



Law Enforcement of Unfair Business Competition in the Procurement of Goods and Services

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Abstract—The purpose of this study is to determine the importance and immediacy of punitive measures for violation offenders in government procurement systems for goods and services within Indonesia. It also aims to evaluate Business Competition Supervisory Commission and State Administrative Court's roles in enforcing business competition law as well as their responsibilities in conflict resolution. Normative methodology forms the basis of this investigation that delves into legislation related to these areas while looking at what each institution does vis-a-vis its mandate towards resolving conflicts. A systematic review approach is taken where laws, doctrine, regulations are carefully considered so that a proper perspective can be obtained on how best law enforcement efforts could be improved especially when dealing with public procurement issues. The research outcome points out that decisions made by KPPU and PTUN do not show any discouraging impact towards those actors involved in the Procurement Violations— hence the call for more clear administrative sanctions plus a revision of some sections within Presidential Decree 12 of 2021. Communication between KPPU, PTUN, and the Government Procurement Policy Institute also needs to be improved. This research provides a deeper understanding of the urgency of sanctions for procurement actors as an instrument for enforcing unfair business competition laws and resolving disputes over procurement of goods/services by the government in Indonesia. The implication of this research is the need to apply strict administrative sanctions to Procurement Actors in resolving unfair business competition procurement disputes to enforce the law and prevent future violations.

Keywords— *Business Competition Supervisory Commission, State Administrative Court, Unfair Business Competition Laws, Administrative Sanctions, Procurement Disputes.*

I. INTRODUCTION

The acquisition of goods and services by government entities is a fundamental process for effective fiscal governance. Through procurement, governments obtain essential resources required to fulfill their mandated obligations and execute their core functions. Moreover, the government procurement system serves as a vehicle for allocating public funds to meet the needs of the citizenry, encompassing crucial areas such as infrastructure development, education provision, and healthcare delivery. [1]Procurement of goods/services by the government involves providers from the private sector, which results in a contractual relationship between the government and the provider so that legal obligations and relationships are formed.[2]

Government agencies are responsible for the goods/services procurement activities carried out as well as decisions related to the procurement process. Therefore, the Government is obliged to have a transparent and well-organized procurement mechanism. For example, a directive from the European Union requires member countries to publish procurement tenders whose value is above a certain threshold through the Daily Electronic Tenders (TED) system so that they can be accessed openly. [3]Based on information from the General Procurement Plan Information System for Government Goods/Services Procurement Policy Institutions in Indonesia, the budget provided for government spending activities through providers in 2024 for Ministries, Institutions, Provinces, and Cities is IDR 3.80 trillion. Meanwhile, in 2023 the budget provided is IDR 3.91 trillion. These huge costs every year must be secured so that procurement of government products and services can run effectively and avoid fraud.

The impact of unhealthy competition has an impact on several parties, including the Government, Business Actors, and Society. From the government's side, unfair business competition practices can damage the public's trust as stakeholders in the government. The public will see that the government is unable to enforce the law and protect their interests. From a business actor's perspective, unhealthy business competition practices can also create a business climate that is not conducive to business actors. This can cause honest and competent business actors to be reluctant to invest and develop their businesses. So, competent and clean business actors will not want to get involved in businesses related to the Government. The impact felt when unhealthy business competition often occurs has a big impact on society. People are at risk of receiving low-quality public facilities, which can endanger their safety and health even though the price paid for these facilities is not cheap. Unfair competition or corruption can result in a waste of tender budgets, and create uncertainty in the tender process due to fraud, loss of public trust, and economic losses for the state and society.[4]

The procurement of goods and services frequently encounters issues, leading to disputes among the involved parties and ultimately resulting in procurement-related conflicts. Unethical purchasing behaviors can have significant financial and reputational consequences for individuals and organizations. Multiple studies have examined the ethical considerations of procurement professionals in relation to these behaviors and have determined their frequency.[5] If there are unhealthy procurement practices, there are Procurement Disputes which are useful so that the procurement process can run better, reduce violations, and protect the interests of the parties involved in government procurement. Procurement disputes can arise at various stages, from the qualification stage in the provider selection process to the contract signing and implementation stage. [6]In Indonesia, procurement dispute resolution outside of court can be carried out through several mechanisms, such as mediation, conciliation, and arbitration. If the mediation, conciliation, and arbitration processes do not resolve the procurement dispute then the problem can then be resolved through the State Administrative Court (PTUN) or the Business Competition Supervisory Commission (KPPU).

