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Implementation of Indirect Evidence on Tender Conspiracy in The Construction Services: How to Prove it?

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Abstract

In the current government era, the focus on infrastructure development is carried out to increase competitiveness on a national and international scale. Tthe realisation of the infrastructure budget in 2021 reached IDR 402.8 trillion, growing 31.1% compared to 2020. However, it is not uncommon for irregularities to occur in preparing and implementing infrastructure development, one of which is a tender conspiracy in the construction services sector. Difficult proof becomes an obstacle in law enforcement regarding business competition. Therefore, this research focuses on implementing indirect evidence in the construction services sector to sanction violations of business competition aspects in Indonesia. This research is descriptive and uses normative juridical research. The statutory approach (statute approach) and conceptual approach (conceptual approach) are used, supported by the secondary data divided into primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data was obtained through library research collection techniques and then analysed qualitatively. The results of this study prove that indirect evidence can be used to confirm that the respondent was found guilty of tender conspiracy, indicating the practice of unfair business competition. The respondent is subject to administrative sanctions to provide a deterrent effect so as not to repeat the violation.

Keywords: *Indirect Evidence; Tender Conspiracy; Construction Services Sector; Monopolistic Practices; Unfair Competition.*

Abstrak

Pada era pemerintahan saat ini berfokus pada pembangunan infrastruktur dilakukan untuk meningkatkan daya saing di skala nasional maupun internasional. Realisasi anggaran infrastruktur tahun 2021 mencapai Rp 402,8 triliun, tumbuh 31,1% dibandingkan tahun 2020. Akan tetapi, tidak jarang penyimpangan dalam proses persiapan dan pelaksanaan pembangunan infrastruktur, salah satunya adalah terjadi persekongkolan tender di sektor jasa konstruksi. Pembuktian yang sulit menjadi hambatan dalam penegakan hukum dalam aspek persaingan usaha. Oleh karena itu, tujuan penelitian ini berfokus pada implementasi pembuktian tidak langsung (*indirect evidence*) di sektor jasa konstruksi, guna memberikan sanksi pada pelanggaran aspek persaingan usaha di Indonesia. Penelitian ini bersifat deskriptif dengan jenis penelitian yuridis normatif. Jenis pendekatan yang digunakan adalah pendekatan peraturan perundang-undangan *(statue approach)* dan pendekatan konseptual (*conseptual approach*). Data yang digunakan pada penelitian ini adalah data sekunder yang terbagi atas bahan hukum primer, bahan hukum sekunder, dan bahan hukum tersier. Data sekunder tersebut diperoleh melalui teknik pengumpulan studi kepustakaan (*library research*), yang kemudian data dianalisis secara kualitatif. Hasil penelitian ini membuktikan bahwa *indirect evidence* dapat digunakan untuk membuktikan termohon dinyatakan bersalah atas pelanggaran

persekongkolangan tender, dalam praktik persaingan usaha tidak sehat. Adapun termohon dikenakan sanksi administratif untuk memberikan efek jera agar tidak melakukan pelanggaran tersebut kembali.

Keywords: Alat Bukti Tidak Langsung; Persekongkolan Tender; Sektor Jasa Konstruksi; Praktik Monopoli; Persaingan Usaha Tidak Sehat.

A. INTRODUCTION

In the current state government regime, infrastructure development is carried out to increase competitiveness on a national scale, as well as to equalize development in each region to reduce the level of disparity between regions. Infrastructure development is the driving force for a nation's economic growth and development.[1] The existence of physical facilities and infrastructure, also known as infrastructure, is an essential element in bringing about welfare, entailing, among others, the development of road transportation, airports, ports, and reservoirs to support the economic growth of the community.[2]

The availability of good infrastructure affects economic growth through the creation of interregional linkages and resource allocation. Inter-regional relations achieved by improving the quality of mobility factors, information and technology can create equitable development and result in better labour mobility between regions. Such fair development will encourage the formation of new investments and new jobs and boost community income.[3]

Based on the analysis research from Katadata, the realization of the infrastructure budget in 2021 reached IDR 402.8 trillion, growing by 31.1% compared to the figure in 2020. The realization of the infrastructure budget is equivalent to 96.5% of the total ceiling set, namely IDR 417.4 trillion. The 2021 achievement also indicates that infrastructure development has spent a budget above IDR 400 trillion.[4]

No	Year	Infrastructure Budget/Rupiah	Growth/Percent
1	2016	Rp.269,100,000,000,000.00	5.1%
2	2017	Rp.381,200,000,000,000.00	41.6%
3	2018	Rp.394,000,000,000,000.00	3.4%

[1] Raden Muhammad Arvy Ilyasa, "Prinsip Pembangunan Infrastruktur yang Berlandaskan HAM Terhadap Eksistensi Masyarakat Hukum Adat di Indonesia", *SASI* 26, no. 3 (July-September 2020): 380-391, https://doi.org/10.47268/sasi.v26i3.296.

[2] Andi Asnudin, "Pendekatan Partisipatif dalam Pembangunan Proyek Infrastruktur Perdesaan di Indonesia", *Jurnal SMARTek* 8, no. 3 (August 2010): 183-190, http://jurnal.untad.ac.id/jurnal/index.php/SMARTEK/article/view/638.

[3] Erika Sefila Putri dan Wisudanto, "Struktur Pembiayaan Pembangunan Infrastruktur di Indonesia Penunjang Pertumbuhan Ekonomi", *Simposium I Jaringan Perguruan Tinggi untuk Pembangunan Infrastruktur Indonesia*, (2016): 222-228, http://dx.doi.org/10.12962/j23546026.y2017i5.3136.

