Dominikus Rato, *Filsafat Hukum Mencari: Memahami Dan Memahami Hukum* (Laksbang Pressindo 2011).

recently criticized the evolution of antitrust law and policy as a “failed experiment” that lasted for 40 years. The current Chair of the Federal Trade Commission has expressed the intention to “turn back the clock,” replacing the existing case-by-case, evidence-based approach to antitrust enforcement with an ex-ante regulatory approach based on structural presumptions and explicit prohibitions against certain conduct. Much of the support for the effect-based analysis stems from peer-reviewed economic research published during the same period. To justify this shift, the government must ignore decades of empirical economic findings and the lessons from the credibility revolution in antitrust enforcement, which is elaborated further below.²¹

Although the concepts of *unlawful acts* and *anti-monopoly law* arise from different legal domains, they can be analyzed together using the principle of *lex specialis derogat legi generali* – which gives precedence to specific laws over general ones. Nevertheless, it remains valid to examine bid rigging through the lens of unlawful acts by analyzing the relevant elements. Unfair competition inherently contains the element of unlawfulness.²² However, the definition and indicators of “unlawful acts” are not explicitly found in the Indonesian anti-monopoly legislation or its subordinate regulations. Article 22 of the Anti-Monopoly Law governs bid rigging, but it does not comprehensively elaborate on the element of unlawfulness. Therefore, this study adopts the concept of *onrechtmatige daad* (unlawful act) as regulated in Article 1365 of the Indonesian Civil Code (KUHPerduta).

The interpretation of *onrechtmatige daad* (unlawful act) in Dutch law, particularly as interpreted by the HogeRaad (Dutch Supreme Court), is broad. This is evident in the interpretation of Article 1401 of the former Dutch Civil Code (BW), which corresponds to Article 1365 of the Indonesian Civil Code (KUHPerduta). The landmark decision in the case of *Lindenbaum v. Cohen* dealt with unfair business competition. Both Lindenbaum and Cohen operated competing printing businesses. In this case, Cohen persuaded one of Lindenbaum’s employees – with various gifts – to provide copies of Lindenbaum’s offers and disclose the names of clients who had placed orders with Lindenbaum, with

²¹ Luke M Froeb, Bruce H Kobayashi and John M. Yun, ‘Organizational Form and Enforcement Innovation’ (2023) 85 Antitrust Law Journal 300.

²² Siti Anisah and Trisno Raharjo, ‘Batasan Melawan Hukum Dalam Perdata Dan Pidana Pada Kasus Persekongkolan Tender’ (2018) 25 Jurnal Hukum Ius Quia Iustum 24.

the aim of diverting those clients to Cohen's business.²³

Lindenbaum then filed a lawsuit against Cohen in the Amsterdam District Court, arguing that Cohen had committed an unlawful act (*onrechtmatigedaad*), violating Article 1401 BW. While Lindenbaum initially won the case at the district court level, the appellate court ruled in favor of Cohen, stating that Cohen had not violated any written law. However, in the cassation stage, the Hoge Raad ultimately ruled in favor of Lindenbaum, marking a pivotal moment in the development of the doctrine of unlawful acts. The Supreme Court ruled that an unlawful act was not limited to direct violations of statutory law but also included actions that: a) violate another person's legally protected rights, b) breach a legal duty imposed on the perpetrator, c) contravene public morals (*goedzeden*), or d) violate social propriety. Thus, based on the *Lindenbaum v. Cohen* decision, unlawful acts extend beyond statutory violations to include behavior that conflicts with accepted norms of decency or societal expectations.²⁴

A distinctive characteristic of bid rigging is the existence of an agreement—either written or verbal—between business actors and either the tender committee or other business actors. The broad range of behaviors involved in collusion includes activities related to production and/or distribution, trade association activities, price-setting, and manipulation or collusion in tenders (*collusive tender*), which can occur between business actors, between project owners, or between both parties conspiring together. Bid rigging practices can be implemented at every stage of the procurement process, starting from the planning and drafting of requirements by the tender committee, to coordination of tender documents between participants, and finally the announcement of the tender winner. The main goal of such collusion is to eliminate competition and block other competitors from participating fairly in the market.²⁵

