



RECHTSIDEE

PUBLISHED BY
UNIVERSITAS
MUHAMMADIYAH
SIDOARJO

ISSN 2443-3497
(online)



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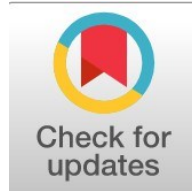
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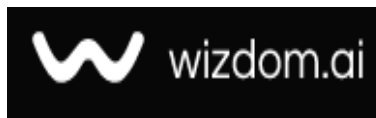
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Sanctions Against Working Groups for the Selection of Goods/Services Providers in Cases of Tender Collusion (Study: Comparison between Indonesia and Malaysia)

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Abstract

The general background of this study is the persistent dominance of tender collusion in Indonesia's procurement sector, which undermines fair competition and public welfare. **The specific background** focuses on KPPU Decision No. 15/KPPU-L/2023, where the Working Group (POKJA) was proven negligent but exempted from sanctions due to its unclear legal status under Law No. 5/1999. **The knowledge gap** lies in the absence of explicit regulatory authority to sanction POKJA, creating ambiguity in defining "other parties" within tender collusion provisions. **The aim** of this research is to compare Indonesia's regulatory framework with Malaysia's system, which empowers MYCC to impose administrative sanctions directly on public officials involved in bid rigging. **The results** show that Malaysia's Competition Act 2010 provides broader investigative and enforcement powers, enabling more effective deterrence, while Indonesia relies on fragmented administrative mechanisms that weaken accountability. **The novelty** of this study is its comparative legal analysis demonstrating how dual-authority competition bodies enhance integrity in public procurement. **The implications** highlight the urgency to revise Law No. 5/1999, clarify POKJA's legal standing, and establish expert data-analysis bodies to strengthen preventive measures against future tender collusion.

Highlights:

- Indonesia's weak sanctioning framework leaves POKJA's accountability unclear in tender collusion cases.
- Malaysia's MYCC demonstrates stronger enforcement through integrated administrative and public powers.
- Reform of Law No. 5/1999 is essential to strengthen oversight and prevent future bid-rigging practices.

Keywords: Tender Collusion, POKJA, Competition Law, MYCC, Procurement Governance

Published date: 2025-12-10

Introduction

A country's national economy is considered good if there is stability, equity, and public welfare. One form of public welfare can be achieved if the state, as a provider, can deliver satisfaction, convenience, and benefits in the form of development infrastructure. Successful development that is able to meet the needs of the community can boost a country's welfare in various aspects. To achieve good development, the state needs high-quality and competent service providers to carry out infrastructure improvements and development. In the process of finding competent service providers that fit within the government budget, a tender registration process, commonly known as an open tender, is held. A tender is a series of bidding activities aimed at selecting, obtaining, determining, and identifying the most suitable and eligible company to carry out a work package. Tenders can include bids to submit prices for contracting or carrying out work, procuring goods and/or services, purchasing goods or services, or selling goods and/or services[1]. Meanwhile, in the tender selection process, there is a Working Group or POKJA that is assigned to select and choose the tender participants that are eligible to win. In this context, the Selection POKJA has a very big responsibility[2]. The Working Group (POKJA) is the entity allowed to choose suppliers of goods and services in accordance with Presidential Regulation No. 16 of 2018 Governing Government Procurement of Goods/Services, as most recently updated by Presidential Regulation No. 12 of 2021. Additionally, according to Regulation of the Government Goods/Services Procurement Policy Agency (LKPP) Number 12 of 2021 concerning Guidelines for the Implementation of Government Goods/Services Procurement through Providers, the Selection Working Group is responsible for making sure that every step of the provider selection process complies with the procurement principles of efficiency, effectiveness, transparency, openness, competitiveness, fairness/non-discrimination, and accountability.

Based on the annual report of the Business Competition Supervisory Commission (KPPU), tender cases dominate the handling of business competition violations from year to year. In 2022, the KPPU noted that more than 50% of the total cases handled were cases of collusion in tenders for the procurement of goods/services, both at the central and regional levels. Thus, it can be concluded that tender collusion is one of the most common forms of business competition violations in Indonesia. In relation to this, the author conducted research on one of the KPPU's decisions regarding tender collusion, namely KPPU Decision Number 15/KPPU-L/2023, which was on the procurement of construction for the improvement of the Kandang Roda-Pakansari Road in Bogor Regency for the 2021 Fiscal Year. The case began when the Bogor Regency PUPR Office issued letter No. 027/660-PJJ-PUPR dated January 20, 2021, regarding the Request for Tender for Construction Services for the 2021 Fiscal Year. Then, two days later, a letter of instruction was issued by the Head of the Goods/Services Procurement Division for the Special Selection Working Group II-2021 (hereinafter referred to as POKJA) to carry out the selection process for goods/services providers, so that POKJA opened registration for construction business actors.

At the end of the registration period, there were four applicants who passed the document qualification stage, namely PT Lambok Ulina, PT LU, PT Tureloto BI, PT TT, and PT LS. However, the latter two companies, PT TT and PT LS, did not pass the administrative stage because they did not submit the original bid documents. The Working Group then announced the winner of the tender, namely PT LU, while PT TBI became the reserve winner. However, there were allegations of collusion among the tender participants. There were three reported parties who were suspected of colluding to win the tender. It is known that the first reported party, Lai Bui Min, an individual, borrowed the names of PT LU (hereinafter referred to as the second reported party) and PT TBI (hereinafter referred to as the third reported party), which already had a "name" in the infrastructure sector, and then the first reported party registered both of them. The indication of collusion was proven by the following facts:

1. Similarity in IP addresses, where Respondent II and Respondent III are known to have used the same access to submit their bids, using the same network with the same devices
2. Similarity in metadata in the bid submissions. In his statement, the expert stated that, in essence, the similarity in some of the metadata indicated that the files were created using the same device and could even be suspected to have been created by the same person.
3. Similarity in the Construction Safety Plan (RKK) documents.
4. Similarity in the prices of Occupational Safety and Health (K3) equipment.
5. Similarity in the Equipment Usage Table and Personnel Schedule.
6. Similarity in writing errors.
7. Similarities in Support Providers
8. The confession of Respondent I, Lai Bui Min, regarding the borrowing of company names
9. The expert also stated in his testimony that the existence of evidence of numerous similarities and evidence of company borrowing in participating in tenders could be categorized as collusion, and could even be categorized as a conventional form of collusion.

