



## Juridical analysis of unfair business competition tender contraction for construction of langsa regional referral Hospital (Study decision number: 04/KPPU-L/2020)

Maya Lisdayani

Department of Law, Muhammadiyah University, North Sumatra, Medan, Indonesia

### Abstract

Law Number 5 of 1999 prohibits collusion between business actors and other parties who are not necessarily business actors, as well as conspiratorial behavior. Unfair business competition was examined in this research, namely unhealthy business competition, namely conspiracy to bid for the construction of the Langsa Regional Referral Hospital in the Aceh Health Service Working Unit of the Aceh Provincial Government, which is contrary to legal provisions. The aim of this research is to find out and explain the mechanism, evidence and considerations of judges in the tender conspiracy for the construction of the Langsa regional referral hospital in decision number: 04/KPPU-L/2020. This research method is research normative juridical. The research data sources are primary legal materials and secondary legal materials. Primary legal materials are the main sources, such as Decision Number: 04/KPPU-L/2020 and laws related to the problem. The data collection technique used is library techniques. The data analysis used is analytical descriptive analysis. The research results show that the conspiracy mechanism in the tender for the construction of the Langsa Regional Referral Hospital is that initially, the tender announcement was made by setting a budget of IDR 40,000,000,000.00. There are 108 companies interested in participating in this tender. Then, a clarification meeting was held, at the next stage, namely the conspiracy stage, there were indications of unfair practices. Proving Tender Conspiracy is carried out using several pieces of evidence in the form of letters relating to the tender process, witness statements, documentary evidence. The judge's considerations in this case are in Decision Number: 04: KPPU-L-2020 considering the following, Reported Party I's confession, Reported Party I did not submit evidence, Fulfillment of the elements of Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Competition Unhealthy Business, Take into consideration the things that might relieve the Reported Party.

**Keywords:** Tender rigging, langsa regional Hospital, business competition

### Introduction

In the era of globalization and free trade, business competition is increasingly strong and complex. Healthy and fair business competition is the key to success for companies in maintaining business continuity. However, in tight business competition, many companies use unfair and unlawful measures to win over their competitors, such as regulating prices, dividing markets, or carrying out monopolistic practices.

To avoid unfair business competition, it is necessary to have business competition law as an effort to protect competitors fairly and safeguard the interests of consumers and society. Business competition law contains rules regarding healthy and fair business competition, as well as providing sanctions for companies that commit violations<sup>[1]</sup>.

Criminal acts in business competition law are important to pay attention to. This criminal act is called administrative penal law, because this action can cause "two blades", meaning that this activity falls under the scope of criminal law and administrative law<sup>[2]</sup>. Healthy and fair business competition is the most important thing in developing a country's economy. One such practice is bid rigging, which occurs when several companies agree to rig the outcome of a tender so that one of them will win the contract without fair competition<sup>[3]</sup>.

The case of conspiracy to bid for the construction of the Langsa Regional Referral Hospital at the Aceh Health Service Working Unit of the Regional Government of Aceh Province is an example of unfair business competition. This case has been processed and prosecuted by the Business Competition Supervisory Commission (KPPU) and resulted

in decision number 04/KPPU-L/2020. Tender conspiracy or often referred to as a tender cartel is the practice of collusion between several service providers or suppliers to regulate tender results with the aim of obtaining large profits<sup>[4]</sup>.

The PT Mina Fajar Abadi case was legally proven and violated the relevant applicable legal provisions a tender or offer submits a price to obtain a product, employ someone, or provide a service. Based on preliminary data from researchers, PT Mina Fajar Abadi submitted an objection to the KPPU against decision number 04/KPPU-L/2020 dated 11 February 2021. PT Mina Fajar Abadi stated that the KPPU's decision was not objective and inconsistent between one reason and another, so it was seen emotional towards PT Mina Fajar Abadi. Apart from that, the element of conspiracy alleged against PT Mina Fajar Abadi was not proven, so the KPPU's decision was considered to be materially juridically flawed. PT Mina Fajar Abadi also considers that the fine imposed is not relevant to apply to PT Mina Fajar Abadi. The Court decided to reject the Petitioner's request for objection to the KPPU decision Number: 04/KPPU-L/2020, dated 11 February 2021. Based on the considerations and evidence obtained during the examination, there are several sufficient facts and conduct so that PT Mina Fajar Abadi is proven has carried out vertical and horizontal collusion in the tender for the work package for the construction of the Langsa Regional Referral Hospital at the Aceh Health Service Working Unit of the Regional Government of Aceh Province for the 2018 fiscal year (Tender Code 17684106).

