


The Essence of the Prohibition of Tender Rigging from a Business Competition Law Perspective

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Abstract

Introduction: The government has made efforts to ensure that existing business competition legal regulations can accommodate the broad legal needs of society, but in reality, in everyday life, legal problems are still often encountered. One of the fundamental legal issues related to business competition in Indonesia is regarding government procurement of goods/services. There are many practices of bid rigging in the process of procuring government goods/services to determine the winner in a tender. Tender conspiracy cases often occur in Indonesia, therefore everything related to tender conspiracy must be carefully scrutinized.

Purposes of the Research: The aim of this research is to analyze and discover the nature of the prohibition on bid rigging from a business competition law perspective.

Methods of the Research: The research method used is normative juridical. Descriptive and argumentative techniques must be used in carrying out the analysis.

Results of the Research: The essence of the prohibition on bid rigging from a business competition law perspective can actually be observed in Article 22 of Law no. 5/1999, Per. KPPU No. 2/2010, and Constitutional Court Decision Number 85/PUU-XIV/2016. This prohibition aims to not give rise to unhealthy business competition, so that the aim of holding tenders can be achieved properly to provide equal opportunities to business actors in offering competitive prices and quality, which in the end will result in the lowest price with the best quality.

Keywords: Essence; Tender Rigging; Business Competition Law.

Submitted: 2024-05-20

Revised: 2024-10-30

Accepted: 2024-11-21

Published: 2024-11-29

How To Cite: Dave David Tedjokusumo, Lucianus Budi Kagramanto, Endang Prasetyawati, and Krisnadi Nasution. "The Essence of the Prohibition of Tender Rigging from a Business Competition Law Perspective." *Batulis Civil Law Review* 5 no. 3 (2024): 146-155. <https://doi.org/10.47268/ballrev.v5i3.2093>

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INTRODUCTION

Realizing a prosperous and just society based on the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) is included in one of Indonesia's national development goals. Currently, national development has progressed both in the economic and monetary fields. This has been clearly reflected in the economic improvement which is relatively high and the inflation rate is quite controlled. The aim of realizing a prosperous society must of course be carried out in a way that does not discriminate against every citizen who wants to carry out the production process and marketing of goods/services in conditions of healthy, effective and efficient business competition so that progress can be achieved and the market economy can run well.

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Batulis Civil Law Rev, 5 (3) November 2024: 146-155

P-ISSN: 2722-4465, E-ISSN: 2746-8151

Published by: Faculty of Law, Universitas Pattimura

Every citizen who is a business actor in Indonesia has the right to experience healthy business competition. Business actors often do not have a concentration of economic power in conditions of healthy business competition and perfect competitive markets, on the other hand, in conditions of unhealthy business competition, competition between business actors in carrying out production and/or marketing activities of goods/services is carried out in an unfair manner, honest, against the law or hinders business competition.¹ There are several benefits that can be gained if conditions for healthy business competition are created, such as optimal utilization of resources, minimizing production costs so that prices are cheaper and quality does not decrease.² Conditions of healthy business competition can also be used as a fundamental basis for above average employment in the long term and are referred to as sustainable competitive advantages.³ Healthy business competition is an important factor in the business world because this competition can drive the business world and the economy to develop healthily. Competition means prices are determined through market mechanisms, so that business actors are encouraged to innovate their products. This competition will produce varied products at competitive prices, which will ultimately benefit producers and consumers.⁴

We need to pay close attention to the fact that healthy business competition conditions are really needed. Therefore, it is very necessary to have firm and definite legal rules to regulate healthy business competition. A strict legal rule must exist and be implemented in an orderly manner because Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that Indonesia is a state of law. As a consequence of the existence of this legal basis, the government is working together with the House of Representatives (hereinafter referred to as the DPR) to strive to encourage the economy in the free market era by establishing Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unlawful Business Competition. Healthy (hereinafter referred to as Law No. 5/1999). Article 2 Law no. 5/1999 states that business actors in Indonesia carry out their business activities on the basis of economic democracy by paying attention to the balance between the interests of business actors and the public interest. UU no. 5/1999 was ratified on March 5 1999 and was implemented with several objectives, which consisted of: 1) Improving people's welfare by safeguarding public interests and increasing national economic efficiency; 2) Ensure the certainty of equal business opportunities for large business actors, medium business actors and small business actors by creating a conducive business climate through regulating healthy business competition; 3) Minimizing monopolistic practices and/or unfair business competition that are often carried out by business actors; 4) Creating effectiveness and efficiency in business activities.