Legal consequences of tender conspiracy on business actors who are found to have violated Article 22 of the -Anti-Monopoly Law will be subject to administrative

²³ Gita Anggreina Kamagi, 'Perbuatan Melawan Hukum (Onerrechtmatige Daad) Menurut Pasal 1365 Kitab Undang-Undang Hukum Perdata Dan Perkembangannya' (2018) 6 *Lex Privatum* 60.

²⁴ *ibid* 61.

²⁵ Nova Angelina Silalahi, "Pembentukan Perangkat Kepatuhan Persaingan Usaha Sebagai Strategi Untuk Meningkatkan Kepatuhan Persaingan Usaha" (2022) 2 *Jurnal Persaingan Usaha*. [34].

and criminal sanctions. However, after the enactment of the job creation law, criminal sanctions will be abolished leaving administrative sanctions in the form of payment of a fine of at least Rp. 1.000.000.000,-. The calculation of fines is regulated in Article 21 of Government Regulation Number 44 of 2021 concerning the implementation of the prohibition of monopolistic practices and unfair business competition, in Article 12, administrative actions in the form of fines as referred to in Article 6 paragraph (2) letter g are basic fines. The imposition of administrative actions in the form of fines by the Commission is carried out based on the following provisions: a. at most 50% (fifty percent) of the net profits earned by business actors in the relevant market, during the period of violation of the law; or, b. at most 10% (ten percent) of the total sales in the market concerned, during the period of violation of the law. Paragraph 2, as a guarantee of compliance with the decision of the Commission containing administrative measures in the form of fines, states the reported Party shall submit sufficient bank guarantees, at most 20% (twenty percent) of the value of the fine, at most 14 (fourteen) working days after receiving notification of the decision of the Commission.

Bid rigging causes a range of harms and impacts, including: a) Obstruction of competition – where other tender participants with potentially higher-quality goods or services are prevented from winning due to manipulated processes; b) Financial losses to the state – especially in cases involving procurement funded by public budgets; c) Immaterial loss – such as a decline in market trust, particularly in the credibility of the government and procurement officials overseeing the tender process.²⁶

To deepen this analysis, KPPU Decision No. 30/KPPU-I/2019 was used for a reference, which investigated an alleged violation of Article 22 concerning bid rigging in the construction of the Ruang Ngajam – Apulea Segment III road in the North Halmahera Public Works and Spatial Planning Office.²⁷ The procurement process was conducted by Working Group I (POKJA I) of the North Halmahera Procurement Service Unit (ULP). Due to the government's limited capacity to carry out development projects directly,

²⁶ M Afif Hasbullah, 'Persekongkolan Pengadaan Barang Dan Jasa Pemerintah Dalam Perspektif Hukum Persaingan Usaha' (2021) 9 Jurnal Education and Development 684.

²⁷ Decision of the KPPU Number 30/KPPU-I/2019 concerning Alleged Tender Collusion for the Construction of the Ngajam.

private sector participation was necessary, and tenders served as the mechanism for selecting these partners. The concept of tenders is also discussed in the Anti-Monopoly Law, where it is defined as a price offer submitted as part of the process of contracting goods or services procurement.²⁸

The implementation of procurement tenders refers to Presidential Regulations on Government Procurement.²⁹ Unfortunately, the open opportunity for businesses to engage in procurement is sometimes exploited by irresponsible actors. The procurement officials or Commitment-Making Officials (PP/PPK) must prepare to obtain goods or services effectively from catalog providers. One of the tools to assist with this is the Reference Price, which is used as a basis for price negotiation. Other important preparatory steps include: a) Using valid data sources to draft the Reference Price; b) Searching for comparable product prices outside the Electronic Catalog system (if available); c) Collecting cost or sample price data; and d) Obtaining general price information.³⁰