This research will conduct an analysis of KPPU decision number 04/KPPU-L/2020 regarding the tender rigging case

in question. The practice of bid rigging can have far-reaching negative impacts on society and the economy. This includes inefficient use of public money, lack of innovation in projects undertaken, as well as potential losses for bidders who are not involved in the conspiracy.

Based on the explanation above, what this research wants to examine is the juridical analysis related to unfair business competition in the case of conspiracy to bid for the construction of this Hospital. This research aims to find out and explain the mechanism, evidence and considerations of judges in the tender conspiracy for the construction of the Langsa regional referral hospital in decision number: 04/KPPU-L/2020.

### Research Methods

Based on the research carried out by the author, this type of research is namely normative juridical. Normative juridical research is focused on laws and regulations in particular, the relationship between rules and how they are applied in practice is limited to written regulations or other legal resources<sup>[5]</sup>.

The approach methods in this research are the statutory approach, conceptual approach. The statutory approach is a research approach to legal products.

The data in this research is data from primary secondary legal materials. Primary legal material in this research namely decision number: 04/KPPU-L/2020<sup>[6]</sup>. Meanwhile, secondary legal materials are the results of scientific work in the legal and other fields<sup>[7]</sup>.

The data collection technique chosen was library research techniques. Library research requires data in completing research that originates from libraries including books, encyclopedias, dictionaries, journals, documents, magazines and others<sup>[8]</sup>. Analysis of this research data, namely analytical descriptive analysis by concluding.

### Research Results and Discussion

#### Mechanism of the Tender Conspiracy for the Construction of the Langsa Regional Referral Hospital

Development can cover a variety of types and projects, including public infrastructure projects. In practice, the implementation of these projects involves various parties, including contractors, parties ordering the work (budget users), and various other entities. In order for construction to run smoothly, an agreement is often required between the government and the contractor. However, such agreements often have elements of public law and focus on upholding the public interest.

The government is one party to the contract as the task provider or party providing the work, while the other party is the contractor or contractor, who often comes from the private sector. In the context of procurement of goods and services, the word "tender" is often referred to as the process of offering prices or offering work.

The act of conspiring to determine the tender winner is a form of legal violation because the tender process should take place fairly, evenly and confidentially. To determine the existence of conspiracy, the elements that need to be considered are the existence of cooperation or conspiring between business actors, the presence of a third party who regulates the tender winner., and the creation of unhealthy business competition. Tender rigging as a violation of Article 22 of Law No. 5 of 1999 and regarding the

determination of administrative sanctions from the KPPU is a problem that often occurs.

In this tender conspiracy case, there are several sufficient facts and conduct so that PT Mina Fajar Abadi is proven to have committed vertical and horizontal conspiracy in the tender for the work package for the construction of the Hospital mentioned here, for the 2018 fiscal year (Tender Code 17684106).

This case began on July 27 2018 when the Head of the Goods and Services Procurement Division (Mr. Ir. Nizarli, M.Eng) assigned the Procurement Committee (Pokja) to conduct an electronic tender for the construction of a regional referral hospital in Langsa, Aceh. The tender was announced on 3 August 2018 via the LPSE Aceh website and is open to non-small companies. The total budget for this project is IDR 40,000,000,000.00. During the period 3-12 August 2018, interested parties were able to download procurement documents, and 108 companies reportedly downloaded or registered for e-tendering. A clarification meeting was held on August 7 2018. PT Mina Fajar Abadi, PT Sumber Alam Sejahtera, and PT Arafah Alam Sejahtera were among the companies participating in the tender. PT Mina Fajar Abadi and PT Sumber Alam Sejahtera appointed directors to sign the required documents, while PT Arafah Alam Sejahtera set up a branch office to participate in the tender

