



Guidelines on Article 22
Regarding Prohibition of Conspiracy in Tenders
Under Law No. 5 Year 1999 Regarding Prohibition of Monopolistic
Practices and Unfair Business Competition

Commission for the Supervision of Business Competition
Republic of Indonesia

Preface

Pursuant to Article 35 sub-article (f) of Law No. 5 Year 1999 regarding Prohibition for Monopolistic Practices and Unfair Business Competition, the Commission for the Supervision of Business Competition (KPPU) is assigned to prepare guidelines and or publications related to the implementation of Law No. 5 Year 1999. This time, KPPU has prepared guidelines on the implementation of Article 22 of Law No. 5 Year 1999 in relation to the enforcement of fair business competition principles in tenders.

The guidelines are prepared in order to enable KPPU to perform its supervisory function on the implementation of Law No. 5 Year 1999 accurately. In addition, they are also expected to provide thorough and comprehensive explanations for various parties which indirectly participate in creating a fair business climate, namely, among others, business actors, the government, law enforcement officers and the community in general. Based on the aforementioned considerations, KPPU prepares Guidelines on Article 22 regarding Prohibition of Conspiracy in Tenders under Law No. 5 Year 1999.

Considering the very dynamic and continuously growing nature of business activities, these Guidelines are likely to be continuously improved.

Jakarta, July 2005
Chairman of KPPU

Table of Contents

| | |
|--------------|--|
| Chapter I. | Background |
| Chapter II. | Objectives and Scope of the Guidelines |
| | 2.1. Objectives of the Guidelines |
| | 2.2. Scope of the Guidelines |
| Chapter III. | Article Related to the Prohibition of Conspiracy in Tenders |
| | 3.1. Definition and Scope of Tender |
| | 3.2. Description of the elements of Article 22 |
| Chapter IV. | Conspiracy in Tenders and Case Examples |
| | 4.1. Concept and Definition of Conspiracy in Tenders |
| | 4.2. Indicators of Conspiracy in Tenders |
| | 4.3. Impacts of Conspiracy in Tenders |
| | 4.4. Matters to be observed in analyzing the existence of Conspiracy in Tenders |
| | 4.5. Case Examples |
| | 4.5.1. Case of Horizontal Conspiracy in Casing and Tubing Pipes Tender |
| | 4.5.2. Case of Vertical Conspiracy in Security Personnel Tender |
| | 4.5.3. Case of Vertical and Horizontal Conspiracy in Shares and Bonds Tender |
| Chapter V. | Sanctions |
| Chapter VI. | Closing Remarks |

CHAPTER I BACKGROUND

The People's Legislative Assembly of the Republic of Indonesia (DPR RI) has passed Law No. 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as "Law No. 5/1999") as a measure to guarantee fair business competition. Effective implementation of Law No. 5/1999 is expected to stimulate fair and sound business culture so as to continuously encourage and improve the competitive edge of business actors.

Law No. 5/1999 prohibits acts which may result in unfair competition, including conspiracy in tender. The general principles which must be observed in a tender are transparency, respect for money, effective and transparent competition, fair negotiation, accountability and assessment process, and non-discrimination. In line with the foregoing, Law No. 5/1999 also prohibits conspiracy in Tender as stipulated by Article 22.

Conspiracy in a tender may be committed with written or oral agreements. It has an extensive scope, which includes production and or distribution businesses, trading associations' activities, pricing and tender manipulation or collusion in tender (collusive tender), which may be committed under an agreement among business actors, among work owners or between those aforementioned parties. Collusion or conspiracy in tenders is aimed at restricting other potential competitors to engage in business in the relevant market by determining tender awardees. It may be conducted at any phase of a tender, ranging from the planning and preparation of the requirements by the tender committee, alignment of tender documents among bidders up to the tender announcement.

The practice of conspiracy in tenders is prohibited because it may result in unfair business competition and it is also contradictory to the objective of the organization of a tender, namely providing equal opportunity for business actors to submit offers of competitive price and quality, with the final objective of obtaining the best quality at the lowest price.

Considering the various forms of conspiracy in tenders and its potential impact of impeding the creation of fair business competition, it is therefore necessary to have Guidelines that can provide better understanding of the prohibition of conspiracy in tenders as intended in Law No. 5/1999 and provide specific illustrations of various examples of conspiracy practices in tenders.

CHAPTER II

OBJECTIVES AND SCOPE OF THE GUIDELINES

2.1. Objectives of the Guidelines

The Commission for the Supervision of Business Competition (KPPU) has been established to supervise the implementation of Law No. 5 Year 1999. One of its duties is to prepare guidelines and or publications related to Law No. 5/1999 (Article 35 sub-article f). These guidelines are required to provide clearer understanding of the articles and other matters which have not been provide in details in Law No. 5/1999. It is expected that business actors and other stakeholders may adapt to the Guidelines so as not to violate business competition as regulated by Law No. 5/1999.