The authority to handle procurement concerns varies between the KPPU and PTUN, depending on the nature of the infringement and the parties involved. The KPPU primarily investigates violations of the KPPU Law related to the purchase of goods and services, including monopolistic practices, unfair commercial competition, and conspiracy. The Administrative Court (PTUN) has a key role in assessing the legality of decisions and actions taken by state administrative bodies and officials in the procurement of goods and services. Its main focus is to ensure that these entities comply with legislative requirements and uphold the principles of good governance. The ultimate goal is to ensure the integrity and protection of government procurement from any unethical competitive practices.

The Indonesian Competition Commission (KPPU) derives its competition policy in Indonesia from Law Number 5 of 1999, which explicitly forbids monopolistic acts and unfair business competition. When the KPPU receives reports or detects suspected violations of this legislation, it has the power to investigate and examine circumstances involving alleged monopolistic actions and unfair business competition. These reports might come from the public, commercial enterprises, or be discovered by the Commission itself. The KPPU has the authority to enforce administrative penalties, such as legal proceedings and monetary fines, on commercial companies that have been found guilty of violations. Although blacklisting providers might be a useful strategy, if it is applied with too much leniency, it will result in negative consequences. Although issuing a fine is the preferred method, a blacklist can be used as an alternative if it is not possible to impose a cost. Nevertheless, it is imperative that the blacklist has a substantial deterrent effect in order to effectively avert undesirable effects.[7]

The PTUN (Administrative Court) is a judicial body empowered to resolve disputes pertaining to the government procurement for goods and services based on legal authority stems from Law Number 51 of 2009. The PTUN also has the jurisdiction to adjudicate cases involving unlawful acts committed by government agencies and/or officials. Essentially, disputes originating from unlawful government actions fall under the domain of administrative justice, as stipulated in the Government Administration Law.[8]

In the KPPU Decision Number 08/KPPU-L/2023 regarding, the defendant was a business entity that violated Article 22 of Law Number 5 of 1999, sanctions have been given in the form of fines by the Law. Meanwhile, Government Goods/Services Procurement Actors who are proven to be in violation are not given sanctions or fines. Furthermore, in the PTUN decision number 191/G/2019/PTUN-JKT, the sanction issued to the Defendant who is proven guilty is that the Defendant, namely the Goods/Services Procurement Committee, is required to pay the court costs. arises as a result of a dispute that is filed whose value is not large. Based on the differences in the imposition of sanctions, this needs to be discussed further to provide a deterrent effect to Government Goods/Services Procurement Actors who are proven to have violated them, thereby reducing the potential for further violations in the future. By analyzing the KPPU and PTUN decisions regarding regulations discussing the Procurement of Government Goods and Services, it is hoped that we can find solutions to problems that occur in the dispute process for the procurement of government goods and services.

This article seeks to examine the enforcement of sanctions imposed by the KPPU (Indonesia's competition authority) and PTUN (Indonesia's administrative court) in matters related to the purchase of goods and services by the Indonesian government. It is expected that the sanctions imposed will serve as a deterrence to the

reported/defendants, thereby mitigating issues related to the Indonesian government's acquisition of goods and services. The defendants or reported individuals in instances related to the Indonesian government's purchase of goods and services can include business entities, working groups responsible for selecting goods or service providers, as well as commitment making officials (PPK).

