

THE GLOBALIZATION CHALLENGES IN THE PROCUREMENT OF GOODS AND SERVICES AND THE ANTICIPATION OF THE CONSPIRACY TENDERS

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ABSTRACT

Through the Research Grant 2015/2016, with the contract No: 788/K3/KM/SPK.LT/2016, dated June 14 2016, we have completed the 1st year of research as follows: One of an unfair competition forms is a tender conspiracy which is prohibited by Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition. The conspiracy tender could happen through the written or unwritten agreement. This conspiracy includes a wide range of business behavior, such as, business production and/or distribution, trade association activities, the assignment of price, and an auction manipulation or collusive tender that occurred through the agreement between business owners. Collusion or conspiracy tender is intended to restrict other potential competitor to compete in the market by determined the tender winners. During the period of 2006-2012, has been found a large amount of the conspiracy tender. From 173 cases that have been decided, around 97 cases (56%) is the conspiracy tender case in the procurement of goods and services with a total value reached Rp 12.35 trillion. These cases are the combination of private sector projects, the State-Owned Enterprises (BUMN), The Indonesian State Budget (APBN), and the Regional Government Budget (APBD). From the 97 conspiracy tender cases, 75 Court's decisions have been proved with a total value reached Rp 8.6 trillion. During 2013, The Commission for the supervision of Business Competition (KPPU) reported 138 from 171 tenders. In 2015, the Corruption Eradication Commission (KPK) reported that 24 from 33 corruption cases has been handled, it is related to the procurement of goods and services for the government. The criminal acts of corruption in the procurement of goods and services is referred to markup, deceitful act, bribery, embezzlement, fraud, commission share, abuse of power, nepotism, and counterfeiting. The State losses due to corruption in the procurement of goods and services during the 2005 until 2009 reached Rp 689.19 billion or 35 % of the total value Rp1.9 trillion. The State loss is largely occurs because of the direct appointment in the procurement of goods and services. The amount has reached Rp 647 billion or 94 % from the total of State loss. While the rest of the loss are caused by the markup price practice, with a total value reached Rp 41.3 billion or 6 % from the total of State loss. There are four agencies that have the authority to do the law enforcement in the conspiracy tender case, especially in the procurement of goods and services. KPPU has the authority in the civil law enforcement, while for the corruption case is under the authorities of KPK, the National Police of the Republic of Indonesia, and the General Attorney with different function. This situation could lead to the overlapping prosecution.

Key words: The dualism in law enforcement, A conspiracy tender, Harmonization

1.1 Introduction

The idea of the people of Indonesia is implicitly stated in the Preamble of the 1945 Constitution of the Republic of Indonesia, namely, "People's Welfare". In that context, wealth is translated as a social welfare. The economic policy journey in Indonesia, especially in creating the economy prosperity and the economy competitiveness, began with the banking policy package on 1 June 1983, which is supported the strengthening of a good national banking¹.

It is undeniable that the economic policy in the New Order era, replete with the situation and policy that lead to the monopoly and unfair competition. The mastery production (upstream to downstream), raw material, monopoly production by one company, a conspiracy between businessman/state officials, and others. That kind of situation can have a direct negative impact, not only to

¹AgusBudianto, *Merger Bank di Indonesia beserta Akibat-Akibat Hukumnya*, (Jakarta, Ghalia Indonesia, 2004), Page.5 – 26.

big companies but also to small-middle companies and Koperasi (cooperatives), who are being a new competitor in the same production field. Especially, it will impact the foreign investors who seek the consumerism market in Indonesia society. These economic condition in Indonesia, has finally gained resistance through the global growth in economic cooperation, such as AFTA, APEC and the WTO. Hence, it becomes our research motivation to study about the regulation of fair business competition, especially related to the procurement and the law enforcement in Indonesia.

Finally, the economy design in Indonesia with a "fair competition" perspective began to appear through the enactment of Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition², based on the economic democracy with attention to the balance between the businessman interests and public interests with the purpose to preserves the public interests and to protect consumers, to grow a conducive business climate through the creation of fair competition and guarantee the certainty of the same competition chance for everyone, to prevent monopoly practices and to create the effectiveness and efficiency in order to improve the national economy. On the other words, it can be seen clearly the relation between the business competition policy with the people's welfare³.

Since the Law No. 5 Year 1999 has applied and after one year The Commission for the supervision of Business Competition (KPPU) has been working effectively, it shows the government effort to revamp the business system in Indonesia. The practice in the field shows that the activities that lead to the unfair competition has been decreased. In terms of the law enforcement, this regulation has a special characteristic which is The Commission for the supervision of Business Competition (KPPU) has the duty and the authority to conduct criminal investigations, prosecution and also as well as a court as stated in the Article 35 and Article 46. Furthermore, in the Article 35 and Article 36 of Law No. 5 Year 1999, also give KPPU a duty and an authority to conduct criminal investigations, prosecution and at the same time as a court that can decide and specify the perpetrators loss whether from the businessman or the citizen. Without an intention to reduce the reward for KPPU efforts and the results that have been achieved in upholding the mandate of the Law No. 5 Year 1999 in a short time, there are still so many flaws in the law practice⁴ that must be solved in order to create an honest and a fair competition climate as well as an effort to create an authoritative law institution, fair, and trusted.