The following are some of the most important factors in business competition law to achieve the above objectives, namely by protecting an object such as: 1) Protecting business actors who are not dominant because they tend to be weak; 2) Protecting consumers from

¹ Resmaya Agnesia Mutiara Sirait, "Prohibition of Conspiratorial Actions in Tenders Based on Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition," *Tanjungpura Law Journal* 4, no. 2 (2020): p 181, <https://doi.org/10.26418/tlj.v4i2.33980>.

² Mutafa Kamal Rokan, *Business Competition Law (Theory and Practice in Indonesia)* (Jakarta: Raja Grafindo Persada, 2010), p. 1.

³ Johny Ibrahim, *Business Competition Law (Philosophy, Theory and Implications of Its Application in Indonesia)* (Malang: Bayu Media, 2006), pp. 102-103.

⁴ Veri Antoni, "Law Enforcement of Cartel Cases Outside of Tender Rigging in Indonesia," *Mimbar Hukum - Faculty of Law, Gadjah Mada University* 31, no. 1 (2019): p 96, <https://doi.org/10.22146/jmh.37966>.

paying (high) prices that are not commensurate with the quality of the product obtained; 3) Protecting the country from inefficiencies in business activities that could be detrimental to national prosperity; 4) Protecting the business competition process itself means protecting a healthy market mechanism system so that it is not disturbed by the actions of business actors (supply and demand).

It is clear that Law no. 5/1999 has several regulations consisting of prohibited agreements, prohibited activities, dominant position, Business Competition Supervisory Commission (hereinafter referred to as KPPU), and other requirements. This prohibited agreement is clearly different from prohibited activities, generally the difference can be seen from the number of business actors. Prohibited agreements look at the elements of the word, namely agreements, it is certain that there must be at least two parties, while in prohibited activities, only one business actor can carry out these activities.⁵One form of activity prohibited in Law no. 5/1999 is a conspiracy.

Conspiracy in Law no. 5/1999 consists of three types. The first type, called tender collusion, occurs when business actors, who are supposed to compete behind closed doors, conspire to increase prices or reduce the quality of goods/services for buyers who wish to obtain goods/services through a procurement process. Public and private organizations often rely on a competitive process to obtain the best results with available funds. Low prices and/or better products are desirable because they result in resources being saved or reduced for use on other goods/services.

Regulations related to bid rigging are regulated in Article 22 of Law no. 5/1999 which states that business actors are prohibited from conspiring with other parties to organize and/or determine the winner of a tender so that it can result in unfair business competition. The second type is called conspiracy to leak trade secrets. The term trade secret is a translation of the terms "undisclosed information", "trade secret", or "know how". Trade secrets must not be made public, because apart from having technological value they also have economic value which is useful in business activities and are kept confidential by the owner.

For Indonesia, regulations regarding trade secrets are regulated separately, not regulated in Law no. 5/1999, but is regulated in Law of the Republic of Indonesia Number 30 of 2000 concerning Trade Secrets (hereinafter referred to as Law No. 30/2000). The definition of trade secret is regulated in Article 1 Number 1 of Law no. 30/2000 which states that trade secrets are information that is not known to the public in the field of technology and/or business, has economic value because it is useful in business activities, and is kept confidential by the owner of the trade secret. Regulations regarding conspiracy to leak trade secrets are regulated in Article 23 of Law no. 5/1999 which states that business actors are prohibited from conspiring with other parties to obtain information on their competitors' business activities which are classified as company secrets so that it can result in unfair business competition. The third type is called conspiracy to hinder trade. Prohibited trade barriers can be divided into two types, namely: 1) Restrictive trade agreements, namely a form of collusion between suppliers which aims to eliminate competition in whole or in part; 2) Restrictive trade practice, which is a tool to reduce or eliminate business competition between competing product suppliers, for example what occurs in exclusive dealing

⁵ Per. KPPU No. 11/2011, p 4.

agreements, refusal to supply. Regulations related to conspiracy to hinder trade are regulated in Article 24 of Law no. 5/1999 which states that business actors are prohibited from conspiring with other parties to hamper the production and/or marketing of goods/services of competing business actors with the intention that the goods/services offered or supplied in the relevant market will be reduced in terms of quantity, quality and timeliness. required. If Articles 22-24 of Law no. 5/1999 is violated, KPPU will later assess whether the conspiracy resulted in monopolistic practices and/or unfair business competition. KPPU is an independent institution that is free from influence from any party including the government, so Law no. 5/1999 can be implemented efficiently, in accordance with its principles and objectives.