II. LITERATURE REVIEW

The creation of healthy business competition in tenders for the procurement of goods/services by the government is a crucial aspect in preventing the practice of conspiracy. KPPU acts as a supervisory institution that investigates allegations of conspiracy at every stage of the procurement process (Law No.5/1999). KPPU strives to create a conducive business climate and reviews the suitability of existing policies with the principles of healthy competition, especially regarding collusion in government tenders. This body also provides recommendations to the government to be careful in the implementation and requirements of tenders. The KPPU carries out prevention efforts by cultivating the values of healthy business competition, such as increasing synergy with the Supreme Audit Agency (BPK). The results of the BPK audit are used as initial indications in investigating allegations of conspiracy at the KPPU. Apart from that, KPPU actively holds workshops, seminars, outreach, and advocacy on business competition law related to the procurement of goods/services to prevent procurement officials from being involved in conspiratorial practices. In enforcing business competition law, the KPPU carries out the duties mandated by Law No. 5/1999, especially Article 35 concerning the authority to take action against perpetrators of violations. Considering the large number of cases of collusion, legal protection for business actors, especially small and medium ones who wish to compete in tenders, needs to be improved. Direct supervision of the procurement process by a special agency with high-integrity personnel is also required.[11]

Imposing rigorous and all-encompassing penalties on those who commit infractions is a vital tool in implementing business competition rules and settling disputes related to government procurement in Indonesia. Appropriate penalties are necessary to establish a deterrent impact and foster an environment of robust commercial rivalry. The procurement of government products and services is a susceptible economic activity that is particularly prone to unfair business rivalry practices, particularly instances of bid rigging. Tender rigging constitutes a breach of Law No. 5 of 1999, which prohibits monopolistic practices and unfair competition in business. The KPPU, as a regulatory body for business competition, plays a crucial role in overseeing and implementing laws related to business competition, particularly in relation to bid rigging. Nevertheless, there is a perception that the law enforcement conducted by the KPPU is suboptimal. An approach to enhance the efficacy of enforcing business competition laws in relation to government procurement is to enforce stringent penalties against those who commit infractions, including both commercial entities and procurement officials. In addition to enhancing regulations, it is imperative to augment coordination and synergy between KPPU and affiliated state organizations, including the Financial Audit Agency (BPK), the Police, and the Prosecutor's Office. [11]

Furthermore, regarding the State Administrative Court (PTUN), after the Government Administration Law was established, there were still differences in the handling of government procurement cases in the Indonesian administrative courts. Some State Administrative Courts (PTUN) apply the opposing theory, considering that procurement disputes are not the absolute competence of administrative justice, while others ignore this theory. In France, administrative courts have the authority to handle disputes over the procurement of government goods and services, with the subject of the lawsuit being the cancellation of administrative decisions or compensation. Indonesia should follow this pattern. The implication is that the PTUN will handle compensation claims from third parties who are not involved in the issuance of administrative decisions, by Constitutional Court Decision No. 22/PUU-XVI/2018. It is necessary to synchronize the authority of the Indonesian KPPU and PTUN. Based on Supreme Court Regulation no. 2/2019, cases of unlawful acts by government agencies/officials are the domain of the PTUN by the Government Administration Law, so objections to KPPU decisions regarding public procurement should be submitted to the PTUN, not the Commercial Court which only has authority if it does not involve the government.[8]

Procurement is always associated with acts of corruption, Until now, corruption remains an epidemic that has hit almost all countries in the world. Regardless of the progress of a country's social and economic system, corrupt practices are still found in it. Apart from that, corruption is also a significant obstacle to democratization efforts and the implementation of good governance. The phenomenon of increasingly corrupt local administration occurs globally. In Indonesia itself, corruption is increasingly widespread and entrenched. After the era of Soeharto's leadership ended, various corruption eradication programs were launched to increase transparency and the quality of government governance.[9]