The LPSE (Electronic Procurement Service) of North Halmahera Regency announced the tender on its official website in May 2018. The tender evaluation process was carried out in four stages:³¹

- a. *Arithmetical Correction* – This stage involved adjusting the total value of offers to match the figures in the submitted tender documents, including corrections to the calculations listed in the bill of quantities and prices.
- b. *Administrative Evaluation* – In this case, PT Hapsari Nusantara Gemilang was disqualified due to failure to include the required offer letter and related documents. PT Cipta Aksara Perkasa was also disqualified for the same reason. Thus, only two companies advanced to the next stage.
- c. *Technical Evaluation* – Of the remaining companies, only PT Ikhlas Bangun Sarana passed the technical evaluation. PT Alfa Adiel was disqualified because the technical specifications in its offer did not match the required terms stated in the procurement documents, and the qualifications of its proposed administrative personnel were not

²⁸ Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

²⁹ Presidential Regulation (Perpres) Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 on Government Procurement of Goods/Services.

³⁰ Ade Kristianto, 'Negosiasi Harga E-Purchasing Katalog Dalam Pengadaan Barang/Jasa Pemerintah' (2022) 1 Jurnal Pengadaan Barang dan Jasa 55.

³¹ Hamkah, Hadi Purwanto and Josephus R Matitaputty, 'Evaluasi Dokumen Penawaran Menurut Jenis Kontrak' (2019) 9 Jurnal Simetrik 226.

in accordance with the required standards.

- d. Price Evaluation – At this final stage, PT Ikhlas Bangun Sarana was declared the winner with a bid amounting to IDR 76,164,194,000.

In its decision, the KPPU panel found violations not only of Article 22 of the Anti-Monopoly Law (which prohibits bid rigging) but also identified elements of unlawful acts within the process. Specifically, KPPU Decision No. 30/KPPU-I/2019 stated that Respondent V (the tender committee) had neglected to act upon indications of collusion between the other respondents. This inaction, in accordance with Presidential Regulation No. 54/2010, constituted an unlawful act. Based on the foregoing explanation, the fulfillment of the elements of an unlawful act in the practice of bid rigging will be further elaborated.

1. Existence of an Act

The fulfillment of the element “existence of an act” is evident in the KPPU Decision, which concluded that the unlawful act began with the actions or conduct of the perpetrators. In general, an act may include both active conduct (doing something) or passive conduct (failing to act). In connection with Article 22 of the Anti-Monopoly Law, the act in question corresponds to the conspiracy element and the act of arranging and determining the tender winner, as stipulated in Article 1365 of the Indonesian Civil Code (KUHPerdara). The active acts committed by the business actors in this case include conspiring, coordinating, and adjusting documents before submitting their tender proposals to the committee (via an online system). This was supported by evidence such as similarity in company ownership among the respondents, matching IP (Internet Protocol) addresses, consistent metadata across submissions, identical labor unit prices, and identical transportation unit prices.

The existence of an “act” is thus fulfilled, as the respondents jointly manipulated the process and prearranged the tender outcome. This active coordination resulted in Respondent I (PT Ikhlas Bangun Sarana) being selected as the predetermined winner. Moreover, Respondent V, the tender committee, granted exclusive access to Respondent I, even though Respondent I should have been disqualified at the administrative evaluation stage due to submitting expired documents. However, Respondent I was allowed to proceed and ultimately won the tender.