However, in the business competition case that related to the conspiracy tenders in the procurement of goods and services for government, the KPPU's authority is in intersect with the authority of others law institution, such as the National Police of the Republic of Indonesia, the General Attorney, and the KPK relating to the criminal acts of corruption in the conspiracy tender. In the procurement of goods and services for government, there is an intention from the businessman to get a large amount of profit. The procurement process also need to be set up, in order to anticipate the tendency of businessman to practice an unfair competition and monopolized the market. In this situation, the buyers can potentially create an unfair competition for a personal purpose to get a benefit from their spending, by conducting a conspiracy with businessman, it closed the opportunity for another businessman. This is known as the vertical conspiracy.

Another situation, if the procurement of goods and services for government started with the same form as mentioned before, it is being a part of the criminal acts of corruption as regulated in the Law No. 31 Year 1999 that has amended and improved by the Law No. 20 Year 2001 Concerning the Eradication of the Criminal Act of Corruption. On the other words, the criminal acts of corruption can be done by the conspiracy between the businessman and the buyers, and vice versa. So, it is closely related between the criminal acts of corruption with the unfair competition.

Based on the KPPU data, during the period of 2006-2012 has been found the conspiracy tender with a value reached Rp8.6 trillion⁵. From 173 cases that has been decided, around 97 cases (56%) is the conspiracy tender case in the procurement of goods and services, while another 76 cases are related to the assignment of price case and the abuse of dominant position in supply arrangements. A total value of 97 cases in conspiracy tenders reached Rp 12.35 trillion. These case are the combination of private sector projects, the State-Owned Enterprises (BUMN), The Indonesian State Budget (APBN), and the Regional Government Budget (APBD). From the 97 conspiracy tender cases as mentioned above, 75 Court decisions has been proved with a total value reached Rp 8.6 trillion. From the KPPU perspective, conspiracy tenders is the part of four types of hardcore cartel practice, which are the conspiracy tender, the division of region, the supply arrangement, and the assignment of price. During 2013, The Commission for the supervision of Business Competition (KPPU) reported 138 from 171 tender⁶. Based on that reports, KPPU has issued "The Guideline of Article 22 Concerning the Prohibition in Conspiracy Tender"⁷.

The prohibition of unfair competition in the procurement has been regulated under the Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition. In this regulation, businessman is prohibited to have a conspiracy with other parties in order to manage or to determine the tender winners that can lead to the unfair competition. The activities that can be categorized as a conspiracy tender in procurement are :

- a. Cooperation between the two or more parties to set up and/or to determine the tender winner.
- b. In an overt manner or secretly performing the act of adjusting documents with other participants.

² State Gazette of The Republic of Indonesia Year 1999 Number 33.

³ Daniel Agustino, "FaktorPenentuDampakAktivitasAntipersainganPengecualian UU No. 5/1999 Pasal 50 Huruf G", JurnalPersaingan Usaha, Ed. 1 Year 2009, Page 25.

⁴DestianoWibowo&HarjonSinaga, *HukumAcaraPersaingan Usaha*, (Jakarta: Kelopak, 2004), Page.54-57 and Page.95-98

⁵<http://www.tribunnews.com/nasional/2013/01/27/kppu-temukan-rp-86-triliun-persekongkolan-tender>

⁶<http://kominfo.jatimprov.go.id/watch/38095>

⁷ KPPU, The Guideline of Article 22 Concerning the Prohibition in Conspiracy Tender Based on the Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition (Jakarta: Cetakanke-IV, 2007).

- c. Comparing the tender document before the submission.
- d. Creating a quasi competition.
- e. Approve and/or facilitating the conspiracy.
- f. Accept to perform an action although they already know or should know that the action is to set up the auction winner.
- g. The intervention of tender's committee or any related parties by unlawfully providing an exclusive opportunity to the auction participants.

The conspiracy tender occurs when the businessman who should have to compete privately, but in fact do a conspiracy to increase the price or to reduce the quality of goods or services for buyers through the tender process. The conspiracy tender can be destructive when it affects the public procurement⁸.

On the other hand, the potential of criminal acts of corruption in the procurement of goods and services for government is referred to the enormity of the procurement of goods and services in a public institution, the average value reached 15% -30% from Gross Domestic Product (GDP). The multitude of the procurement of goods and services in government institution, could create an opportunity to increase the corruption risk. The loss from corruption act is almost reached 10-25% on a normal scale. In some cases, the loss amount reached 40%-50% from the contract value⁹.