Accordingly, the objectives of the Guidelines on Prohibition of Conspiracy in Tenders (hereinafter referred to as "Guidelines") are as follows:

1. To provide clear and accurate definition of the prohibition of conspiracy in tenders as referred to in Article 22 of Law No. 5/1999.
2. To provide basis of understanding and clear direction in the implementation of Article 22 so that there will be no interpretation other than those described in these Guidelines.
3. To be used by all parties as a foundation to conduct acceptable behaviors so that there will be no party harmed and furthermore these guidelines are aimed at creating a fair business competition.

The Guidelines on Article 22 regarding Prohibition of Conspiracy in Tenders is not extended to explain how KPPU should conduct its investigation in enforcing the law or provide recommendations and policies. These guidelines focus on the provision of clear understanding, scope as well as limitations of the provisions related to the prohibition of conspiracy in tenders.

Although these Guidelines provide explanations on the provisions regarding conspiracy in tenders, priority must be given to the Commission's standpoint and decision in conducting investigations on alleged conspiracies in enforcing Law No. 5/1999 and they should not be limited only to these Guidelines.

2.2. Scope of the Guidelines

The Guidelines on Prohibition of Conspiracy in Tenders pursuant to Law No. 5/1999 include the philosophy, spirit and directions of the provisions applied in promoting fair business competition. These guidelines also briefly describe possible conditions caused by the lack of system which supports the enforcement of the fair business competition principles, particularly the consequences of unfair business competition in tenders. Systematically, the contents of these Guidelines include the following:

| | |
|------------|--|
| Chapter I | Preface |
| Chapter II | Objectives and Scope of the Guidelines |
| | This chapter describes the objectives of the preparation of the Guidelines and the matters included in the Guidelines. |

| | |
|-------------|--|
| Chapter III | Articles Related to the Prohibition of Conspiracy in Tender. This chapter describes the definition and scope of tenders pursuant to Law No. 5 Year 1999, as well as the elements included in Article 22 of the Law. |
| Chapter IV | Conspiracy in Tenders and Case Examples. This chapter describes the concept and definition of conspiracy in tender, types of conspiracy, losses caused by conspiracy, as well as matters which must be observed in analyzing the existence of conspiracy in tender. Several case examples related to conspiracy in tender are also described in this Chapter. |
| Chapter V | Sanctions This chapter includes several sanctions which can be imposed by KPPU on conspiracy in tender. |
| Chapter VI | Closing remarks |

We try to prepare these Guidelines by using the simplest and clearest writing system and language to the farthest possible extent in order to ensure that all parties can easily understand the applicable regulations and to avoid legal uncertainty in the enforcement of Law No. 5/1999.

CHAPTER III

ARTICLES RELATED TO PROHIBITION OF CONSPIRACY IN TENDERS

3.1. Definition and Scope of Tender

Law No. 5 Year 1999 prohibits business actors from committing acts which are aimed at hampering or are contradictory to the principles of fair business competition, including restriction of access to market, collusion and other actions intended to eliminate competition. Conspiracy to rig a tender as intended in Article 22 of Law No. 5/1999 is also an action which may result in unfair business competition.

Conspiracy in the selection of tender awardees is frequently found in the implementation of goods and or service procurement conducted by the central government or regional government (government procurement), State-Owned Enterprises (BUMN) and private companies. Therefore, Article 22 of Law No. 5/1999 does not only include procurement activities conducted by the Government but also those conducted by state-owned enterprises (BUMN/BUMD) and private companies.

Pursuant to the Elucidation of Article 22 of Law No. 5/1999, tenders shall be bids submitted to contract certain work, for the procurement of goods or the provision of services. This article does not mention any number of parties submitting bids (either by several business actors or one business actor in case of direct appointment/selection). Such definition of tender includes bids submitted:

1. To contract or carry out a certain work.
2. To procure goods and or services.
3. To purchase goods and or services.
4. To sell goods and or services.

Based on the aforementioned definition, the basic scope of the application of Article 22 of Law No. 5/1999 shall be tenders or bids which can be submitted through:

1. Open Procurement,
2. Limited Procurement,
3. Public Auction, and
4. Limited Auction.

Based on this basic scope, direct selection and direct appointment which constitute parts of tender process is also included in the application of Article 22 of Law No. 5/1999.

3.2. Description of Elements

Article 22 of Law No. 5/1999 reads as follows:

“Business actors shall be prohibited from entering into conspiracies with other parties in order to arrange and or determine awardees of tenders which may potentially result in unfair business competition”.

