

Beneficial Owners And Conflicts Of Interest In Indonesia Public Procurement

Ronald Hasudungan Sianturi¹, Deasy Arisandy Aruan²

¹ Prima Indonesia University, Faculty Of Law

² Prima Indonesia University, Faculty Of Economics

Abstract

One of the principles in government procurement of goods/services is the principle of competition between tenderers so that the job owner is required to identify conflicts of interest between tenderers. The identification of conflicts of interest between tenderers regulated in Presidential Regulation No. 16/2018 on Government Procurement of Goods/Services is concurrent positions between tenderers, but it cannot anticipate conflicts of interest through concurrent beneficial owners between tenderers. Therefore, this research will elaborate on how the implementation of the principle of recognizing beneficial owners in preventing conflicts of interest in the implementation of tenders for government goods/services. This type of research is juridical normative because it examines the norms regarding beneficial ownership in government tenders for goods/services. The approaches used in this research are conceptual approach, statutory approach and case approach. The data used is secondary data in the form of laws and regulations, books, court decisions and other documents. Data collection is done through literature study and document study. Data analysis was conducted qualitatively to obtain arrangements for preventing conflicts of interest between tenderers through the beneficial owner concept. The results show that the principle of competition cannot be implemented if the identification of conflicts of interest is only based on concurrent positions between tender participants. Therefore, the identification of conflicts of interest should also be carried out based on the concurrent owners of interests through the method of declaration of beneficial owners by tenderers.

Keywords: beneficial owner, public procurement, conflict of interest, tender.

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I. Introduction

Background

One of the modes of corruption offences in public procurement is the control of several bidders to participate in a public procurement tender. The control of several bidders is a conspiracy that can involve the Pokja/ULP or not involve the Pokja/ULP. Efforts to prevent the control of several tenderers to participate in a tender are through the ethics of public procurement where one of the ethics of procurement is to avoid and prevent conflicts of interest of related parties that result in unfair business competition where one form of conflict of interest is several business entities participating in the same Tender/Selection, controlled either directly or indirectly by the same party, and/or their share ownership is more than 50% (fifty percent) controlled by the same shareholder. In this case, the ULP Working Group has the duty and authority to evaluate conflicts of interest between bidders through administrative evaluation, which is an evaluation based on data submitted by bidders such as (a) company qualification forms such as company name, position, company organs and (b) company documents such as the articles of association of bidders. The data that must be submitted by bidders can anticipate conflicts of interest between bidders that occur due to direct company control, but these data cannot anticipate conflicts of interest due to indirect company control.

Indirect corporate control is carried out through a chain of beneficial ownership where the controlling party is not the formal owner of the corporation's capital (*legal owner*) but the actual *beneficial* owner of the transactions carried out by the corporation (*beneficially owner*). One example of a case of control of a tender participant by a *beneficially owner* is KPPU Decision No. 03/KPPU-L/2018 on the tender for the Road Reconstruction Preservation Package and Routine Maintenance of the Simpang Sei Asam - Takaras - Tumbang Talaken Bridge at the Central Kalimantan Provincial Public Works Agency for the 2017 Budget Year. In this case, there was control of 3 (three) tender participants, namely PT Mellindo Bhakti Persadatama (Reported Party II), PT Jaya Wijaya Cooperation (Reported Party III) and PT Margo Umega (Reported Party IV). The control was carried out by the same person, namely Vino Oktaviano as Director of PT Jaya Wijaya Cooperation (Reported

Party III) to arrange Reported Party II as the tender winner while Reported Party III and Reported Party IV as companion companies. In this case, Vito Oktaviano was not the *legal owner* of the three companies but the *beneficial owner* of the transactions in the tender activities carried out by the three companies. Another case of controlling tender participants by *beneficially owners* is the case of corruption in several procurement packages involving the Permai Group where Anas Urbaningrum and Nazaruddin are not formal owners of the corporation (*legal owner*) but are *beneficial owners* of the activities carried out by the Permai Group.¹

Regulations regarding the prevention of conspiracies of public goods/services tender participants carried out by beneficial owners have not been regulated in Presidential Regulation No. 16/2018 on Government Procurement of Goods/Services. Therefore, it is necessary to develop laws and regulations regarding the procurement of government goods/services. One way to develop laws and regulations is through legal transplantation. Legal transplantation in the form of legal structures from one country to another. Other legal systems have become a trend in legal development in various parts of the world. Indonesia is no exception, having transplanted laws from various foreign legal systems or other countries in the formation of various laws and regulations. The development of civilization and international relations has the consequence that Indonesia must adjust national laws and regulations to comply with international standards. Various legal transplants that have been carried out by Indonesia such as intellectual property rights law transplanted from various laws and regulations on the protection of intellectual property rights in accordance with global standards as a consequence of Indonesia's participation in the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO), laws and regulations on anti- money laundering and terrorism financing in accordance with global standards of anti- money laundering regimes and terrorism financing as a consequence of Indonesia's membership in The Financial Action Task Force (FATF).