In 2015, the Corruption Eradication Commission (KPK) reported that 24 from 33 corruption cases has been handled, it is related to the procurement of goods and services for the government. The criminal acts of corruption in the procurement of goods and services is referred to markup, deceitful act, bribery, embezzlement, fraud, commission share, abuse of power, nepotism, and counterfeiting¹⁰. The State losses due to corruption in the procurement of goods and services during the 2005 until 2009 reached Rp 689.19 billion or 35 % of the total value Rp1.9 trillion. The State loss is largely occurs because of the direct appointment in the procurement of goods and services. The amount has reached Rp 647 billion or 94 % from the total of State loss. While the rest of the loss are caused by the markup price practice, with a total value reached Rp 41.3 billion or 6 % from the total of State loss¹¹.

The terms of procurement in goods and services appeared due to the needs of goods or services. This procurement terms includes a preparation stage, the determination and implementation of tender administration for the procurement of goods, scope of work or other services. The procurement of goods and services is not only limited to the selection of project associates with the purchasing unit or an official agreement between both parties, but also includes the entire process from the planning, preparation, licensing, determination of the tender winner to the implementation stages and administration process in the procurement of goods and services, or another services such as technical consultant, financial consultant, law consultant, and so on. Furthermore, as already mentioned that the procurement of goods/services for government are including the procurement of goods/services activities that funded by the APBN/APBD, both carried out by a self-contained or by goods/service provider¹². From above description, this research will be focus on two main problems. How is the prosecutions arrangement of a conspiracy tender in the procurement of goods and services for government by KPPU, Police, Attorney, and KPK? How is the harmonization of prosecutions between those law agencies?

1.2 Analysis

1.2.1 The law enforcement of conspiracy tender by KPK

The law enforcement nowadays is far from the founding fathers spirit that is stated in the Preamble of the 1945 Constitution of the Republic of Indonesia, which is based on the rule of law. It has a meaning that the law enforcement should be in the highest placed within the Nation. Currently, the criminal acts of corruption is being wider and more systematic so it has been regarded as a breach of the social and public economic rights, therefore it becomes an extraordinary crime. In the last five years, Indonesia is still occupying one of the most corruptive countries in the world. Corruption Perception Index (CPI) only increased 0.5 points from 1.9 in 2001 to 2.4 in 2006 and declined 0.1 points to 2.3 in 2007¹³. The audit results from the Audit Board of the Republic of Indonesia (BPK) also shows the financial irregularities and administration tend to increase from year to year, it shows the lack of government efforts to improve themselves. The BPK's audit reports until 2007 has found 36.009 checks with the loss value reached Rp3.657.71 trillion. In the mid-year of 2007, around 77.56% from BPK's audit has not been followed up by each institution¹⁴.

⁸In OECD Countries, the public procurement reached 15% of GDP. While non-OECD Countries, the percentage number is even higher. Bribery in Procurement, Methods, Actors and Counter-Measures, 2007

⁹ Transparency International, *Panduan Mencegah Korupsi dalam Pengadaan Barang dan Jasa di Pemerintah (Handbook – Curbing Corruption in Public Procurement)*, Jakarta, 2006, Page.1

¹⁰ Adrian Sutedi, *Aspek Hukum Pengadaan Barang dan Jasa dan Berbagai Permasalahannya*, (Jakarta, Sinar Grafika: 2008), Page. 275

¹¹ Tumpak Hatorangan Panggabean speech on The National Conference of the Eradication of Corruption in Jakarta, Wednesday (2/12/2009)

¹² Article 1 Paragraph 1 the Presidential Regulation No. 8 Year 2006 concerning the 4th amendments of the Presidential Decree No. 80 Year 2003 concerning the Guidelines of Procurement of Goods/services for Government.

¹³ Full version can be retrieved in: http://www.transparency.org/news_room/in_focus/2007/cpi2007/cpi_2007_table

¹⁴ the Audit Board of the Republic of Indonesia (BPK RI), Summary of the Audit Report of the First Semester of 2007 (IHPS I Fiscal Year 2007), Page. 287.

Based on mistrust of the legal institutions ability to dismissed corruption acts, the executive and legislative agency has established the Corruption Eradication Commission (KPK). The existence of KPK is refers to The Independent Commission Against Corruption (ICAC) that was established by the Hong Kong government in 1974. KPK is one of the new institutions that established with the spirit of the law enforcement in the criminal acts of corruption through the Law No. 30 Year 2002 Concerning the Corruption Eradication Commission. The purpose of KPK is to increase the eradication results on the criminal acts of corruption to avoid conflict of interests. So in carrying out the tasks and the authority, KPK is independent and free from any power¹⁵. KPK is performing their tasks and authority based on: legal certainty, transparency, accountability, public interests, and proportionality¹⁶.