[4] Katadata, "Belanja Infrastruktur 2021 Cetak Rekor Terbesar Rp402 Triliun", accessed from https://katadata.co.id/maesaroh/berita/61d5dcbac885a/belanja-infrastruktur-2021-cetak-rekor-terbesar-rp-402-triliun accessed on February 5, 2023, at 13.00 WIB.

4	2019	Rp.394,100,000,000,000.00	0
5	2020	Rp.281,100,000,000,000.00	-28.7
6	2021	Rp.417,400,000,000,000.00	48.4

Table 1. Growth of the State Budget for Infrastructure in Indonesia 2016-2021
Source: Katadata with Data Processed by the Author

The growth of the state budget for infrastructure in Indonesia in 2021 is divided into several ministries/institutions, which are assigned to manage the infrastructure development fund budget with the following distribution:

Responsible Institutions	**Total Budget/Rupiah**
Ministry of Public Works and Housing of the Republic of Indonesia **(PUPR)**	Rp155.900.000.000.000,00
Ministry of Transportation of the Republic of Indonesia **(Kemenhub)**	Rp34.200.000.000.000,00
Ministry of Communication and Information of the Republic of Indonesia **(Kominfo)**	Rp16.500.000.000.000,00
Regional Government	Rp101.400.000.000.000,00
National Strategic Project **(PSN)**	Rp14.400.000.000.000,00
State Capital Participation **(PMN)**	Rp16.600.000.000.000,00

Table 2. Distribution of the State Budget by Responsible Institutions 2021
Source: Katadata with Data Processed by the Author

The amount of planning and realization of the state budget for infrastructure development in Indonesia is inextricable from the existence of Indonesia's goals for the welfare and prosperity of its people.

Based on the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia ("1945 Constitution"), "the earth and water and the natural resources contained therein shall be under the control of the state and shall be used for the greatest prosperity of the people". It represents the basis of economic democracy as an effort for the prosperity of society and not individuals and is based on social spirit and places control over various resources in the public interest.[5] This arrangement is based on the assumption that the State is the mandate holder to carry out state life in Indonesia which controls natural resources to be used to the greatest extent for the prosperity of the people.[6] However, a big question remains: have the procedures in infrastructure development been appropriately implemented?

[5] Reka Dewantara, "Rekonseptualisasi Asas Demokrasi Ekonomi dalam Konstitusi Indonesia", *Arena Hukum* 7, no. 2 (September 2014): 195-209, https://doi.org/10.21776/ub.arenahukum.2014.00702.3.
[6] Roni Sulistyanto Luhukay dan Abdul Kadir Jaelani, "Penataan Sistem Peraturan Perundang-Undangan dalam Mendukung Penguatan Konstitusi Ekonomi Indonesia", *Jatiswara* 34, no. 2 (July 2019): 155-170, http://www.jatiswara.unram.ac.id/index.php/js/article/view/200.

Infrastructure development certainly cannot be carried out instantly in the procurement process. Infrastructure development must follow procedural provisions, one of which is through a tender for Government Procurement of Goods / Services. Tender is one of the initial stages in the construction services procedure. Based on Article 38 paragraph (2) of Law Number 2 of 2017 concerning Construction Services ("Law of 2/2017"), the implementation of construction services business can take place independently or through contractual arrangements involving forming an engagement between parties. In such arrangements, the parties include the government as a service user (project owner) and business entities or individuals as service providers (contractor services).[7]

Such contractual arrangements are divided into two stages: the pre-qualification selection and/or qualification stage of selecting service providers and the determination of service providers and the signing of tender documents as a form of contractual relationship between service users and service providers.[8] The concept of such binding construction services is identical to that of civil engagement because the contractual arrangements result in a legal, contractual relationship between two or more people, which further leads to the emergence of rights on one party and obligations for achievements on the other party in the field of property.[9]

The legal relationship caused is referred to as a construction service employment relationship. Normatively, the binding of construction services in work relations must pay attention to fair competition and can be scientifically accounted for.[10] The work relationship arrangement between service users and service providers must be outlined in a construction work contract, which is the basis for binding legal relations between the construction work provider (service user) and the construction executor (construction services).[11]

However, in practice, procedures and regulations for implementing tenders in procuring goods/services in the construction sector are often circumvented. Based on data from the Business Competition Supervisory Commission of the Republic of Indonesia ("KPPU RI") in 2020, the most dominant violations of business competition cases handled are in the form of late notification of mergers and acquisitions (60%), tender conspiracies (33%) and cartels (7%).

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[7] Erwin Suryoprayogo, "Keabsahan Kontrak Kerja Konstruksi yang Terbukti Dibentuk Dari Persekongkolan Tender", *Jurnal Lex Renaissance* 7, no.1 (March 2022): 6-30, https://doi.org/10.20885/JLR.vol7.iss1.art2.

[8] Ginanjar Bowo Saputra dan Hernawan Hadi, "Penegakan Hukum Persekongkolan Tender Menurut Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat", *Privat Law* 4, no. 2 (July-December 2018): 213-219, https://doi.org/10.20961/privat.v6i2.25592.