Corruption poses a substantial threat in Indonesia, exerting considerable harmful influence. In light of this predicament, or possibly due to political propriety, the administration that came into power after independence declared the battle against corruption as a matter of urgency. However, it was not until the Reformation Era in 2000, as recognized by Indonesians, that the fight against corruption gained significant momentum. This was achieved through the implementation of Law No. 30/2002, which formed the Corruption Eradication Commission (KPK). Since its inception, this Commission has vigorously pursued and apprehended those involved in corrupt

practices like never before. Nevertheless, pursuing corrupt authorities is a challenging endeavor. With the Corruption Eradication Committee gaining more legal backing and increased public confidence, corrupt individuals resort to illicit methods to manipulate or impede the law in order to evade punishment for their offenses. This activity is commonly referred to as obstruction of justice.[10]

Referring to the literature on obstruction of justice, efforts to eradicate corruption in Indonesia can be a relevant reference in this article. This emphasizes the importance of strong law enforcement, clear regulations, collaboration between institutions, and community participation in creating healthy business competition and transparent and accountable procurement processes. The author will further identify legal certainty regarding the imposition of sanctions for Government Officials who violate the provisions. This is necessary because if there is no legal certainty for imposing sanctions, it will create a legal vacuum for Procurement Actors who are found guilty in the KPPU and PTUN decisions. Mistakes made by Procurement Actors are not always related to corruption but also non-compliance with procedures which must also be given sanctions by applicable regulations so that procurement actors cannot deliberately avoid procedures to carry out procurement practices correctly and cleanly.

In connection with the literatures, this paper identifies further regulations regarding the imposition of sanctions on Procurement Actors so that there is no legal vacuum that allows decisions to be hampered in imposing sanctions on Government Procurement Actors who are found guilty. Furthermore, coupled with an analysis of the latest Regulations on Procurement of Government Goods/Services, as well as decisions issued by the KPPU and PTUN along with the authority of these institutions, it will be possible to find out more deeply regarding the existence of sanctions for Procurement Actors who violate the provisions.

III. METHOD

This study employs normative research methodology, utilizing secondary data in the form of statutory regulations. These regulations are thoroughly analyzed in conjunction with legal principles and regulations of public procurement. Moreover, this research delves into the implementation of sanctions and relevant legislation concerning government procurement infringements. It also explores the functions of the KPPU and PTUN in addressing such violations. Additionally, the study suggests legal refinements to Indonesia's integrated justice system, particularly regarding the imposition of penalties. This approach involves a meticulous examination of applicable laws, established principles, and regulations to pinpoint deficiencies, propose legal modifications, and offer valuable insights to enhance law enforcement in specific scenarios. The analysis encompasses relevant legislation, including Law Number 5 of 1999 and Law Number 51 of 2009, which specifically pertain to the enforcement of sanctions against Business Actors involved in procuring Government Goods/Services. Furthermore, this study employs literature research and employs a normative juridical approach to assess the regulatory framework governing the enforcement of laws for public procurement, specifically in cases when actors violate government procurement regulations.

IV. RESULTS AND DISCUSSION

A. Settlement of Unfair Business Competition and Settlement of Government procurement Disputes

The KPPU has issued multiple decisions declaring the respondent's guilt. One such decision is KPPU Decision Number 18/KPPU-L/2022, which pertains to the procurement of construction work for the Double Track Electrical Signaling System for the Bogor – Cicurug Cross Train at the Railway Engineering Center Work Unit for the Western Java Region of the Ministry of Transportation Fiscal Year 2019-2021 (Tender Code 59035114). The verdict concluded that PT Len Industri, PT Len Railway System, the Working Group for Selection of Suppliers of Goods/Services Related Work Packages, and the Commitment-Making Officer were found guilty of violating Article 22 of Law Number 5 of 1999, based on strong and irrefutable evidence. The sanction issued required Reported Party I to pay a fine of Rp. 6,058,000,000.00, which must be placed into the State Treasury. Reported Party II was also had to pay a fine of Rp. 4,915,000,000.00, which must be deposited in the State Treasury.

