

**THE INDICATION OF UNFAIR BUSINESS COMPETITION PRACTICE
IN THE IMPLEMENTATION OF PUBLIC PROCUREMENT AUCTION
USING E-TENDERING**

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Abstract

Public Procurement or E-Procurement is one of the efforts to improve the quality of public services. Implementation of Public Procurement electronically at auctions is conducted through E-Tendering. Though it has been arranged with clear legal rules, there were still deviations in conducting the auctions of Public Procurement. One of the Ministry that organizes the auctions of Public Procurement through E-Tendering is the Regional Office of Ministry of Justice and Human Rights of Central Java. The researcher conducted a juridical study on the auctions of Public Procurement through E-Tendering with the research questions as follows: (1) How is the implementation of auctions of Public Procurement through E-Tendering at the Regional Office of Ministry of Justice and Human Rights of Central Java? (2) How is the indication of unfair competition practice done in the auction of Public Procurement through E-Tendering at the Regional Office of Ministry of Justice and Human Rights of Central Java? This research was Qualitative research based on empirical-juridical legal research approach. The results showed that the implementation process of the auctions of Public Procurement through E-Tendering in Procurement Services Unit (ULP) Regional Office of Ministry of Justice and Human Rights of Central Java has been in accordance with the Presidential Regulation Number 54 Years 2010 along with the changes and with the Chief of Department of Public Procurement Policies (LKPP) Regulation Number 1 Year 2015 about E-Tendering. Besides, the implementation of auctions of Public Procurement through E-Tendering on Procurement Services Unit (ULP) Regional Office of Ministry of Justice and Human Rights of Central Java has ever happened a horizontal conspiracy.

Keywords: Indication of Unfair Competition Practice, Auctions of Public Procurement, E-Tendering.

INTRODUCTION

The Organization of public procurement is done electronically or so-called E-Procurement. It is in accordance with the Presidential Regulations Number 54 of the year 2010 as a manifestation of the reformation in organizing the public procurement. The system of E-Procurement or public procurement electronically is believed as an instrument for the realization of good governance and public services as it will increase cost-efficiency, effectiveness, faster cycle time, improve the transparency of auction packages, provide better public monitoring, improve healthy competition, and increase government accountability. After the establishment of this system, the country's expenditure in terms of public procurement is predicted that it can be pressed until forty trillion per annum¹. Besides, these regulations are used to reduce the country's losses in the process of public procurement².

Public procurement electronically or E-Procurement is required by agency/government institution that use partially or wholly sources is obtained from State Budget (APBN) or Local Government Budget (APBD) in the implementation of the public procurement. E-Procurement is essentially created as a system of prevention of the occurrence of fraud in the public procurement.

However, the regulation has undergone refinement and improvement of the system of auctions on the public procurement, there are still opportunity to engage in the practice of fraud that can lead to unhealthy business competition. It is in the form of conspiracy. Conspiracy is a partnership between two or more parties which act together to violate the law³.⁴ It is contrary to the Presidential Regulations Number 54 of the year 2010 on the Public Procurement which mandates that one of the purposes of Public Procurement electronically is to increase healthy business competition.

¹ Hardiyansyah, 2011, *Kualitas Pelayanan Publik (Konsep, Dimensi, Indikator dan Implementasinya)*, Yogyakarta: Gava Media, page 12.

² <http://www.bppk.kemenkeu.go.id/publikasi/artikel/147-artikel-anggaran-dan-perbendaharaan/19919-persekongkolan-dalam-perspektif-pengadaan-barang-jasa-pemerintah> on 9th March 2018, 09.00 WIB.

³ Pedoman Pasal 22 Tentang Larangan Persekongkolan dalam Tender, (Komisi Pengawas Persaingan Usaha, 2009), page 16.