[9] Arifa Puspa Maulidya, Budi Santoso, dan Budiharto, "Analisis Yuridis Terhadap Praktik Dugaan Persekongkolan Tender Pembangunan Jalan (Kasus Putusan Perkara Nomor 07/KPPU-I/2017)", *Diponegoro Law Journal* 8, no.4 (October 2019): 2475-2491, https://doi.org/10.14710/dlj.2019.25507.

[10] Nurul Fitriani, "Wewenang KPPU terhadap Pemberian Sanksi pada Pihak Lain Dalam Kasus Persekongkolan Tender", *Jurnal Ilmiah Universitas Batanghari Jambi* 21, no. 1 (February 2021): 169-176, http://dx.doi.org/10.33087/jiubj.v21i1.1241.

[11] Maria Avilla Cahya Arfanti, "Pelaksanaan Sistem E-Procurement dalam Pengadaan Barang/Jasa Pemerintah untuk Mencegah Terjadinya Persekongkolan Tender (Studi di Dinas Pekerjaan Umum, Perumahan, dan Pengawasan Bangunan Kota Malang)", *Jurnal Universitas Brawijaya* (January 2014): 1-22, https://download.garuda.kemdikbud.go.id/article.php?article=188095&val=6466&title=PELAKSANAAN%20SISTEM%20EPROCUREMENT%20DALAM%20PENGADAAN%20BARANGJASA%20PEMERINTAH%20UNTUK%20MENCEGAH%20TERJADINYA%20PERSEKONGKOLAN%20TENDER%20Studi%20di%20Dinas%20Pekerjaan%20Umum%20Perumahan%20dan%20Pengawasan%20Bangunan%20Kota%20Malang.

Meanwhile, based on the classification of reports of alleged violations, it is divided into two forms of classification as follows:[12]

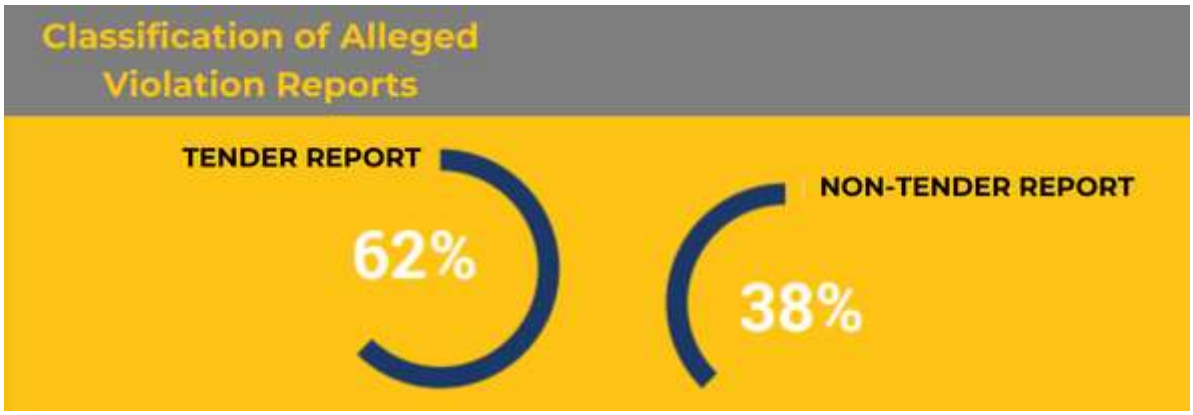

Figure 1. Classification of Alleged Violation Reports 2020
Source: Data Processed by the Author

Figure 1 shows a dominance of the classification of alleged violations in the form of tender conspiracy abuses in Indonesia.

The percentage of reports on the classification of alleged violations is obtained through 2 ways: *First*, public reports that are followed up based on the results of clarification and proceed to the investigation stage with the fulfilment of the requirements of the completeness of the administration of the report, the clarity of the alleged violation of the article of law violated, the suitability of the KPPU RI absolute competence and the presence of at least one piece of evidence; *second*, examination of business actors based on their initiatives sourced from Initiative Case Research throughout 2020 and continued Initiative Case Research activities from the previous year (carryover) from 2019.[13]

The information shown by the data above can draw a common thread, indicating that there are rampant cases of violations of business competition in the form of tender conspiracies, where tenders are one of the procedural provisions used in the construction services sector.[14] The difficulty of proof in a tender conspiracy hampers KPPU RI investigators and prosecutors in processing these violations to create justice. Article 42 of the Law of 5/1999 provides limited restrictions on evidence for the KPPU RI examination in the form of witness testimony, expert testimony, letters and/or documents, clues, testimony of business actors, clues, and statements of business actors.[15]

Meanwhile, the case of a tender conspiracy in the construction services sector conceals various secrets that are difficult to uncover. Since the law is a corridor so that human rights are

[12] Komisi Pengawas Persaingan Usaha Republik Indonesia, "Laporan Tahunan KPPU Tahun 2020", accessed from https://kppu.go.id/wp-content/uploads/2021/04/Laporan-Tahunan-KPPU-2020.pdf, accessed on February 5, 2023, at 13.15 WIB
[13] *Ibid.*
[14] Veri Antoni, "Penegakan Hukum Atas Perkara Kartel di Luar Persekongkolan Tender di Indonesia", *Mimbar Hukum*, 31, no.1 (February 2019): 95-111, https://doi.org/10.22146/jmh.37966.
[15] Mochammad Abizar Yusro, *et al.*, "Parameter Hak Monopoli Badan Usaha Milik Negara dalam Perspektif Persaingan Usaha di Indonesia", *Journal of Judicial Review* 23, no. 2 (December 2021): 217-230, http://dx.doi.org/10.37253/jjr.v23i2.4394.

