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Review of E-Purchasing Law in Procurement Related to Open and Competitive Principles

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Abstract

The Government Products and Services Procurement Policy Institute (LKPP) organizes and develops the e-cataloque system, which is used for e-purchasing, which is the process of buying products and services. E-purchasing and e-catalog are components of electronic procurement. Presidential Regulation No. 16 of 2018 governs government acquisition of products and services that use electronic procurement, or e-procurement. According to the rule, e-commerce must be implemented before goods and services can be purchased to address strategic and/or national demands that are established by the regional head or head of the institution. This research aims to review the application of open and competitive principles and rules in business competition law to the procurement of goods and services using the e-purchasing method. This is a normative legal study, which takes a statutory approach and is prescriptive in character. It examines all statutory laws that deal with how providers of goods and services, particularly e-purchasing, are chosen. The findings of the study indicate that there exists a possibility of collusion, leading to unfavorable company competitiveness when employing the electronic purchasing method to procure goods and services. As a result, rules that precisely define the parameters and standards for using techniques for choosing suppliers of goods and services are required.

Keywords: *Competitive Principles; E-Purchasing; Procurement*

Introduction

Procurement of goods and services is essentially the user's effort to obtain or realize the goods and services they want, using certain methods and processes to reach an agreement on price, time, and other agreements. The implementation of e-procurement in the procurement of goods and services is expected to be able to apply the principles of procurement of goods and services, namely effective, efficient, transparent, open, competitive, fair, and accountable so that good and clean government can be achieved. The use of electronic procurement in the procurement of government goods and services is demonstrated by the issuance of Presidential Regulation Number 16 of 2018 concerning the procurement of government goods and services. Presidential Regulation No. 16 of 2018, one of which regulates electronic procurement services, namely information technology management services to facilitate the implementation of electronic procurement of goods and services (Iqbal, 2020).

As regulated in Presidential Regulation No. 16 of 2018 concerning the procurement of government goods and services, as amended by Presidential Decree No. 12 of 2021, there are currently five methods for selecting providers: e-pushing, direct procurement, direct appointment, fast tender, and tender. Tendering is a conventional method of procuring goods and services. In a tender, there are stages, including announcement, giving explanation or explanation, uploading or submitting participant bid documents, administrative, qualification, technical, and price evaluation by the selection working group, proving qualifications, determination, and announcement of winners, rebuttal period, technical, and price negotiations. From these stages, it can be seen that the competition is taking place among the tender participants so that it can produce winners or potential providers of goods or services who are competent and with competitive or lowest bid prices among participants who pass the bid evaluation and qualifications.

Procurement of goods and services is essentially the user's effort to obtain or realize the goods and services they want, using certain methods and processes to reach an agreement on price, time, and other agreements. The implementation of e-procurement in the procurement of goods and services is expected to be able to apply the principles of procurement of goods and services, namely effective, efficient, transparent, open, competitive, fair, and accountable so that good and clean government can be achieved. One of the basic principles of government procurement of goods and services is the principle of openness and competition. This principle can be interpreted as meaning that the process of procuring goods and services must provide equal opportunities to all business actors who meet the qualification and technical requirements, encourage healthy competition between equal business actors, meet the established criteria, follow defined procedures, and be transparent. The principle of competition emphasizes that in the process of procuring goods and services, there must be fair competition among as many business actors as possible who meet the requirements and are equal. This aims to obtain goods and services that are available competitively and to prevent interventions that could disrupt market functions in the procurement process (Sancoko & Pratama, 2020).

In contrast to the method of selecting providers by tender, e-purchasing is carried out by commitment-making officials or procurement officials by directly selecting goods or services that are available or displayed in electronic catalogs, be they national, sectoral, or local. Even though e-purchasing is often considered more efficient because the process can be carried out more quickly and with less bureaucracy, if you look back at its implementation, it seems that the competition between business actors is artificial or vague. This certainly raises doubts about the upholding of open and competitive principles in the process of procuring goods and services using the e-purchasing method.

The holding of a mini-competition method for procuring goods and services through electronic catalogs is a form of the government's efforts to encourage the creation of more competitive competition, similar to the competition that occurs in the process of procuring goods and services by tender or fast tender. However, based on information from LKPP, the use of the mini-competition method by budget users is still very far compared to the price negotiation method. Seeing this inequality certainly raises a question, namely why the PPK, or procurement officer, tends to choose the procurement method through electronic catalogs utilizing price negotiations compared to mini competitions. So it is important to conduct a study of this problem. This research will focus on the reasons for using the method of selecting providers of goods and services through electronic catalogs to uphold open and competitive principles as well as rules in business competition law. Through this research, it is hoped that it can provide ideas and input for the preparation of regulations and guidelines to strengthen the procurement system in Indonesia, especially in terms of provider selection methods.