An unlawful act may consist of conduct that violates specific regulations, infringes upon the legal rights of others as guaranteed by law, contradicts the legal obligations of the perpetrators, or is contrary to morality and public interest. In the case of bid-rigging conspiracies, the elements that fulfil the definition of an unlawful act include the existence of collusion, the deliberate arrangement and designation of the tender winner, and elements of unfair competition. The collusion among the reported parties was demonstrated through cooperation in adjusting and comparing bid documents prior to submission. This is proven by the similarity in company ownership among the reported parties, which constitutes an unlawful act as it violates the provisions of the Anti-Monopoly Law as outlined in the Annex to KPPU Regulation No. 2/2010. The element of “organizing and determining the winner” meets the criteria of an unlawful act, as evidenced by the coordination between the three reported parties to create a false sense of competition and jointly manipulate bid documents before submission. The element of unlawfulness is satisfied because such actions are in breach of anti-monopoly and competition law policies, specifically the Anti-Monopoly Law and the KPPU Regulation on Guidelines for Bid-Rigging Arrangements. The element of unfair business competition also fulfils the criteria for an unlawful act, as shown by evidence gathered by the investigation team. The collusion conducted by the business actors constitutes fraudulent conduct, violates the law, and creates barriers to entry for other competitors.

2. Existence of Fault

The element of fault is a crucial requirement for holding a party accountable for an unlawful act under civil law. This is aligned with the principle of *strict liability* as distinguished in Article 1365 of the Indonesian Civil Code, which does not rely solely on criminal intent but instead requires the existence of culpability (*schuld element*). Legal scholar Rutten emphasizes that no one can be held responsible for an unlawful act without the existence of fault. He categorizes fault into two types, i.e., negligence or carelessness, and intentional misconduct. Similarly, Munir Fuady asserts that a person can be held legally accountable for an act when one of the following is present: intentional

misconduct, negligence, and absence of any justification or excuse.³²

In the bid rigging case, the actions of the respondents clearly demonstrate intentional fault. This is shown by the existence of collusion and conspiracy among the respondents, coordination to determine and prearrange the tender winner, exclusive treatment given to Respondent I by Respondent V (the tender committee), even though Respondent I should have been disqualified during the administrative evaluation. In civil law, both intentional and negligent misconducts carry the same legal consequences, i.e., the obligation to compensate for all resulting damages.

3. Existence of Loss

In civil law, losses are typically categorized into two types, i.e., material (pecuniary) loss – losses that are directly measurable in financial terms, and immaterial (non-pecuniary) loss – losses that may not have immediate financial value but impact future opportunities or reputation.³³ In this case, the element of loss is considered fulfilled. This is supported by the fact that one of the reported parties, Respondent IV (PT Alfa Adiel), was found not to be involved in the tender conspiracy. The KPPU Panel ruled that Respondent IV did not participate in the collusive acts carried out by the other four respondents. Despite this, Respondent IV suffered losses: immaterial loss, including the loss of opportunity to win the tender for the Ngajam–Apulea Road Segment III Construction Project (2018–2020), damage to the company’s reputation and honor due to being wrongly suspected of participating in bid rigging. These consequences satisfy the requirement of loss as defined in Article 1365 of the Indonesian Civil Code, since an act is only considered an unlawful act if it causes loss to another party. Thus, the presence of both immaterial loss and reputational damage indicates that the loss element is clearly fulfilled in the context of this bid rigging case.

4. Causal Relationship Between the Act and the Loss

The causal relationship is a key element in proving an unlawful act under civil law. It refers to the link between the act and the resulting loss, meaning that a party can

³² Prihati Yuniarlin, 'Penerapan Unsur-Unsur Perbuatan Melawan Hukum Terhadap Kreditur Yang Tidak Mendaftarkan Jaminan Fiducia' (2022) 19 Jurnal Media Hukum 8.

³³ Abdulkadir Muhammad, *Hukum Perdata Indonesia Cetakan Ke-V* (Citra Aditya Bakti 2014).

only be held responsible if their actions can be proven to have caused the harm suffered by another party. In this context, Respondent IV (PT Alfa Adiel) suffered immaterial loss due to being wrongfully implicated in a conspiracy that they were not a part of. To prove this element, it must be established that the loss incurred by Respondent IV was a direct result of the conspiracy carried out by Respondents I, II, III, and V. Moreover, there exists a factual cause (cause in fact), where the loss wouldn't have occurred but for the unlawful actions of the other respondents. The evidence from KPPU Decision No. 30/KPPU-I/2019 supports this. The decision confirms that the actions of Respondents I-III (business actors) and Respondent V (the tender committee) created a false competition that denied Respondent IV a fair opportunity to compete in the tender process. The conspiracy effectively barred other qualified participants from having a fair chance to win the project. Because the loss of opportunity and reputational damage suffered by Respondent IV can be directly traced to the bid-rigging conspiracy, the causal relationship is proven. Hence, this element under Article 1365 of the Civil Code is also satisfied.