The aforementioned Article 22 can be dissected into several elements as follows:

- (1). The element of Business Actor
As referred to in Article 1 sub-article 5, business actors are defined as follows:
“Any individual or business entity, either incorporated or unincorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic sector”.
- (2). The element of Conspiracy
Conspiracy is defined as follows:
“Cooperation conducted by business actors with other parties at the initiative of any party whatsoever in any way whatsoever with the intention of assisting certain bidder to win a tender.”
- The element of Conspiracy may take the following forms:
1. cooperation between two parties or more;
 2. covertly or openly adjusting tender documents with other bidders' documents;
 3. comparing tender documents prior to submission;
 4. creating pseudo-competition;
 5. approving and or facilitating conspiracy;
 6. not refusing to conduct an action although such party knows or reasonably knows that such action is conducted for ensuring the appointment of a certain bidder as an awardee;
 7. provision of exclusive opportunity by tender organizer or related parties either directly or indirectly to business actors participating in a tender, in a lawful manner.
- (3). The element of Other Parties
Other Parties are defined as follows:
“parties (vertical and horizontal) involved in a tender process which enter into a tender conspiracy, either business actors as bidders and or other legal subjects related to the tender”.
- (4). The element of Arranging and or Determining Awardees of Tenders
Arranging and or determining awardees of tenders is defined as follows:
“an action of parties involved in a tender process to enter into a conspiracy with the intention of eliminating other business actors as their competitors and/or to ensure that a certain bidder wins the tender in any way whatsoever”. This is conducted among other things during the determination of criteria of awardees, technical specifications, financial specifications, tender process etc.
- (5). The element of Unfair Business Competition
Unfair business competition is defined as follows:
“competition among business actors in conducting activities for the production and or marketing of goods and or services in an unfair or unlawful or anti-competitive manner.”

CHAPTER IV CONSPIRACY IN TENDERS AND CASE SAMPLE

4.1. Definition and Indicators of Conspiracy in Tenders

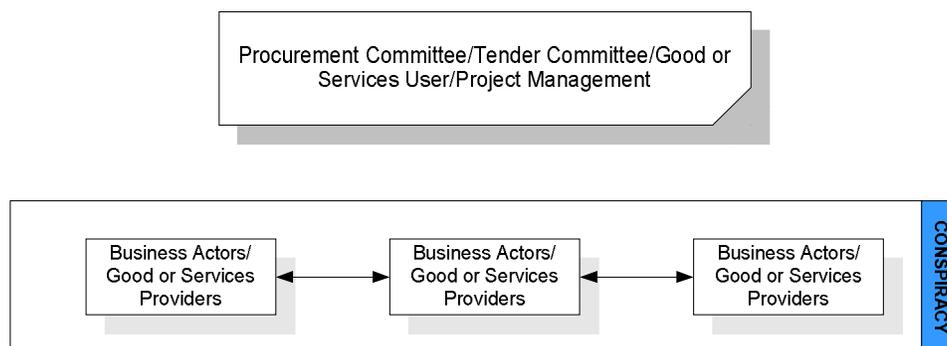
According to legal dictionaries, conspiracy is cooperation between two parties or more which jointly commit unlawful acts. In some countries, conspiracy in tenders is defined as an agreement among several parties to render a certain competitor a winner in a tender. In line with the aforementioned definitions, conspiracy in tenders as referred to in Article 22 of Law No. 5 Year 1999 is cooperation between two parties or more in order to render a certain bidder winner.

Conspiracy in tenders can be conducted covertly or openly by making adjustments to the bids prior to submission or by creating pseudo-competition or consenting and or facilitating or providing exclusive opportunity or not refusing to conduct a certain action although it is known that such action is conducted to rig a tender.

Conspiracy in tenders may be classified into three categories, namely horizontal conspiracy, vertical conspiracy and combination of vertical and horizontal conspiracy. Those three types of conspiracy are described as follows.

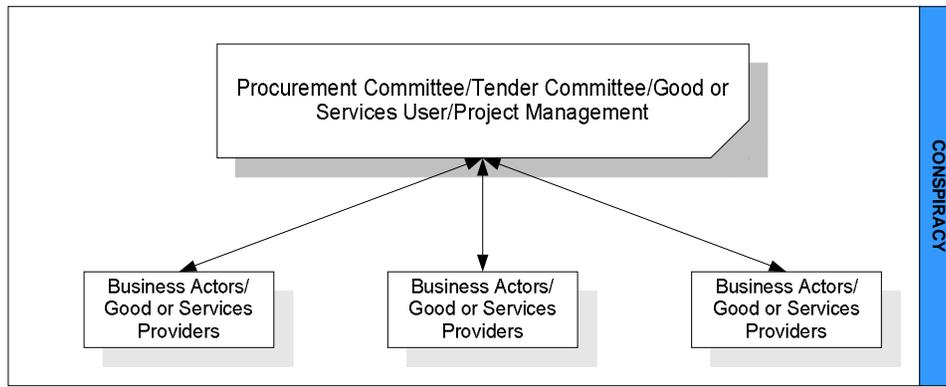
1. *Horizontal Conspiracy*

Horizontal conspiracy is a conspiracy between business actors or suppliers of goods and services and their competitors in the same business line. This can be categorized as a conspiracy by way of creating a pseudo-competition among bidders. Such conspiracy is indicated in the following chart.