Research Method

In this research, researchers used empirical juridical research. The empirical legal research method, or empirical juridical research method, is a method of "legal research that examines applicable

legal provisions and what is happening in reality in society, or research carried out on actual conditions that occur in society, to find facts that are used as research data. Then the data is analyzed to identify problems, which ultimately leads to problem-solving" (Bambang Waluyo, 2002).

Result and Discussion

Unfair business competition is competition between business actors in carrying out the production or distribution of products with actions that are unethical, violate the law, or hinder business competition (Abustan, 2023, p. 1). One form of unfair business competition that is mentioned in Law No. 5 of 1999 as a prohibited activity is conspiracy. A conspiracy is a conspiracy carried out by business actors and/or procurement actors to regulate and direct the winner of the tender. Adapting to current developments in the practice of procuring goods and services, it needs to be interpreted broadly that what is included in the category of conspiracy is not only limited to tenders but also includes the procurement of goods and services through electronic catalogs. Therefore, the legal position of business competition in goods and services procurement activities is very important. The application of business competition law rules is aimed at preventing the emergence of unhealthy business competition (Kustanto, 2022).

Conspiracy in the procurement of goods or services can occur with an agreement between the parties involved, whether in written form or not, to prevent other business actors who have the potential to become competitors in the scope of work to be carried out. Conspiracy can arise at every stage of the procurement process, starting from planning, determining requirements in selection documents, evaluating bids, and up to contract implementation. In his writing, Manthovani explains the elements of a conspiracy, namely (Mantovani, 2023): (1) the existence of cooperation or agreement between two or more parties; (2) openly or secretly conducting document conditioning, creating pseudo-competition, agreeing and/or supporting the emergence of conditioning, and not refusing to carry out certain actions even though knowing that the action being carried out is to regulate certain business actors who will be appointed as providers of goods and services, including exclusive opportunities provided by procurement actors to business actors, either directly or indirectly, through methods that are inconsistent with or against the law. For example, certain business actors have made agreements or conspiracies with procurement actors or with other business actors to be appointed as providers of goods or services for activities to be carried out, thereby preventing other business actors from having the opportunity to get the job. Conspiracy in the procurement of goods and services can be grouped into 3 types, namely (ICW, 2018): horizontal conspiracy, vertical conspiracy, and combined horizontal and vertical conspiracy. Horizontal conspiracy occurs between fellow business actors; vertical conspiracy occurs between business actors and procurement actors; and joint conspiracy occurs between two or more business actors and procurement actors. It is necessary to uphold the principles of openness and competition to avoid bid rigging.

The principle of openness and competition is expressly stated in Article 6 of Presidential Decree No. 16 of 2018 concerning the procurement of goods and services as amended by Presidential Decree No. 12 of 2021. The open principle can be interpreted as meaning that every business actor who can meet the technical requirements and qualifications that have been determined is allowed to participate in the selection of goods and service providers. Meanwhile, the principle of competition is sought to create healthy competition among business actors, which must be applied in the process of selecting providers of goods and services, thereby producing quality goods and services, with no intervention by any party that can hinder the process of forming a market mechanism for product supply. The open principle has a different meaning from the transparent principle. The open principle focuses on opening the procurement and selection of providers to as many business actors as possible with similar classifications and equivalent qualifications. Meanwhile, the principle of transparency emphasizes the openness and clarity of all information, provisions, and requirements for selecting providers of goods and services that can be seen and known by the public at large (Mawarni et al., 2020). To uphold the principle of openness and competition, indicators must be met, including (1) the procurement process is carried out transparently

and can be accessed by all business actors; (2) the selection working group must be able to maintain an atmosphere for provider selection that remains conducive for the parties involved in procurement; (3) all stages of the provider selection process must strive to create healthy competition; (4) activity managers are obliged to take action against things that could hinder the creation of healthy competition; (5) all procurement stages must avoid conflicts of interest (Arifin, 2020).

The method for selecting providers of goods and services as regulated in Article 38 of Presidential Decree No. 16 of 2018 as amended by Presidential Decree No. 12 of 2021 consists of (Malinda et al., 2017): (1) E-purchasing; (2) direct procurement; (3) direct appointment; (4) fast tender; (5) tenders To determine the provider selection method that will be used, the procurement officer or PPK is required to understand the criteria and conditions that must be met and adapt them to the characteristics of the goods or services to be procured. E-purchasing is part of the government's efforts to simplify bureaucracy but is not intended to replace tenders that implement procurement principles. E-purchasing has many advantages in terms of the simplicity it offers, including not requiring time and lengthy processes like tenders, no need to prepare HPS, and eliminating the potential for failed tenders.