Based on the analysis above, it can be concluded that bid rigging practices within the framework of business competition law fulfil all the elements of an unlawful act as stipulated in Article 1365 of the Indonesian Civil Code. This is because each element contained in Article 22 of the Anti-Monopoly Law –namely the presence of business actors, the element of conspiracy, the involvement of other business actors/third parties, the arrangement and determination of the tender winner, and the element of unfair business competition – is closely related to the elements of an unlawful act as previously described. Based on this analysis, the aggrieved party (Respondent IV) may file a claim for losses under Article 1365 of the Indonesian Civil Code.

Actions of Business Actors Proven to Have Engaged in Bid Rigging and Their Legal Consequences

Every business activity is subject to legal policies established by the state, both in laws and regulations below the law. Bid rigging conducted by business actors that violates Article 22 of the Anti-Monopoly Law results in legal consequences for the reported parties proven to have engaged in such conduct. Legal consequences

arise from legal acts.³⁴ Soeroso explains that legal consequences are the results and impacts of actions used to obtain outcomes from those found guilty and regulated by legislation.

Competition law governs six instruments: prohibition of agreements, prohibition of activities, abuse of dominant position, the KPPU, procedures for handling competition law cases, and other provisions under the Anti-Monopoly Law. Every unlawful act has legal consequences in the form of legal sanctions.³⁵ As explained, the law regulates prohibited activities, including bid rigging. This applies to the reported parties and the Procurement Working Group Unit I in Halmahera Regency. These parties were suspected by the KPPU of engaging in bid-rigging conspiracies. This incident was also triggered by government actions that may result in unfair business competition, including 1) Creating artificial barriers and capital market distortions; 2) Granting excessive privileges to certain business actors.³⁶

In the examination and review process by the KPPU commissioners, the Rule of Reason approach was used to assess the violation and serve as the basis for deciding the case. This approach allows the panel to determine whether the elements of the prohibition on bid rigging under the Anti-Monopoly Law are fulfilled based on evidence. If all elements are met, the fact-finder must also assess whether the act creates entry barriers and its impact on competition.³⁷ Article 22 clearly prohibits bid rigging between reported parties and other involved entities because it causes harm to other business actors and distorts fair competition. The phrase “resulting in unfair business competition” indicates that the KPPU investigation uses the Rule of Reason.³⁸ Hence, the use of this approach aims to determine the legal consequences imposed on the reported parties in the bid-rigging case.

³⁴ Rivo Krisna Winastri, Ery Agus Priyono and Dewi Hendrawati, ‘Tinjauan Normatif Terhadap Ganti Rugi Dalam Perkara Perbuatan Melawan Hukum Yang Menimbulkan Kerugian Immateriil (Studi Kasus Putusan Pengadilan Negeri Istimewa Jakarta No. 568/1968.G)’ (2017) 6 Diponegoro Law Journal 4.

³⁵ Munir Fuady, *Perbuatan Melawan Hukum: Pendekatan Kontemporer* (Mandar Maju 2005).

³⁶ Rizkyy Novyan Putra, ‘Urgensi Keberadaan Hukum Persaingan Usaha Dan Anti Monopoli Di Indonesia’ (2016) 1 Business Law Review 40.

³⁷ Hermansyah, *Pokok-Pokok Hukum Persaingan Usaha Di Indonesia* (Prenada Media 2008).