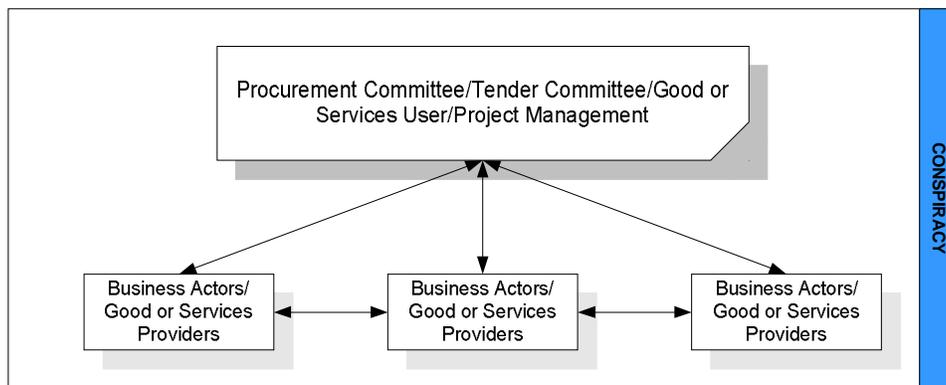
2. *Vertical Conspiracy*

Vertical Conspiracy is a conspiracy between one or several business actors or suppliers of goods and services and tender organizer or tender committee or users of goods and services or work owner or employer. This conspiracy may occur when the tender committee or users of goods and services or work owner or employer cooperate with one or several bidder(s). Such conspiracy is indicated in the following chart.



3. *Horizontal and Vertical Conspiracy*

Horizontal and Vertical Conspiracy is a conspiracy between a tender committee or users of goods and services or employer and business actors or suppliers of goods and services. This conspiracy may involve two or three parties related in a tender process. One of the forms of this conspiracy is fictitious tender, in which the tender committee, employer, or business actors conduct a tender process in administrative and closed manner. Both aforementioned conspiracies are indicated in the following chart.



4.2. Indications of Conspiracy in Tenders

Tenders that have the potential to create unfair business competition or restrict business competition are:

1. Tenders that are closed or not transparent or not publicly announced, causing potential and qualified business actors unable to participate;
2. Tenders that are discriminative and inaccessible to business actors having similar competencies;
3. Tenders with technical requirements or specifications or brands that are leading to a certain business actor, therefore restricting other business actors from participating.

In order to discover the existence of a conspiracy in a tender, we need to see various indications of conspiracy in a tender as described below. It is necessary to note that the following items are only indications of conspiracy, whereas the form or manner of the conspiracy or the existence of conspiracy must still be proven through an investigation by an Investigation Team or the Commission Council of KPPU.

Indications of conspiracy during planning include among others:

- a. The selection of a procurement method that circumvents the implementation of an open tender.
- b. The inclusion of technical specifications, amount, quality, and/or delivery time of the goods to be offered or sold or tendered, resulting in an article that can only be supplied by a certain business actor.
- c. The tender is conducted in a package that only one or two participants can participate in it/carry out the work.
- d. There is an interconnection between the source of funding and the source of the goods/services.
- e. The amount of the bid bond is stipulated much higher than the base value of the tender.
- f. The designated time and location of tender that is hard to reach and attend.

Indications of conspiracy during the formation of the Committee include among others:

- a. The selected Committee members do not have the required qualifications so that they can be easily to be influenced.
- b. The Committee members are affiliated with certain business actors.
- c. The composition and the performance of the Committee are not announced or tend to be concealed.

Indications of conspiracy during company pre-qualification and during pre-tender include among others:

- a. The requirements for taking part in the pre-qualification are restricting and/or leading to certain business actors.
- b. There is an agreement with a certain business actor regarding the specifications, brand, amount, and delivery location and/or time of the goods and services to be tendered.
- c. There is an agreement concerning the method, location, and/or time of the tender announcement.
- d. There is a business actor that has already been declared passing the pre-qualification even though it does not meet or is not sufficiently meeting some of the stipulated requirements.
- e. The Committee grants specific/special treatments to a certain business actor.
- f. There are additional requirements made after the pre-qualifications and not all participants are informed about it.