The purpose of "shadow bidding" or borrowing the name of this company was carried out by the first reported party in

order to increase the probability of winning. In this case, collusion occurred due to an agreement on payment of a share or fee by the first reported party to the second and third reported parties at a certain percentage according to the tender results. This case was then reported to the KPPU as the business competition supervisory agency to be given administrative sanctions, but the fourth reported party, namely the 2021 Special Selection Working Group II or POKJA, was exempted from sanctions because the judge considered that POKJA did not fulfill the elements of collusion, only negligence and incompetence. This phenomenon shows that tender collusion not only undermines fairness for other tender participants, but also has the potential to cause large losses to the state and create distortions in the allocation of public budgets. This is because the procurement of goods and services by the government is a sector that is prone to collusion, triggered by the large value of contracts and the complexity of procurement procedures, which create loopholes for illegal cooperation between parties. The government procurement system is designed to obtain goods and services of the highest quality at competitive prices, but collusion in tenders defeats this purpose because the prices set often exceed market prices and the quality of the goods or services obtained tends to be suboptimal. Collusion in tenders not only harms the national economy but also impacts the quality of projects that are ultimately delivered to the public. For example, infrastructure projects that cost more than they should can reduce the budget available for other more urgent projects. In addition, collusion often results in poor quality because the businesses involved prioritize personal gain over ensuring the quality of goods or services.

The alleged collusion in the tender for construction work using a shadow bidding mechanism raises critical questions about the extent to which the Selection Working Group (POKJA) has exercised its authority professionally, independently, and in accordance with procurement principles. This decision provides an important basis for further examination of the Selection Working Group's responsibility in anticipating and taking action against collusion in public procurement. The exemption of sanctions against the working group or Selection Working Group for the procurement of construction goods/services also needs to be examined more deeply, namely whether the exemption of the Working Group from sanctions has provided legal certainty or not. Thus, research on the exemption of sanctions against the Selection Working Group for Goods/Services Providers for collusion in the procurement of construction work is not only important academically, but also in terms of its practical application in the field. The results of this study are expected to contribute to strengthening a more transparent and integrity-based government goods/services procurement system that is capable of closing loopholes for unhealthy business competition, such as collusion practices that are detrimental to the state and society.

To assess and examine the issue of POKJA's authority in the government procurement tender process, another country is needed as a basis for comparison so that it can be used as a recommendation for future law enforcement. Malaysia is one country that is quite relevant to Indonesia, considering that both countries adhere to the Civil Law system. In addition, the institutional structure in the procurement process in both countries is relatively similar in terms of selecting goods and service providers. This similarity makes Malaysia relevant as a comparative object to examine the extent to which the responsibilities and sanctions against procurement officials are applied proportionally. Malaysia has the Malaysia Competition Commission (MyCC), which has the same position as the KPPU in Indonesia. These two institutions have almost similar mandates, namely to prevent and crack down on bid rigging practices in the public procurement process. In fact, Malaysia has an advantage in terms of a more systematic legal framework through the Competition Act 2010 (Act 712) and the existence of Guidelines on Bid Rigging, which clearly provide technical guidelines for law enforcement against tender collusion. This situation opens up the possibility of comparing how the two countries regulate, implement, and interpret sanctions against parties authorized in the tender process, including the possibility of exempting the selection working group from sanctions.

There are several relevant previous studies on bid rigging and the position of the Selection Working Group (POKJA) in terms of its responsibilities and role in preventing and overcoming bid rigging. The first study, entitled "The Position of the Tender Committee in Cases of Bid Rigging in Goods and Services Procurement Projects (Study of KPPU Decisions No. 10/KPPU-L/2014 and No. 15/KPPU-L/2009)" by Amreny, V in 2017, which discusses the position of the tender committee in tender collusion cases by examining two KPPU decisions, namely KPPU Decision No. 10/KPPU-L/2014 and KPPU Decision No. 15/KPPU-L/2009. This journal emphasizes the need to strengthen the integrity and supervision of tender committees, as their weak role often becomes an entry point for both horizontal and vertical collusion practices. The second journal is an article by Prabawa, A & Hadi, H in 2018 entitled "Analysis of the Legal Position of Tender Committees in Tender Collusion Cases in Indonesia Based on Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition" which discusses the position and responsibilities of the tender committee or POKJA in tender collusion cases in Indonesia, particularly in relation to Law No. 5 of 1999. The journal states that regulatory harmonization is needed to clarify the role of the committee, including strengthening the mechanisms for administrative and criminal sanctions if the committee is involved in unfair business competition practices. The third journal is entitled "KPPU's Authority to Impose Sanctions on Other Parties in Tender Collusion Cases" written by Fitriani, N in 2021, which emphasizes that according to Law No. 5 of 1999, the legal subjects that can be sanctioned by KPPU are only business actors, not other parties such as tender committees or procurement officials. However, the journal also highlights the phenomenon in which other parties, such as committees or state officials, play an important role in facilitating collusion. Therefore, the question arises as to whether the KPPU has the authority to impose sanctions on these parties. Based on the above background, there are two issues that can be raised. First, how are sanctions regulated against the working group for the selection of goods and services providers in the event of tender collusion in Indonesia and Malaysia? Second, how can risks be mitigated to prevent tender collusion in the procurement of construction work?