³⁸ Andi Fahmi Lubis and others, ‘Hukum Persaingan Usaha Antara Teks & Konteks’ (2009).

The Anti-Monopoly Law regulates legal consequences in the form of administrative sanctions, criminal sanctions, and additional criminal penalties under Articles 47 to 49. The legal consequence for parties found to have violated the Anti-Monopoly Law is an administrative sanction, as stated in the KPPU ruling. This ruling must be carried out by the reported parties found guilty.³⁹ The actions taken by the tender participants in relation to collusion in the tender for the construction of the Ruang Ngalam – Apulea Segment III Road undoubtedly have legal consequences because of the violation, as stated in the KPPU's decision.⁴⁰ The legal consequences for the reported parties include administrative sanctions regulated under Article 36 point 8 of the Anti-Monopoly Law.

Legal policy regarding punishment for business actors also changed with the enactment of the Omnibus Law (Job Creation Law). The purpose of this law is to encourage investment, accelerate economic transformation, harmonize central-local policies, facilitate business processes, simplify overlapping regulations, and eliminate sectoral egos.⁴¹

One of the notable changes introduced by the law is the amendment to Article 47, particularly paragraph (2) letter g,⁴² which removes the upper limit of fines that was previously set at IDR 25 billion. Now, the minimum fine is IDR 1 billion, and there is no longer a maximum threshold. Criminal penalties are now only applicable for violations of Article 41, which concerns the obligation of business actors to submit evidence to support investigations. Outside of administrative sanctions, if bid-rigging cases are brought to court, the criminal penalties under Article 22 have been abolished by the Job Creation Law.⁴³ Additionally, Article 49 on additional penalties has also been removed. Therefore, with the enactment of this law, the enforcement of sanctions under the Anti-Monopoly Law is now purely administrative and enforced by the KPPU. There are

³⁹ Hermansyah (n 37).

⁴⁰ Decision of the KPPU Number 30/KPPU-I/2019 concerning Alleged Tender Collusion for the Construction of the Ngajam.

⁴¹ Gustini Widjaningsih, 'Penyelesaian Sengketa Praktik Monopoli Dan Persaingan Usaha Tidak Sehat Pasca Berlakunya Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja' (2022) 5 Unizar Law Review 31.

⁴² Shidarta, 'Catatan Tentang Pengaturan Persaingan Usaha Dalam Pp No. 44 Tahun 2021' (2021) Bussines Law Binus.

⁴³ *ibid.*

several factors that may reduce the severity of administrative sanctions, including the reported parties' cooperative attitude in consistently attending hearings, the absence of prior violations, and the impact of the COVID-19 pandemic. These are outlined in Article 14 letter c and Article 15 of the KPPU Regulation regarding mitigating factors. These regulatory changes provide legal certainty regarding the jurisdiction of commercial courts in handling competition law cases. Legal certainty⁴⁴ is achieved when legislation contains legal principles and norms consistent with good regulatory practices. For instance, the Job Creation Law removes the maximum administrative sanction (IDR 25 billion) and replaces it with a minimum fine of IDR 1 billion.

Based on these reasons, the Commission Panel then imposed sanctions for violations of the Anti-Monopoly Law on the guilty business actors. The ruling ordered Respondent I and Respondent II to each pay fines according to the competition law provisions, to be deposited as non-tax state revenue within one year from the decision date. Additionally, the KPPU imposed an administrative sanction banning the respondents from participating in any government procurement tenders (APBN/APBD) for approximately one year and required proof of fine payment to be submitted to the KPPU.

The consequences of the reported parties' actions include losses to the tender committee, harm to good-faith business actors who followed procedures, creation of market entry barriers, suppression of fair competition, and state financial losses due to the involvement of government infrastructure projects. Therefore, the business actors rightfully received administrative sanctions and other legal consequences. These follow the enactment of the Job Creation Law, which eliminated core criminal penalties and additional penalties.