In addition to transplanting international law into national law, legal transplants are also carried out between certain legal regimes within a national legal system. A concept in a particular legal regime that is outdated requires transplantation by adopting concepts from other legal regimes so that the objectives of the law can be achieved. Law No. 12/2011 on the Establishment of Laws and Regulations in Appendix II contains the principle of "*duidelijke terminologien*", which means that for something that has the same meaning and meaning, use the same term, while for something that has a different meaning, use a different term. In relation to this research, there is a difference in terms between corporate controllers and corporate beneficial owners. The corporate controller is the formal owner of the corporation's capital (*legal owner*) so that it can control the corporation without the mediation of other parties. In its development that corporate control can also be carried out by parties other than the owner of corporate capital (*legal owner*), namely the beneficial owner of the corporation that controls the corporation through the chain of *beneficial ownership*.

Beneficially owner as the controller of the company is regulated in Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating Criminal Acts. The principle of Recognizing the beneficial owner of a corporation in the Prevention and Eradication of the Criminal Acts of Money Laundering and the Criminal Acts of Financing of Terrorism is not recognised in Presidential Regulation No. 16 of 2018 on Public Procurement of Goods/Services, which only recognises corporate control by the *legal owner*. Therefore, the regulation on *beneficial owners* in Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism must be transplanted into the provisions of public procurement so that the control of the tendering company by the *beneficial owner* can be prevented as well as the control of the tendering company by the *legal owner*.

Regulations on the prevention of indirect company control have been regulated through the *beneficial ownership principle*, for example the single ownership policy in the banking industry (*single present policy*) as stipulated in OJK Regulation Number 39/POJK.03/2017 concerning Single Ownership in Indonesian Banking which states that each party can only be a controlling shareholder in 1 (one) bank. In this case, the controlling party is a beneficial owner (not a shareholder) so that the party who is the beneficial owner of a bank is prohibited from owning shares / interests in other banks.

The *beneficial ownership principle* has not been recognised in Presidential Regulation No. 16/2018 on Government Procurement of Goods/Services. Provisions related to the *beneficial ownership principle* are the principle of competition as stipulated in (a) Article 6 of Presidential Regulation No. 16/2018 on Government Procurement of Goods/Services which states that the procurement of goods/services must be carried out through fair competition among as many providers of goods/services as possible that are equal and meet the requirements, so that competitively offered goods/services can be obtained and there is no intervention that interferes with the creation of market mechanisms in the procurement of goods/services; (b) prevention of preventing conflicts of

¹Corruption Eradication Commission, *Anas Urbaningrum Case Trail*, accessed via <https://acch.kpk.go.id/id/jejak-kasus/8-anas-ubaningrum>.

interest of related parties, either directly or indirectly, which result in unfair business competition in the procurement of goods/services as stipulated in Article 6 of Presidential Regulation No. 16/2018 on Government Procurement of Goods/Services. Article 7 of Presidential Regulation No. 16/2018 on Public Procurement. The principle of competing and preventing conflicts of interest in tender activities stipulated in Presidential Regulation No. 16/2018 on Public Procurement still considers that the principle of competing and preventing conflicts of interest between tender participants occurs because the directors, board of commissioners, or core personnel in a business entity, concurrently serve as directors, board of commissioners, or core personnel in other business entities participating in the same tender/selection. This is not in line with the principle of *beneficial ownership* where the beneficial owner of a corporation is not limited to the core organs or personnel of the corporation but rather the controlling party and/or the actual beneficial owner of a corporation. Therefore, in order for the principle of competition to be implemented in tender activities, the prevention of conflicts of interest between tender participants is not only limited to core organs or personnel who concurrently serve as core organs or personnel of other business entities participating in the same tender, but also the owners of interests in more than one tender participant participating in the same tender.

The concept of preventing conflicts of interest between tenderers must be changed from concurrent positions (either as organs of business entities or core personnel) between tenderers to concurrent beneficial owners between tenderers so that tenderers can compete. Therefore, this research will elaborate on how the implementation of the principle of recognition of beneficial owners in order to prevent conflicts of interest in the implementation of tenders for government goods/services.

II. Research Methods

This type of research is normative juridical research because it examines the norms regarding *beneficial ownership* in government tenders for goods/services. The approaches used in this research are *conceptual approach*, *statutory approach* and *case approach*. The conceptual approach is used to analyse the concepts of conflict of interest and control of tenderers by *beneficial owners*. The statutory approach is used to review the laws and regulations related to the control of tendering companies by *legal owners* and *beneficial owners*. A *cases approach* is used to analyse cases of control of tenderers by *beneficial owners*.