In the Article 11 and 12 the Law No. 30 Year 2002, stated that in the conduct of investigation and prosecution KPK is subject to the applicable law. KPK can be categorized as special body (ad hoc) who is authorized to handle the corruption cases, which are: 1) involving another legal officials, agency, and others who related to the criminal acts of corruption committed by law agencies or state officials; 2) Attached to the people concern; and 3) regarding to the state losses for at least Rp. 1.000.000.000,- (one billion rupiah).

Whereas the authority to conduct an investigation, it seems like there is an overlapping authorities between KPK and police in doing an examination, tapping, trap, and others that belong to the Police authority in the field. While the authority to conduct a case examination considered overlapping with the attorney authority in the administrative field. According to the author's perspective, based on the '*lex specialist derogate lege generali*' principle it is not a contrary. The attorney and the police have an authority in the implementation of the criminal law in general, but the authority can be taken over in some specific case¹⁷.

It is important to have coordination between the legal institutions to refine the overlapping tasks and authority. But, the independency of KPK was absolutely necessary to face certain situations. At least, the overlapping authorities as mentioned above can be solved by the implementation of KPK's duty and the coordination between the legal institutions that authorized to eradicate the criminal acts of corruption. This indicates that the legal institution have to be more of cooperative in performing their tasks, so that with the similar authority will not be tussle and thus are more likely to facilitate the eradication of criminal acts of corruption in Indonesia.

1.2.2 The law enforcement of conspiracy tender by KPPU

The Commission for the supervision of Business Competition (KPPU) is a special institution that established based on Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition (Anti-Monopoly Practice). Thus, in order to supervise the implementation of the Law concerning KPPU, the Presidential Decree No. 75 Year 1999 was issued. The same as KPK, KPPU is an independent institution which is free from any influence or the government control or other stakeholders. The KPPU is responsible directly to the President, as head of the State.

In overseeing the implementation of anti-monopoly practice, KPPU has the task as stated in the Article 35 paragraph 1, 2 and 3¹⁸, it is a guidelines for handling the case that have to be followed by KPPU, in addition to the Article 29 paragraph (1) that required the businessman to give a report to KPPU within 30 (thirty) days since the merger or the consolidation of business entities, or takeover of the company share. KPPU can be conducted an evaluation after receive a report. According to the procedures of handling the case, KPPU has the authority as follows¹⁹:

1. Receiving reports from the citizen and/or the businessman about the allegations of monopolistic practices and unfair competition;
2. Conducting research on the business activities and/or businessman that have a tendency to perform monopolistic practices and unfair competition.
3. Investigating the allegations of monopolistic practices and unfair competition that is reported by citizens or businessman or based on the result of KPPU research;
4. Concluding the investigations result about whether or not the existence of monopolistic practices and unfair competition;
5. Calling out the businessman who were suspected to the breach of law;
6. Calling out and presenting witnesses, expert witnesses, and anyone who is considered knew the breach of law;

¹⁵ Article 3 Law No. 30 Year 2002 Concerning the Corruption Eradication Commission.

¹⁶ "Proportionality" is the principle of the balance between the task, authority, responsibility and obligation to KPK.

¹⁷ Indrayana, Denny, Berantas Korupsi, Perangi Mafia Peradilan, Retrieved from : <http://dennyindrayana.blogspot.com>