In the order of selecting the procurement method to be used by service users, tenders occupy the last position after e-purchasing, direct procurement, direct appointment, and fast tenders. This is stated in Article 38, Paragraph 7, of the Presidential Decree concerning the procurement of goods and services, which states, "Tenders as intended in paragraph (1) letter e is carried out if the supplier selection method as intended in paragraph (1) letters a to d cannot be used.". The use of tenders as a final alternative in selecting a procurement method shows that tenders tend to require a long process and more effort compared to other procurement method options. However, on the other hand, tenders offer competitive competition among participants to be named the winner. The form of competitive competition is clearly illustrated by the stages that must be passed in the tender, namely: tender announcement, download of tender documents, provision of explanations by the Working Group, submission of bids, evaluation of administration, qualifications, technical, and price, verification of qualifications and negotiations, determination of winners. , and providing opportunities to submit objections for participants who do not agree with the evaluation results. All participants are required to fulfill the requirements specified in the tender document, and in determining the requirements for the package to be completed, the working group is required to comply with the guidelines stated in the statutory provisions. If there are indications of fraud, then there are consequences that must be borne by the parties, one of which is a failed tender, which must be followed up with a re-tender, submission of a re-offer, or re-evaluation (Suryani, 2011)

For further discussion, researchers will focus on e-purchasing procurement methods. As stated in Article 13 of LKPP Regulation Number 9 of 2021, the authority for managing the national electronic catalog vested in the head of the LKPP consists of: (1) deciding on product and provider requirements; (2) approving the display of goods and services; (3) establishing and canceling provider sanctions; and (4) carrying out supervision and evaluation. For sectoral catalogs, this authority is delegated to the head of the institution, and for local catalogs, it is given to regional heads.

E-purchasing can be done with a choice of 3 methods, namely (Kristianto, 2022): (1) price negotiation, mini; (2) competition; and (3) competitive catalog. E-purchasing negotiations are the stage of the negotiation/bargaining process that involves the procurement officer/PPK, catalog provider, and other related parties (if necessary) regarding goods or services listed or displayed in the electronic catalog. In conducting negotiations, the parties have various intentions; from the PPK side, as the service user, they want to get quality products at competitive prices, but from the business actor's side, of course, they are driven by the motivation to get the maximum profit. However, the reality on the ground is not like that; procurement actors often do not have a sense of "ownership," as if buying goods with their own money. Regarding the available procurement methods via e-purchasing, there are no provisions that explicitly regulate the parameters or benchmarks for service users to determine which method should be used. This will, of course, confuse, and for parties who do not uphold procurement principles and ethics, of course, this loophole will be exploited to fulfill personal interests and desires.

Based on the percentage of data selecting the e-purchasing method, there is a gap between the use of the mini-competition method and other methods by procurement actors in procuring goods and services through electronic catalogs. The author believes that this inequality can be caused by two possibilities, namely the lack of information conveyed to procurement actors regarding the availability of mini-competition facilities and/or the tendency of procurement actors to take advantage of the ease of negotiation methods in selecting the desired product or business actor at a predetermined price. arranged with the aim of personal gain. In procurement through electronic catalogs, several things need to be underlined, namely: (1) there is no firm benchmark in determining the selected provider for negotiation; (2) the element of rivalry or competition is reduced because users of goods or services can only choose providers whom The product has only appeared in the electronic catalog. In certain cases, the concept of selecting providers makes it possible to appoint certain business actors without competition. However, this must fulfill the following elements (Wibowo, 2018): (1) to deal with special conditions, for example, an emergency; (2) because of certain conditions, for example, due to patent rights, the product to be procured can only be provided by certain business actors; (3) due to considerations of effectiveness. Because of this, discretion or privilege in determining providers without going through competition, such as in tenders, can become a space for collusion to arise.

Based on the above, if users and providers of goods and services adhere to procurement ethics, especially in determining the provider selection method that will be used in the goods and services procurement process, of course, there is no need to worry about weakening the principles of openness and competition. However, in reality, there is a tendency to satisfy personal interests by taking advantage of existing regulatory loopholes and avoiding provider selection methods that enforce fair business competition. There needs to be a policy from the government to encourage procurement officers and PPKs to choose the mini-competition method. This is possible by clarifying the provisions, requirements, and criteria that must be met before determining which method to use (mini-competition or price negotiation) so that there are no more loopholes that can be exploited by irresponsible parties.

Conclusion

Based on the results of the research and discussion, it can be concluded that the implementation of selecting goods and service providers using the e-purchasing method currently still leaves gaps for unhealthy business competition to occur through acts of conspiracy, thereby eliminating the principle of openness and competition, namely the price negotiation method. This is because the substance of the existing regulations still seems permissive, only optional, and does not clearly and firmly regulate the provisions, criteria, and requirements that must be met in determining the use of the e-purchasing method (price negotiation or mini-competition). When procuring goods and services, communication must be maintained following applicable procedures and regulations and provide the best performance. Apart from that, you must maintain an attitude of integrity and high commitment in carrying out your duties so that you can apply the principles of procurement of goods and services contained in the regulations.

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