

BUSINESS COMPETITION IN IMPLEMENTATION GOVERNMENT TENDER

Albert Ben Affendy

Universitas Prima Indonesia
arubatoben@gmail.com

Arbina Florenchia

Hukum Universitas Prima Indonesia
Arbinaflorenchia98@gmail.com

Dinda Evita

Universitas Prima Indonesia
dindasarahevit@gmail.com

Ella Lirpa Simaremare

Universitas Prima Indonesia
lirpaella100@gmail.com

Abstract

The Business Competition Supervisory Commission (KPPU) has the authority to examine and decide on alleged violations of business competition in tenders under Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices. The results of the study of Case Verdict Number: 34 / KPPU-L / 2009 are that there are several facts that business actors have violated Article 22 of Law Number 5 of 1999 that fulfills elements of conspiracy, the form of conspiracy is vertical collusion and conspiracy horizontal. In Case Decision Number 34 / KPPU-L / 2009 it is shown that a violation of business competition has Elements that can determine that there is an unfair business practice, in this case it is stated that Reported I, Reported II, Reported III, Reported IV, Reported V, Reported VI was proven to have been legally and convinced to have carried out a tender conspiracy. The formulation of the problem in the research is an analysis of the authority of the KPPU and the elements of a tender conspiracy. The type of research that was used in this journal were the Normative Research Type, and the data collection technique used is the literature study.

Keywords: *KPPU's Authority, Tender Collusion, Elements of Collusion*

A. PRELIMINARY

1. Background

In economic life, to be precise in developing countries, competition among business actors is an inevitable necessity. Both in terms of obtaining the maximum number of consumers, competing in controlling a market share or competing in winning a tender or a project that has high economic value.

Competing can be defined as an individual action and only concerned with personal interests to achieve a goal or a separate advantage. However, this is not always bad, especially in Indonesia which is known for its culture of mutual cooperation, gentleness and togetherness. This makes competition something useful to motivate everyone to achieve a goal. Competition is wrong if it is not carried out in a dishonest manner. This phenomenon of competition occurs naturally between entrepreneurs so that they get a big profit.¹

Tender aims to select the best service provider using several methods, namely the direct procurement method, the tender method, the direct projection method, the fast tender method, and the single vendor method. With the aim of creating fair tender competition for providers of goods/services who have met the requirements, with the methods determined by the parties concerned on a basis in order to be selected as only the best providers (Susanti Adi Nugroho, 2014: 232).²

In accordance with the Legislation No. 5 of 1999 regarding things that are prohibited in the implementation of acts of controlling the market (*monopoly*) as well as competition between unhealthy business actors, abbreviated as Law No. 5 of 1999. Which functions to maintain the integrity of public needs as well as increase the values of economic efficiency in general (*national*) with one of the objectives, namely to debate/increase the level of the welfare of the people, to create a conducive atmosphere of business competition, and to reduce monopolistic practices and increase efficiency in business activities.³

UU No. 5 of 1999 creates conditions for fair business competition and is directly supervised by the Business Competition Supervisory Commission (*hereinafter abbreviated as KPPU*). KPPU is an independent institution that is independent from the influence and power of the government and other parties in supervising business competition activities, the formation of which is based on Article 30 of Law No. 05 of 1999.⁴

¹ Ningrum Natasya Sirait. 2011. *Hukum Persaingan Di Indonesia*. Medan: Pustaka Bangsa. Hal.14-15.

² Apectriyas Zihaningrum. 2016. *Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat*. Privat Law, Vol. IV. No 1. Hal. 3.

³ Penjelasan atas Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat.

⁴ *Ibid.*

The task of the KPPU is to check or evaluate if there is a prohibited agreement or an illegal business activity, which is contained in Law No. 05 of 1999, namely KPPU assesses that an agreement or business activity is prohibited, then KPPU may use an authority to order the termination of the agreement and the prohibited business activity.⁵

Therefore, law has a role to regulate business competition in the economic or business fields so that no one party feels disadvantaged.