Method

The author used normative legal research to prepare this paper. Soerjono Soekanto defines the normative legal research

approach as legal research that uses secondary data or literature by locating and examining laws and legal literature that are pertinent to the topics being examined. The statutory approach, the comparative approach, and the case approach were the methods employed in this investigation. In order to implement the legislative approach, a number of pertinent rules were examined, including Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition and its implementing regulations. In the meantime, two things in one pertinent situation were compared using a comparative research. The comparative technique, according to Hudson (2007: 3), compares and contrasts two or more facts and features of the objects under study using a particular framework of thought. In order to evaluate the applicability of business competition legislation to collusive practices in tender submissions, the case approach was finally implemented by analyzing KPPU Decision Number 15/KPPU-L/2023 as the primary subject of study. The uniformity of law enforcement and the harmony between legal standards and judicial practice in bid-rigging instances were the main focus of the qualitative analysis of all the data.

Results and Discussion

A. Sanctions Against the Working Group for the Selection of Goods/Services Providers for Tender Collusion in Indonesia and Malaysia

The Head of the Goods/Services Procurement Division appoints a group of people known as the Goods/Services Provider Selection Working Group, or POKJA, to oversee the selection of government procurement tenders. Because POKJA is in charge of choosing which businesses are qualified to win, their position and responsibilities are crucial in the government's procurement process for products and services. Unfair commercial competition is a major risk in the process of choosing government suppliers of products and services, particularly in the construction industry. Based on data from the KPPU or Business Competition Supervisory Commission, tender cases dominate the handling of business competition violation cases from year to year. In 2022, KPPU noted that more than 50% of the total cases handled were cases of collusion in goods/services procurement tenders, both at the central and regional levels. For example, as the organization authorized to oversee and look into business competition cases, the KPPU or the Business Competition Supervisory Commission reviewed case number 15/KPPU-L/2023 concerning Alleged Violation of Article 22 of Law Law Number 5 of 1999 related to the Procurement of Construction Work for the Improvement of the Kandang Roda Pakansari Road in Bogor Regency for the 2021 Fiscal Year.

This case began on January 22, 2021, based on Order Number 027/264-PBJ, the Head of the Goods/Services Procurement Division ordered the Special Selection II Working Group (hereinafter referred to as "POKJA") -Year 2021 to carry out the selection process for goods/services providers for the improvement of the Kandang Roda Pakansari road in Bogor Regency, with membership consisting of Setyawan, S.T., Brian Angga Frawira, S.E., Wira Graha Saputra, Yodi Anugrah Saputra, S.I.Kom, and Masagus Asmiraldi. On February 1, 2021, the POKJA announced the tender through the electronic procurement service (LPSE) with a registration period from February 1-8, 2021. By the end of the registration period, the POKJA had received registration documents from 95 (ninety-five) companies, but by the time the bid documents were submitted and evaluated, only 2 (two) companies had passed, namely PT LU and PT TBI. The POKJA then designated PT LU as the winner and PT TBI as the alternate winner. After the winners were determined, facts were discovered that indicated collusion in the tender through the mechanism of borrowing the names of the two companies that registered, which then made Lai Bui Min the First Reported Party, PT LU the Second Reported Party, PT TBI the Third Reported Party, and the Working Group the Fourth Reported Party. In the KPPU's decision, Respondents I, II, and III were given sanctions in the form of fines and revocation of rights, while Respondent IV, POKJA, was exempted from sanctions. The exemption of sanctions against POKJA, which was negligent despite having a strategic position to supervise and prevent unfair business competition, raises questions about the extent of POKJA's authority and responsibilities according to applicable regulations.

The United States Department of Justice (DOJ) has identified several forms of collusion in the tender process. These forms include: [3]

1. Bid Suppression, in order to allow a predetermined party to win the tender, tender participants or potential participants agree not to participate in the auction process or withdraw from bidding.
2. Complementary bidding, also known as cover or courtesy bidding, is the practice of several tender participants agreeing to make offers at extremely high rates or under terms that the organizer (the buyer) will not approve. The goal is to provide the impression that there is competition, but in reality, this behavior is being used to conceal price inflation and trick the tender organizer.
3. Bid rotation is a type of collusion in which bidding turns are arranged in a certain way. In order to determine the tender winner in turn, tender participants decide who will be the lowest bidder on each project. In order to give each party the chance to alternately win, this pattern is frequently carried out by taking into account the amount of the contract value or the equivalency of business capabilities among participants.
4. Another symptom of collusion in tenders is subcontracting, in which companies agree to become suppliers or subcontractors for the company chosen as the tender winner in exchange for not making direct bids.

Based on the types of collusion described above, the type of collusion in KPPU Decision No. 15/KPPU-L/2023 falls under the category of Complementary Bidding. This is because the tender participants submitted bids that were mutually adjusted and

non-competitive (as evidenced by the similarity of documents, IP addresses, and bidding patterns) to give the impression of pseudo-competition, when in fact the winner had been predetermined. In addition, collusion in tenders can be divided into four types, namely:

1. Horizontal collusion: collusion that takes place between competitors who are business players or sellers of goods and services. This kind of collusion can be classified as collusion that makes tender participants artificially competitive.
2. Vertical collusion: collusion that takes place between one or more business players, suppliers of goods and services, the tender or auction committee, consumers of products and services, owners, or employers. Collusion may take the form of cooperation between one or more tender participants and the tender committee, auction committee, user of goods and services, owner, or employer.
3. Vertical and horizontal (combined) collusion: is collusion between business actors or suppliers of goods and services and the tender committee, auction committee, owner, employer, or user of goods and services. Two or three parties participating in the tender procedure may be involved in this collusion.
4. Collusion in other forms is collusion involving one or more other parties, including parties not participating in the tender process, who act as scenario organizers/financiers/intermediaries/brokers and/or other roles to organize and/or determine the winner of the tender.

Based on the existing forms of tender collusion, the form of collusion in this case falls into the category of horizontal collusion, namely collusion among fellow tender participants, because the involvement of the Working Group could not be proven during the investigation process.