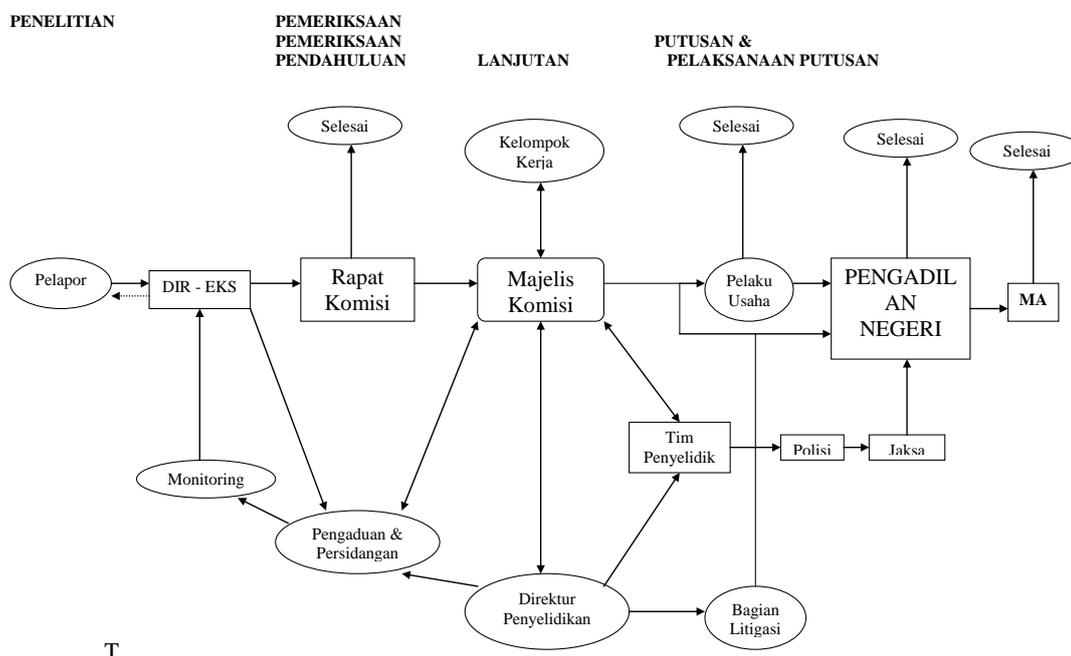
¹⁸ Article 35 (1) Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition.: 1. conducting evaluation of the agreement that occur the monopolistic practices and unfair competition; 2. conducting evaluation on the business activities that occur the monopolistic practices and unfair competition; 3. conducting evaluation of whether or not there is abuse of dominant position that that occur the monopolistic practices and unfair competition, including monitoring of the corporate merger or consolidation or the takeover of the company shares which should be suspected as the monopolistic practices and unfair competition.

¹⁹ Article 36 the Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition.

7. Asking for the investigators help to present businessman, witnesses, expert witnesses, or anyone as mentioned in the point e and f, who is not willing to fulfill the KPPU's call;
8. The investigators in this terms mean the investigators as intended in Law No. 8 Year 1981 Concerning the Criminal Law Procedures, namely, the National Police of the Republic of Indonesia or the civil servants that given a special authority by the regulation to conduct criminal investigations;
9. Request information from the government in relation to the investigation and or the examination of businessman who breached the law;
10. Examine, and/or assess the letter, document, or another evidence for the initial investigation and/or inspection;
11. Decide and specify whether or not any damages happened to another businessman or citizen.
12. Announced the KPPU decision to the businessman who were suspected perform monopolistic practices and unfair competition;
13. Imposed sanctions, could be an administrative sanction to the businessman who breached the law.

The Law of Anti-Monopoly Practice give KPPU an authority to perform a direct examination to the businessman, based on the allegations of law violation, although there is no report. Direct examination as already mentioned, consists of several activities. An examination by KPPU, as in the following image:

Figure 1 :The process of handling the case by KPPU



he evidence such as witness testimony; experts testimony; letter and or document; inquiry; and a whistleblower testimony (in this term is referred to the businessman themselves). In addition, the decision of KPPU must be read in a court that open for the public and immediately informed the businessman. A person who received the notifications can be filed an objection on the decision and the implementation of the Decision.

1.2.3 The procurement of goods and services for government

The procurement of goods and services that organized by the government, the State-Owned Enterprises (BUMN), Regional Owned Enterprises (BUMD), and private enterprises are related to the practice of direct appointment, collusion or other unfair practices that would be very harmful to the principles of transparency and accountability or give a direct financial impact on the State losses. The National Development Planning Agency (BAPPENAS) noted that the corruption case in procurement of goods and services hinder the absorption of the development budget in the period 2005-2009 with a total amount reached Rp689,195 billion, the State loss been counted after the permanent court decision (*inkracht*) has dropped. The criminal acts of corruption in the procurement of goods and services is referred to the enormity of the procurement of goods and services for public institution, around 15% -30% from the Gross Domestic Product (GDP). With the multitude numbers of the procurement of goods and services for government, has stimulated an opportunity and increase the risk of corruption. The loss amount due to corruption is expected to reach 10-25% on the normal scale. In some cases, the loss amount reached 40%-50% of the contract value.

In 2005 Adrian Sutedi is providing data that taken from the KPK, related to the procurement of goods and services for the government, 24 from 33 corruption cases has been handled. The criminal acts of corruption in the

procurement of goods and services is referred to markup, deceitful act, bribery, embezzlement, fraud, commission share, abuse of power, nepotism, and counterfeiting²⁰.

Thus, the probability of deviations in the practice of the procurement of goods and services are no longer in KPPU area, but has become the authority of other agencies because it consists of corruption elements as formulated in the Criminal Act of Corruption. The corruption practice in the procurement of goods and services is increasing due to the following factors : money circulated in huge amount, enclosed contacts between the procurement service provider and the auction committee, and too much procedure that should be followed.