not violated, substantive and procedural justice must also be juxtaposed in its implementation.[16] Therefore, Article 57 of Regulation of the Business Competition Supervisory Commission Number 1 of 2019 concerning Procedures for Handling Cases of Monopolistic Practices and Unfair Business Competition ("Commission Regulation of 1/2019") provides an extension to the evidence of instructions which can be in the form of economic and/or communication evidence as indirect evidence.[17]

This evidence tool has been implemented in Decision of the Business Competition Supervisory Commission of the Republic of Indonesia Number 25/KPPU-I/2020 (Commission Decision of 25/2020) with the Reported parties, including PT Cipta Karya Multi Teknik, PT Bangun Konstruksi Persada, PT Wahana Eka Sakti, PT Tiara Multi Teknik, and Working Group ("POKJA") Technical Implementation Unit for Procurement Services ("UPT P2BJ"). Such evidence allows for uncovering the violations of business competition existing as a tender conspiracy in the construction services sector.

The research corresponds to several previous studies: 1). Nuraeni (2019). The Use of Indirect Evidence by the Business Competition Supervisory Commission (KPPU) in the Process of Proving Alleged Cartel Practices (Study of Decision No. 24/KPPU-I/2009). Thesis, Faculty of Sharia and Law, State Islamic University of Alauddin Makassar; 2). Muhzen Muzadi (2018). The Strength of Indirect Evidence in Cartel Cases on the Regulation of Broiler Seed Production (Study of Supreme Court Decision No. 444k/Pdt.Sus-KPPU/2018). Thesis, Faculty of Sharia and Law, Syarief Hidayatullah State Islamic University Jakarta; 3). Maria Avilla Cahya Arfanti (2014). Implementation of the E-Procurement System in the Procurement of Government Goods/Services to Prevent the Occurrence of Tender Conspiracy (Study at the Public Works, Housing, and Building Supervision Office of Malang City). Thesis, Faculty of Law, Universitas Brawijaya.

However, the difference lies in the focus of this research on the implementation of indirect evidence in the form of violations of business competition for tender conspiracy in the field of construction services frequently occurring in Indonesia. Then, the point of the problem is how indirect evidence is implemented in the form of violations of business competition in the tender conspiracy in the construction services sector.

B. METHOD

This research uses a type of normative juridical research method. The rationalization of using normative or doctrinal legal research methods is considered because the focus of the problem is related to legal norms and the norming of a law elaborated with contemporary legal concepts. The search for legal materials was obtained using a literature study method, which involved searching for relevant legal materials, studying, and citing legal materials from available

[16] Muhammad Randhy Martadinata dan Faisal Ahmadi, "Asas Keadilan Hukum Putusan Peradilan", *Jurnal Wasatiyah: Jurnal Hukum* 2, no. 2 (December 2020): 12-24, http://jurnal.staimaarifjambi.ac.id/index.php/Wasatiyah/article/view/60.

[17] Dina Mayasari Sinaga, *et.al*, "Penggunaan Indirect Evidence (Alat Bukti Tindak Langsung) Oleh KPPU Dalam Proses Pembuktian Dugaan Praktik Kartel (Studi Di Kantor Komisi Pengawas Persaingan Usaha Wilayah I Medan)", *Jurnal Magister Hukum Program Pascasarjana Universitas HKBP Nommensen* 2, no.1 (January 2021): 37-46, https://doi.org/10.51622/njlo.v2i01.207.

sources supported by statutory and conceptual approaches.[18] A statutory approach refers to the provisions of laws and regulations such as, among others, the Law of 5/1999 and the Commission Regulation of 1/2019. The conceptual approach is used to understand the theories and concepts that can be used as the basis for this research. The secondary data covers primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data was obtained through library research collection techniques and analysed qualitatively.[19] The method used to analyse legal materials in this study was processing all the collected legal materials before they were inventoried, classified, and analysed. This stage aims to describe the problems or legal issues investigated. The result is intended to provide the right solution related to the legal certainty of indirect evidence in the construction services sector.[20] To analyse the legal materials, several interpretation methods were used:[21] 1). grammatical interpretation was used to analyse the meaning and meaning of diction, terms, words and terminology relevant to the research legal material; 2). systematic interpretation was used to analyse the regulation of one legal product concerning other legal products; 3). teleological interpretation was used to analyse the substance of regulations based on the intent or purpose of the regulation (*ratio legis/raison d'etre*).

C. RESULTS AND DISCUSSION

1. Regulation of Indirect Evidence in Tender Conspiracy

In essence, the legal basis regarding tender conspiracy in business competition is regulated in the Law of 5/1999. The presence of the Law of 5/1999 narrows the opportunity for business actors to exploit consumers so that it can support the progress of the market economy system.[22] As an inherent characteristic of human life, competition does not require economic power to rest on one party alone. For this reason, the actions of dishonest or unlawful business actors will hamper the healthful course of business competition.