According to the 1945 Constitution (UUD). In the definition of tender in Law Number 05 Year 1999, the content/meaning is very strict (narrow) and very limited. Strict/narrow due to the existence of an official offer, namely (tender) which is assumed to be an act of offering a price, while in its implementation, tenders can be divided into several activities, including documents in the form of bids, submission and examination of responses or rebuttals, determination of tender winners, requests such as buying goods (*sale of tender goods*), requests for procurement of goods and services, technical and price proposals (*offers*) and price quotes, evaluation of prequalification documents (*if proven to exist*). Technical bids and prices are the essence of important evaluations for holding official bids in the form of tenders to determine who wins the official bid (*tender*).⁶

In conspiracy to tender for the procurement of goods and services, there is a mechanism for conducting tender conspiracy, so that it will be a little troublesome for KPPU as an independent institution in business competition to investigate this matter further. Various actions are taken by business actors to win a tender, starting from exchanging information with fellow business actors involved in the auction project or cooperating with the tender committee in order to win projects that the business actor is participating in. The tender itself is known by several terms, such as "vertical tender collusion", and "horizontal tender collusion". Vertical tender conspiracy is tender conspiracy carried out by a business actor and the tender committee or the party holding the tender, and horizontal tender conspiracy is tender

⁵ Ungki Miftahul Muttaqin. 2009. *Peran Komisi Pengawas Persaingan Usaha (KPPU) Perspektif Hukum Islam*. Skripsi Universitas Islam Negeri Sunan Kalijaga. Yogyakarta. Hal. 72.

⁶ Anna Maria Tri Angraini. 2009. *Implementasi Perluasan Istilah Tender dalam Pasal 22 UU Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat*. Jurnal Persaingan Usaha, Edisi.No. 2. Hal. 82.

conspiracy committed by fellow business actors or the tender participants themselves.

2. Formulation of the Problem

Based on the background, the problem formulation in this journal is whether the KPPU has the authority to examine and decide on allegations of business competition violations in tenders and how to classify elements of unfair business competition in case decision Number 34 / KPPU-L / 2009.

B. METHOD

1. Type and Nature of Research

The type of research we use is a normative juridical research with qualitative research

2. Source of Legal Material

The data we use is secondary data. The data is obtained from:

a. Primary Legal Material

Namely binding legal materials, such as statutory regulations, among others: Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition and the Civil Code.

b. Secondary Legal Material

Namely materials that can provide clarity about primary legal materials, such as research literature articles and legislation and their explanations.

c. Tertiary Legal Material

Namely materials that can provide guidance or explanation for primary and secondary legal materials, such as the Big Indonesian Dictionary, encyclopedias and others.

3. Data Collection Technique

In writing this thesis, the technique used in collecting data is a literature study technique, namely by conducting research on various reading sources such as books, laws and regulations, scientific papers, lecture materials, legal expert opinions, articles, and news obtained from the internet.

4. Data Analysis

In writing this thesis the writer uses qualitative data analysis methods where the data obtained is arranged systematically and then analyzed qualitatively to meet the objectives of writing a thesis. Qualitative research is research that refers to the norms that live and develop in society.

C. RESULTS AND DISCUSSION

1. The Authority of KPPU to Investigate and Decide on Alleged Violations of Business Competition in Vertical and Horizontal Tenders

Definition of the Business Competition Supervisory Commission (KPPU)

A country that has a system regarding the law for the implementation of business competition actions that is in current situations and is quite different from the competition law enforcement system and the authority of its business competition institutions. Indonesia has, the existence of Law No. 05 of 1999, a supervision is needed in the framework of its implementation. The enactment of Law Number 05 of 1999 concerning the prohibition of monopolistic practices and unfair business competition in its basis regarding the term competition policy is followed by the establishment of the supervisory commission which is useful/useful to ensure and supervise compliance with its provisions in the Antimonopoly Law the.⁷

With the authority of the supervisory commission, the commission has the following tasks:

- a. Checking/assessing agreements that may result in the implementation of monopolistic practices (actions) and/or unfair business competition, such as: "oligopoly, price discrimination, price fixing, zoning, boycotts, cartels, trusts, oligopsony, vertical integration, closed agreements, and agreements with foreign parties.
- b. Carry out an assessment of unhealthy business activities and/or illegal business actions / behavior such as controlling the market (*monopoly*), monopsony, and conspiracy.
- c. Carry out checks that depend on the presence or absence of an abuse of a dominant position which may result in monopolistic practices and/or unfair business competition, which may arise as a result of the presence of a

⁷Hermansyah. 2008. *Pokok-Pokok Hukum Persaingan Usaha Di Indonesia*. Jakarta: Kencana Prenada Media Group. Hal.73.

dominant position, merger, multiple positions, consolidation of share ownership and acquisition.