In determining whether an action constitutes tender collusion, Indonesia has regulations under the KPPU that refer to Article 22 of the Anti-Monopoly and Unfair Business Competition Law as a guideline containing several elements that must be fulfilled before declaring an action to be collusion, including the following:

1. Business Actor Element

According to Article 1 paragraph 5, business actors in this context are any individuals or business entities, whether legal or non-legal, that are established, domiciled, or conducting activities within the Republic of Indonesia's jurisdiction, either individually or jointly through an agreement, carrying out various business activities in the economic field [4]. Consequently, it can be said that signs of tender collusion must include the business actor aspect, where the business actor is any individual or legal body that engages in commercial activity. According to KPPU Decision No. 15/KPPU-L/2023, PT Lambok Ulina (Reported Party II) was the business entity that registered to take part in the tender procedure. Thus, it can be said that the requirement for a commercial entity has been met.

2. Element of Collusion

Collusion comes from the root word "conspiracy". A conspirator is a person who participates in a plot to commit a crime or fraud, and many else [5]. Collusion can occur when two or more competitors agree not to compete with each other in order to achieve a certain goal, for example in a tender. In other words, collusion occurs when tender participants agree to eliminate competition among themselves so that one of the participants can win the tender process. In this case, collusion can be carried out openly or secretly. Actions taken include adjustments, pre-submission offers, creating false competition, agreeing and/or facilitating, and granting exclusive opportunities. This includes not rejecting even though it is known that the action is being taken to rig the tender.

3. Other Business Actor Elements

Other business actors are parties that have a relationship or connection with the parties involved in the collusion, and/or parties that receive special treatment from the organizer, and/or benefit from the collusive actions. In the case in question, the other business actor referred to is the Third Reported Party, which is a legal entity. In practice, Respondent III, together with Respondent II, lent their company to Respondent I to be used in participating in the procurement process for the Kandang Roda–Pakansari Road Improvement Construction Project, Bogor Regency, Fiscal Year 2021.

4. Other Parties

Point 3.14.3 on page 190 of the Constitutional Court of the Republic of Indonesia's Decision Number 85/PUU-XIV/2016 states that "the meaning of collusion as referred to in Article 1 point 8 of Law 5/1999 can answer and counterbalance the complexity of existing modes of collusion, so it must be expanded not only between business actors in the conventional sense but also to "parties related to business actors." As per the Court's view, the term "other parties" as defined in Articles 22, 23, and 24 of Law 5/1999 is intended to be restricted to parties that are connected to business players, in addition to being applicable to anyone. Parties with a connection or affiliation to business players engaged in the procurement process are considered other parties in the case at hand. The other parties named in this case are Reported Party I and Reported Party IV based on their involvement in the tender procedure and their actions. Reported Party I is a person who took on the identity of the company owned by Reported Party II and Reported Party III in order to take part in the Procurement of Construction Work for the Improvement of the Kandang Roda–Pakansari Road, Bogor Regency, Fiscal Year 2021. Furthermore, Respondent IV, the working group in charge of executing the construction work procurement process, may be

regarded as a third party. Because it was determined that Respondent IV oversaw and carried out the process, Respondent IV has a direct contact with the entities who participated in the tender it organized.

5. Elements of Regulating and/or Determining Tender Winners

The act of collaboration by the parties involved in the tender process with the intention of eliminating other business actors as competitors and/or ensuring the victory of specific tender participants through various ways is what is meant by organizing and/or selecting the winner of a tender. That such collusion was carried out more effectively by Respondent I, Respondent II, and Respondent III, as evidenced by the actions of Respondent IV as the tender organizer who failed to properly verify and evaluate the tender documents. This negligence indicates the manipulation and/or determination of a specific tender participant, in this case Respondent II as the tender winner.

6. Unfair Business Competition

According to Law Number 5 of 1999's Article 1 Point 6, "Unfair business competition is competition between business actors in carrying out production and/or marketing of goods and/or services that is conducted in a dishonest or unlawful manner or hinders business competition" [6] As a result, the Respondents' collusive acts during the procurement process can be classified as dishonest, illegal, and/or impeding business competition. The KPPU court discovered the following evidence, which supports the notion that this case involves tender collusion based on the previously mentioned components, especially the aspect of collusion:

- a. The admission of Respondent 1 that Respondent I is the financier and controller of Respondent II and Respondent III in participating in the tender in question. Respondent I controlled Respondents II and III with the assistance of Makmur Hutapea. In addition, Respondent I also admitted to borrowing the Bogor Regency LPSE User ID belonging to Respondents II and III to participate in the tender process. Respondents II and III also admit that their companies, namely PT LU and PT TBI, were borrowed by Respondent I to participate in the tender in exchange for a fee.
- b. Similarity of IP Addresses, where Respondents II and III are known to have used the same access in submitting their bid documents.

Table 1. IP Addresses of Reported Party I and Reported Party II [7]

<i>IP Address</i>	<i>Peserta</i>	<i>Waktu Akses (Log In)</i>	<i>Waktu Akses (Log Out)</i>
140.213.188.176 (09 Februari 2021)	PT Lambok Ulina	09:11	09:11
	PT Tureloto Battu Indah	09:44	09:45

<i>IP Address</i>	<i>Peserta</i>	<i>Waktu Akses (Log In)</i>	<i>Waktu Akses (Log Out)</i>
112.215.170.32 (10 Februari 2021)	PT Lambok Ulina	01:38	01:39
	PT Tureloto Battu Indah	01:38	01:38
	PT Tureloto Battu Indah	02:14	-

<i>IP Address</i>	<i>Peserta</i>	<i>Waktu Akses (Log In)</i>	<i>Waktu Akses (Log Out)</i>
140.213.187.93 (13 Februari 2021)	PT Lambok Ulina	21:28	21:34
	PT Tureloto Battu Indah	21:10	21:11