Conclusion

The conclusion of this study is that the actions of business actors sometimes result in harm and cause other businesses to face obstacles, particularly in the procurement of

⁴⁴ Rahmadi Tektona, 'Quo Vadis : Kepastian Hukum Aturan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat Pada Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja' (2022) 2 Jurnal Persaingan Usaha 34.

goods and services, where the organizing party imposes burdensome requirements to favor a predetermined winner (vertical collusion), leading to losses for other participants. The nature and type of bid rigging are prohibited activities as stipulated under the Anti-Monopoly Law and, from a civil law perspective, constitute unlawful acts (tort). Therefore, the author examines Decision No. 30/KPPU-I/2019 on bid rigging. Through legal analysis, it is evident that all elements of an unlawful act in this decision are fulfilled, including fault, loss, the act itself, and a causal relationship. Recommendations are that, first, the substance and content of Article 22 of the Anti-Monopoly Law should be amended to clearly include criteria for both horizontal and vertical bid rigging. Second, the Indonesia Competition Commission (KPPU) should explicitly include the elements of unlawful acts (tort) in its legal reasoning within decisions on bid-rigging cases.

Acknowledgments

-

Disclosure Statement

The authors report no potential conflicts of interest.

Funding

-

References

- Anderson TJ, *Our Competitive System and Public Policy* (South Western Publishing 1958).
- Anisah S and Raharjo T, 'Batasan Melawan Hukum Dalam Perdata Dan Pidana Pada Kasus Persekongkolan Tender' (2018) 25 Jurnal Hukum Ius Quia Iustum.
- Ardani MYB, 'Penerapan Justice Collabulator Dalam Reposisi Penegakan Hukum Indonesia Pada Kasus Persekongkolan Gabungan Tender' (2024) 12 Jurnal Privat Law.
- Decision of the KPPU Number 30/KPPU-I/2019 concerning Alleged Tender Collusion for the Construction of the Ngajam.

- Dewobroto M, 'Persekongkolan Tender Pada Proyek Kerjasama Pemerintah Dan Swasta Dalam Perspektif Hukum Persaingan Usaha: Studi Kasus Putusan KPPU Perkara Nomor 15/KPPU-L/2007 & Perkara Nomor 23/KPPU-L/2007' (Universitas Indonesia 2008).
- Froeb LM, Kobayashi BH and John M. Yun, 'Organizational Form and Enforcement Innovation' (2023) 85 Antitrust Law Journal.
- Fuady M, *Perbuatan Melawan Hukum: Pendekatan Kontemporer* (Mandar Maju 2005).
- —, *Konsep Hukum Perdata* (Rajawali Press 2015).
- Hamkah, Purwanto H and Matitaputty JR, 'Evaluasi Dokumen Penawaran Menurut Jenis Kontrak' (2019) 9 Jurnal Simetrik.
- Hasbullah MA, 'Persekongkolan Pengadaan Barang Dan Jasa Pemerintah Dalam Perspektif Hukum Persaingan Usaha' (2021) 9 Jurnal Education and Development.
- Hermansyah, *Pokok-Pokok Hukum Persaingan Usaha Di Indonesia* (Prenada Media 2008).
- Jusmadi R, *Konsep Hukum Persaingan Usaha : Sejarah, Kaidah Perdagangan Bebas Dan Pengaturan Merger-Akuisisi* (Malang Setara Press 2014). <<https://pustaka.unimal.ac.id/opac/detail-opac?id=16635>>.
- Kamagi GA, 'Perbuatan Melawan Hukum (Onerrechmatige Daad) Menurut Pasal 1365 Kitab Undang-Undang Hukum Perdata Dan Perkembangannya' (2018) 6 Lex Privatum.
- Kristianto A, 'Negosiasi Harga E-Purchasing Katalog Dalam Pengadaan Barang/Jasa Pemerintah' (2022) 1 Jurnal Pengadaan Barang dan Jasa.
- Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.
- Lubis AF and others, 'Hukum Persaingan Usaha Antara Teks & Konteks' (2009).
- Maheswari AA, 'Batasan, Wewenang Dan Keterlibatan KPPU Dalam Kasus Persekongkolan Tender Menurut Hukum Persaingan Usaha' (2020) 3 Jurist-Diction.
- Malaka M, 'Praktek Monopoli Dan Persaingan Usaha' (2014) 7 Jurnal Al-Adl.
- Muhammad A, *Hukum Perdata Indonesia Cetakan Ke-V* (Citra Aditya Bakti 2014).
- Muskibah, 'Larangan Persekongkolan Dalam Tender Perspektif Undang-Undang

Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat' (2013) 6 Inovatif: Jurnal Ilmu Hukum.

Nurhikmahyanti D, 'Strategi Pengembangan Sumber Daya Pengadaan Barang Dan Jasa Untuk Meningkatkan Daya Saing Indonesia: Tinjauan Terhadap Kebijakan Dan Implementasi Manajemen' (2024) 3 Jurnal Pengadaan Barang dan Jasa.

Prabwa AD and Hadi H, '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' (2018) 6 Jurnal Privat Law.

Presidential Regulation (Perpres) Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 on Government Procurement of Goods/Services.

Puspaingrum G, *Hukum Persaingan Usaha: Perjanjian Dan Kegiatan Yang Dilarang Dalam Hukum Persaingan Usaha Di Indonesia* (Aswaja Pressindo 2013).

Putra RN, 'Urgensi Keberadaan Hukum Persaingan Usaha Dan Anti Monopoli Di Indonesia' (2016) 1 Business Law Review.

Rato D, *Filsafat Hukum Mencari: Memahami Dan Memahami Hukum* (Laksbang Pressindo 2011).

Shidarta, 'Catatan Tentang Pengaturan Persaingan Usaha Dalam Pp No. 44 Tahun 2021' (2021) Bussines Law Binus.

Sidauruk GD, 'Kepastian Hukum Putusan Komisi Pengawas Persaingan Usaha Dalam Penegakan Hukum Persaingan Usaha' (2021) 6 Jurnal Lex Renaissance.

Silalahi NA, 'Pembentukan Perangkat Kepatuhan Persaingan Usaha Sebagai Strategi Untuk Meningkatkan Kepatuhan Persaingan Usaha' (2022) 2 Jurnal Persaingan Usaha.

Suryoprayogo E, 'Keabsahan Kontrak Kerja Konstruksi Yang Terbukti Dibentuk Dari Persekongkolan Tender' (2022) 7 Journal Lex Renaissance.

Tarmizi, 'Analisis Hukum Persaingan Usaha Di Indonesia Dalam Undang-Undang Nomor 5 Tahun 2019' (2022) 8 Shar-E Jurnal Kajian Ekonomi Hukum Syariah.

Tedjokusumo DD, 'Praktik Persekongkolan Tender Dalam Pengadaan Paket Pembangunan Revetment Dan Pengurungan Lahan Di Pelabuhan' (2023) 8 Jurnal Ius Constituendum.

Tektona R, 'Quo Vadis : Kepastian Hukum Aturan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat Pada Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja' (2022) 2 Jurnal Persaingan Usaha.

Widijaningsih G, 'Penyelesaian Sengketa Praktik Monopoli Dan Persaingan Usaha Tidak Sehat Pasca Berlakunya Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja' (2022) 5 Unizar Law Review.

Winastri RK, Priyono EA and Hendrawati D, 'Tinjauan Normatif Terhadap Ganti Rugi Dalam Perkara Perbuatan Melawan Hukum Yang Menimbulkan Kerugian Immateriil (Studi Kasus Putusan Pengadilan Negeri Istimewa Jakarta No. 568/1968.G)' (2017) 6 Diponegoro Law Journal.

Yuniarlin P, 'Penerapan Unsur-Unsur Perbuatan Melawan Hukum Terhadap Kreditur Yang Tidak Mendaftarkan Jaminan Fiducia' (2022) 19 Jurnal Media Hukum.