PT Mina Fajar Abadi is suspected of conspiring with its competitors in the tender for the construction of the Langsa Regional Referral Hospital. This can happen by setting prices or determining who will be the winner of the tender. PT Mina Fajar Abadi is suspected of conspiring with several of its competitors to determine which party will win the tender, thereby influencing competition that should occur fairly and healthily. Setting prices means making an agreement between several companies to increase the price of goods or services offered in a tender. In this case, PT Mina Fajar Abadi allegedly made an agreement with a rival to increase the cost of products or services offered in the tender so that other competitors could not compete fairly.

Apart from that, PT Mina Fajar Abadi is also suspected of conspiring with its competitors in the process of selecting tender winners. This can happen by making an agreement to divide work or to determine who will win the tender. PT Mina Fajar Abadi is suspected of conspiring with several of its competitors to determine who will win the tender, thereby affecting competition that should occur fairly and healthily.

Conspiracy in project tenders is a violation of the law and is detrimental to consumers and parties involved in business competition. PT Mina Fajar Abadi's actions violate applicable legal provisions relating to offers or proposals for submitting prices to purchase work, obtain commodities, or provide services. This also violates Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

The mechanism in this case begins with the announcement of a tender with a certain budget, which attracts interest from 108 companies to participate. Then, a clarification stage was carried out to maintain the transparency of the tender process. However, the next stage is the conspiracy stage, where there are indications of unfair practices, such as similar documents, prices close to the Self Estimated Price (HPS), and others. This reflects collusion efforts among

tender participants aimed at controlling tender results for the common good.

The process of proving conspiracy in this case involves collecting evidence that reflects joint actions or joint efforts which refer to the definition of conspiracy in legal theory. Technical documents, similar bids, the participation of several businesses operating under one roof, consistency of content in the bid documents, and bid bonds issued by the same guarantor are pieces of evidence used to prove the existence of conspiracy.

In this case, the KPPU has processed and prosecuted PT Mina Fajar Abadi for conspiring in the tender for the construction of the Langsa Regional Referral Hospital. KPPU decision number 04/KPPU-L/2020 has determined that PT Mina Fajar Abadi is guilty and subject to relevant fines in accordance with applicable legal regulations.

Based on Standard Electronic Procurement Documents for Procurement of Construction Work Procurement Document Number 01/POKJA-LXXXIX/DINKES-02/2018 dated 03 August 2018 for Procurement of Construction of Langsa Regional Referral Hospital Chapter III Instructions to Participants (IKP) in number 4 are as follows (vide evidence C2 Prohibition of Corruption, Collusion and Nepotism (KKN), Conspiracy and Fraud).

The mechanism for this development tender conspiracy is as follows

1. **Tender Announcement:** The process begins with a tender announcement by the Head of the Goods and Services Procurement Division. In this announcement, the hospital construction project was announced with a budget of IDR 40,000,000,000.00.
2. **Company Participation:** Companies interested in participating in this tender download the procurement documents and register for the e-tender. A total of 108 companies downloaded or registered.
3. **Implementation of Clarification Meetings:** Clarification meetings are held to discuss the tender process and answer questions from tender participants.
4. **Implementation of Conspiracy:** There are several indications of conspiracy in the tender process, such as:
  - a. There are similarities in technical documents and offers between several participants.
  - b. The offer price is close to the Self Estimated Price (HPS).
  - c. Participation of several companies under the same control.
  - d. Similarities or errors in the contents of the bid documents.
  - e. Issuance of offer guarantees from the same guarantor with consecutive serial numbers.
5. **Selection of Winners:** In the process of selecting tender winners, there are indications that unfair business competition is occurring, and certain companies may have collaborated to influence the outcome of the tender.
6. **Proposed Sanctions:** The KPPU's decision has imposed fines and administrative sanctions on companies involved in rigging in tenders. PT Mina Fajar Abadi is one of the companies subject to sanctions.

