Potential Vulnerability to Corruption in Government Procurement: Prospects for Fair Competition

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ABSTRACT

Embezzlement in the procurement of goods and services is the largest category of corruption cases handled by the KPK. In general, the form of fraud in the procurement of goods and/or services is the practice of direct appointment and the manipulation of the self-estimated price (HPS). The purpose of this research article is to analyse the potential susceptibility to corruption in tenders for the procurement of government goods and services that are not in accordance with the principles of fair business competition, and the efforts to prevent the potential susceptibility to corruption in tenders for the procurement of government goods and services that are in accordance with the principles of fair business competition. The method used is normative legal research. The results of the study indicate that the collusion between business actors and public officials in the tendering process begins during the budget planning and tendering process. The government's efforts to reduce the potential for corruption in the procurement of public goods and services by changing the organisational structure of procurement and tenders are being carried out through e-purchasing and expanding the object of refutation of auctions and tenders carried out by taking into account the principles of fair business competition, namely in a transparent, non-discriminatory manner and without barriers to entry.

Keywords: Corruption, Tender, Fair Competition.

ABSTRAK

Penggelapan pengadaan barang dan jasa merupakan kategori kasus korupsi terbesar yang ditangani KPK. Secara umum bentuk penipuan dalam pengadaan barang dan/atau jasa adalah praktik penunjukan langsung dan manipulasi harga perkiraan sendiri (HPS). Tujuan dari artikel penelitian ini adalah untuk menganalisis potensi kerentanan korupsi dalam tender pengadaan barang dan jasa Pemerintah yang tidak sesuai dengan prinsip persaingan usaha yang sehat, dan upaya untuk mencegah potensi kerentanan korupsi dalam tender pengadaan barang dan jasa Pemerintah. pengadaan barang dan jasa Pemerintah yang sesuai dengan prinsip persaingan usaha yang sehat. Metode yang digunakan adalah penelitian hukum normatif. Hasil penelitian menunjukkan bahwa kolusi antara pelaku usaha dan pejabat publik dalam proses tender dimulai pada saat perencanaan anggaran dan proses tender. Upaya Pemerintah untuk mengurangi potensi korupsi pengadaan barang dan jasa publik dengan mengubah struktur organisasi pengadaan dan tender dilakukan melalui e-purchasing dan memperluas objek sanggahan lelang dan tender yang dilakukan dengan memperhatikan prinsip persaingan usaha yang sehat, yaitu transparan, tidak diskriminatif, dan tanpa hambatan masuk (barriers to entry).

Kata Kunci: Korupsi, Tender, Persaingan Usaha.
INTRODUCTION

The practice of collusion in tenders for the procurement of goods and services is prohibited because it may lead to unfair business competition and conflict with the objectives of the tender, namely to provide equal opportunities for participants to participate in offering competitive prices and quality. Implementation of the tender procedure. The aim is to obtain the lowest price for the best quality. In several corruption cases heard by the Corruption Court, corruption of the state budget was usually carried out by several bureaucrats through the procurement of goods and services. The most common method is to increase the value of projects and to rig tenders. Some individuals budget for fictitious projects in the APBN.[1]

This is consistent with the data from the KPPU, which shows that almost 75% of KPPU cases are related to bid rigging. In bid-rigging, there is always facilitation by public officials in the form of a vertical conspiracy to direct one of the winners in the hope of getting an imbalance from the suppliers of goods/services. There must be a game here that starts with the collusion behind the corruption in the procurement of goods/services through collusive tenders. Data from the KPPU show that in the period 2006-2014, the KPPU has dealt with 247 cases, in terms of violations that form the basis for investigations and decisions, 75% of the cases are cases related to tenders for the procurement of goods and services that incidentally use government budgets, both central and regional. As preliminary data, the tender value for 43 decisions is Rp. 2.3 trillion. 52.1% or 35 of the 43 tenders that were proven to be collusive amounted to Rp. 1.2 trillion. This allows us to estimate the potential loss to the state due to the bid-rigging conspiracy. The bidding conspiracy between businessmen and public officials started when the budget was planned and the bidding was carried out. So the tender that took place was a mere formality because the winner was targeted from the beginning.