KPPU has the authority to exercise investigative authority, law enforcement authority and adjudicatory authority. Investigations carried out by the KPPU can occur on the basis of a report or on the basis of its own initiative and this can be seen from the case number. Audits based on reports are audits carried out because of reports from people who have been harmed or based on reports from business actors who have been harmed by the reported actions of business actors. For cases based on reports, No. case/KPPU-L (report)/year. Examinations based on initiative are examinations carried out on the basis of the KPPU's own initiative due to allegations or indications of violations. For cases based on initiative, No. case/KPPU-I (initiative)/year. The Commission Council in carrying out its duties will be assisted by commission staff. In fact, if you look closely at the various regulations above in Law no. 5/1999 has accommodated the legal needs of society in the past, but currently the legal rules are not completely able to keep up with current developments. An example is Article 44 Paragraph (2) of Law no. 5/1999 which states that business actors can submit objections to the District Court no later than 14 (fourteen) days after receiving notification of the decision. The Commercial Court should be more competent in examining business competition cases, because the judges at the Commercial Court are used to examining and making decisions related to business. Therefore, Articles 44-48 of Law no. 5/1999 was amended and Article 49 of Law no. 5/1999 was deleted and this regulation has been stated in Article 118 of Law of the Republic of Indonesia Number 6 of 2023 concerning the Determination of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (hereinafter referred to as Law No. 6/2023) . As a result of the creation of Law no. 6/2023, must be accompanied by implementing regulations, namely Government Regulation of the Republic of Indonesia Number 44 of 2021 concerning the Implementation of Prohibitions on Monopoly Practices and Unfair Business Competition (hereinafter referred to as PP No. 44/2021). In fact, the government has made efforts so that the existing business competition legal regulations can accommodate the legal needs of the wider community, but in reality, in everyday life, legal problems are still often encountered. One of the fundamental legal issues related to business competition in Indonesia is regarding government procurement of goods/services.

There are many practices of bid rigging in the process of procuring government goods/services to determine the winner in a tender.⁶Tender conspiracy cases often occur in Indonesia, therefore everything related to tender conspiracy must be carefully scrutinized. The following are examples of tender rigging cases in Indonesia: 1) KPPU Decision No.

⁶ Alya Anindita Maheswari, "Limitations, Authority and Involvement of the KPPU in Tender Rigging Cases According to Business Competition Law," *Jurist-Diction* 3, no. 5 (September 11, 2020): p 1584, <https://doi.org/10.20473/jd.v3i5.21967>.

25/KPPU-I/2020, which was stipulated on January 19 2022 and read out at a hearing which was open to the public on January 25 2022. The KPPU's decision is related to the procurement of a revetment (coastal wall) construction package and land confinement at the Port Popoh Fisheries, Tulungagung Regency Fiscal Year 2017; 2) KPPU Decision No. 32/KPPU-I/2020, which was stipulated on 12 November 2021 and read out at a hearing which was open to the public on 16 November 2021. The KPPU's decision was related to the procurement of the Sei Saren-Teluk Nilau-Senyerang-Bts Road work package. Riau within the Public Works and Public Housing Department of the Jambi Provincial Government APBD for Fiscal Year 2017.

This conspiracy has its own characteristics, because in a conspiracy there is cooperation involving two or more business actors who jointly carry out unlawful actions. The aim of this research is to analyze and discover the nature of the prohibition on bid rigging from a business competition law perspective.