The second document is KPPU Decision Number 15/KPPU-L/2023, which pertains to the construction project for the improvement of Jalan Kandang Roda Pakansari in Bogor Regency during the fiscal year 2021. The decision affirms that the suppliers and Working Group XXXIII Procurement and Services Bureau of Aceh Province have been legally and convincingly found guilty of violating Article 22 of Law Number 5 of 1999. Sanctions have been imposed PT Cahayahikmah Jayapratama in the form of a fine of Rp. 1,350,000,000.00, which must be paid to the State Treasury. Reported PT Karya Kandangan Nasional is prohibited from participating in the procurement of

goods and/or services sourced from the APBN/APBD for a period of 2 years throughout Indonesia. Similarly, PT Diang Ingsun Mandiri is also prohibited from participating in the procurement of goods and/or services sourced from the APBN/APBD for a period of 2 years throughout Indonesia.

The third document is KPPU Decision Number 25/KPPU-I/2020. The decision confirms suppliers and Working Group for Selection of Suppliers of Goods/Services Related Work Packages have been found guilty of violating Article 22 of Law Number 5 of the Year 1999, based on solid legal evidence. The imposed sanction requires PT Cipta Karya Multi Teknik to pay a fine of Rp. 2,700,000,000.00, which must be deposited into the State Treasury. Additionally, Reported Suppliers are forbidden from participating in tenders in the construction services sector funded by the APBN and APBD for a duration of 1 year in all regions of Indonesia.

The KPPU decision has determined that Business Actors (Providers) and Procurement Actors (Pokja Procurement and PPK) had contravened Article 22 of Law Number 5 of 1999. The KPPU decision states that Business Actors that commit infractions are subject to punishment under the legislation. Nevertheless, the KPPU lacks the authority to impose penalties on the Procurement Working Group and PPK due to the absence of consequences for Procurement Actors in Law Number 5 of 1999. In this scenario, there is a lack of legal framework, resulting in Procurement Actors who are found guilty without being subjected to any form of penalties.

Apart from the KPPU, the PTUN also has the authority to handle problems related to the Procurement of Goods and Services, namely adjudicating disputes related to the Procurement of Goods and Services. Several PTUN decisions were also found that upheld the plaintiff's decision regarding Goods and Services Procurement Disputes. Firstly, The Jakarta State Administrative Court, in Decision Number 191/G/2019/PTUN-JKT, ruled that the Auction Cancellation Announcement Letter dated August 2, 2019, has been canceled. The decision declares the disputed object as defective and mandates the defendant to retract it. The defendant is also obligated to pay court fees resulting from this dispute.

Second, Decision Number 4/G/2017/PTUN-PDG from the Padang State Administrative Court stated that the object of the dispute, namely the West Sumatra Province ULP Working Group Letter from the West Sumatra Province Regional II National Road Implementation Work Unit, was void. The decision is the same as the previous decision, namely declaring the object of the dispute invalid and requiring the defendant to withdraw the object of the dispute and pay the court costs.

Third, Decision Number 12/G/2017/PTUN-PDG from the Padang State Administrative Court stated that the object of the dispute, namely the Letter from the West Sumatra ULP Working Group, the West Sumatra Province Road Infrastructure Service Work Unit, Determining Winners, Securing the Road Body for the Bukit Putus - City Limits Road Padang - Painan City limits are void. The verdict and sanctions are the same as the two previous decisions.

According to the PTUN Decision, defendants who are proven guilty are obligated to cover the court expenses resulting from the procurement dispute in question. The purpose of this sentence is to dissuade the offender from making any other errors in the future. Nevertheless, although the process of resolving conflicts in the purchase of goods/services is intricate and falls under the category of state administrative issues, it is unambiguous in judicial proceedings. Paradoxically, the majority of these issues center around the question of the State Administrative Court's absolute competence and jurisdiction to analyze, decide, and resolve them. [12] Thus, there needs to be certainty of authority for the PTUN before it can provide effective sanctions to provide a deterrent effect.