- d. Providing assistance and advice on a policy from the government, which is related to unfair business trade competition or also known as monopolistic practices.
- e. Prepare publications that are related to Law Number 05 of 1999.
- f. Submit information (reports) on a regular basis regarding the results of assessment/checks to the president and the DPR.

In the details (core) of the tasks and powers of the KPPU above, it can be seen that the authority of the supervisory commission is only limited to administrative authority, which is an authority similar to that of an investigating body, a prosecuting body, even a decision body, but that is only in a situation where it has been decided only administrative penalties are due to the fact that the commission body is not a special police body, or a civilian investigative body. However, the decision of the supervisory commission has executive legal force, that is, a decision which is equivalent to a decision made by a judge. Because of this, the decision of the supervisory commission can be directly requested for an execution at the competent district court and without the need for another trial in court.

Although the existing commission can hold independent hearings and has decided which cases to bring to it, however, to strengthen its decisions the commission has the power or executorial power, and also in cases concerning violations where the threat can be in the form of a basic criminal sentence, the commission must seek assistance from court before an action occurs.⁸

In accordance with the regulation regarding the authority of the commission in this Law, this supervisory commission actually has enormous authority over all acts of violations by unhealthy business actors. The supervisory commission not only pays attention to and conducts assessments/checks on business actors, but this commission also has the authority to carry out examinations/assessments accompanied by sufficient audit evidence so that within the time period determined by this law. The commission has reached a decision, the decision is then referred to

⁸Mustafa Kamal Rokan. 2017. *Hukum Persaingan Usaha*. Jakarta: PT Raja Grafindo Persada. Hal. 282.

as a Commission Decree as an act of supervision and protection of the law regarding business competition. As a development of competition law, competition law enforcement is not only related to civil law, but also contains elements of criminal law and administrative law. This is due to a violation of competition law that can harm society at large and in general, and can also harm the country's economy in the financial sector. Therefore, the Supervision Commission based on this law is only allowed to carry out supervision or assessment and enforcement of competition law, while the environment of criminal law is not the environment of the authority of the supervisory commission (KPPU).⁹

The KPPU's authority to impose sanctions on violators of Article Law concerning Anti-Monopoly and Unfair Business Competition, namely "Article 22" is very limited. Important things, in the implementation of the rules (*law*) of business competition, especially in cooperation (*conspiracy*) in tenders based on the Anti-Monopoly Law, it is more concerned with imposing (*giving*) sanctions to business actors who violate Article 22. and the absence of sanctions for other parties, for example: "involving tender organizers (*tender committee*) if the conspiracy was carried out by means of a vertical type of tender or a combination of vertical and horizontal tenders". This is because according to Article 36 letter 1 of the Law on Anti-Monopoly and Unfair Business Competition, it states or indicates that "KPPU has the authority to impose/impose sanctions in the form of administrative actions/behavior against business actors who violate the provisions of this Law". This commission is not a police agency specifically concerned with business competition, thus, this commission is more like an administrative body (*institution*) due to the fact that the authority attached to the agency is only administrative in nature, so that only sanctions can be given/was imposed, namely the same administrative sanctions according to Andi Fahmi Lubis. Namely that "according to Article 47 of the Law concerning the prohibition of implementing monopoly (*Anti-Monopoly*) and the Implementation of Unfair Business Competition, this supervisory commission only has the authority to impose administrative sanctions on business competition implementers who violate the provisions of Article 22" , that is:

⁹Ahmad Junaidi. 2012. *Jurnal Persaingan Usaha*. Jurnal Komisi Pengawas Persaingan Usaha . Edisi No. 7. Hal. 4-5.