RESEARCH METHODS

The type of research used in this research is normative juridical. This type of research is a type of research that uses library sources as a research basis by searching for rules and books that are relevant to the problem being studied. The legal materials used in this research are secondary legal materials, which come from theories obtained through library research, by reading, researching, and quoting various ideas, concepts, and rules that are related to the problems being researched. Descriptive and argumentative techniques must be used in carrying out the analysis. Problems that arise in this research are overcome by analyzing existing materials. Normative legal research can also be carried out using authentic, grammatical and systematic interpretation.

RESULTS AND DISCUSSION

The main aim of healthy business competition is to support the creation of a perfectly competitive market. There are also several characteristics that must be met by business actors in a market, namely, consistent application of the principles of fair business competition law. These principles consist of:⁷ 1) There are the same number of buyers and sellers: In this case, indirect competition will occur if large numbers of buyers and sellers interact with each other to actively maximize profits and satisfaction on the basis of prices determined by supply and demand; 2) Heterogeneous products: Products that have the same function but different packaging, size and shape; 3) *No barrier to entry*: There is nothing that prevents a company from entering a certain business field; 4) *No product and price discrimination*: There is no discrimination in goods and prices; 5) Fair: It is not discriminatory, provides equal treatment for all parties, and does not aim to provide benefits to certain parties while still paying attention to national interests; 6) Products, price effective and efficient: The product must suit the needs, targets that have been set, and provide maximum benefits. The product must be produced using minimum funds and resources to achieve good quality and targets within the specified time or use predetermined funds to achieve results and targets with maximum quality; 7) *No deal weight*

⁷ Rezmia Febrina, "Business Competition in the Digital Era According to a Business Competition Law Perspective," Journal of Multidisciplinary Scientific Work (JURKIM) 2, no. 1 (2022): p 124, <https://doi.org/10.31849/jurkim.v2i1.9309>.

loss: There is no loss of agreement or agreement; 8) Producers and consumers receive easy information about product quality, price and perfect service: This information must not be covered up, it must be transparent so that producers and consumers can easily understand an existing product; 9) Must not engage in monopolistic practices: Monopoly practices can harm other business actors; 10) There are substitute products: Human necessities that perfectly replace each other's function, in other words, if there is no main item, it can be replaced with another item.

The principles of healthy business competition above must be carefully observed, so that every business actor can run his business well, so that together he can realize the goals of Indonesia's national development. In fact, if you look closely, in everyday life, even though there are clear legal rules and guidelines, they cannot guarantee that there will be no violations of these legal rules. Regarding this matter, it has been clearly proven in everyday life where violations of existing legal regulations are still often found, especially in Law no. 5/1999 and the principles of fair business competition.

This can happen because every business actor in general always wants to get the maximum profit and is never satisfied and of course also does not have good intentions. Therefore, the types of violations in Law no. 5/1999 needs to be understood together, but in this discussion we will focus more on the prohibition of bid rigging, because cases of bid rigging in Indonesia tend to be more numerous than other types of violations regulated in Law no. 5/1999.

This tender conspiracy is actually an activity that is prohibited in Law no. 5/1999 and related to this, it is different from arrangements abroad. This means that tender conspiracy abroad is included in prohibited agreements. For example, you can look at the substance in the United Nations Conference on Trade and Development (hereinafter referred to as UNCTAD), which in its regulations has categorized tender conspiracy, especially collusive tenders, as a form of agreement or mutually agreed behavior (restrictive agreement or arrangements).

Supposedly, this bid rigging is more likely and suitable in prohibited agreements and not vice versa in prohibited activities. If you look closely, the activities prohibited by the prohibited agreement are clearly different. The difference can be seen from the number of business actors, for example in prohibited activities it can of course be carried out by only one business actor, whereas in prohibited agreements it can be carried out by a minimum of two business actors.⁸in Law no. 5/1999 has clearly classified that: 1) Prohibited activities consist of monopoly, monopsony, market control, selling at a loss (predatory pricing), fraud in determining production costs, and conspiracy; 2) Prohibited agreements consist of oligopoly, price fixing, market division, boycott groups, cartels, trusts, oligopsony, vertical integration, closed agreements, and agreements with foreign parties.