Tender collusion by circumventing the budget for the procurement of goods and/or services with surcharges, planning activities/projects that are not in line with needs, fictitious projects, choosing a tender system that has been directed to one supplier of goods/services and the goods and/or services to be auctioned can only be supplied by one particular economic actor (directing certain brands) and the Procurement Committee (POKJA)/public officials appointed to conduct the auction do not have the required qualifications, so they are easily influenced and regulated by economic actors who have colluded with the PPK (Commitment Making Officer). This often includes the minister, governor, regent, mayor, head of the service and even councilors. These are the forms that often appear in vertical bid rigging. Vertical collusion is a conspiracy between economic actors (bidders) and other parties vertically. This kind of thing happened in a number of cases, including the construction of an integrated sports facility at the Ministry of Youth and Sports, and the procurement project for two-wheel and four-wheel SIM simulators at the National Police Traffic Corps, E-KTP, Trans Jakarta, and so on. There are also individuals who budget fictitious projects in the APBN.[2]

Essentially, the conduct of the tender must comply with the principles of fairness, openness and non-discrimination. In addition to tenders, attention must be paid to matters that do not conflict with the principle of fair business competition. It is now being implemented through the electronic procurement of goods or services (e-procurement). This means that the wider business community that is interested and qualified can follow it. However, in practice, the mechanism of electronic procurement of goods and services is only effective for the procurement of goods, but it has not been fully implemented for the service sector, especially construction services. So far, there is still a lot of bad collusion between job providers and service providers, which leads to corrupt practices. For example, by registering the names of different companies but still in the same syndicate or controlled by the same person, giving rewards to employers, and so on. In addition to the unfair business competition practices described above, there are other forms or models of competition that business actors engage in with government institutions. This means that there are countries that facilitate, or in other words, this unfair business competition is carried out by the state by receiving certain rewards by facilitating the process of procuring government goods and/or services.

According to Kaufmann, the procurement of goods and services (PBJ) is the government activity that is considered most vulnerable to corruption, and this is true all over the world. The results of this study have been more or less confirmed in Indonesia. KPK case handling statistics are available in several KPK annual reports, since 2004-2014, the KPK has handled 411 corruption cases, of which 131 or one third of the cases occurred in the procurement of goods/services. This makes corruption in this area the second most common case handled by the Commission after bribery. Therefore, it is necessary to conduct research on the potential
susceptibility to corruption in tenders for the procurement of government goods and services that do not comply with the principles of fair business competition.

The purpose of this study is to find out what are the potential vulnerabilities to corruption in tenders for the procurement of government goods and services that are not conducted in accordance with the principles of fair business competition, and what efforts are being made to prevent potential vulnerabilities to corruption in tenders for the procurement of government goods and services that are conducted in accordance with the principles of fair business competition.

The research used in this study is a combination of normative and sociological legal research. This research does not only aim to find the rule of law, legal principles, and legal doctrines to answer the legal questions faced,[3] but also the implementation of existing provisions in the field[4]. Thus, the statute approach and the empirical approach are used. For the collection of legal materials in this study, the library research method is used. As for the data obtained from interviews with relevant stakeholders. The research collects legal materials, and the data needed for further research is collected based on the problem topics that have been formulated and classified according to the source and hierarchy to be studied comprehensively. The analysis technique used in this study is a qualitative descriptive technique.[5] From the results of the analysis, the interpretation or interpretation of the law is then carried out with the help of methods or doctrines of interpretation. The methods of interpretation used in this study are grammatical interpretation, systematic interpretation, and futuristic interpretation.

**DISCUSSION**

**Emerging Potential Vulnerability to Corruption in Tenders for The Procurement of Goods and Services by The Government**

Corruption is one of the inhibiting factors in the process of creating a healthy and competitive business climate, as well as the realization of added value and economic progress, both nationally and internationally. Marwan Effendy mentions corruption itself, namely:

“An act carried out to obtain an advantage that is not in accordance with the official duties and rights of another party, wrongfully using one's position or character to obtain an advantage for oneself or for another person, together with one's duties and rights. from the other side”[6]

The elements of the criminal offense of corruption are specified in Articles 2 and 3 of Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 on the Eradication of Criminal Acts of Corruption, including the fulfillment of the following elements: (1) Anyone, (2) Unlawful, (3) Benefiting oneself or another person or entity, (4) May cause economic or financial loss to the state (Article 2) Or (1) Anyone, (2) Deliberately, (3) Benefiting oneself or another person or entity, (4) By abusing their authority to their position or position, (5) May cause economic or financial loss to the state (Article 3). The extent to which the implementation of the State's financial management is carried out in accordance with the provisions of the legislation is examined in order to find elements against the law, whether there are personal gains or not other people, and whether there are financial losses to the State as a result of acting against the law. The element against the law must meet the following requirements: the formal legal requirements of a criminal act, i.e. the act of the perpetrator must be expressly determined to have deviated from the provisions of the law, is not considered by society to be despicable or contrary to decency, public order and security.