Tender conspiracy is regulated in Article 22 of the Law of 5/1999 *"Business actors are prohibited from conspiring with other parties to arrange and or determine the winner of a tender to result in unfair business competition"*. Meanwhile, the definition of tender is further regulated in the Elucidation of Article 22 of the Law of 5/1999, which is defined as an offer to procure a work or to obtain goods and/or services. The underlying reason for procuring this tender is efficiency and effectiveness because the project will be carried out by a party with the capability.[23] The stipulation of Article 22 of the Law of 5/1999 is the basis that prohibits tender conspiracy considering that each business actor who becomes a tender participant has the same position in achieving the goals.[24]

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[18] Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi*, Cetakan ke 2 (Jakarta: Kencana, 2017), page. 137.
[19] *Ibid*, page. 138.
[20] David Tan, "Metode Penelitian Hukum: Mengupas dan Mengulas Metodologi dalam Menyelenggarakan Penelitian Hukum", *Nusantara: Jurnal Ilmu Pengetahuan Sosial 8*, no. 8 (2021): 2473-2474, http://jurnal.um-tapsel.ac.id/index.php/nusantara/index.
[21] M. Nazir, *Metode Penelitian*, (Jakarta: Ghalia Indonesia, 2005), page. 35.
[22] Ari Purwadi, "Praktik Persekongkolan Tender Pengadaan Barang dan Jasa Pemerintah", *Jurnal Hukum Magnum Opus* 2, no. 2 (August 2019): 99-113, https://core.ac.uk/download/pdf/229337861.pdf.
[23] Ari Purwadi, *Op. Cit*, 100, https://core.ac.uk/download/pdf/229337861.pdf.
[24] Enrico Billy Keintjem, "Tinjauan Yuridis Praktek Persekongkolan yang Tidak Sehat dalam Tender Proyek Menurut Undang-Undang Nomor 5 Tahun 1999", *Jurnal Lex Administratum* 4, no. 4 (April 2016): 109-116, https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/11830/11420.

The Regulation of the Business Competition Supervisory Commission Number 2 of 2010 concerning Guidelines for Article 22 of Law Number 5 of 1999 concerning Prohibition of Tender Conspiracy ("Commission Regulation of 2/2010") states that Article 22 contains the following elements: 1). Business Actor; 2). Conspiracy; 3). Other Parties; 4). Arranging and/or Determining the Tender Winner; and 5). Unfair Business Competition.

As for the stipulation of Article 22 above, Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law ("Law of 6/2022") clarifies the regulation of sanctions for tender conspiracy as previously regulated in the Law of 5/1999, as stipulated in Article 47 paragraph (2) letter c of the Law of 6/2023 which states that administrative sanctions in the form of orders to cease activities that cause monopolistic practices, unfair business competition, and/or harm the public, can be imposed by the KPPU RI on business actors proven in the Law of 6/2023. Meanwhile, the provisions regarding fines (a minimum Rp.1,000,000,000.00) are regulated in Article 6 paragraph (2) letter g of Government Regulation Number 44 of 2021 concerning the Implementation of Prohibition of Monopolistic Practices and Business Competition ("Government Regulation of 44/2021").

In Indonesia, there are several types of procedural law in court to prove a case, one of which is business competition procedural law. In business competition law, the evidence used is listed in Article 42 of the Law of 5/1999, including: 1). Witness testimony; 2). Expert testimony; 3). Letters and/or documents; 4). Clues; 5). Testimony of business actors. In deciding a case, the Commission Panel of KPPU RI must use at least 2 (two) pieces of evidence as mentioned above, as well as what is believed by the Commission Panel of KPPU RI in the alleged violation committed by the Reported Party.

In business competition, 2 (two) evidentiary tools are generally used by the Commission Panel of KPPU RI in resolving cases:

1. Direct Evidence
   Direct evidence is physically submitted in court, such as electronic mail evidence, recorded telephone conversations, and faxes. The litigant can submit the necessary evidence to the trial. If the evidence has not reached the minimum limit, it can be assisted by presenting witnesses at the trial to provide the necessary information. Referring to the theory, type, and form, direct evidence is referred to as evidence because it has a physical and tangible form and can be shown concretely in court.
2. Indirect Evidence
   Indirect evidence cannot show the occurrence of an event or legal act directly, as is mentioned in the law. The provisions of Article 57 of the Commission Regulation of 1/2019 regulate indirect evidence, which includes the following:

Evidence	Remarks	Legal Basis
Clues	Instructional evidence is an act, event or circumstance that has a link or relationship with a prohibited	Article 57, paragraphs (1) and (2) of the Commission Regulation of 1/2019.

	agreement and/or activity and/or abuse of dominant position as stipulated in the Law so as to indicate that an agreement and/or activity that is prohibited and/or abuse of dominant position has been carried out. In business competition, clue evidence can be divided into economic and communication evidence.	
Economy	Economic evidence is defined as the analysis of economic sciences either obtained through quantitative and/or qualitative data analysis methods or expert opinions, used to resolve indications of monopolistic practices and/or unfair business competition.	Article 57 paragraph (3) of the Commission Regulation of 1/2019.
Communication	Communication evidence is data and/or documents that show an exchange of information between the parties believed to be committing monopolistic practices and/or unfair business competition.	Article 57 paragraph (4) of the Commission Regulation of 1/2019.

Table 3. Regulation of Indirect Evidence

Source: The Commission Law of 1/2019 with Data Process by the Author

It can be concluded that indirect evidence does not directly indicate the existence of monopolistic practices and unfair business competition, generally in the form of agreements or agreements that are not written. There are two forms of indirect evidence, namely communication evidence that does not directly state the existence of an agreement, such as:[25]

1. The existence of recorded telephone conversations or text messages between business actors competing in a tender, records of travel to the same destination or participation in a meeting.
2. Other evidence indicating communication between business actors, such as minutes or records of meetings leading to discussions on prices, requests, internal company documents, pricing strategies, etc.