7. **Further Investigation:** Even though PT Mina Fajar Abadi filed an objection to the KPPU's decision, the court decided to reject the objection request and uphold the KPPU's decision. This shows the importance of taking firm action against violations in tenders to maintain healthy business competition.

8. **Recommendations for Disciplinary Sanctions:** Apart from sanctions from the KPPU, in the trial the panel of judges recommended giving disciplinary sanctions to Procurement Committee (Pokja) personnel who were involved in the tender process and did not carry out their work and obligations based on the applicable regulations.

This mechanism includes tender announcements, company participation, clarification, identification of acts of conspiracy, selection of winners, proposed sanctions, and recommendations for disciplinary sanctions for the personnel involved. The aim is to ensure that the tender process is carried out fairly and transparently and to prevent unfair business competition practices such as conspiracy.

### **Proving the Tender Conspiracy for the Construction of the Langsa Regional Referral Hospital**

In the case of conspiracy to tender for the construction of this Hospital, there are sufficient facts and conduct so that PT Mina Fajar Abadi is proven to have carried out vertical and horizontal conspiracy in the tender for the work package for the construction of the Langsa Regional Referral Hospital at the Aceh Health Service Working Unit of the Regional Government of Aceh Province for the 2018 fiscal year (Code Auction 17684106).

Based on Article 22 of Law Number 5 of 1999, business actors are prohibited from conspiring with other parties in organizing or determining tender winners. In this context, the "rule of reason" approach means that the KPPU must examine whether the action produces an impact that is detrimental to business competition.

The process of proving conspiracy in this case was carried out using several pieces of evidence.

#### **Documentary evidence relating to the tender process**

This evidence is in the form of a tender invitation letter, tender requirements documents, and price offer documents from tender participants. Based on the evidence, it is known that PT Mina Fajar Abadi's participation in this tender was authorized by Brother Ichwan as Branch Director who was appointed through Power of Attorney Number 1877/MFA/VIII/ 2018 dated 06 August 2018 which was signed by Muhammad Yusuf as Main Director of PT Mina Fajar Abadi Based on of the power of attorney, Brother Ichwan as Branch Director was given the authority to sign the Offer Letter, Integrity Pact, Agreement Letter, - 14 - Rebuttal Letter, and Appeal Rebuttal Letter

According to the evidence, it is known that the PT Mina Fajar Abadi Bidding Document was prepared or drafted by Brother Hendrik with a service fee of IDR 15 million (see Exhibit B3, Power of Attorney Document Number 1877/MFA/VIII/2018 dated 06 August 2018 in the PT Mina Fajar Abadi Bidding Document)

Documentary evidence relating to the tender process can be used as evidence in the process of proving this development tender conspiracy. Some letters that can be used as evidence are

- a. Tender Invitation Letter, Tender invitation letter issued by the Aceh Health Service, Aceh Provincial Government.
- b. Tender Requirements Document issued by the Aceh Health Service, Aceh Province Regional Government.
- c. Price Bid Document submitted by PT Mina Fajar Abadi and other tender participants.
- d. Contract Letter issued by the Aceh Health Service, Aceh Provincial Government.
- e. Project Implementation Report Document published by PT Mina Fajar Abadi and the government.

This evidence shows that there was conspiracy in the tender process and can be used as evidence in the process of proving this case.

#### **Witness statements**

The witnesses who can be presented at the trial are all parties involved in the tender process, both from the government and from the companies participating in the tender. The actions of Reported Party I, Reported Party II, Reported Party III, Reported Party IV, Reported Party V, and Reported Party VI related - 29 - to the fact that there are similarities and/or similarities as described in point Facts/Findings can be grouped as actions carried out by two or more parties which cooperating, overtly or covertly editing documents with other participants, comparing tender documents before submitting, holding fictitious competitions, supporting and/or enabling conspiracies, and failing to act even though one knows or should know that such action is being taken to arrange for winning bidder.