B. Effectiveness of Sanctions for Procurement Actors in Resolving Unfair Business Competition and Resolving Disputes in Procurement of Government Goods/Services

Public procurement by the government is an important process in national development. However, it is also vulnerable to unfair business competition practices and procurement disputes. Even if anti-corruption programs are well designed and implemented, efforts to improve overall corruption control can be hampered if corrupt actors can develop strategies to circumvent new regulations. The reform succeeded in closing several loopholes and making some corrupt actors comply, according to corruption control theory. However, other corrupt actors adapt their behavior to continue manipulating administrative procedures and gain illegitimate personal gain. [13] Thus, sanctions for procurement actors who commit violations in the procurement of government goods and services are an important element in enforcing the law and creating a government procurement system for goods and services that is transparent, accountable, and competitive.

The authority of procurement actors in the provider selection process to make decisions has the potential to create problems in that if open competition is limited, it could open up opportunities for preferential treatment to companies with connections. Situations like this give rise to unhealthy business competition which can hurt efficiency in the provision of public goods. [14] Firm and effective sanctions can provide a deterrent effect for procurement actors not to commit violations. This is important to prevent unfair business competition practices and disputes over the procurement of government goods and services which can harm state finances and hinder national development.

Nevertheless, there is a lack of explicit legislation concerning penalties for government officials involved in intentional errors and engaging in unfair commercial practices during the acquisition of products and services. This is demonstrated by the rulings of the KPPU and PTUN which lack the authority to prescribe or suggest penalties for Procurement Actors who have been proven guilty. Instead, they may only enforce penalties on Business Actors in accordance with the relevant legislation. Procurement actors who violate the provisions may face administrative sanctions, as stated in Presidential Regulation Number 12 of 2021. According to Article 82, paragraph (3) of this regulation, disciplinary sanctions of varying severity can be imposed on PA/KPA/PPK/Procurement officials/Election Working Group members who are found to have violated the integrity pact, based on decisions made by the Business Competition Supervisory Commission, General Court, or State Administrative Court. Moreover, according to Article 82, paragraph (2) of Presidential Regulation Number 12 of 2021, the enforcement of administrative penalties mentioned in paragraph (1) is conducted by the Personnel Development Officer or an authorized official in accordance with the terms of statutory rules. KPPU and PTUN shall have the authority to advise authorized Personnel Development Officers on imposing administrative penalties in order to deter and ensure legal clarity for Procurement Actors who breach the regulations. Regrettably, the rulings announced by the KPPU and PTUN fail to address the further penalties that should be imposed on procurement actors who have been found guilty of intentional errors.

V. CONCLUSION

Security is needed related to the implementation of procurement of goods and services from internal government, namely Procurement Actors, as well as from external parties, namely Business Actors in Laws related to Unfair Competition. KPPU and PTUN have the authority to adjudicate if there are problems with the government procurement, but the decisions issued by KPPU and PTUN have not yet reached procurement actors so that they can provide a deterrent effect. In the KPPU Decision, it was stated that the Defendant as the Procurement Actor was declared guilty but there was no follow-up to the decision such as recommendations regarding sanctions for Procurement Actors who participated in Unfair Business Competition. Apart from that, the decision issued by the PTUN also only has the authority to decide on the revocation of decisions made by Procurement Actors in Government Agencies and to impose sanctions in the form of charging case fees for defendants who are proven guilty. The decision issued by the PTUN also did not have a significant deterrent effect because the monetary value of the case charged was not large. Therefore, it is necessary to have a decision from the KPPU and PTUN to be able to provide recommendations for administrative sanctions for Procurement Actors by Presidential Regulation Number 12 of 2021 as a reference for Personnel Management Officers in providing administrative sanctions. There is also a need to change the rules in Presidential Decree 12 of 2021 to make the procedures for imposing sanctions on Procurement Actors clearer for administering Administrative Sanctions. There is also a need for communication between the KPPU, PTUN, and the Government Procurement Policy Institute to create synchronous and effective regulations.

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