- g. There are common shareholders among the participants or Committee members or the work owner or other parties directly concerned with the tender (conflict of interests).

Indications of conspiracy during the making of the required documents for participating in a tender, or during the preparation of the tender documents, include the existence of tender requirements that are leading to a certain business actor in relation to the certification of goods, quality, capacity, and the delivery time that must be fulfilled.

Indications of conspiracy at the time of tender announcement include among others:

- a. Extremely limited period for tender announcement.
- b. The information in the tender announcement is intentionally made to be incomplete and insufficient. While a much more detailed information is given only to certain business actors.
- c. The tender announcement is carried out through a media with a very limited coverage, e.g. on a newspaper that is not widely known or on a notice board that is seldom seen by the public or in a newspaper having limited number of issues that it cannot reach most of the target audience.
- d. The tender announcement is posted in a newspaper within a very small advertisement or on a section/layout of the newspaper that is often missed by the target audience of the tender.

Indications of conspiracy during the pickup of the tender documents include among others:

- a. Potential tender participants are given different tender documents.
- b. The period of time given for tender documents pick-up is very short.
- c. It is difficult for potential tender participants to find the address or location for the tender document pick-up.
- d. The Committee suddenly changes the tender document pick-up location close to the end of the pick-up window, and that change is not publicly announced.

Indications of conspiracy during the determination of the Self-Estimated Price or the Auction Base Price include among others:

- a. There are two or more self-estimated prices or base prices for a single goods or service being tendered.
- b. The self-estimated price or base price is only given to certain business actors.
- c. The self-estimated price or base price is determined based on unclear and unreasonable considerations.

Indications of conspiracy during pre-bid meeting or auction open house, include among others:

- a. Information on goods/services being tendered is unclear and tends to be hidden.
- b. Only limited number of business actors can agree on the tender explanation, while most of the other potential participants cannot approve it.
- c. The Committee is working in a secretive manner and does not give services or information that should be given openly.
- d. One of the potential tender participants holds a closed meeting with the Committee.

Indications of conspiracy during the submission and opening of documents or the tender bid box include among others:

- a. There are bid documents that are accepted after the end of the time limit.
- b. There are documents placed in a single envelope together with another bid from a different tender participant.

- c. The Committee receives a bid from a business actor that does not participate or does not pass the qualification or administration process.
- d. There is an adjustment to bid price in the last moments before submitting the bid.
- e. There is a change in the bid documents submission location/place without a public announcement.

Indications of conspiracy during the evaluation and stipulation of the tender winner include among others:

- a. The number of tender participants is smaller than the number of participants in the previous tender.
- b. The winning bid price is much higher or lower than the price in the previous tender by the same company or business actor.
- c. The tender participants submit bid prices that are almost similar.
- d. The same tender participant, in a different tender submits a different price for the same article, without any logical reason to explain for the difference.
- e. The Committee tends to grant privileges to a certain tender participant.
- f. There are several similar tender bid documents.
- g. There are bid documents that are exchanged or modified by the Committee.
- h. The evaluation process is carried out in a remote and hidden area.
- i. The behavior and bids of the tender participants in submitting their bids follows a similar pattern as demonstrated in several previous tenders.

Indications of conspiracy during the announcement of potential winners include among others:

- a. The announcement is made in a limited manner so that it cannot optimally be known by qualified business actors, e.g. announced in an unclear mass media or announced through facsimile with an unclear sender name.
- b. The date of the tender announcement is postponed without any clear reason.
- c. Tender participants win a tender based on fixed turns.
- d. There are tender winners repeatedly winning tenders in a certain region.
- e. There is a big difference between the bids of the tender winner and the bids of other participants, with an unreasonable or unexplained reason.

Indications of conspiracy during the submission of an objection includes among others:

- a. The Committee does not respond to objections filed by tender participants.
- b. The Committee tends to conceal the evaluation process and results.

Indications of conspiracy during the appointment of a tender winner and contract execution include among others:

- a. The tender winner appointment letter is issued before the objection process is finished.
- b. The issuing of the tender winner appointment letter is postponed without any justifiable reason.
- c. The tender winner appointment letter is incomplete.
- d. The draft contract omits important items that should become inseparable parts of the contract.
- e. The contract is signed in a closed manner.
- f. The contract execution is postponed for unexplainable reasons.

Indications of conspiracy during the implementation and evaluation of implementation, include among others:

- a. The tender winner subcontracts the work to other companies or losing tender participants;

- b. The volume or value of the project being handed over is not in accordance with the initial provisions, without any justifiable reasons.
- c. The results of the work are not in accordance with or lower than the technical specifications, without any directly justifiable reasons.