The Law No. 31 Year 1999 that has amended and improved by the Law No. 20 Year 2001 Concerning the Eradication of the Criminal Act of Corruption has regulated the deviation in procurement of goods and services activities. Such criminal acts can be categorized into²¹:

1. The State loss as arranged in Article 2 and Article 3.
2. Bribery as arranged in Article 5 paragraph 1 letters (a) and (b); Article 5 paragraph 2; Article 13; Article 12 letters (a), (b), (c) and (d); Article 11; Article 6 paragraph 1 letters (a) and (b); Article 6 paragraph 2.
3. Extortion as arranged in Article 12 letter (e), (g) and (h).
4. Deceitful act, as arranged in Article 7 paragraph 1 letters (a), (b), (c) and (d); Article 7 paragraph 2; Article 12 letter h.
5. Conflict of interest in the procurement as arranged in Article 12 letter (i).
6. Gratuity as arranged in Article 12 B jo. Article 12 C.

There is unclear definition concerning the corruption act in the procurement of goods and services, it is only provide a narrow definition which is the misuse of resources and public finance by the public officials and the economic practitioners. Furthermore, the definition about the procurement of goods and services is arranged in the Presidential Regulation No. 54 Year 2010 concerning the procurement of goods and services for Government, as follows: "Procurement of goods/services for government herein after called the procurement of goods/services are activities to obtain goods/services from the Ministry/Government Institutions/Regional Government/other institutions that the process starts from the planning to the final process in order to obtain goods/services". The Procurement of goods/services are required to apply the principles of efficient, effective, open for competition, transparent, fairness, non-discrimination, and accountable.

1.2.4 Corruption in the procurement of goods and services and the Government Policy

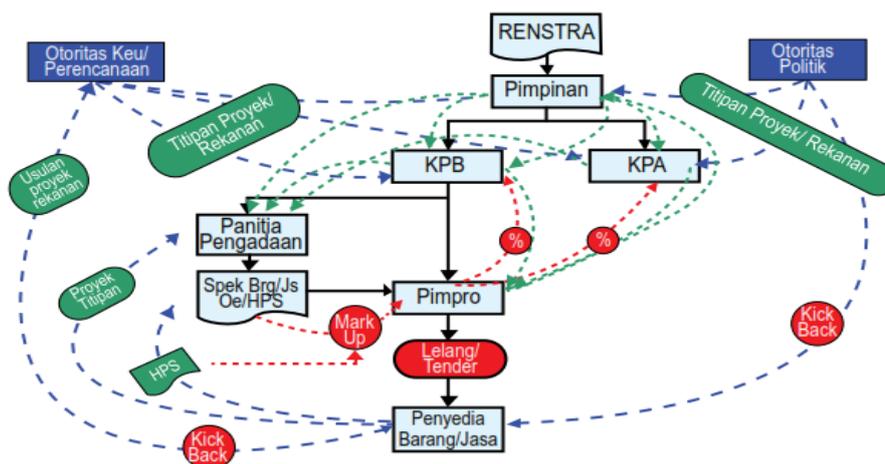
The procurement of goods and services for government is based on the Presidential Decree No. 80 Year 2003 concerning the Guidelines of Procurement of Goods/services for Government, with its amendments as follow: the Presidential Decree No. 61 Year 2004; the Presidential Regulation No. 32 Year 2005; the Presidential Regulation No. 70 Year 2005; the Presidential Regulation No. 8 Year 2006. The Presidential Regulation No. 79 Year 2006; the Presidential Regulation No. 85 Year 2006; and the Presidential Regulation No. 95 Year 2007 concerning the 7th amendments of the Presidential Decree No. 80 Year 2003 concerning the Guidelines of Procurement of Goods/services for Government. Below are the process of procurement of goods and services for government that regulated in on the Presidential Decree No. 80 Year 2003 : procurement planning, establish the auction committee, company prequalification, document arrangement, announcement, document submission, self-estimated price (HPS), explanation (*Aanwijzing*), adjustment of the opening price, evaluation, announcement of the offering price, disclaimer of participants, announcement of the auction winner, the signing of the contract, and the handover of goods/services. Those procurements of goods and services process have a potential of deviation²². The following image shows the possibility of criminal act of corruption that occurs in the procurement of goods and services for government.

Figure 2 : The deviation in the procurement of goods and services for Government

²⁰ Adrian Sutedi, *Aspek...Op.,cit*, Page. 275.

²¹ KPK, *Memahami Untuk Mambasmi: Buku Panduan Untuk Mamahami Tindak Pidana Korupsi*, (Jakarta: KPK, 2006), Page. 15 – 17.

²² Much Narachmad, *Buku Pintar Pengadaan Barang/Jasa Pemerintah*, (Jakarta, Visimedia, 2011), Page 56.