Due to the existence of conspiracy either horizontally or vertically in the implementation of auctions through E-Tendering held among agency/government institutions, there should be anticipation or prevention efforts undertaken by the Procurement Services Unit (ULP) as the government organizational units who has duty in carrying out Public Procurement. It is also done by the Regional Office of the Ministry of Justice and Human Rights of Central Java as one of the agencies/government institutions using State Budget (APBN) in financing the Public Procurement. Based on the backgrounds above, the research problems are as follows: (1) how the process of auction implementation of Public Procurement through E-Tendering on the Procurement Services Unit at the Regional Office of the Ministry of Justice and Human rights of Central Java? (2) How is the indication of unhealthy business competition practice at the auction of Public Procurement through E-Tendering on the Procurement Services Unit at the Regional Office of the Ministry of Justice and Human Rights of Central Java?

RESEARCH METHODS

The research methods used were empirical juridical legal research methods. Empirical legal research is a legal research to obtain data from primary data or directly from the community⁴. The types and source of data that used are primary and secondary data. The data sources used in this research was the primary data obtained from interviews with respondents and informants, and secondary data used was documentation and library research. Technique examination of data validity in this research use technique triangulation. Techniques of data analysis use qualitative analysis techniques with interactive models owned by Miles and Huberman.

RESULTS AND DISCUSSION

The implementation of public procurement auction through E-Tendering on the Procurement Services Unit (ULP) at the Regional Office of the Ministry of Justice and Human Rights of Central Java

In 2010, the Regional Office of the Ministry of Justice and Human Rights of Central Java has been implementing E-Procurement. It has just been run on the

⁴ Soemitro R. Hanitijo, 1985, *Metode Penelitian Hukum*, Jakarta: Ghalia Indonesia, page. 24.

stage of the Election Announcement of the Goods and Services Provider, while the whole stages of public procurement is still done manually. It can implement the public procurement electronically or E-Procurement for the whole stages in 2011.

It is due to the period of transition from the manual to electronic process of Public Procurement or E-Procurement which is still limited for the ability of human resources, technology, and infrastructure owned.

Each Ministry/Agency/Regional Work Unit/Institution are required to have a Procurement Services Unit (ULP) which can provide services/coaching in the areas of Public Procurement. Up to now, the Procurement Services Unit (ULP) at the Regional Office of Ministry of Justice and Human Rights of Central Java is still ad hoc in nature. As a result, the staff of Procurement Services Unit (ULP) is still under the other divisions of the Agency. It is because the lack of human resources and budget which makes it rather difficult to be permanent.

Public Procurement electronically or E-Procurement can be done with E-Tendering or E-Purchasing. E-Tendering is used to select the Goods and Services Provider which is being performed openly and followed by all Goods and Services Provider listed in the electronic procurement system by way of conveying one time deals in specified time. E-Purchasing is used to purchase goods/services through electronic catalog system.

The selection of Goods and Services Provider through E-Tendering is done by the Procurement Services Unit (ULP) division. For the permanent Procurement Services Unit (ULP), the staffs are divided into some divisions such as Goods Procurement, Construction Work Procurement, Consultation Service Procurement, and other Service procurement. The functional staffs of public procurement who own competencies of procurement could gather in a place with special auth related to each division and can concentrate on the process of public procurement services according the their competencies. Hence, the staffs of Procurement Services Unit (ULP) are not bothered by the events outside each auth respectively. Whereas, on the non-permanent Procurement Services Unit (ULP), the staffs have not been divided. In addition, for ad-hoc Procurement Services

Unit (ULP) staffs, they are still under the other divisions on related institutions, so that the public procurement functional staffs can focus to take care of the public procurement activities and the other activities related. Although the ad hoc Procurement Services Unit (ULP) staffs in nature are allowed to double the post, they cannot fill the position of Commitment Maker Official (PPK) (Treasurer/verifier/Payment Instruction Signatory Officer) in either one same Procurement Package or another Procurement Package. It is in accordance with the provisions of article 17 paragraph (7) Presidential Regulations Number 54 of the year 2010.