- 1) Order the executors of business competition to immediately stop business actions that have been proven to have resulted in monopolistic behavior (practice) or have caused unfair business competition which may harm the public according to Article 47 paragraph (2);
- 2) Termination of the total amount of compensation in accordance with (Article 47 paragraph (2) letter f) and/or; 3) Imposition of a minimum fine of IDR 1.000.000.000,00 (one billion rupiah) and a maximum of IDR 25.000.000.000,00 (twenty five billion rupiah) (Article 47 paragraph (2) point g).¹⁰

Elements of Unfair Business Actions/Behavior in Case Number 34/KPPU-L/2009 Concerning Vertical and Horizontal Tenders.

The origin of the words for tender conspiracy can be seen in 2 words, namely, conspiracy and tender. With the above definition, it can be concluded that tender conspiracy is the actions of executors/other business owners with the aim of controlling the market by determining and/or determining the tender winner in order to result in an unfair business competition environment. Accordingly, tender conspiracy contains the following elements.¹¹

According to the Guidelines for Commission Supervision Rules Number 2 of 2010 which contain and regulate acts of conspiracy in tenders, there are several elements of cooperation (conspiracy) in the form of tenders mentioned in "Article 22", namely:

- a) Elements regarding related business actors
- b) Elements contained in a conspiracy
- c) Elements regarding other parties in a conspiracy
- d) The elements that regulate and determine who will win the tender
- e) Elements of business competition which can be defined as unfair business.

¹⁰ Apectriyas Zihaningrum, *Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat*, op. cit, Hal. 6-7.

¹¹ Mustafa Kamal Rokan, *Hukum Persaingan Usaha*, op. Cit, Hal. 184.

Each of these elements constitutes one unit and becomes a consideration for the supervisory commission in proving that there was and/was not a violation. "Article 22 of Law no. 5 of 1999.¹²

a) Elements of Related Business Actors

The definition of the implementing element (owner) of the business, which is in accordance with "Article 1 point 5 of Law no. 5 of 1999 "regarding each individual or, business entity/company with various forms as, business entity/company and/or non-company, which is formed and domiciled or carries out business actions in the jurisdiction of the state, either separately or jointly with through an agreement which, carry out business activities in the economic field.¹³

Examples of these elements from the above decision are:

According to the above verdict, the business actors had violated "Article 1 Number 5 of Law no. 5 of 1999 "which is an act of each individual or business entity, in the form of a legal entity or not a company that is established, domiciled, and which has carried out business practices in an area/regions state law, either separately or by many business entities concerned through an agreement or agreement, as well as carrying out various business actions in the economic sector;

Whereas according to the decision on the business actor in this case, the Reported Party I was known as PT Bunga Raya Lestari Jo PT Citra Nusra Persada, and was referred to as (Reported Party IV) under the company name PT Nasri Niagatama, as described in point 1.1. the section on Law;

Whereas accordingly, the elements of business actors are fulfilled;

b) Elements that exist in a conspiracy, namely:

1. Conspiracy (cooperation) with 2 and/or 3 or more parties or many parties at once.

¹² Daniel Jusuf Said Sembiring. 2016. *Persekongkolan Tender Secara Vertikal Dan Gabungan Horizontal Dan Vertikal Di Indonesia Ditinjau Dari Putusan Komisi Pengawas Persaingan Usaha Tahun 2013 Sampai Tahun 2014*. Universitas ATMA Jaya Yogyakarta. Hal. 2-3.

¹³ Asmah.2017. *Penerapan Sanksi Denda Terhadap Kasus Persekongkolan Tender Jalan Nasional* , Naskah Fakultas Hukum Universitas Sawerigading Makassar. Hal. 5.

2. Openly or publicly or in silence where an adjustment has been taken/equates documents with other participants.
3. Compare tender documents prior to a document submission.
4. Creating competition that looks like the original (*pseudo*) but not like the real thing (*sham competition*).
5. Support or provide facilitation/opportunity for a conspiracy.
6. The absence of an act of refusal to take an action despite knowing that the action has been taken to regulate in order to win a certain tender participant.
7. Giving (special) opportunities from tender administrators or parties related or not directly related to business executors who are connected to the tender with actions that violate the rules (law)

Examples of Factors Conspiring on Case Decision Number 34 /KPPU-L/2009 are:

1. Cooperation between two or three parties or more:

The Examination Team has concluded that there is evidence of an unfair business competition between the limited company (PT). Nasri Niagatama, (PT). Bima Putera Mandiri, and the limited partnership (CV). Silver in tender.