4.3. The Impacts of Conspiracy in Tenders

From the viewpoints of consumers or employer, conspiracy in tenders may be detrimental in the following ways:

- a. Consumers or employers pay higher than the actual price.
- b. The goods or services obtained (whether from the aspects of quality, amount, time, or value) are often lower than what could be obtained if the tender is performed honestly.
- c. There is a market barrier for potential participants who do not obtain the opportunity to participate and win the tender.
- d. The project value (for service procurement tenders) is higher due to mark-ups committed by the conspiring parties. If those conspiracies are committed in a Government project financed by the State Budget, such conspiracy has the potential to create a high cost economy.

4.4. Matters that must be considered in Analyzing the Existence of Conspiracy In Tenders

Pursuant to Law No. 5/1999, conspiracy in tenders is defined as a rule of reason behavior, namely that an action requires substantiation in determining whether there has been a violation of fair business competition or not. Therefore, in a tender conspiracy, it is necessary to know whether the tender is performed in a dishonest or unlawful manner or restricting business competition.

4.5. Case Examples

The following are several examples of conspiracy in tenders that have been handled by the KPPU. We expect that our explanations on these cases it would be useful in understanding tender conspiracy as intended in Article 22 Law No.5 Year 1999, either committed horizontally, vertically, or both vertically and horizontally.

4.5.1. Case of Horizontal Conspiracy in the Tender of Casing and Tubing Pipes

Prior to the year 2000, in order to fill its annual need of pipes, PT A usually held a tender for casing and tubing pipes, including heat treated and upset pipes, which was open to all vendors according to the Qualified Partner List (TDR). The tender was usually called Blanket Purchase Order (BPO). BPO consisted of several items (max. 8 items) in 2 (two) categories, namely Low grade (75% of the total request) and High grade (25% of the total request). Since 2000, PT A held a series of socialization meetings for the purposes of introduction and gathering feedbacks in order to establish a new procurement system, by inviting 6 (six) pipe processors. Based on that meeting, a new procurement system was established whereas the implementation was still referring to the provisions of regulations on goods and services procurement.

Before carrying out the casing and tubing tender process, PT. A conducted a manufacturer assessment on 8 (eight) potential partners namely B, C, D, E, F, G, H, and I. Out of the 8 (eight) business actors assessed, PT. A concluded that there were only 3 (three) partnership alternatives that could be carried out, namely between PT. A and D and G, PT. A and B, and PT. A and E, C, and F. Whereas I and H were deemed only appropriate for

supporting those three partnership alternatives. After PT. A held a meeting with the government, PT. A decided that only 4 (four) pipe processors, namely B, E, D, and H would be invited to participate in the tender. Out of the 4 (four) pipe processors invited to participate in the tender, only 2 (two) pipe processors could meet the requirements stipulated by PT. A, while 2 (two) pipe processors that did not have high-grade facilities as required (namely E and H), were obligated to obtain a letter of support from business actors owning such facilities.

Those two companies decided to request a letter of support from B by considering their proximity. As the situation developed, the letters of support given by B to E and H were not given until one day before the bid opening, in a hotel room in Pekanbaru. The letters of support were given after B asked E and H to show their bid prices which would be submitted on the bid opening. E and H agreed to show their bid prices after being promised to receive jobs from B. Finally, B was named the winner of the tender with the lowest bid price.

The conspiracy in this case is a horizontal conspiracy between Tender Participants. The conspiracy was facilitated by the stipulation of a requirement by the Tender Committee, namely ownership of mill source that was in favor of certain Tender Participants, namely;

- a. Bidders were obligated to bid for all items (low grade and high grade) in one package;
- b. Bidders that only have low-grade facilities, were obligated to obtain a letter of support from a domestic business actor that has a high-grade facility;
- c. Domestic business actor that has high-grade facility is a competitor of the business actors that only have low-grade facilities;
- d. The lack of the abovementioned letter of support would result in the disqualification of the bidders;

Based on the Investigation, KPPU discovered that the conspiracy was in the form of the action of Tender Participants showing their bid prices to each other. That was discovered following the finding of evidence that there was an agreement for B, a Tender Participant, to give a letter of support to E and H by requiring those two companies to show their bid prices to B. Therefore, B was able to offer a lower price than E and H, by promising to give jobs to them. It was subsequently proven that B was named the winner of the tender.