The system changes on the process of Public Procurement from manual to electronic process can be associated with the theory of law as a tool of social engineering conceived by Roscoe pounds. According to Pound, law is created and used as a tool/instrument of social engineering to encourage and create changes in the community. Therefore, law is required to modify the behaviors/attitudes of the community in order to behave in accordance with the goals set. With the existence of the Presidential Regulations Number 54 of the year 2010 along with the changes aims to change the behavior of the parties involved in the auction of the Public Procurement in order to reach the proper purposes of Public Procurement electronically.

In Article 107 of Presidential Regulations Number 54 of the year 2010 along with the changes, there are five purposes of the existence of Public Procurement electronically as the following:

- a. Increase transparency and accountability
- b. Improve market access and healthy business competition
- c. Improve the level of efficiency of the procurement process
- d. Support the process of monitoring and audit
- e. Fulfill the needs of real time access to information

These purposes are realized by the existence of SPSE applications which is connected to all ministries/agencies/local governments/agencies that do an auction of public procurement through E-Tendering. The initial step of the auction implementation process is by uploading a General Draft of Public Procurement

(RUP) through SiRUP by Budget User (PA) or Proxy of Budget User (KPA) until the contract of the auction results are also uploaded on the SPSE application based on the specified schedule. In addition, SPSE application is accessible publicly at all times.

In line with the implementation of public procurement through E-Tendering can be associated with Social Justice Theory expressed by John Rawls. He declares that there are 2 (two) principle of Justice, namely the difference principle and the principle of fair equality of opportunity. The different principle means that the social and economic differences should be set up to provide the most benefit to those who are most disadvantaged⁵. While, the principle of fair equality of opportunity means that everyone has the same rights to the most widespread basic freedom and be compatible with the other similar freedoms⁶.

If the implementation of public procurement auction is associated with the theory of Social Justice expressed John Rawls, it creates opportunities and access for the implementation of public procurement auction through E-Tendering toward all Goods and Services Provider to participate in the auction of public procurement that exists in all regions of Indonesia. It is proved by the existence of SPSE application as a means for SPSE auction organizers and Goods and Services Provider to implement the auction in accordance with the stages that have been arranged, so the Goods and Services Provider located outside the areas/regions where an agency held auctions can get information and be able to register without having to come first to the agencies concerned. It proves that the auction implementation of the public procurement through E-Tendering manifests the principle of fair equality of opportunity where any competent goods/services Goods and Services Provider can follow the auction without the any discrimination.

In addition, the implementation of public procurement auction through E-Tendering embodies the difference principle. Before the existence of Presidential

⁵ Damanhuri Fatah, *Teori Keadilan Menurut John Rawls*, Jurnal TAPIS Volume 9 No.2 Juli-Desember 2013, page. 35.

⁶ Pan Mohammad Faiz, *Teori Keadilan John Rawls*. Jurnal Konstitusi, Volume 6, Nomor 1, April 2009, page. 141 .

Regulations Number 54 of the year 2010, the implementation of public procurement auction is still done manually so that access to information on the implementation of public procurement auction is still limited, which makes the participants are only those parties who have extensive connections in some government institutions. As for providers that have no or few connections will rarely get information about the implementation of the auction. Hence, the opportunity to participate in the public procurement is minimal.

The implementation of public procurement auction through E-Tendering is surely with obstacles or constraints. The biggest obstacle being experienced is still a bit number of the Procurement Services Unit (ULP) staffs and Electronically Procurement Services (LPSE) staffs who has already been competent and had certification. In addition, ad-hoc Procurement Services Unit (ULP) staffs, they are still under the other divisions on related institutions so that almost all the staffs have double post, which makes the Procurement Services Unit (ULP) staffs cannot only focus on the public procurement. Electronically Procurement Services (LPSE) is also still temporary because the staffs are still under the other divisions on related institutions. It causes not all disruption on a SPSE and LPSE network applications can be fixed though there are some disruption on SPSE application can be fixed by Electronically Procurement Services (LPSE) available.

So it is expected that the change of system in public procurement auction that were previously done through manual and become through electronic ought to be offset by the changes in abilities and capabilities of the parties involved in auction of public procurement through electronic especially the staffs on Procurement Services Unit (ULP) and Electronically Procurement Services (LPSE) divisions. In addition, the implementation of auction of public procurement through E-Tendering needs to be supported by adequate infrastructure and facilities. It is expected to support the auction of public procurement and can minimize the presence of constraints, obstacles and irregularities which may happen.