2. Openly or publicly or in silence where he has done a behavior (action) to equate files (documents) with other participants:

It was reported that (PT). Bunga Raya Lestari Jo, and (PT). Citra Nusra Persada has admitted that they have provided softcopy of post-qualification documents to (PT). Moderna Teknik Perkasa and (PT). Sarana Multi Usaha in the form of a CD and the reason is to "help friends", but (PT). Bunga Raya Lestari Jo, and (PT). Citra Nusra Persada denies that she has collaborated with (PT). Moderna Teknik Perkasa and PT Sarana Multi Usaha in preparing post-qualification documents;

3. Comparing Tender Documents before Submission :

It was reported that, (PT). Moderna Teknik Perkasa as (Telapor II) and PT Bumi Putera Mandiri as (Reported Party V) have never been present to fulfill the summons for examination;

It has been proven that PT Nasri Niagatama is (Reported Party IV), (PT). Bumi Putera Mandiri who was reported as (Reported Party V) and with (CV). Silver as (Reported Party VI) deliberately made dividends between companies and made adjustments to the bid documents;

4. Creating Pseudo Competition (sham competition)

The Examination Team conducts an examination or an assessment of the similarity of ownership and management found between (PT). Sarana Multi Usaha and (PT). Moderna Teknik Perkasa which has resulted in competition that looks like the original (pseudo) but not like the original (sham competition) among the tender participants which may create an unfair business competition environment;

And thus, the Examination Team Groups can conclude that there has been cooperation (conspiracy) between (PT). Sarana Multi Usaha with (PT). Moderna Teknik Perkasa in the official bid (tender).

5. Approve or facilitate the occurrence of conspiracies:

It was reported that (Reported Party IV) as (PT). Nasri Niagatama has legalized (acknowledged) that they have lent the company to another PT/ CV;

6. The absence of an act of refusal to take an action despite knowing that the action has been taken to regulate in order to win a certain tender participant:

The conclusion of the Examining Team confirming that there are signs that there is a conspiracy between the parties, namely: (Reported Party I), (Reported Party II), and (Reported Party III) cannot be accepted. This is because the essence of the problem against (Reported Party I) is merely providing a form (blank) containing a qualification for the two reported parties, namely: (Reported Party II) and (Reported Party III). Even though there is writing of the same form (blank), the objective is completely different (not the same) which does not belong to the environment of tender conspiracy as referred to in the guidelines for Article 22 of Law No. 05 of 1999 in an effort to win over one of the executors of the tender event;

7. Providing (*special*) opportunities from tender administrators or parties related or not directly related to business executors who are connected to the tender with actions that violate the rules (law):

Reported by an expert witness of LKPP, namely: "Setya Budi Arijanta" who reported that photocopies (*softcopy*) of the form (*blank*) filling in qualifications are allowed/can be obtained from the tender executor concerned. This may also imply that the qualifying form (blank) form is not something that is kept secret (general), and that it is an ordinary document that can be accepted by the relevant auction participants in general;

c) Elements Regarding Other Parties in a Conspiracy

In Article 22, there is a guideline regarding the elements of other parties in a conspiracy, namely "parties (*vertical or horizontal*) involved in unhealthy business processes (*tenders*) that have carried out tender conspiracy as well as business actors as tender participants and/or other legal subjects that can be associated with the tender. "Or as for what is meant by other parties in the situation of this case, namely parties who are horizontally one of the business parties as one of the tender participants, as well as parties horizontally and other parties vertically, namely the organizer as other legal subjects and also related with the tender."¹⁴

Examples of the above elements from the above decision are:

It is reported that what is meant by other parties are also parties related to the process in this tender and who have also carried out auction conspiracy, both business actors as tender participants and/or other legal subjects related to the tender;

And also in this case other parties such as Limited Liability Companies (PT). Moderna Teknik Perkasa as (Reported Party II) and (PT). Sarana Multi Usaha as (Reported Party III) in "Package IV" with "Package V" the official offer (tender) aquo, (PT). Bima Putera Mandiri which was reported as (Telapor V) and the Limited Partnership (CV). Silver, namely as (Reported Party VI) in "Package I": tender aquo as described in accordance with the section in the law. That thus the elements of other parties are fulfilled.

d) Elements That Regulate And Determine Who Will Win The Tender

¹⁴ Asmah. *Penerapan Sanksi Denda Terhadap Kasus Persekongkolan Tender Jalan Nasional* , ibid, Hal. 6.