- c. Similarity of Metadata, based on the Alleged Violation Report and the Investigator's Trial Conclusions, it is known that there are similarities in metadata in the form of creation and modification dates, application, PDF Producer, and PDF Version submitted by Respondent II and Respondent III. The expert essentially explained in his statement that the similarities in some of the metadata indicate that the files were likely created using the same device, and may even have been created by the same person. In addition, based on the testimony of Respondent I, it is known that the documents belonging to Respondent II and Respondent III were compiled by a freelancer working under the control of Respondent I.
- d. Similarities in the Construction Safety Plan (RKK) documents, in that there are similarities in the format of the Inspection and Audit Schedule tables, as well as similarities in typing errors and editorial similarities in the description of the Construction Safety Plan
- e. Similarity in the Price of Occupational Safety and Health (OSH) Equipment
- f. Similarity in the Equipment Usage Table and Personnel Schedule, it is known that there are similarities in the Equipment Usage Schedule and Personnel Schedule tables.

g. Similarity in the Price of Occupational Safety and Health (OSH) Equipment

h. Similarity in the Equipment Usage Table and Personnel Schedule, it is known that there are similarities in the Equipment Usage Schedule and Personnel Schedule tables.

i. Similarities in Errors Writing

The words “Bersedi” (should be “Bersedia”) and ‘kostruksi’ (should be “konstruksi”) in the BPJS Employment Participation Statement Letter

The words “pratek” (should be “praktek/praktik”) and ‘terimakasih’ (should be “terima kasih”) in the Integrity Pact

The words “Pt.” (should be “PT/PT.”) and ‘Conloc’ (should be “Conbloc”) in the Recapitulation of Letters of Support

The word “dibawah” should be “di bawah” and ‘terimakasih’ should be “terima kasih” in the Construction Safety Commitment Pact

j. Similarities between Support Providers



Figure 1. Similarities between Supporters in the Recapitulation of Letters of Support for Reported Party II and Reported Party III [8]

The negligence of the Reported Party IV or the Working Group in conducting a fair tender process and preventing unfair business competition. This can be proven based on the Working Group's admission that it only conducted an evaluation by comparing the suitability of the documents with the existing requirements (in this case, the presence or absence of documents, or the presence of documents that were not suitable). In addition, there is the fact that the Working Group had minimal knowledge and experience regarding unfair business competition. The Working Group can also be said to have been negligent because it did not conduct a thorough clarification and verification of the tender in question.

Based on Decision No. 15/KPPU-L/2023, the commission panel assessed that Respondent IV or POKJA, as the official responsible for the procurement of goods or services, had neglected to see indications of collusion in the similarity of bid documents. In addition, in the panel hearing that was held, based on the available evidence and admissions, POKJA failed to optimally implement the provisions of Presidential Regulation No. 16 of 2018 concerning Government Procurement of Goods/Services, as amended by Presidential Regulation No. 46 of 2025, and LKPP Regulation No. 12 of 2021, as amended by LKPP Regulation No. 4 of 2024. The commission panel also believes that the tender should have been declared unsuccessful by the POKJA based on the provisions of LKPP Regulation Number 9 of 2018 on page 66, section 4.2.7 concerning Document Evaluation (letters e and f). However, based on the assessment and consideration of the POKJA's defense, the judge ruled that:

1. The POKJA had been cooperative and acted in good faith during the trial process.
2. At the time the tender was held, the COVID-19 pandemic was ongoing, making it difficult for the POKJA to meet face-to-face to directly verify the participants' documents.
3. The POKJA was aware of its lack of capability and technology to determine the similarity of the metadata in the tender participants' documents.
4. The POKJA acknowledged and accepted the contents of the alleged violation report.
5. The POKJA had never violated the law's prohibitions on monopolistic tactics and unfair commercial competition before
6. That the Commission Council considers that the POKJA's negligence and carelessness in conducting the evaluation assessment does not necessarily prove the existence of vertical collusion to determine the tender winner.

In light of the aforementioned factors, it is determined that POKJA as respondent IV, did not infringe Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

The KPPU's legal considerations in Decision No. 15/KPPU-L/2023 show the application of the principles of prudence and proportionality in determining the legal responsibility of the parties involved in the tender collusion. Although the Working Group (POKJA) was proven to have been negligent in carrying out its duties to ensure that the procurement process was conducted objectively, transparently, and competitively, the KPPU assessed that such negligence could not be classified as active participation in collusion that violated Law No. 5 of 1999. However, from the perspective of administrative law and the principle of good governance, the POKJA's negligence still has significant legal implications. As functional officials, the POKJA has a legal obligation to ensure that the procurement process is conducted fairly, openly, and free from conflicts of interest. When the POKJA fails to verify and evaluate documents thoroughly and carefully, it reflects a weakness in internal oversight that can become a loophole for collusion to occur.

In analyzing the exemption from sanctions imposed on the Working Group, there is a theory of legal certainty that needs to be considered. One of the goals of law, which is to establish justice in law enforcement, is legal certainty. According to Gustav Radbruch, the notion of legal certainty requires that the facts expressed in the law be clearly articulated in order to prevent misunderstandings and to facilitate easy [9]. According to this idea, legal clarity is required, particularly when penalizing the Working Group for the Selection of Goods/Services Providers for its demonstrated negligence in overseeing the bidding process [10]. In the case of the Working Group that was proven to have been negligent in preventing tender collusion, a legal problem arose because the position and responsibilities of the Working Group were not explicitly regulated in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The Working Group is not a "business actor" as referred to in Article 1 point 5 of the law, so the KPPU does not have a strong legal basis to impose sanctions on them. However, on the other hand, there is an element of "Other Parties" in the article that does not clearly and thoroughly explain who can be classified as "Other Parties" [11] [12]. In this case, there could be multiple interpretations in classifying them because the scope of other parties is very broad and unlimited, and POKJA could certainly fall under the element of "Other Parties" because they are individuals involved in tender procurement. Therefore, legal certainty is urgently needed in relation to the position of the POKJA, considering that the POKJA has a strategic role in ensuring that the procurement process is transparent and free from collusion [13]. This ambiguity creates a grey area in the interpretation and application of the law, namely whether the negligence of the POKJA can be categorized as a violation of competition law or merely an administrative violation in the context of government procurement law. However, if it is only an administrative violation, who then has the authority to investigate and impose sanctions for such negligence?