The economic evidence that is also included as indirect evidence can be classified as:[26]

[25] Udin Silalahi dan Isabella Cynthia Edgina, "Pembuktian Perkara Kartel di Indonesia dengan Menggunakan Bukti Tidak Langsung (Indirect Evidence)", *Jurnal Yudisial* 10, no. 3 (December 2017): 311-330, https://doi.org/10.29123/jy.v10i3.216.

[26] Faishal Akbar, "Analisis Yuridis Terhadap Penerapan Bukti Tidak Langsung dalam Pembuktian Kasus Kartel (Studi Kasus Putusan KPPU Perkara Nomor 08/KPPU-L/2018)", *Diponegoro Law Journal* 11, no.1 (January 2022): 1-17, https://doi.org/10.14710/dlj.2022.33191.

1. The behaviour of business actors, namely in the form of simultaneous price increases, non-competitive and suspicious tender patterns, behaviour that facilitates tender conspiracy;
2. Market structure, which is determined by various factors such as the number of sellers and buyers, market share, level of technological mastery, the elasticity of demand for a product, location, entry barriers, level of efficiency and several other factors; and
3. Facilitation practices can be in the form of information exchange between business actors, price signalling, and equalized delivery.

In practice, the KPPU RI team will examine direct evidence and evidence that explicitly shows monopolistic practices and unfair business competition (indirect evidence). However, the use of direct evidence is much easier to prove because it does not require in-depth interpretation to suspect a tender conspiracy, but often, the existence of direct evidence is difficult to obtain considering that there are cases where there is no written agreement, there are parties who are secretive or there are covert actions that are difficult to detect. This is why cases of tender conspiracy are not easy to prove, so there is an urgency to implement indirect evidence to solve indications of tender conspiracy cases.[27]

2. Analysis of the Implementation of Indirect Evidence in Tender Conspiracy in the Construction Services Sector

Evidence is conducted to provide certainty to the Judge regarding the truth of the disputed concrete events.[28] Likewise, in business competition law, to find out whether the actions carried out by business actors have violated the provisions of the Law of 5/1999 certainly requires proof. In practice, the Commission Panel of KPPU RI will use interconnected evidence to reveal the veil of tender conspiracy before the trial.[29]

The difficulty of proving a tender conspiracy makes the Commission Panel of KPPU RI able to dig deeper into the existence of indirect evidence in this case. Unfortunately, the Indonesian Civil or Criminal Procedure Law system does not regulate indirect evidence as valid evidence. In business competition, indirect evidence is only regulated in the Commission Regulation of 2/2020. As an implication, there are many differences in the position of indirect evidence before the court. Not a few District Courts have rejected the existence of indirect evidence. Meanwhile, in the Supreme Court, indirect evidence still ignites debate because not all of them reject the existence of indirect evidence as evidence that contributes to strengthening the case.[30]

One example of the implementation of indirect evidence was carried out by the Commission Panel of KPPU RI in the case of a tender conspiracy in the Procurement of Revetment Development Package and Landfill at Popoh Fishing Port Tulungagung Regency for the 2017 Fiscal Year as decided in the Commission Decision of 25/2020. This case began on February

[27] Mahmul Siregar, "Bukti Tidak Langsung (Indirect Evidence) dalam Penegakan Hukum Persaingan Usaha di Indonesia", *Jurnal Hukum Samudra Keadilan* 13, no. 2 (July-December 2018): 187-200, https://doi.org/10.33059/jhsk.v13i2.910.
[28] Elisabeth Nurhaini Butarbutar, "Arti Pentingnya Pembuktian dalam Proses Penemuan Hukum di Peradilan Perdata", *Mimbar Hukum* 22, no. 2 (June 2010): 347-359, https://doi.org/10.22146/jmh.16225.
[29] Sterry Fendy Andih, "Pengaturan Bukti Petunjuk pada Hukum Acara Persaingan Usaha dalam Kerangka Hukum Pembuktian di Indonesia", *Jurnal Magister Hukum Udayana* 8, no. 4 (December 2019): 575-587, https://doi.org/10.24843/JMHU.2019.v08.i04.p10.
[30] *Ibid.*

1, 2017, when the POKJA of the Technical Implementation UPT P2BJ was commissioned by the Head of the UPT Procurement of Goods/Services, Ir. Yuswanto, MSI, to conduct the selection of providers of goods/services for the DPA for the 2017 fiscal year at the Department of Marine Affairs and Fisheries for the Construction of Revetment and Landfill at Popoh Harbor. On February 9, 2017, POKJA announced this on the website http://www.lpse/jatimprov.go.id and said the registration period was held on February 9-16, 2017.[31]

By the end of the registration period, a total of 67 (sixty-seven) companies had registered for the tender electronically. However, after POKJA gave time to submit Tender Participants' Tender Documents, only 3 (three) companies were left to submit tender documents, namely PT Cipta Karya Multi Teknik, PT Wahana Eka Sakti, and PT Bangun Konstruksi Persada. However, only PT Cipta Karya Multi Teknik passed the administrative, price, and qualification evaluations because the other 2 (two) companies did not submit the Tender Guarantee, so they were declared cancelled.[32]

The consideration of the Commission Panel of KPPU RI in this case is to describe the elements of Article 22 of the Law of 5/199, which include the following:[33]

1. Elements of Business Actors

   The business actors referred to in the provisions of this article are those who conspire with other business actors to regulate and/or determine the winner of the tender so as to cause unfair business competition. In this case, the business actor who won the tender was PT Cipta Karya Multi Teknik as the 1st Respondent. Therefore, the element of business actors has been fulfilled.
2. Elements of Other Business Actors and/or Other Parties Related to Other Business Actors

   The element of other business actors as intended is in accordance with the provisions of business actors in Article 1 number 5 of the Law of 5/1999 but in addition to the Reported Party I. In this case, other business actors in the following tender case are PT Bangun Konstruksi Persada as the Reported Party II, PT Wahana Eka Sakti as the Reported Party III, and PT Tiara Multi Teknik as the Reported Party IV.