The Directorate of monitoring at KPK has identified the characteristics of deviation and corruption in the procurement best practices: First, the process are closed for public, not transparent, and not widely announced so that the businessman who are interested and meet the qualification cannot participate the tender; Second, discriminative and cannot be followed by all businessman with the same competence; and Third, the requirements and specifications or brand leads to certain businessman. In relation with those characteristics, it is necessary to increase transparency in order to eradicate corruption in the procurement of goods and services for government. The deviation in the procurement of good and service for government is still belong to the domain of KPPU, but if in the implementation there is found a criminal act of corruption elements then it becomes the domain of KPK. In the KPPU provision No. 2 Year 2010 on the implementation of the Article 22 of Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition, has been mentioned that the implementation of the Article 22 is associated with the conspiracy tender that specifically addressed to: a) businessman and related parties in understanding the provisions of the Article 22 on the implementation of Law No. 5 Year 1999 against the conspiracy tender; and b) The Commission for the supervision of Business Competition (KPPU) in carrying out the tasks and authorities referred to the Article 35 and Article 36 Law No. 5 Year 1999 jo. Article 4 and Article 5 of the Presidential Decree No. 75 Year 1999 concerning Commission for the supervision of Business Competition.

There are two institutions with the same authority in handling and monitoring the procurement of goods and services for government activities, especially in the conspiracy tender. The conspiracy tenders as mentioned in the KPPU provision occurs when the businessman who should have to compete privately, but in fact have a conspiracy to increase the price or to reduce the quality of goods or services for buyers through the tender process²³.

The conspiracy tender can be in various forms, to undermine buyers –whether in central or regional government – in order to obtain goods and services in a low price. Usually, at the very first time all competitors agree to specify who will win the tender. A common form of conspiracy tender is by increasing the procurement value and therefore the winner can enjoy the benefits of the value.

The conspiracy tender scheme is including the allocation and distribution of profits mechanism as a result of higher contract value among the tender participants. For example, if the competitor refused to bargain or to offer the losing bid, then the competitor will receive a sub-contracts or supply contract from the winner in order to share the benefits of invalid offer. In addition, a better method is needed to determine the winner, to monitor and to share the monthly or annually benefits in accordance to the tender agreement. The conspiracy tender includes the down payment to determine the tender winner between parties. It is commonly called as the compensation payments that associated to the company who offer the high cover bidding²⁴.

Although all parties may agree to implement the method of a conspiracy tender in various way, but in practice it usually implement a similar strategy. These kinds of techniques are usually not too exclusive. For an example, the cover bidding may be used together with the bid-rotation method. Those strategies will draw a pattern that can be detected by the tender officials and can be used to disclosure the method. The conspiracy tender can be classified in several forms, as follow²⁵:

1. Cover bidding, (could be in the form of the prize, friendship, or symbol) is a conspiracy tender method that frequently used. It appears when the individual or the company agree to participate in tender that involving at least one of the following factors: (1) competitors agree to put a higher offer than an offer from the agreed

²³ OECD, *Bribery ...Op., cit*

²⁴ In many cases, the compensation payments will be facilitated through the use of false receipt for the sub-contract. In fact, there is no project as mentioned in the receipts. The use of false consultation contracts also can be used for this purpose.

²⁵ OECD, *Guidelines..Op.,cit*, Page. 2.

- winner, (2) competitors put an offer that too high to received, or (3) competitors put an offer by listed the special condition that is cannot be accepted by the buyer. The cover bidding is intended to give the impression that there is a fair competition.
2. Bid suppression, is a method of arranging the offer that involving the agreement between parties, where one or more companies agree to draw from the previous tender, so that the winner offer will be accepted. In fact, the offer arrangement interpreted as the company's offer does not want to be considered.
 3. Bid rotation, in this method the conspire companies keep doing an offer, but then agreed to take the turn as the tender winner (the lowest qualification). The bid rotation agreement may be vary. For example, the conspiracy perpetrators may choose to allocate the same value of money or based on the measurements from a specific contract to each company.
 4. Market allocation, where the competitors agree to share the market and not to compete on certain customers or in a specific geography area. For example, the company allocated a specific customer to the different companies, so that competitors will not offer the cover bidding to the potential customers that are allocated for a certain company. In return, the competitors will not compete in the area that is already allocated for other companies as mentioned in the agreement.

According to the irregularities in the procurement of goods and services as mentioned above, Government need to established a special institution for monitoring and regulating the procurement of goods and services for government, called the Government Goods and Service Procurement Policy Agency (LKPP)²⁶. This institution has formulated the procurement system that more transparent and effective as instructed in the Presidential Regulation No. 54 Year 2010 concerning national strategy and policy for e-Government development, that being adopted into the Head of LKPP Regulation No. 5 Year 2011 Concerning the standard document for e-government goods/services (e-Proc). In 2007, The National Development Planning Agency (BAPPENAS) had issued a model bid document, which is expected to be a reference material and to prevent the practice of corruption in the procurement of goods and services for government. In the model bid document, the e-Proc is being implemented through e-Regular Tendering²⁷, e-Reverse Tender, e-Purchasing, e-Reverse Auction, and e-Selection.