Indication of Unhealthy Business Competition in the implementation of Public Procurement Auction in Procurement Services Unit (ULP) of Regional Office of Ministry of Justice and Human Rights Central Java

Government through National Procurement Board (LKPP) is trying to improve the equitable procurement systems through E-Procurement method, but still found the procurement of goods and/or services in collusive way either vertical which involving committee or horizontal among participants of the tender (bidder). One form of action that may lead to unhealthy competition is a conspiracy in the tender. The conspiracy in public procurement auction can be distinguished into three types, as follows:⁸

- a. Horizontal Conspiracy, is a conspiracy that happen between the provider of goods and services with fellow rival provider of goods and services. This conspiracy can be categorized as a conspiracy by creating artificial competition among bidders.
- b. Vertical Conspiracy, is a conspiracy that happen between one or more providers of goods and services with the auction committee.
- c. Joint Conspiracy, is a conspiracy combined vertical conspiracy and horizontal conspiracy. A joint conspiracy is a conspiracy between the auction committee and the providers of goods and services.

One of the efforts to prevent tender conspiracy is to keep the objectivity of Division of Procurement Services Unit (ULP) in doing the evaluation of the bid. On the page of SPSE application, it is just only written 1st Provider, 2nd Provider and so on and without mentioning the name or address of the bidder. It is done so that the results of the evaluation of the bid is \ in accordance with the applicable provisions.

Division of Procurement Services Unit (ULP) of Regional Office of the Ministry of Justice and Human Rights Central Java and Division of Procurement Services Unit (ULP) of Universitas Negeri Semarang detect that there is an indication of unhealthy business competition on the implementation of auction procurement of goods/services at the time they did the evaluation of the bid with the based on the explanation of article 83 of Presidential Regulation Number 70

Year 2012 that explains that the indication of conspiracy among providers of goods/services must be complied at least 2 (two) of the indications below:

- a. There are similarities in common technical documents, such as: working method, materials, tools, technical approach analysis, unit price, and/or specification of goods offered (brand/type) and/or technical support;
- b. The entire bid is from the providers approaching Owner Estimate (HPS);
- c. There is participation of some goods/services Providers that are within 1 (one) control;
- d. There are similarities/errors in content of bid document, such as similarity/error in typing, arrangement, and writing format;
- e. Warranty of bid is removed from the same guarantor with consecutive serial numbers.

On the Presidential Regulation Number 54 of the Year 2010 just regulates forms of indication of indication of horizontal conspiracy only. This is because at the explanation of Section 83 subsection (1) letter e Presidential Regulation Number 70 Year 2012 only mention conspiracy between goods/services Providers only. Whereas if it is viewed from the elaboration of section 22 of Constitution No. 5 of year 1999 mentioned that the tender conspiracy can be in form of horizontal conspiracy, vertical, conspiracy and joint conspiracy. So it is needed the existence of arrangement which set up the indication of vertical conspiracy and joint conspiracy. In addition, related to Guarantees of Bid in the implementation of E-Tendering is no longer needed. This is in accordance with section 109 subsection (7) Presidential Regulation number 4 Year 2015 and section 4 subsection (1) letter a Regulation of National Procurement Board (LKPP) Principal number 1 Year 2015 about E-Tendering. So the point of indication of conspiracy related guarantee of the bid could not be imposed on auction of public procurement through E-Tendering.

Indication of an unhealthy business competition above can only be found when Division of Procurement Services Unit (ULP) is doing bid evaluation. If Division of Procurement Services Unit (ULP) have known that there is any indication of conspiracy between providers of goods/services, then Division of

Procurement Services Unit (ULP) will do clarification to the providers of goods/services that was indicated having conspiracy. If the provider of the goods/services is proved for having conspiracy, then the Division of Procurement Services Unit (ULP) will dismiss their offer in the process of auction procurement of goods/services. In addition, Division of Procurement Services Unit (ULP) can propose goods/services providers that were proved for having conspiracy, to the Proxy of Budget User (KPA) to be included into black list.