Reflecting on the legal vacuum regarding the imposition of sanctions on POKJA that has been proven negligent in preventing tender collusion, a comparative study with other relevant countries is important to highlight because it can be used as material for discussion and recommendations for law enforcement in Indonesia. The country that will be the object of comparison is Malaysia [14]. The reason why Malaysia can be used as an object of comparison is because Indonesia and Malaysia have several similarities, one of which is that both countries' legal systems adhere to civil law influenced by English common law traditions, especially in the field of public administration, particularly government procurement of goods and services, so that comparing the regulations between the two is still equivalent and relevant. These similarities make Malaysia a relevant object of comparison for examining the extent to which the responsibilities and sanctions imposed on procurement officials are applied proportionally [15] [16].

The KPPU, or Business Competition Supervisory Commission, is responsible for overseeing and resolving claims pertaining to unfair business competition in Indonesia. In order to prevent unfair commercial competition, the POKJA, a panel established by the UKPBJ, oversees the selection of government goods/service suppliers or bids. In this instance, the POKJA's role is vital and significant, therefore the POKJA's carelessness in carrying out assessments and clarifications—as demonstrated in KPPU Decision Number 15/KPPU-L/2023—raises concerns about the POKJA's role and position in Indonesia's commodities procurement system. The Choice While the Goods/Services Procurement Work Unit, also known as UKPBJ, is a work unit in a Ministry, Institution, or Local Government that is a center of excellence for Goods/Services Procurement, POKJA is a human resource designated by the head of the UKPBJ to oversee the selection of providers. Initially, the UKPBJ's head gave the Selection Working collection, an odd-numbered collection of individuals, a task order to pick service providers. In this case, it is appropriate for the UKPBJ to organize human resources or individuals with special expertise to understand the meaning of construction work tender agreements as referred to in the Law. Based on LKPP Regulation Number 12 of 2021, specifically point 1.3, the preparation for the selection of tender providers is carried out after the POKJA receives a request from the PPK or the Commitment Making Officer to conduct the selection. The tasks of the POKJA in preparing for the selection include reviewing procurement

preparation documents, determining the method for selecting providers, determining the qualification method, determining provider requirements, determining the bid evaluation method, and determining the method for submitting documents, offering, preparing and determining the election schedule and preparing election documents. Meanwhile, based on Article 13 of Presidential Regulation Number 16 of 2018, the duties of the election working group include the following: [17]

1. Complete the planning and execution of the provider selection
2. Complete the planning and execution of the electronic catalog's provider selection. Determining the winner of the selection/Supplier for the selection method:
 - a. Tender/Direct Appointment for packages of construction work, goods procurement, and other services with a budget ceiling of Rp100,000,000,000.00 (one hundred million rupiah)
 - b. Choosing and scheduling a direct appointment for the most expensive consulting services procurement packages, with a maximum budget ceiling of IDR 10,000,000,000.00 (ten billion rupiah). Three people will make up the Selection Working Group mentioned in paragraph (1).
3. The number of members of the Selection Working Group mentioned in paragraph (2) may be raised if the complexity of the Provider selection justifies it, as long as the overall number stays odd.
4. A team or knowledgeable staff may support the Selection Working Group.

Based on LKPP Regulations, a tender should be declared unsuccessful if, during the evaluation of bid documents, evidence/indications of unfair business competition and/or collusion between participants with the aim of ensuring the victory of one participant is found. This can be seen in LKPP Regulation Number 12 of 2021, Page 80, which states that indications of collusion between participants must meet at least 2 (two) of the following indications: [18]

1. Work techniques, materials, tools, technical approach analysis, unit costs, and/or product specifications (brand, kind, and kind) and/or technical support are all identical in technical documentation.
2. Every participant's bid is in close proximity to the expected price.
3. Multiple participants are involved under a single control.
4. The bid documents' content contains similarities and flaws, including similarities and errors in writing format, layout, and type.
5. The bid bonds have sequential serial numbers and are issued by the same guarantor.

Based on the above points, the case in KPPU Decision Number 15/KPPU-L/2023 has fulfilled at least four of the above points, but could not be identified by the Working Group during the tender process. The Working Group's failure to see the indications and prevent this tender collusion was due to negligence, incompetence, and compelling circumstances that prevented them from performing their duties optimally. Under current legislation, there are no specific regulations containing prohibitions and sanctions for the Working Group that is negligent in performing its duties. This is important to note because all provisions in the Presidential Regulation describe the position of the Working Group for the Selection of Construction Service Providers and do not mention any authority attached to the Working Group, but only "duties" attached to a group of specific individuals with an odd number and specific tasks in establishing employment relationships for the selection of providers for the implementation of construction [10].

Malaysia also has institutions such as KPPU, whose on duty to prevent and adjudicate disputes over unfair business practices in the procurement of construction work. In Malaysia, this organization is called Malaysia Competition, or MyCC [19]. The Competition Act 2010 in Malaysia, also known as Law No. 5 of 1999 about the Prohibition of Monopolistic behaviors and Unfair Business Competition in Indonesia, provides the legal foundation for the ban on monopolistic behaviors. As explained earlier, in Indonesia there is a Working Group (POKJA) which is an ad hoc or temporary body tasked with examining, evaluating, and selecting tender winners. However, in practice, the position of the POKJA, which is not a business actor, exempts them from various types of administrative and employment sanctions. In this case, KPPU does not have the authority to impose sanctions on POKJA because POKJA is a public official, so imposing sanctions on the tender committee that colludes with tender participants is within the scope of the authority of criminal investigators. However, the fact is that the criminal provisions in the Anti-Monopoly and Unfair Business Competition Law do not explicitly state who has the authority to conduct investigations or inquiries in the context of criminal cases [20]. In contrast, Malaysia has clearer regulations regarding the duties of an agency. Malaysia has a "Suruhanjaya," which is an independent and permanent state institution established under a special law, such as the Competition Commission Act 2010 or the Competition Act 2010. In this case Suruhanjaya is a national regulatory body with public legal authority to investigate, adjudicate, and impose administrative sanctions for violations of competition law. Thus, the difference is that Malaysia has an agency that can cover two areas of law, namely competition law and public law, while Indonesia does not. In fact, the existence of such a body could make it easier to impose sanctions on the Tender Committee for negligence in preventing bid rigging, as the body has the authority to act as public law in antitrust cases. Therefore, it can be understood that in Malaysia, the Commission is the main enforcer of competition law. It examines business operators, including government entities if they are involved in anti-competitive practices, in this case, the tender committee, which is made up of government officials. The Tender Board (or