1.2.5 Challenges in order to face the globalization era

The procurement of goods and services for government, by the State-Owned Enterprises (BUMN), Regional Owned Enterprises (BUMD), and private enterprises have a strategic role to create anti-monopoly and fair business competition. It is also to create good governance and good corporate governance based on the transparency and accountability in order to support the eradication of corruption, collusion and nepotism. The importance of the procurement of goods and services is to build a competitive climate and to attract investors. If the system is not transparent and full of 'negotiation', the investors will be reluctant to open the business in Indonesia. Furthermore, related to the law enforcement of the procurement of goods and services is revealed the allegations of the criminal act of corruption, it supposed to be clear in which institution that have an authority to deal with such matter.

The handling of case by two or more institutions, have a tendency of overlapping authority, although in the Law No. 5 Year 1999, the criminal sanction is limited to administrative sanctions for those who breach the law, while in the Criminal Act of Corruption the sanction is consists of person and fines. It needs to be clear on the working mechanism between the KPPU, KPK and the Police/Attorney, so that each party can perform the specify tasks and authority, especially to face the globalization era and regionalism of economy. Basically, the WTO era is intended to be a global rotation for economy activities, trade, investment and business without many obstacles²⁸.

The global economic impact towards the national development, are: 1) refers to the market with cultural basis, not geography basis. This means the economy is no longer dominated by the big cities, for example in Southeast Asia, the existence of Hong Kong and Singapore as the trade center is referred to the business cultural basis that continuously changing; 2) There is no geography boundaries, those cities will be replaced with technology as a trade/business platform; 3) The changing of management, marketing patterns, business view, and government system. The WTO APEC, AFTA member countries, is no longer seen the government policy as a trade barriers, furthermore the government policy from each member countries are expected to support this free trade area.

Based on the above analysis and discussion, the author concluded that Indonesia as the party of WTO members, APEC and AFTA have to prepare not only the human resources and infrastructure (technology), but also the law policy to supports the free trade area, throughout in accordance to the applicable law in Indonesia. The investor is interested to invest in Indonesia as long as the implementation of regulation that support the market economy are

²⁶ Presidential Regulation No. 106 Year 2007 concerning the Department of Policy Development of goods/services for Government.

²⁷e-Regular Tendering is the general auction in order to get goods/services tender which the offer price held once on the date and time appointed in the procurement document. Refer to the Head of LKPP Regulation No. 1 Year 2011 concerning the Procedures of E-Trading.

²⁸ Budi Winarno, *Globalisasi: Peluang atau Ancaman Bagi Indonesia*, (Erlangga, Bandung: 2008), Page 23 and 24.

transparent, conducive, and consistent. The investor also concern to the fair competition that is reflected in the good implementation of the Anti-Monopoly Practice within KPPU and Judicial officer²⁹.

1.3 Conclusion

Based on the above analysis as explained by the author, the limitation of this research is one of the unfair competition form is a tender conspiracy which is prohibited by Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition. Besides, the conspiracy tender is also regulated in the Law No. 31 Year 1999 that has amended and improved by the Law No. 20 Year 2001 Concerning the Eradication of the Criminal Act of Corruption. Based on data, during the period of 2006-2012, has been found a value of the tender conspiracy reached Rp. 8,6trillion. From 173 cases that has been decided, around 97 cases (56%) is the tender conspiracy case in the procurement of goods and services with a total value reached Rp 12,35 trillion. These cases are the combination of private sector projects, the State-Owned Enterprises (BUMN), The Indonesian State Budget (APBN), and the Regional Government Budget (APBD). In 2015, the Corruption Eradication Commission (KPK) reported that 24 from 33 corruption cases has been handled, it is related to the procurement of goods and services for the government. There are four agencies that have the authority to do the law enforcement in the tender conspiracy case, especially in the procurement of goods and services for government. KPPU has the authority in the civil law enforcement, while for the corruption case is under the authorities of KPK, the National Police of the Republic of Indonesia, and the General Attorney with different function. It need to be clear in case of prosecution that related to the conspiracy tender with the criminal act of corruption elements, so there is a clarity of handling this conspiracy tenders cases in terms of business competition or criminal acts of corruption as part of globalization that could not be removed. The author's suggestion in this research is to create the MoU between those authorized law agencies in a conspiracy tender, into an effective legal product before Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Competition is changed.

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²⁹UdinSilalahi, Rayendra L. Toruan, *Perusahaan SalingMematikan&Bersekongkol: Bagaimana Cara Memenangkan?*(Jakarta, Elek Media KomputindoKelompokGamedia, 2007), Page. 113.