   Meanwhile, the element of other parties related to business actors is also considered by the Commission Panel of KPPU RI by considering the provisions of the Construction Court Decision Number 85/PUU-VIV-2016 point 3.14.3 page 190 which states that the meaning of conspiracy as referred to in Article 1 number 8 of Law Number 5 Year 1999 must be expanded. In this case, the parties that are bound are not only between business actors but other parties that have links with business actors. In this case, the other business actors referred to are POKJA 84 UPT P2BJ. Thus, the elements of other business actors and/or other parties related to business actors have been fulfilled.
3. Element of Conspiring to Arrange and/or Determine the Tender Winner

   The element of conspiring is referred to in Article 1 paragraph 8 of the Law of 5/1999. Meanwhile, arranging and/or determining the winner of a tender is an act of the parties

[31] KPPU RI, Commission Decision of 25/2022, page. 8.
[32] *Ibid*, page. 9.
[33] *Ibid*.

aiming to eliminate other business actors who are competitors so that the conspiring party can win the tender. In this case, the Commission Panel of KPPU RI considered that there was a horizontal conspiracy committed by the Reported Parties I, II, III, and IV who cooperated secretly or overtly to adjust documents with other participants, creating false competition. This is evidenced by the tender prices being close to the SEP and the similarity of metadata and IP Address.

The Commission Panel of KPPU RI also elaborated that in this case, there was a vertical conspiracy committed by the Reported Party V for approving or facilitating the conspiracy, considering that the Reported Party V did not evaluate and perform its duties properly to prevent conspiracy among the participants. Therefore, the element of conspiring to arrange and/or determine the winner of the tender has been fulfilled.

4. Elements May Result in the Occurrence of Unfair Business Competition

In this case, the conspiracy committed by the Reported Parties I, II, III, IV, and V has been proven to result in unfair business competition because it was conducted dishonestly and unlawfully, and inhibited business competition. Therefore, the element of causing unfair business competition has been fulfilled.

The Commission Panel of KPPU RI decided that all of the Reported Parties have been proven legally and convincingly violating Article 22 of the Business Competition Law. A fine was imposed for the Reported Party I in the amount of Rp2,700,000,000.00 (two billion seven hundred million rupiahs), which will be deposited to the State Treasury and prohibits all reported parties from participating in tenders in the field of construction services funded by the APBN and APBD for 1 (one) year in Indonesia.[34]

Based on the evidence in the decision, it is known that there are metadata similarities in the tender documents of the business actors participating in the tender. The metadata similarities involve similarities in author, application, pdf producer, and pdf version. This led to the fact that the documents were made on the same computer device.[35] In addition to the tender documents being made on the same computer device, indications of a tender conspiracy were further strengthened by the similarity of Internet Protocol **("IP")** addresses of several business actors participating in the tender.[36]

This indicates there was communication or coordination between the reported parties, which at least involved meeting in the same place or even using the same device. In this case, the above evidence can be classified as communication evidence because it is included as evidence that can be adjusted with other evidence to form a clue that the parties to the tender have communicated with each other to conspire.

The economic evidence in this decision is the action of Reported Party V, which overrides the fact that the tender prices of all participants are close to the Self-Estimated Price **("SEP")**. The comparison of the tender prices of the participants with the SEP obtained the facts as follows:[37]

[34] *Ibid*, page. 421.
[35] *Ibid*, page. 429.
[36] *Ibid*, page. 24.
[37] *Ibid*, page. 124.

No.	Company	Corrected Price (Rp)	SEP (%)
1.	PT Cipta Karya Multi Teknik	31.490.888.000,-	99,30
2.	PT Wahana Eka Sakti	31.645.410.000,-	99,78
3.	PT Bangun Konstruksi Persada	31.672.447.000,-	99,87

Table 4. Comparison of Participant's Tender Prices

Source: Commission Decision of 25/2020 with Data Processed by the Author

Table 4 indicates that the tender prices submitted by the three participants are very close to the SEP. Moreover, the action of the Reported Party V has also clearly facilitated the Reported Party I to become the tender winner because the Reported Party I was not eliminated during the classification and qualification proof stages even though the tender document of the Reported Party I did not meet the requirements in the procurement document. Such evidence can be classified as economic evidence because it includes facilitation practices carried out by the tender provider in determining the winner of the tender to cause false competition.