The data used in this research is secondary data in the form of laws and regulations, books, court decisions and other documents. Data collection is done through literature study and document study. Data analysis is carried out qualitatively to obtain arrangements for preventing conflicts of interest between tender participants through the *beneficial owner* concept.

III. Research Results And Discussion

Setting the Scope of Beneficial Owners in Indonesia

White-collar crime continues to evolve following the development of human civilisation. One of them is the use of corporations by the perpetrators of criminal acts to hide and disguise the identity of the perpetrators and the results of criminal acts. The Financial Action Task Force (FATF) research in 2014 on the regulation and implementation of *beneficial owner information* transparency, states that the lack of adequate, accurate or guaranteed *beneficial owner* information, and can be accessed quickly, is used by the perpetrators of criminal acts to hide (1) the identity of the perpetrators of criminal acts; (2) the actual purpose of opening an account on behalf of the corporation which is used as a "vehicle or media" for money laundering; and (3) the source or purpose of the use of assets from the corporation suspected of originating from criminal acts.² There are still many countries that do not have regulations and implement policies on *beneficial owner* information transparency, including Indonesia. The results of PPATK research in 2015 on the risk of money laundering offences committed by corporations are higher than money laundering offences committed by individuals with a threat value of 7.1 compared to 6.74. This shows that Indonesia needs to immediately strengthen the regulation and implementation of money laundering offences transparency of *beneficial owner* information from corporations. As a follow-up to the research, PPATK initiated the drafting of regulations on *beneficial owners* until finally Presidential Regulation Number 13 of 2018 concerning the Application of the Principle of Recognizing Beneficial Owners of Corporations in the Prevention and Eradication of the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism.³ Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Crime of Money Laundering and the Crime of Financing Terrorism is a consequence of Indonesia's membership in The

² Kiagus Ahmad Badaruddin, 2018, *Remarks of the Head of PPATK at the Dissemination of Presidential Regulation No. 13/2018 on the Application of the Principle of Identifying Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism*, Jakarta, 27 March 2018, pp. 2-3. 2-3.

³ *Ibid*

Asia/Pacific Group on MoneyLaundering (APG) which aims to ensure the adoption, implementation and enforcement of internationally accepted anti-money laundering and counter-terrorism financing standards as recommended by The Financial Action Task Force (FATF). Beneficial owner recommendations from The Financial Action Task Force (FATF) are transplanted in Indonesian laws and regulations, specifically in Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Combating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism such as the definition and scope of beneficial owners.

The Financial Action Task Force (FATF) defines Beneficial Owner as "Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement."⁴ The FATF is of the opinion that Beneficial Owner refers to the party who actually owns or controls a corporation. Beneficial owner or actual controller refers to a situation where ownership/control is exercised through a chain of ownership or through control other than direct control. The definition of the beneficial owner is reflected in Article 1 point 2 of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money Laundering Crime and Terrorism Financing Crime is an individual who can appoint or dismiss directors, board of commissioners, administrators, supervisors, or supervisors in the Corporation, has the ability to control the Corporation, is entitled to and/or receives benefits from the Corporation either directly or indirectly, is the actual owner of the funds or shares of the Corporation and/or fulfils the criteria as referred to in this Presidential Regulation.

The definition of the beneficial owner is the result of a transplant from TAFT which has the concept that (a) the beneficial owner is not only limited to the ownership of corporate capital as a formality in the articles of association of the corporation, but the owner of the corporation actually owns and controls the corporation; (b) the beneficial owner of the corporation is actually an individual and not a legal entity. Presidential Regulation No. 13/2018 regulates the beneficial owner of a corporation, which is an organized collection of people and/or wealth, whether it is a legal entity or not a legal entity. The corporation can take the form of a limited liability company, foundation, association, cooperative, partnership, firm partnership and other forms of corporation.

Beneficial owners of a corporation can be categorised into 2 (two) types, namely (a) Beneficial Owners who are direct capital owners of the Corporation; or (b) Beneficial Owners who are not direct capital owners of the Corporation but own it through the ownership chain. Parties that can be categorised as beneficial owners for each corporation are as follows:

Limited Liability Company

Beneficial Owner as *legal owner* is a party that owns shares, voting rights and profits of more than 25% according to the articles of association; or has the authority to appoint, dismiss and replace the board of directors and board of commissioners. Beneficial Owner as *beneficially owner* is the party who has the authority to control the PT without the authorization of other parties, the actual beneficiary of the PT or the actual owner of the PT shares.