Regulating and determining who will win the tender is an act of the parties involved in the tender process in conspiracy with the aim of eliminating other business actors as competition and/or to win certain tender participants in various ways. The arrangement and/or determination of the tender winner, among others, is carried out in terms of determining the criteria for winners, technical requirements, finance, specifications, tender process, and so on.

Examples of elements regulating and determining who will win the tender from the above decision, namely:

Conspiracy based on the Principles of Article 22 of Law Number 5 Year 1999 is like a conspiracy carried out by business actors with other parties at the initiative of anyone and in any way with an attempt to win participants/determine the winner of a particular tender;

According to Article 1 point (8) of Law Number 5 Year 1999, conspiracy or business conspiracy are forms of cooperation carried out by business actors with other business actors with the aim and aim of unfairly controlling the relevant market for the interests of business actors who are related and who have agreed to conspire;

Based on the Guidelines for Article 22 of Law Number 5 Year 1999, conspiracy can occur in three forms, namely horizontal conspiracy, vertical conspiracy, or a combination of horizontal and vertical conspiracy;

Horizontal conspiracy is a conspiracy that can occur between business actors or providers of goods and/or services with fellow business actors or with competitors' goods and service providers;

It has been meant that vertical conspiracy is a conspiracy that has occurred between one or several business actors or providers of goods and services and with the tender committee as well or the auction committee or the goods and services users or the owner or employer;

Reported on the existence of a combination of horizontal and vertical conspiracy, namely conspiracy between the tender committee or auction committee or users of goods and services or owners or employers with business actors or providers of goods and services;

It was proven that there was a horizontal conspiracy between the tender participants in "Package I, namely the tender for the Rehabilitation of the Sigi Rato W = 40 M bridge" in Bolo District ", namely:

(Reported Party IV) with the name (PT). Nasri Niagatama, (PT). Bima Putera Mandiri as (Reported Party V), (CV). Silver, namely (Reported Party VI) in the form of:

Lending and borrowing companies that have been carried out by (PT). Nasri Niagatama (Reported Party IV), (PT). Bima Putera Mandiri (Reported Party V), and (CV). Silver as (Reported Party VI);

The existence of an act of cooperation in the preparation of the bid document, which resulted in a similarity in format and similarity of writing errors in the bid documents between (PT). Nasri Niagatama (Reported Party IV), (PT). Bima Putera Mandiri as (Reported Party V), and (CV). Silver as (Telapor VI);

It is evident that there was a horizontal conspiracy between the tender participants in Package IV, namely the tender for the improvement of the Sarita Wadukopa Kala road, Rato Mangge, O'o Mangge, Sangari Mbawa, Bajo Sampungu, Karaku Roa Kecil and the Bolo city environment, and in "Package V" the tender was for the Improvement of Daru-Jala-Nggembe, Donggobolo-Kalampa, Tente-Ncera, Pucuke-Keli and Pandai Risa roads, namely: (PT). Bunga Raya Lestari Jo. (PT). Citra Nusra Persada (Reported Party I), (PT). Moderna Teknik Perkasa (Reported Party II), and (PT). Sarana Multi Usaha as (Reported Party III) in the form of:

The existence of cooperation in making bid documents to the parties participating in the tender, giving rise to the same format and similarity of writing errors in the bid documents between (PT). Bunga Raya Lestari Jo. (PT). Citra Nusra Persada (Reported Party I), (PT). Moderna Teknik Perkasa as (Reported Party II), and (PT). Sarana Multi Usaha as (Reported Party III); similarity of ownership and management of the company between (PT). Moderna Teknik Perkasa as (Reported Party II) with (PT). Sarana Multi Usaha, namely (Reported Party III);

Whereas accordingly, it has been proven that the elements of conspiring to regulate and determine who the tender winner have been fulfilled.