Procurement Committee) in Malaysia is a government body, equivalent to the POKJA in Indonesia. The Competition Act 2010 in Malaysia still applies to the activities of government or public bodies when they act in a commercial capacity or facilitate anti-competitive practices. This is explained in section 3(2) of the Competition Act 2010, which states that the CA 2010 applies to all commercial activities, whether carried out by the private sector or government agencies, unless the action is a sovereign function. So, when the Tender Board acts within the administrative context of public tenders, it still falls within the purview of MYCC, especially if it is proven to have contributed to, allowed, or facilitated tender collusion (bid rigging) among business operators. In the competition regulations in Malaysia, the MYCC or its equivalent, such as the KPPU, can act as an investigator of criminal matters. The Competition Act of 2010, Chapter 3, Article 17, which deals with Investigative Powers, provides an explanation of this. (1) Under this Act, a Commission officer is endowed with full investigative and law enforcement capabilities. (2) To be clear, an officer of the Commission investigating any infraction under this Act has all or some of the authority of a police officer for the purposes of this Act. This is not the case in Indonesia, where the KPPU, as an administrative body, is not permitted to investigate cases involving government officials who engage in commercial competition conflicts or are careless. The POKJA, which is made up of public functional authorities, does not have the same ability as KPPU to issue punishments as tender participants who are business players. The Civil Servant Development Officer (PPK)/Direct Supervisor of ASN may approve the Working Group in this case in accordance with Government Regulation Number 94 of 2021 about Civil Servant Discipline and Law Number 20 of 2023 concerning Civil Servants. Furthermore, LKPP might recommend sanctions against the Procurement Working Group (POKJA) in its capacity as the supervising organization for the procurement body.

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The types of sanctions imposed by the Project Owner (PPK) or LKPP according to Presidential Regulation Number 12 of 2021, Article 89 and Annex IV regarding the Sanction Mechanism in the Procurement of Goods/Services, are written warnings, revocation or cancelation of tender results, dismissal from duties as a member of the POKJA, and employee blacklisting. KPPU cannot directly impose sanctions on the Procurement Working Group (POKJA), but it can provide recommendations to the National Public Procurement Agency (LKPP) or the Procurement Implementing Officer (PPK) to follow up on their negligence or participation in proven tender collusion. For example, in KPPU Decision Number 08/KPPU-L/2017 (Tender for Road Improvement Work in Riau): KPPU stated that the Procurement Working Group (POKJA) is not a business actor, but has administrative responsibility to ensure a clean tender process. The KPPU then forwarded the recommendation to the LKPP and the personnel development officer to follow up on the Working Group's negligence. This condition has weaknesses because sanctions depend on superiors or the PPK, who are often from the same agency as the POKJA, which can lead to conflicts of interest. Additionally, there is no independent oversight body like the Suruhanjaya in Malaysia, which is authorized to investigate public officials such as the POKJA involved in the realm of business competition. Finally, sluggishness occurs because KPPU's recommendations are often not followed up by the ASN's supervising agencies. Therefore, it can be concluded that with the bureaucracy of different authorities in imposing sanctions on POKJA in Indonesia, the mechanism in Malaysia is certainly better and wiser because there is a permanent body, the Suruhanjaya, whose authority can stand on two different sides: competition law and public law. This makes it less likely that the issues will not be followed up, because the Suruhanjaya can investigate directly without having to hand it over to other government agencies like in Indonesia [21].

B. Risk Mitigation to Prevent Bid Rigging in Construction Procurement

Reflecting on the KPPU report regarding the number of business competition dispute reports, which were dominated by collusion in the procurement of goods/services tenders exceeding 50% in 2022, it is necessary to discuss ways to prevent or mitigate collusion in tender disputes in Indonesia. Risk mitigation measures must be taken by all relevant parties, especially government officials responsible for facilitating and overseeing the procurement process for goods/services, such as tenders. There are several things that the tender committee or working group can do to prevent collusion among business actors. First, creating clear requirements that do not leave any loopholes for tender participants. Second, carefully and thoroughly examine the bid documents, not just to ensure they meet the requirements or not, as happened in the case of KPPU Decision Number 15/KPPU-L/2023. In that case, the POKJA stated in its defense that to determine whether there were similarities in the metadata of the tender participants' bid documents, such as the same created and modified dates, application, PDF Producer, and PDF Version, tools, equipment, and expertise were needed to detect this [22]. The POKJA also argued that based on the provisions of Presidential Regulation Number 16 of 2018 and Public Works and Housing Ministerial Regulation Number 14 of 2020, there is no regulation that explicitly and clearly states the delegation of authority to the Selection POKJA to conduct inspections or evaluations regarding the examination of tender documents. The fact is, according to Article 9 paragraphs 4 and 5 of PUPR Regulation Number 14 of 2020, the Working Group is stated to be able to request assistance from teams/experts/technical teams/support teams to find evidence or indications of unfair business competition, but this was not done by the Working Group during the examination process. Additionally, regarding authority, the provisions of Article 93 of PUPR Regulation Number 14 of 2020 have clearly stipulated that the Procurement Working Group is given the authority to find evidence or indications of unfair business competition. Therefore, to mitigate collusion, the Procurement Working Group must be aware that their task is not limited to assessing whether a document meets the tender

requirements, but also to carefully evaluate and determine if there are any indications of collusion. Additionally, in order to prevent collusion, the Working Group needs to ensure that each participant submitting bid documents is not under the same control, as was the case in KPPU Decision Number 15/KPPU-L/2023.