Before looking at the nature of the prohibition on tender collusion, you must first understand what the definition of conspiracy and tender is, so that you can have a systematic, clear and of course not vague framework for thinking. The definition of conspiracy itself is actually clearly regulated in Article 1 Number 8 of Law no. 5/1999, which states that, conspiracy or business conspiracy is a form of cooperation carried out by

⁸ Per. KPPU No. 11/2011, p 4.

business actors with other business actors with the aim of controlling the relevant market for the interests of the colluding business actors.⁹

Regulations related to bid rigging are included in Article 22 of Law no. 5/1999, which states that business actors are prohibited from conspiring with other parties to organize and/or determine the winner of a tender so that it can result in unfair business competition. Elucidation to Article 22 explains the definition of a tender which states that a tender is an offer to submit a price to purchase a job, to procure goods or to provide services.¹⁰ If you look closely, there is an inconsistency in legal regulations between Article 1 Number 8 and Article 22 of Law no. 5/1999.

This inconsistency can be observed in Article 1 Number 8 which uses the phrase "other business actors", while in Article 22 it uses the phrase "other parties". The phrase "other party" has a general meaning and thus opens up various interpretations, although the phrase "other party" can refer to Article 1 Number 8 of Law no. 5/1999, however the use of the phrase "other party" is still seen as not providing legal certainty and is susceptible to subjective interpretation by expanding the meaning of the phrase "other party".

Therefore, PT. Bandung Raya Indah Lestari, submitted a request for judicial review of Article 22 of Law no. 5/1999 to the Constitutional Court. Observing the petitum submitted, the Petitioner requested that the panel of judges declare that Article 22, limited to the phrase "other parties" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force with all its legal consequences, as long as it is not interpreted as "other business actors". The Constitutional Court Decision Number 85/PUU-XIV/2016 stated that the Petitioner's petition was granted in part.

This means stating the phrase "other party" in Article 22 of Law no. 5/1999 is conditionally contradictory to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted other than "and/or parties related to other business actors", so that the substance in Article 22 becomes, business actors are prohibited from colluding with other business actors. and/or parties related to other business actors to regulate and/or determine the winner of the tender so that it can result in unfair business competition. The prohibition on bid rigging contained in Article 22, aims to not give rise to unhealthy business competition, so that the aim of holding tenders can be achieved well to provide equal opportunities to business actors in offering competitive prices and quality, which in the end will get the lowest price with the best quality.¹¹ Observing the variety of tender rigging practices that exist in Indonesia, it is necessary to pay attention to Per. KPPU No. 2/2010. The purpose of establishing Per. KPPU No. 2/2010 is for:¹² 1) Providing a clear and precise understanding of the prohibition of collusion in tenders as intended in Article 22 of Law no. 5/1999; 2) Provide a basis for understanding and clear direction in the implementation of Article 22 so that there are no other interpretations; 3) Used by all parties as a basis for behavior so that no party is harmed and furthermore to create conditions for business competition that grows naturally.

⁹ Suhasril and Mohammad Taufik Makarao, *Law Prohibiting Monopoly Practices and Unfair Business Competition in Indonesia* (Bogor: Ghalia Indonesia, 2010), p 65.

¹⁰ *Ibid.*, p 66.

¹¹ Per. KPPU No. 2/2010, p 1.

¹² Per. KPPU No. 2/2010, p. 3.