4.5.2. Case of Vertical Conspiracy in the Tender of Security Services.

The Security Department of PT. X sent a purchase requisition to the Department Procurement of PT. X to procure security service. Based on that request, PT. X established a Tender Committee and a Supervisory Committee to carry out the tender. In the implementation of the tender, PT. X evaluated 14 (fourteen) companies that would be invited to participate in the selection process to procure security services, namely: A, B, C, D, E, F, G, H, I, J, L, M, N, O, and P. Based on the evaluation of those 14 (fourteen) security service companies, 7 (seven) companies were selected to participate in the tender, namely A, F, G, J, M, and N. After sending an invitation to those seven companies, PT. X asked the Tender Committee to repeat the ongoing tender/selection (closed tender process) by advertising in mass medias as an effort to maintain transparency. PT. X informed F, M, J, G, A, and N regarding the delay of the tender implementation. Not long after, the Tender Committee announced the pre-qualification of the security services tender in PT. X through advertisements in 2 (two) national mass medias. Based on that announcement, there were 23 (twenty three) companies registering and taking the pre-qualification documents, namely: Q, R, S, T, U, V, W, Y, G, Z, AA, P, AB, AC, M, AD, J, AE, N, AF, AG, AH, and AI. Out of those companies, 16 (sixteen) companies returned the pre-qualification documents.

Out of the 16 (sixteen) companies that returned the pre-qualification documents, 12 (twelve) companies were declared to have completed their pre-qualification documents. Afterwards, after evaluating the validity of the pre-qualification documents, several companies were declared to be disqualified. After completing those documents, PT. X sent letters to M, P, T, N, S, AC, and A to inform them that they had met the pre-qualification requirements and thus able to attend the technical bid explanation meeting. Afterwards, based on the results of the assessment on the technical bids, 3 (three) companies were found to have met the score standards set by PT. X, namely: P, A, and M. After submitting their financial proposal documents, the three companies were evaluated. Based on the technical evaluation results and financial proposal negotiations, A was named the winner of the tender.

The abovementioned case is a form of vertical conspiracy between the Work Owner and Tender Participants. The indications of conspiracy leading to the fixing of tender winner in that case are:

1. There was no announcement regarding the membership of the Committee for the Tender of security services held by PT. X.
2. There was no announcement regarding the winner of the tender. The tender result was only announced by facsimile to every tender participant, which was sent with an unclear sender identity.
3. The pre-qualification process was not fully transparent. An example is that the previous security service provider/A did not take the pre-qualification documents and did not register to participate in the pre-qualification, but it passed the pre-qualification. Whereas on the other hand some tender participants were disqualified for not completing their documents.
4. The fact that A passed the pre-qualification is contrary to the provisions in the pre-qualification invitation, which reads that companies not meeting the entire pre-qualification registration requirements will be automatically disqualified and shall not be invited to participate in the tender.
5. PT. X assessed the price using an unclear conversion on the financial proposal, where the Tender Participants did not know the conversion share used by PT. X on the financial proposal assessment.

Based on the Investigation, KPPU discovered that the conspiracy was committed by giving an exclusive or extra chance by the tender's owner/committee to a business actor participating in the tender. This conclusion is based on the facts that,

1. There were spoken and written communication between the President Director of A (Tender Participant) with the President Director of PT. X (Tender Committee/Work Owner) who asked A to submit the pre-qualification documents to Pt. X, even though A did not register to participate in the pre-qualification.
2. PT. X received the pre-qualification documents from A after the end of the pre-qualification documents receipt period, namely after the pre-qualification documents were opened. The matter was based on the reason that A was the current provider of security services, whereas that reason was not stated in the pre-qualification documents.
3. PT. X accepted A in the pre-qualification of the tender for PT. X security services, even though A only submitted the pre-qualification documents made for the previous tender plan, without any changes on it.
4. PT. X ordered the Tender Committee to conduct price negotiations only with A, and not with the other tender participants ranked and recommended by the Tender Committee.
5. PT. X named A the winner of the tender, differing with the recommendations of the Tender Committee, based on reasons and considerations which were not stated in the tender requirements.

4.5.3. Case of Vertical and Horizontal Conspiracy in a Shares and Bonds Tender

PT. A acting as a financial advisor on behalf of X and B announced in 2 newspapers that it would sell B's entire shareholding in C and the entire bonds issued by B and X. The sale of C's shares and bonds were done through a tender with a sales process in accordance with the provisions made in the Procedure for the Submission of Bids, which included sale structure, binding bid, submission of bids and selection of the winning bidder and closing of the transaction. Among the criteria of tender participant were that it was a partner, or principal, or a subsidiary of a partner including a colleague of a subsidiary, a car distribution company, other auto companies and financial advisor or in essence they had to be bona fide companies.

The implementation of tender for the sale of shares by PT. A did not follow the implementation schedule of the tender for the sale of C's shares made by X as intended in the TOR. PT. A invited 135 companies but only 16 companies signed the confidentiality agreement as required by the procedure. Afterwards, the companies that submitted final bid documents and then participated in the tender were D, E and F. D was finally declared as the winner of the divestment tender.