e) Elements of business competition which can be defined as unfair business

Unfair business competition is competition between business actors with the aim of carrying out production activities or as an act of marketing goods and/or services carried out in a dishonest/incorrect manner, as well as against the law and may hinder the implementation of business competition.¹⁵

Examples of elements of business competition that can be defined as unfair business from the decision in the above case, namely:

That is, it has been meant that unfair business competition in accordance with the provisions of Article 1 point 6 of Law Number 5 Year 1999 is “competition between business actors who are engaged in producing and or marketing goods and or services which are carried out dishonestly or against the law or can hinder the implementation of business competition”;

It is stated that the actions taken by the Reported Parties are as described in point 3.2. the section on Law is an act of dishonesty and against the law, which creates an environment of unfair business competition;

Thus, the element of unfair business competition has been fulfilled.

D. CLOSING

1. Conclusion

Based on the judge's decision in Case Number 34 / KPPU-L / 2009 which stated that reported Party I, Reported Party II, Reported Party III, Reported Party IV, Reported Party V, and Reported Party VI. It has been proven legally and convincingly in accordance with Article 22 of Law Number 5 of 1999 concerning "Prohibition of Monopolistic Practices and Unfair Business Competition" to have committed violations, which contain elements of business actors, elements of conspiring, elements of other parties, elements of regulating and / or determining tender winners, and elements that may result in unfair business competition which

¹⁵ Asmah. *Penerapan Sanksi Denda Terhadap Kasus Persekongkolan Tender Jalan Nasional*, ibid, Hal. 7.

has been carried out in the public bidding project (tender) for handling roads and bridges in Bima Regency by the Public Works Office for Bina Marga, Bima Regency, Fiscal Year 2009. This decision has shown the values and norms applied in the law enforcement process in the field of business competition by providing a fair tender competition guarantee whereby each tender participant has a fair or equitable business opportunity for every business actor and with prevent the implementation of tender conspiracy.

2. Suggestion

With the existence of the Business Competition Supervision Commission, it is hoped that law enforcement against business actors who violate Law Number. 5 of 1999 regarding the practice of market control (monopoly) and unfair business competition can be given appropriate sanctions in order to create business competition in the implementation of the tender running well and fairly.

E. REFERENCES

- Anggraini, Anna Maria Tri. 2009. *Implementasi Perluasan Istilah Tender dalam Pasal 22 UU Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat*. Jurnal Persaingan Usaha, Edisi. No. 2.
- Apectriyas Zihaningrum. 2016. *Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat*. Privat Law. Vol. IV. No 1.
- Asmah. 2017. *Penerapan Sanksi Denda Terhadap Kasus Persekongkolan Tender Jalan Nasional*. Naskah Fakultas Hukum Universitas Sawerigading Makassar.
- Hermansyah. 2008. *Pokok-Pokok Hukum Persaingan Usaha Di Indonesia*. Jakarta: Kencana Prenada Media Group.
- Junaidi, Ahmad. 2012. *Jurnal Persaingan Usaha*. Jurnal Komisi Pengawas Persaingan Usaha . Edisi No. 7.
- Muttaqin, Ungki Miftahul. 2009. *Peran Komisi Pengawas Persaingan Usaha (KPPU) Perspektif Hukum Islam*. Skripsi. Universitas Islam Negeri Sunan Kalijaga. Yogyakarta.
- Putusan Komisi Pengawas Persaingan Usaha Perkara Nomor: 34/KPPU-L/2009

- Rokan, Mustafa Kamal. 2017. *Hukum Persaingan Usaha*. Jakarta: PT Raja Grafindo Persada.
- Sembiring, Daniel Jusuf Said. 2016. *Persekongkolan Tender Secara Vertikal Dan Gabungan Horizontal Dan Vertikal Di Indonesia Ditinjau Dari Putusan Komisi Pengawas Persaingan Usaha Tahun 2013 Sampai Tahun 2014*. Universitas ATMA Jaya Yogyakarta.
- Sirait, Ningrum Natasya. 2011. *Hukum Persaingan Di Indonesia*. Medan: Pustaka Bangsa.
- Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat.
- Zihaningrum, Apectriyas. 2016. *Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat*.