The dropping of the sanctions to the Blacklist to the providers of goods/services that do conspiracy with other goods/services Providers under section 3 subsection (2) letter b Regulation of National Procurement Board (LKPP) Principal Number 18 years 2014 about Blacklisting in the Procurement of Goods/Services of The Government. But in fact, Division of Procurement Services Unit (ULP) only dismissed their bid alone and rarely proposed goods/services providers that the conspiracy proven to Proxy of Budget User (KPA) to be included into black list. The reason is if the goods/services Providers have admitted their mistakes, apologize and have good intention, it is enough for them to only dismiss the bid. In addition, the providers of the goods/services are looking for income through their participation in the procurement of goods/services. If the providers of the goods/services are on the blacklist, then it just closes their livelihood. But if the goods/Services Providers proved fro having conspiracy do not admit their fault, no apologize and do not have good intention, then the new Division of Procurement Services Unit (ULP) will propose the imposition of a black list to Proxy of Budget User (KPA) .

Sanction of the inclusion in the Blacklist is done during the 2 (two) years, so for 2 (two) years the goods/services Providers, which are subjected to sanction of the inclusion in the Blacklist, are not allowed to follow the process of procurement of goods/services in all Ministries/Institutions/Local Government/Agencies that exists throughout Indonesia.

On general provisions in conducting bid evaluation listed in Attachments of Regulation of National Procurement Board (LKPP) Principal No. 6 Year 2012 about technical guide of the implementation of Presidential Regulation No. 70

Year 2012 mentions that if in the evaluation is found evidence of unhealthy business competition and/or shared settings (collusion/conspiracy) between the participants, the Procurement Service Unit (ULP) and/or Commitment Maker Official (PPK), in order to win one of the participants, then:

- a. The participant who is designated as the prospective winner and other participants involved are included into the Black List;
- b. Members of the Procurement Service Unit (ULP) and/or Commitment Maker Official (PPK) involved in conspiracy is replaced, punished of administrative sanction and/or criminal;
- c. Evaluation process is still continued by setting of other participants which is not involved (if any);
- d. If there are no other participants as it means in number (2), then the auction is declared failed.

Further, in section 118 subsection 1 letter (c) Presidential Regulation Number 70 Year 2012 mentions that one of the deeds or actions of the goods/services Providers which are penalized is doing conspiracy with other providers of goods/services to set the bid price beyond the procedures of implementation of the procurement of goods/services, so as to reduce/inhibit/minimize and/or exclude the healthy competition and/or harm others.

Sanctions imposed on the conspiracy laid out in section 118 Presidential Regulation No. 70 of the year 2012 which stated that conspiracy horizontal is penalized as follows:

- a. Administrative Sanctions, done by Commitment Maker Official (PPK)/ division of Procurement Service Unit (ULP) /Procurement Officials.
- b. The sanction of the inclusion in the Blacklist, performed by Budget User (PA)/proxy of Budget User (KPA) after gaining input from Commitment Maker Official (PPK)/ division of Procurement Service Unit (ULP)/Procurement Officials.
- c. In the civil Lawsuit.
- d. Criminal Reporting to the authorities.

The above statement has indeed listed sanctions on both horizontal conspiracy and vertical, conspiracy, and also joint conspiracy. But on presidential regulation Number 70 Year 2012 just set an indication of the occurrence of an unhealthy business competition in the form of horizontal conspiracy as a benchmark of Division of Procurement Services Unit (ULP) to know of any indication of the occurrence of an unhealthy business competition at the time of the auction procurement of goods/services through E-Tendering.

In addition, the overthrow of the sanctions to the members of Procurement Service Unit (ULP) and/or Commitment Maker Official (PPK) involved in conspiracy has not been regulated in detail. So there have been no clear parties determined by the designated constitution to impose sanctions to the persons of members of Procurement Service Unit (ULP) and/or Commitment Maker Official (PPK).