Risk mitigation measures are not only applicable to the POKJA as the tender committee, but also to the government to form or improve existing regulations so that there are no loopholes for tender collusion practices. A network analyst is needed to expose or investigate relationships between participants, the same office address, metadata, the same IP address, and other technology-related matters. This needs to be considered because the tender committee, often lacking such capabilities, often neglects to prevent collusion practices. Clear regulations will also prevent the POKJA from using justifications such as those in KPPU Decision Number 15/KPPU-L/2023, where the POKJA cited incompetence, lack of mandatory authority, and insufficient knowledge as reasons. Without explicit regulations regarding responsibility, the line between negligence and intent is difficult to determine. As a result, when collusion occurs, it is difficult to assess whether the POKJA was negligent or actively participated in the collusion process. Additionally, a suitable competitive method can be created, such as a reverse auction (live electronic auction), where participants compete by openly and in real-time submitting prices [22]. Because the prices are directly visible to all parties, it will be difficult for participants to collude behind the scenes to determine who will win. Beside these methods, mechanisms like random audits can be a form of mitigating bid rigging. Random audits are a process of examining committees and participants without a fixed schedule or prior notice, so that those who wish to collude do not know when they will be inspected, thus minimizing the risk of them manipulating the results. Finally, an integrity pact signed by tender participants could be a solution to prevent collusion. In this case, the Working Group, as the tender committee, may require each tender participant to submit a written statement that the submitted bid was truly prepared independently without collusion with other parties, and to include information about any subcontracting plans. To ensure the validity of the document, the statement must be signed by the party legally authorized to represent the company. Additionally, special sanctions or penalties may be imposed on participants who are proven to have made false or misleading statements.

Mitigation measures also need to be considered by the POKJA, who are the tender procurement committee. Regular training is needed to improve their ability and knowledge in identifying indications of fraud in tender procurement by business actors. Additionally, sanctions for the Procurement Working Group involved in bid rigging are not regulated by KPPU, the competition law enforcer. This is because the KPPU does not have the authority to impose sanctions on the tender committee, as imposing sanctions on a tender committee that colludes with tender participants falls within the scope of criminal investigators' authority. However, the fact is that the criminal provisions in the Anti-Monopoly and Unfair Business Competition Law do not explicitly state who is authorized to conduct investigations or inquiries in the criminal context [23]. This creates a legal gray area that could become a loophole for fraud in future tender processes, as there is no regulation specifying who is authorized to impose sanctions on the Selection Working Group (POKJA) as the tender committee. Due to this, the legal definition of Pasal 22 Undang-Undang Anti Monopoli dan Persaingan Usaha Tidak Sehat regarding tender persekongkolan, specifically regarding the definition of "Other Parties" in the aforementioned undang-undang that may be multitafsir. According to that assertion, "other parties" might be defined either vertically—that is, between business players and the Goods/Services Procurement Working Group or the tender committee—or horizontally—that is, between business actors. According to the aforementioned statement, further definitions can be made either horizontally, which is between business owners, or vertically, which is between business owners and Selection Working Group (POKJA) as the tender committee. Therefore, derivative regulations or improvements are needed to make the sanctions for the Procurement Working Group more focused and clear in writing. In addition, for optimal performance, effective coordination with all relevant parties is also required, because collusion practices in tenders are generally related to widespread indications of corruption, collusion, and nepotism (KKN), both in the past and present [24].

Conclusion

Based on a comparison of sanction regulations for procurement working groups between Indonesia and Malaysia, it can be concluded that Malaysia has more effective regulations and government bodies for investigating indications of bid rigging. There are bodies like the Commission that can act administratively and publicly, so sanctions can be imposed directly on public officials proven to have colluded with business actors without having to be referred to other government agencies like in Indonesia. The lack of authority for KPPU to impose sanctions on the POKJA also needs to be strengthened thru regulation. This is because the elements of collusion in Law Number 5 of 1999 do not clearly specify who the other parties are in the element of tender collusion. This is because "other parties" in this case are very broad and can include anyone, including the POKJA for the selection of goods/services providers. This situation can lead to multiple interpretations and create different decisions for each dispute. Therefore, there needs to be strengthening in this area of regulation. Additionally, bodies like the Commission can serve as a reference and benchmark for the government in the future, allowing them to consider how the Commission can become an effective body capable of investigating criminal matters in competition disputes. In the future, to prevent tender collusion practices, it is also necessary to establish expert bodies specializing in data analysis. This can prevent collusion, which is often found to have similarities in computer server addresses, metadata, IP addresses, spelling errors, and so on, which are difficult for the POKJA to detect due to their lack of ability and expertise in this field. Based on the previous discussion, the imposition of appropriate sanctions for the POKJA as the tender committee and for business actors needs to be considered and its regulations strengthened because this is directly related to how to mitigate the risk of tender collusion in the future. The imposition of clear and targeted sanctions will help mitigate tender collusion practices in the future, both for the goods/services provider selection working group and for tender participants who are business actors. Based on this analysis, there should be a review of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, particularly regarding the extent of the law's reach and law enforcement for the selection POKJA, the tender committee involved in collusion. KPPU should be able to provide recommendations to other relevant agencies to enforce the law against the tender committee.

Acknowledgement

The author would like to express their deepest gratitude to Almighty God for His unwavering blessings and guidance, which enabled the author to complete this article. Additionally, the author would like to thank the Faculty of Law at UPN "Veteran" Jakarta for providing the facilities and platform for writing this article.

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