Regarding all participant's tender prices that were close to the SEP in this case, the Expert of the Public Procurement Policy Institute ("LKPP"), Achmad Zikrullah, also responded, stating that all participant's tender prices that were close to the HPS were not adequate to prove a conspiracy[38] because there are 2 (two) underlying possibilities, namely by design or by chance. If one wants to gain a profit, the offer will be given at a nominal value close to the SEP. Therefore, all forms of indirect evidence cannot be used as the only evidence. In this case, KPPU RI must still use a minimum of 2 (two) pieces of evidence as stipulated in Article 42 of the Law of 5/1999 in the event of a violation of the Law of 5/1999, and between these indicative pieces of evidence, one cannot stand alone. However, the position of economic evidence and communication evidence as above still shows the existence of compatibility between other evidence to form one piece of evidence called indicative evidence.[39]

The prohibition of tender conspiracy in Article 22, one of the substantial contents in the Law of 5/1999, is expected to be a form of protection and legal certainty for business actors to run their businesses fairly and transparently.[40] This is in line with the concept of justice put forward by John Rawls, which states that everyone has the same rights in terms of social values, income, wealth, and the basics for self-esteem, which must be distributed equally.[41]

In this case, the law should not only be fair in upholding the truth but also must be able to provide benefits and certainty. For this reason, the law should accommodate justice, benefit and certainty in achieving its goals. The evidentiary process is crucial in a trial.

The prohibition of bid rigging has been regulated in various countries, including Japan. Tender conspiracy in Japan is a classic form of cartel known as *Dango*. The term has been

[38] *Ibid.*
[39] Erman Rajagukguk, "Perluasan Tafsir Pasal 22 UU Nomor 5 Tahun 1999", *Jurnal Yudisial* 5, no.1 (April 2012): 51-63, https://doi.org/10.29123/jy.v5i1.164.
[40] Indah Febriani, "Analisis Muatan Nilai Keadilan: Undang-Undang tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat", *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 10, no. 2 (November 2021): 187-207, http://dx.doi.org/10.28946/rpt.v10i2.1577.
[41] John Rawls, "Uzair Fauzan, dan Heru Prasetyo (Penerjemah), Teori Keadilan: Dasar-Dasar Filsafat Politik untuk Mewujudkan Kesejahteraan Sosial dalam Negara/John Rawls", (Pustaka Pelajar, Yogyakarta, 2006), page. 72.

standardized into the provisions of *Shiteki Dokusen No Kinshi Oyobi Kosei Torihiki Ni Kansuru Horitsu* or Japanese Anti-Monopoly Act ("JAMA").[42]

The prohibition of bid rigging is regulated in Article 2 paragraph (6) of JAMA, which reads:

> "Unreasonable restraint of trade as used in this Act Shall mean such business activities, by which any entrepreneur by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restrain of competition in any particular field of trade."

In essence, this provision prohibits business actors from conducting business activities through mutually beneficial cooperation between the Company and substantial obstacles in certain business fields contrary to the public interest.

If the provisions of Article 2 paragraph (6) of JAMA are further elaborated, several elements must be proven in the prohibition of bid rigging as follows:

1. Business actors;
2. Concerted action;
3. Substantial obstacle to competition;
4. Public interest;

It is not easy for competition law enforcement institutions to investigate and prove all four elements above because the prohibited acts and/or agreements in the context of tender rigging are carried out with indirect cooperation. Thus, investigation in the search for evidence requires indirect proof to achieve material justice in enforcing unfair business competition law.

In practice, in the Toshiba Chemical Corporation judgment, the Japanese High Court held that if companies exchange price information and then act on it to raise prices, even without a written agreement, it may be considered a "silent agreement" for price fixing. The ruling set a clear precedent for "circumstantial evidence" in Japan's antitrust framework. The judgment provides three conditions for indirect evidence: (i) prior information exchanges, such as a. Frequent meetings before the price increase, b. Telephone conversations or emails (ii) The content of the discussions, such as a. Market analysis b. Price trends c. Statement of intent to fix prices (iii) Joint actions as a result, such as: a. Actual price fixing b. Decision-making mechanism and price monitoring system.[43]

Evidence that is difficult to find in a tender conspiracy case causes an urgency to implement indirect evidence. The role of the theory of justice in the evidentiary process is used as a basis for considering and determining a decision. In essence, the law aims to protect the interests of each community so that these interests cannot be disturbed.[44]

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[42] Masako Wakui and Jonathan Galloway, "The Japanese Cartel Fining System: The 2019 Amendments and Its Real Issue", *Asian Competition Law Review* (2020): 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672871.

[43] Ronald Eberhard Tundang, "Urgensi Pemberlakuan Indirect Evidence pada Penanganan Perkara Kartel di Indonesia", *Jurnal Persaingan Usaha 3*, no. 2 (Oktober 2023): 149, https://doi.org/10.55869/kppu.v3i2.130.

[44] Darji Darmodiharjo dan Shidarta, "Pokok-Pokok Filsafat Hukum Apa dan Bagaimana Filsafat Hukum Indonesia", (Gramedia Pustaka Utama, Jakarta), page. 153.

D. CONCLUSION

The juridical analysis presented above leads to several conclusions. Firstly, the Law No. 5/1999 does not detail the use of indirect evidence in competition law in Indonesia. However, this is elaborated in Commission Regulation No. 2/2020, which extends the scope of circumstantial evidence. Clue evidence is divided into economic and communication evidence, providing a basis for proving tender conspiracy in the construction services sector. Secondly, indirect evidence was effectively applied in KPPU Decision Number 25/KPPU-I/2020, involving POKJA and several construction companies as respondents. This application successfully enabled the Commission Panel of KPPU RI to impose administrative sanctions for violations of business competition, specifically tender conspiracy in the construction services sector. To advance the practice of unfair competition law, it is recommended that detailed technical regulations be established regarding the acquisition and use of indirect evidence in KPPU trials. Additionally, KPPU investigators should be granted further authority to investigate, trace, and obtain indirect evidence to strengthen their case in business competition disputes.

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