Some of the witnesses who can be presented are

- a. Officials from the Aceh Health Service, Aceh Provincial Government, such as the tender committee or officials who signed the contract with PT Mina Fajar Abadi.
- b. PT Mina Fajar Abadi employees who are involved in the price bid submission process and project implementation, such as project managers or employees involved in making decisions regarding price bids.
- c. Other Tender Participants who take part in the same tender process and submit price bids for the same project.

By using the statements of these witnesses, it can be seen that there was conspiracy in the tender process and can be used as evidence in the process of proving this case.

#### **Evidence**

Evidence in the form of internal company documents such as emails between company leaders and employees, memos, or other internal records can show that there is coordination or agreement between company parties in carrying out tender conspiracy. In this case, the KPPU has processed and prosecuted PT Mina Fajar Abadi for unfair business competition violations. After the trial stage, the court decided to reject PT Mina Fajar Abadi's objection request to the KPPU decision Number: 04/KPPU-L/2020, dated 11 February 2021. Therefore, it can be concluded that the tender conspiracy for the construction of the Langsa Regional Referral Hospital has been proven and The perpetrator has been subject to sanctions according to the applicable regulations.

Some documents that can be used as evidence of the existence of this tender conspiracy are

- a. Company internal emails and memos containing communications between company leaders and employees, or between company employees.
- b. The company's financial reports can be used as evidence to show the profits the company obtained from this project.
- c. Work contract document between PT Mina Fajar Abadi and the government as proof of approval of the contents of the work contract.
- d. Project implementation report published by PT Mina Fajar Abadi and the government as evidence of progress and results of work.
- e. Survey documents showing the value of the building or the price of materials used in the development project as evidence of whether the price proposed by PT Mina Fajar Abadi reflects market prices or not.

With this documentary evidence, it can be seen that there was a conspiracy in the tender process and can be used as evidence in the process of proving this case.

#### **Judge's Considerations in the Tender Conspiracy for the Construction of the Langsa Regional Referral Hospital in Decision Number: 04: KPPU-L-2020**

In this case, the commission panel considered before deciding to consider the following matters

##### **Reported party's confession I**

Reported party I's confession states: we consciously admit that we have made mistakes and negligence which resulted in a violation of Article 22 of Law Number 5 of 1999 and apologize profusely to the Honorable KPPU Commission Council for the mistakes we committed, which actions were solely What we do is only to help colleagues who are experiencing difficulties.

Reported party I's confession is one of the considerations that will be considered by the commission panel before deciding on a case. The confession is considered evidence in the trial if it is made voluntarily and not forced.

##### **Reported Party I did not submit any evidence**

Several things the judge must consider when the respondent does not submit evidence

- a. The judge must still consider all the evidence available in the trial.
- b. The judge must ensure that the evidence in the trial is sufficient to prove whether the respondent is guilty or not.
- c. The judge must ensure that the respondent is given sufficient opportunity to defend himself at trial.
- d. The judge must ensure that the decision taken is based on the facts and evidence available in the trial, and not because of other factors.

If the reported party does not present evidence at trial, this can be a consideration for the judge when deciding a case.

#### **Fulfillment of the elements of Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition**

Based on the provisions of Article 22 of Law Number 5 of 1999 as amended in Constitutional Court Decision Number 85/PUU-XIV/2006, it is stated that: "Business actors are

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

### **Elements of Business Actors**

Reported Party I is the business actor in question because he has won the tender for the work package for the construction of the Langsa Regional Referral Hospital for the Aceh Health Service Unit for Fiscal Year 2018 (Tender Code: 17684106) and carries out business activities in the economic sector in the jurisdiction of the Republic of Indonesia.

### **Elements of Business Actors**

Other Business Actors in the case being discussed are Reported Party II, Reported Party III, Reported Party IV, Reported Party V, and Reported Party VI as explained in points 1.2 to 1.6 in the section Regarding the Identity of the Reported Party. In practice, Reported Party II, Reported Party III, Reported Party IV, Reported Party V, and Reported Party VI are participants in the Tender for the Work Package for the Construction of the Langsa Regional Referral Hospital, Aceh Health Service Working Unit for Fiscal Year 2018 (Tender Code: 17684106).