On the early implementation of E-Procurement, there was happened a case of irregularities in the form of a conspiracy carried out by some providers of goods/services in the Regional Office of Justice and Human Rights Central Java. At the time, there is a provider of goods/services that are proven to do conspiracy with other providers of goods/services. The conspiracy was discovered by auditors of BPK while doing an audit towards the implementation of auction procurement of goods/services. In that case, the audit of Indonesian Supreme Audit Institution (BPK) finds the existence of serial number of warranty quote consecutively and the same IP address between the goods/services provider with other goods/services Provider used in log access to SPSE application on 1 (one) the auction package at the time of the auction stages are still ongoing.

It is also ever experienced by the Universitas Negeri Semarang where in the early of timplmentation of the auction procurement of goods/services electronically, there was a horizontal conspiracy happened. The case that experienced is similar to the case of the Regional Office of Justice and Human Rights Central Java, namely equality IP address between one provider of goods/services with other providers of goods/services used in log access to SPSE application. In this case, the providers of goods/services were indicated having

conspiracy namely the participation of some goods/services Providers that are within one (1) control. So the conspiracy that is ever happened at the Regional Office of Justice and Human Rights Central Java is horizontal conspiracy. The effect of the conspiracy, the participation of such goods/services Providers was dismissed by Division of Procurement Services Unit (ULP) . However, it is just dismissed not included in the blacklist.

In the concept of Law as tool of social engineering that is addressed by Roscoe Pound, law is tasked to organize interests that exist within the community in order to achieve a proportional balance, although there is varied interest in the community among human groups so that the details of the uncertain interests can not be done⁹. Setting up the interests manifested in renewing the law related auction procurement of Government goods/services.

If the setting related to the indication of unhealthy business competition associated with the concept of Law as tool of social engineering, then it is needed more detailed rules related to the indications of vertical conspiracy and joint conspiracy. Because at the Presidential Regulation Number 54 Year 2010 along with the changes just set horizontal conspiracy indications only and do not set indication of vertical conspiracy and joint conspiracy that is used as a benchmark the existence of an unhealthy business competition on the implementation of public procurement auction. So it is expected not only the participants of the auction which followed the implementation of the public procurement auction according to the rules, but the auction committee behavior also follows the the implementation of the public procurement auction according to existing rules.

In addition, it needs for more decisive and detailed arrangements related the imposition of sanctions to the person of auction Committee who did the vertical conspiracy or joint conspiracy. Because at the Presidential Regulation Number 54 Year 2010 along with the changes has not yet set up the sanctions that would be imposed and authorities who give sanctions in case of vertical conspiracy or joint conspiracy.

With the rules concerning the indication of the horizontal conspiracy, vertical conspiracy, and joint conspiracy will certainly change the behavior and

mindset of the bidder and the auction Committee in order to promote professionalism and leave the behavior and mindset used to be that still do everything with Collusion, corruption and Nepotism (KKN).

CONCLUSION

The implementation of Public Procurement auction of Procurement Service Unit (ULP) of Ministry of Justice and Human Rights Central Java Office held through E-Tendering is in accordance with Presidential Regulation Number 54 year 2010 along with the changes and Regulation of National Procurement Board (LKPP) Principal No. 1 year 2015 about E-Tendering. The implementation of the public procurement auction through E-Tendering changes the pattern of stages of procurement of goods/services that were previously done manually into electronic applications by utilizing the SPSE application as the facility. On the implementation of public procurement auction through E-Tendering, Division of Procurement Services Unit (ULP) has detected indications of unhealthy business competition at the time of the bid evaluation with the Explanation based on Article 83 of Presidential Regulation Number 70 Year 2012. During the implementation of public procurement auction through E-Tendering is conducted in regional offices of the Ministry of Justice and Human Rights Central Java has ever detected any indication of conspiracy in the form of the existence of the participation of some goods/Services Providers within 1 (one) the control and bid guarantee of the same guarantor with consecutive serial numbers.

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