The element of abuse of the power, opportunity or facility available to someone by virtue of their position or status from Article 3 of Law No. 20 of 2001 is basically an element of Article 52 of the Criminal Code. However, the wording, which uses the general term abuse, is broader compared to Article 52 of the Criminal Code, which specifies it in the words, for committing a crime, or when committing a crime using the power, opportunity or effort obtained from his position. The word authority means having the right and power to do something. This means that someone with a certain position or status will have a certain authority, and with that authority he will have the power or opportunity to do something. This power or opportunity to do something is what is meant by opportunity. Meanwhile, someone who has a position or authority will usually be given certain facilities in order to carry out his duties and authority.[7]

Tendering for goods/services (procurement) is an activity that begins with the identification of needs and ends with the delivery of the work. The guidelines for the implementation of the procurement of goods/services include the preparation of the procurement of goods/services from suppliers, the preparation of the selection of suppliers, the implementation of the selection of suppliers, the implementation of the contracts and the delivery of the work
results. In the explanatory note to Article 22 of Law No. 5 of 1999, it is stated that a tender is an offer to submit a price for the purchase of a work, the procurement of goods or the provision of services. In this case, the number of bidders is not specified, it may be more than one person or only one economic operator in the case of direct appointment/selection. The definition of tender in the Regulation includes an offer to submit a price to buy or carry out a contract, procure goods/services, buy goods/services, sell goods and/or services.

Procurement includes activities to procure goods/services through one of the following three approaches, namely self-management (swakelola), purchase (buy) and rent. Before this approach is chosen, a general procurement plan is prepared and preparation for the implementation of the procurement of goods/services is carried out, resulting in a general procurement plan document and a goods/services procurement document. Efficient, open and competitive procurement of goods/services is necessary for the availability of affordable and quality goods/services, so it will have an impact on improving public services, especially procurement in government agencies. It is hoped that corrupt practices in the procurement of goods and services by government can be eliminated. The reality of corruption in the procurement of government goods and services is increasing. The modus operandi and methods are also becoming more diverse and systemic.

Public Procurement is a government business system that focuses on government procurement process issues such as preparing project specifications, requests/requests, receiving and evaluating bids, awarding contracts and making payments. Public procurement, also known as public contracting, is a process that is a set of multi-step procedures established for the acquisition of goods and services by a government entity. It includes the full cycle of needs assessment, preparation of procurement documents, award of contracts, performance and final accounting of completed contracts. General procurement applies to any government contract for goods, works or services, including consultants.

With reference to the concept of the Association of Certified Fraud Examiners, it is relevant to describe the issue of preventing corruption in terms of the four-diamond theory of abuse (the four-diamond theory of fraud). In essence, this theory states that corrupt behaviour (abuse) can occur due to four things: (i) incentives for employees to misuse money and institutional assets; (ii) circumstances that allow employees to abuse; (iii) employees’ mindset and ethics that allow employees to make their crimes go undetected by the system.

There are 3 (three) elements to be categorised as a criminal offence: firstly, the abuse of authority, secondly, the granting of benefits to oneself and others, and thirdly, causing financial loss to the State. If there are indications or “strong suspicions” of irregularities in the ongoing process, even if it is not final, it may or may not be categorised as a violation of the Corruption Law.

The following are some of the actions that can give rise to criminal offences in the procurement of government goods and services: The crime of bribery is a crime of the same type as corruption and is a very old type of crime. Bribery as a colloquial term, as outlined in the Act, is a gift or promise (“gifted” or “beloften”) given or received. The perpetrators of bribery are divided into active bribery, which is the type of bribery where the perpetrator is the giver of a gift or promise, and passive bribery, which is the type of bribery where the perpetrator is the recipient of a gift or promise. The purpose of this bribery is for the procurement manager to win the bid from the partner so that the activity manager receives the goods/services submitted by the partner, where the quality and/or quantity is lower than agreed in the contract.

Second, splitting or merging packages can be done for clear reasons and in accordance with the principles of effective and efficient procurement. Package splitting can be done because of differences in the target supplier, significant differences in the location of the recipients/users of the goods, or differences in the time of use of these goods and services. Both the Criminal Code (KUHP) and Law No. 31 on the Elimination of Criminal Acts of Corruption do not regulate the threat of bundling or splitting packages. Presidential Decree 54 of 2010, in conjunction with Presidential Decree 70 of 2012, also does not address the threat of merging or splitting packages. The threat of criminal sanctions arises when it is proven that the splitting or merging of packages is followed by the practice of price gouging. In this case, the practice of price gouging is punishable.