### **Elements of Parties Related to Business Actors**

The parties related to the business actors are the Construction Working Group-LXXXIX Aceh Government Goods and Services Procurement Bureau for Fiscal Year 2018 Tender for Work Packages for the Construction of the Langsa Regional Referral Hospital, Aceh Health Service Work Unit, Regional Government of Aceh Province, Fiscal Year 2018 (Tender Code: 17684106) as Reported Party VII as described in point 1.7 regarding the Identity of the Reported Party.

### **Conspiring Elements**

According to Commission Regulation Number 2 of 2010, the element of "conspiring" can occur in the form of:

1. "Cooperation between two or more parties;
2. Carry out document adjustments with other participants, both openly and secretly.
3. Compare tender documents before submission;
4. Creating false competition;
5. Approve and/or facilitate the occurrence of conspiracy;
6. Do not refuse to take an action even though you know or should know that the action is being taken to arrange for the winning of a particular tender participant
7. Providing exclusive opportunities by tender organizers or related parties directly or indirectly to business actors who take part in tenders in a way that is against the law."

### **Elements of Arranging and/or Determining Tender Winners**

Reported Party I and Reported Party IV carried out a tender conspiracy, but there was not enough evidence to arrange and/or determine Reported Party I as the winner of the tender. However, it was proven that Reported Party VII neglected to carry out a proper evaluation and failed the tender process even though there were indications of unhealthy business competition, with the aim of facilitating Reported Party I to become the winner of the tender.

Therefore, the actions of Reported Party VII are evidence of a tender conspiracy carried out by Reported Party VII to arrange and/or determine Reported Party I as the winner of the tender.

### **Elements Can Result in Unfair Business Competition**

The conspiracy by Reported Party I and Reported Party VII has caused, as explained below, unfair business competition carried out in a dishonest or illegal manner or - 198 - hampered business competitiveness as explained below:

1. "The action of Reported Party I in attaching a List of Key Personnel in the Bidding Document that is not in accordance with the Procurement Document and then including the lack of certificates in the Bidding Document when proving qualifications is an act carried out in a dishonest manner.
2. Reported Party VII's actions did not exclude Reported Party I during the evaluation and deliberately allowed Reported Party I to add to the contents of the Bidding Document (post bidding), benefiting Reported Party I as the winner of the tender for the a quo case
3. The actions of Reported Party I and Reported Party VII as referred to in points a to b, constitute acts that are against the law and result in unfair business competition. "In this way, the elements that can result in unfair business competition are fulfilled."

### **Consider things that may relieve the Reported Party**

In this development tender conspiracy case, the judge's considerations in Decision Number: 04: KPPU-L-2020 cover several aspects. First, the confession of Reported Party I and the absence of evidence from Reported Party I. Second, the fulfillment of the elements of Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition. Third, consider mitigating factors for the reported party.

Based on several considerations and evidence, when determining the law, a judge is allowed to consider established legal precedents as well as the views of leading legal experts (doctrine).

### **Conclusion**

The conspiracy mechanism in the tender for the construction of the Langsa Regional Referral Hospital is that initially, the tender announcement was made by setting a budget of IDR 40,000,000,000.00. A total of 108 companies are interested in participating in this tender. Then, a clarification meeting was held, at the next stage, namely the conspiracy stage, there were indications of unfair practices, namely the existence of similar technical documents and offers between several participants.

Proving the Tender Conspiracy for the Construction of the Langsa Regional Referral Hospital was carried out using several pieces of evidence. Documentary evidence relating to the tender process, witness statements, documentary evidence.

The judge's considerations in this construction tender conspiracy case, in Decision Number: 04: KPPU-L-2020, considered the following: Reported Party I's confession, Reported Party I did not submit evidence, Fulfillment of the elements of Article 22 of Law Number 5 of 1999 concerning Prohibition of Practices Monopoly and Unfair Business Competition, taking into account the circumstances that alleviate the Reported Party.

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