In this case of sale of shares tender there is a vertical and horizontal conspiracy, because it involved the owner, the work owner, and the tender participant. Based on its investigation, KPPU discovered that the conspiracy in this case was done by conducting adjustments, comparing tender documents prior to submission, the creation of a pseudo-competition, and the granting of an exclusive chance to a certain tender participant by committing various acts that violated the stipulated procedures.

The indication or signs of conspiracy in the above case came from these discoveries:

1. The implementation schedule of the sale of shares tender was very short, namely 14 days, while the tender was related to huge sums of money and a complex company structure.
2. There were similar tender documents among the tender participants, namely in the choice of words, the form of the letter, and the syntax on the cover letter
3. There were almost similar bidding prices submitted by two tender participants, namely F and E. The value only differs 5% from the highest bidding price submitted by D.
4. There was an effort by two tender participants, namely PT ASI and D, to compare the tender documents before submitting the final bid documents. The matter was discovered following the similarities in the choice of words, the form of the letter, and the syntax in the cover letter submitted during the final bid.
5. There was an effort to create a pseudo-competition following the discovery that a tender participant, E, did not seriously attempt to complete and meet the requirements asked by the selling party as included in the procedures for the submission of bid.
6. There was an effort to give an exclusive chance to a certain tender participant by committing various violations on the stipulated tender procedure. One of them is by giving a time extension of the final bid submission window and there were no objections on the extension by the punctual tender participants. In addition, it was also discovered that the tender committee had accepted a tender participant that did not meet the requirements stipulated in the procedures of the submission of bid, among them were that it was not invited, it never sent a letter of interest and warranty letter, and it did not sign the confidentiality agreement.

CHAPTER V SANCTIONS

In accordance with Article 47 of Law No. 5/1999, KPPU has the authority to impose administrative sanctions on business actors who have violated the provisions in Article 22, in the forms of:

1. An order to the business actor to stop all activities which are proven to have caused monopolistic practice and/or unfair business competition and/or damages to the public (Article 47 paragraph (2) sub-paragraph c); and/or
2. An order to pay compensation for damages (Article 47 paragraph (2) sub-paragraph f); and/or
3. An order to pay a fine in the minimum amount of Rp.1,000,000,000.00 (one billion rupiah) and in the maximum amount of Rp.25,000,000,000.00 (twenty-five billion rupiah) (Article 47 paragraph (2) sub-paragraph g).

Principal punishment as intended in Article 48 of Law No. 5/1999 may also be imposed on violations of Article 22 in the form of:

1. A fine in the minimum amount of Rp.5,000,000,000.00 (five billion rupiah) and in the maximum amount of Rp.25,000,000,000.00 (twenty-five billion rupiah); or a detention in lieu of fines of no longer than 5 (five) months (Article 48 paragraph (2)).
2. A fine in the minimum amount of Rp.1,000,000,000.00 (one billion rupiah) and in the maximum amount of Rp.5,000,000,000.00 (five billion rupiah); or a detention in lieu of fines of no longer than 3 (three) months (Article 48 paragraph (3)), in the event that the business actor and/or refuses to hand-over evidence required in the investigation and/or examination or refuses to be examined, refuses to provide necessary information in the investigation and/or examination, or obstructs the process of investigation and/or examination as intended in Article 41 paragraph (1) and (2).

In addition to the principal punishment, additional sanctions may also be imposed on violations of Article 22 as regulated in Article 49 of Law No. 5/1999 in the form of:

1. Revocation of business permit; or
2. Prohibition for the business actors who have been proven to have violated this law to hold a position as director or commissioner at least within a period of 2 (two) years and at the longest within a period of 5 (five) years; or
3. Termination of certain activities or actions causing damages to other parties.

With regard to conspiracies in tenders involving Government Employees or Officials (Civil Servants or those assigned to State Owned Enterprises, Regional Government Owned Enterprises, or Private Companies), in order to uphold the competition law, KPPU must inform such conspiracies to the superior of the said Employees or Officials or the Public Prosecutor's Office, or even the Commission for the Eradication of Corruption (KPK), to take the necessary legal actions in accordance with applicable laws and regulations.

CHAPTER VI CLOSING REMARKS

Conspiracy in tenders is one of the acts prohibited by Law No. 5 Year 1999, because it can obstruct business competition and detrimental to public interests. In order to clarify the regulation on the prohibition of conspiracy in tenders, both the business actors and the committee/organizer can use these Guidelines as one of the guides in implementing the tender process so in order to avoid violation of Law No. 5 Year 1999. These Guidelines may not accommodate all of tender activities; so that revisions will be made in line with developments in the business world, which may uncover new types of conspiracy or indications of conspiracy in tenders.