Transactive corruption in tendering usually begins with a conspiracy. This is done through agreements, both written and unwritten. This conspiracy is aimed at manipulating tenders/auctions or colluding in tendering (collusive tendering), which can occur through collusion between economic agents or between economic agents and contractors. This collusive tendering or conspiracy is aimed at restricting other
potential competitors from doing business in the relevant market by determining the winner of the tender, starting from the planning and setting of requirements by the executors or the tender committee, through the coordination of tender documents between tender participants, to the announcement of the tender. Forms of irregularities that occur in the procurement of public goods/services include, but are not limited to, corrupt behaviour in the procurement of goods and services. Corrupt behaviour in the procurement of goods and services is a business conspiracy, i.e., a form of cooperation between business actors with the intention of controlling the relevant market for the benefit of the conspiring business actors.[13] Conspiracy can occur between economic agents and other economic agents (competitors of suppliers of goods and services) by creating a pseudo-competition between bidders. This is better known as social gathering bidding, where the winner is determined in advance. Conspiracy can also occur between one or more economic operators and the tendering or auction committee, for example, a procurement plan that targets economic operators by setting qualification requirements and technical specifications, resulting in a brand that prevents other economic operators from participating in the tender.[14]

**Efforts to Reduce The Potential for Corruption In The Procurement of Government Goods and Services**

The Indonesian government has redesigned the structure of the procurement organization, from a very vertical (hierarchical) one to a more horizontal one. The old structure was based on Presidential Decree (Keppres) No 80/2003, while a more horizontal structure was established by Presidential Regulation (Perpres) No 54/2010. The horizontal structure allows for more mutual control over the procurement process. According to Presidential Decree 80/2003, the organizational structure of procurement is divided into three officers: (i) leaders of public bodies; (ii) Users of Goods and Services; and (iii) Procurement Officers or Committees.

There are at least two weaknesses in this organizational structure, as described below. The structure of the Presidential Decree is such that the first officer elects the second officer and the second officer elects the third officer. In other words, the third officer is responsible to the second officer and the second officer is responsible to the first officer (Article 1, Article 9(2) and Article 9(3)(b)). This means that the structure of the procurement organization is hierarchical and tiered, with the first officer at the top of the structure and the third officer at the bottom. The disadvantage of this is that the control pattern that can arise is only from superiors to subordinates.

The potential vulnerability to corruption in tenders for the procurement of government goods and services that do not comply with the principles of fair business competition occurs in a bid-rigging conspiracy of the vertical type, i.e., collusion between business actors participating in the auction/procurement of goods and services with the owner or employer (procurement committee), by facilitating the winning of the tender through rewards in the form of increases in the tender value, bribes, and gratuities. Efforts made by the government to reduce the potential for corruption in the procurement of government goods and services, changing the organizational structure of procurement and tenders are carried out through e-purchasing and expanding the object of refutation of auctions and tenders carried out by taking into account the principles of fair business competition, namely in a transparent, non-discriminatory manner, no barriers to entry and effective and efficient.

Once the public body has found the item it wants, it invites the supplier to negotiate a price. For many categories of goods, such as the procurement of motor vehicles, public authorities may only invite one supplier. These negotiations allow public bodies to bid on prices listed in electronic catalogues. In practice, this system has shown many positive things. Firstly, e-purchasing is believed to be able to prevent budget inflation, as the price of the desired goods has been “fixed” with an umbrella contract. In addition, the price is transparent because it is published on the website of the electronic catalogue.[15]

The concept of challenge in Indonesia tends to focus on downstream activities, namely the decision of the winner of the auction, and not on upstream problems: the challenge of the tender documents. Thus, the concept of rebuttal in Indonesia is still narrow and does not meet the needs of preventing corruption, considering that efforts to outsmart the procurement process have started from the upstream side by engineering the bidding requirements in the procurement documents. In other countries, the concept of this objection is commonly referred to as bid protest. In contrast to the concept of rebuttal, the bid protest mechanism allows potential bidders who feel disadvantaged to request a review of the procurement documents.

A rebuttal mechanism that does not allow review of procurement documents also reduces public confidence in the procurement system. Because it is not part of the legal process, it is...
very likely that suppliers frustrated with the procurement system will resort to illegal means. Common methods include hiring thugs, lobbying politicians, and even using the machinery to pressure the procurement committee.

**CONCLUSION**

The potential vulnerability to corruption in tenders for the procurement of public goods and services that do not comply with the principles of fair business competition arises in the case of vertical bid-rigging, i.e. collusion between economic operators participating in the auction/procurement of goods and services and the owner or employer (procurement committee), by facilitating the winning of the tender through the provision of rewards in the form of premiums on the tender value, bribes, and gratuities. Efforts made by the government to reduce the potential for corruption in the procurement of government goods and services by changing the organizational structure of procurement and tenders are carried out through e-purchasing and expanding the subject of refutation of auctions and tenders carried out by taking into account the principles of fair business competition, namely in a transparent, non-discriminatory manner: no barriers to entry and effective and efficient.

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