Per. KPPU No. 2/2010 is focused on providing a clear understanding, scope and limitations of the provisions prohibiting bid rigging. Although Per. KPPU No. 2/2010 provides an explanation of the provisions regarding bid rigging, however, in the law enforcement process, the views and decisions of the KPPU in conducting examinations still take priority and are not only limited to Per. KPPU No. 5/2010 just this. If explained in detail, the elements contained in Article 22 consist of:¹³ 1) Elements of business actors: A business actor is any individual or business entity, whether in the form of a legal entity or non-legal entity, which is established and domiciled or carries out activities within the jurisdiction of the Republic of Indonesia, either individually or jointly through an agreement, carrying out various business activities in the economic sector. 2) Elements of collusion: Collaboration is cooperation carried out by business actors with other parties on anyone's initiative and in any way in an effort to win certain tender participants. The following are some of the elements of conspiring: a) Collaboration between two or more parties; b) Overtly, or secretly, carry out document adjustments with other participants; c) Compare tender documents before submission; d) Creating false competition; e) Approve and/or facilitate the occurrence of conspiracy; f) Not refusing to take an action even though he knows or should know that the action is being taken to arrange for the winning of a particular tender participant; g) Providing exclusive opportunities by tender organizers or related parties directly or indirectly to business actors participating in the tender, in a way that is against the law. 3) Elements of parties related to other business actors: The existence of restrictions on parties involved in conspiracy cannot overcome the increasingly diverse modes of conspiracy practices, considering the increasingly rapid business competition and various technological advances. Constitutional Court Decision Number 85/PUU-XIV/2016 states that, to answer and balance the complexity of existing conspiracy modes, the elements must be expanded, not only between business actors in the conventional sense but also "parties related to business actors". The meaning of related parties cannot reach anyone without limits, but is limited to parties who are related to business actors. 4) Elements of arranging and/or determining the tender winner: Arranging and/or determining the winner of a tender is an act of the parties involved in the tender process in conspiracy with the aim of eliminating other business actors as competitors and/or to win certain tender participants in various ways. The arrangement and/or determination of the tender winner is carried out, among other things, in terms of determining the winning criteria, technical requirements, finances, specifications, tender process, and so on. 5) Elements of unhealthy business competition: Unfair business competition is competition between business actors in carrying out production and/or marketing activities of goods and/or services which is carried out dishonestly or against the law or hinders business competition.

This tender conspiracy can actually be divided into several types, which consist of:¹⁴ 1) Horizontal bid rigging: It is a conspiracy that occurs between business actors or providers of goods/services and fellow business actors or providers of competing goods/services. This conspiracy can be categorized as conspiracy by creating false competition between tender participants. Collaborative actions carried out by tender bidders, for example, seeking to determine one party as the winner by exchanging price information and increasing or decreasing the bid price. In this kind of collaboration, the losing party is agreed

¹³ Per. KPPU No. 2/2010, pp. 5-6.

¹⁴ Suhasril and Mohammad Taufik Makarao, *Op. Cit.*, pp. 68-69.

to get a sub-contractor from the winning party. 2) Vertical bid rigging: It is a conspiracy that occurs between one or several business actors or providers of goods/services with the tender committee or users of goods/services or owners or employers. This conspiracy can occur if they collaborate with one or several tender participants. In this case, usually the committee provides various conveniences regarding the requirements for a bidder so that the goods/services provider can win the bid. 3) Joint bid rigging: It is a conspiracy between the tender committee or users of goods/services or owners or employers with business actors or providers of goods/services. This conspiracy involves two or three parties involved in the tender process. One form of this conspiracy is a fictitious tender, where the tender committee, job provider, or fellow business actors carry out a tender process only administratively and in a closed manner.

The existing prohibition on bid rigging is actually oriented towards two theories, namely: 1) The theory of legal objectives put forward by Gustav Radbruch, which consists of: a) The theory of legal justice, that the prohibition of bid rigging will create justice for business actors who take part in tenders, so that they can compete in offering the price and quality of goods/services; b) The theory of legal benefit, that the prohibition of bid rigging will create benefits, in particular minimizing the practice of bid rigging; c) The theory of legal certainty, that the prohibition of bid rigging will create certainty regarding tender implementation guidelines, especially for business actors, legal practitioners and the wider community in observing tenders that are being implemented; 2) The theory of legal protection put forward by Philipus M. Hadjon, that the prohibition of tender collusion will provide legal protection in: a) Preventive manner, which is realized by procurement officials in observing indications of tender collusion starting at the planning stage, making requirements by the tender committee, adjusting tender documents, until the tender announcement; b) Repressive, which is manifested in the imposition of sanctions in the form of administrative actions, fines and criminal sanctions in the KPPU's decision section.

CONCLUSION

The essence of the prohibition on bid rigging from a business competition law perspective can actually be observed in Article 22 of Law no. 5/1999, Per. KPPU No. 2/2010, and Constitutional Court Decision Number 85/PUU-XIV/2016. This prohibition aims to not give rise to unhealthy business competition, so that the aim of holding tenders can be achieved properly to provide equal opportunities to business actors in offering competitive prices and quality, which in the end will result in the lowest price with the best quality.

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Conflict of Interest Statement: The author(s) declares that research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest.

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