Foundation

Beneficial Owner as *legal owner* is a party that (a) Has initial wealth of more than 25% of the capital or (b) Has the authority to appoint or dismiss the management, supervisor or supervisor of the Foundation. Beneficial Owner as *beneficially owner* is a party that has (a) The authority to control the foundation without the authorization of other parties; (b) The actual beneficiary of the foundation; or (c) The actual owner of the foundation's capital.

Association

The beneficial owner as the *legal owner of the* association is a party that has a source of funding and receives more than 25% of the results of business activities; or has the authority to appoint, or the management and supervisors of the association. Beneficial Owner as *beneficially owner of the* association is the party that has the authority to control the Association without the authorization of other parties, the actual beneficiary of the Association or the actual owner of the Association's capital.

Co-operative

The beneficial owner as the *legal owner of the* cooperative is the party that receives more than 25% of the remaining operating results or has the authority to appoint or dismiss the management and supervisors of the

⁴ The Financial Action Task Force, 2014, *FATF Guidance, Transparency and Beneficial Ownership*, October 2014, p. 8

cooperative. Beneficial Owner as *beneficially owner of the cooperative* is the party that has the authority to control the cooperative without the authorization of other parties, the actual beneficiary of the cooperative or the actual owner of the cooperative's capital.

Limited liability partnership

The beneficial owner as the *legal owner of a limited liability partnership* is the party who owns more than 25% of the paid-up capital and profits. The beneficial owner as the *beneficial owner of the cooperative* is the party who has the authority to control the partnership without the authorization of other parties, the actual beneficiary of the partnership, or the actual owner of the capital of the partnership.

Firm

The beneficial owner as the *legal owner of the firm* is the party who has paid-up capital and profits of more than 25%. Beneficial Owner as *beneficially The owner of the firm* is the party who has the authority to control the joint venture without the authorization of other parties, the actual beneficiary of the joint venture or the actual owner of the capital of the joint venture.

Other forms of corporation

The beneficial owner as the *legal owner of other forms of corporation* is the party that has paid-up capital and profits of more than 25%. Beneficial Owner as *beneficially owner of other corporate forms* is a party who has the authority to control the corporation without the authorization of other parties, the actual beneficiary of the corporation or the actual owner of the corporation's capital.

The beneficial owner in Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism is different from the corporate controller that has been regulated in sectoral regulations, especially in the financial industry sectors such as:

The control of companies in the insurance sector has been regulated in Law No. 40 of 2014 concerning Insurance where it is stated that the Controller is a Party that directly or indirectly has the ability to determine the board of directors, board of commissioners, or the equivalent of the board of directors or board of commissioners in a legal entity in the form of a cooperative or joint venture and / or influence the actions of the board of directors, board of commissioners, or the equivalent of the board of directors or board of commissioners in a legal entity in the form of a cooperative or joint venture.⁵

Controllers of companies in the banking sector are (a) parties who own shares of at least 25% or (b) own shares below 25% but can be proven to have controlled the company. Each party can only be a controller in one bank as stipulated in Article 1 point (2) of the Financial Services Authority Regulation Number 39/POJK.03/2017 concerning Single Ownership in Indonesian Banking.

Controlling companies in the capital market are known as controlling shareholders, namely (1) parties who own shares of at least 20% of all voting shares; or (b) parties who own shares below 20% of all voting shares but can control companies in the capital market. This is regulated in Article 1 point 7 of OJK Regulation Number 57/POJK.04/2017 concerning the Implementation of Corporate Governance of Securities Companies Conducting Business Activities as Underwriters and Broker-Dealers.

Thus, corporate controllers in the fields of insurance, banking and capital markets are parties that can formally control the corporation due to capital ownership factors so that corporate controllers can be legal entities or individuals. This is different from the owner of the interest because the owner of the interest is an individual as the actual owner of the corporation through the chain of ownership and can control the corporation even though formally it is not the owner of the corporation's capital directly.

Provision of Accurate, Current and Publicly Available Beneficial Owner Information

The Presidential Regulation on Beneficial Owner Recognition is an effort to prevent and eradicate money laundering and terrorism crimes. Perpetrators of money laundering and terrorism can use corporations as a means of money laundering and terrorism financing. Therefore, it is necessary to have information about the beneficial owners of corporations that is accurate and up-to-date and available to the public so that it can be used by *stakeholders*.⁶

⁵ Article 1 point 19 of Law Number 40 of 2014 concerning Insurance. Article 16 paragraph (1) The Insurance Law states that each Party may only become a controlling shareholder in 1 (one) life insurance company, 1 (one) general insurance company, 1 (one) reinsurance company, 1 (one) sharia life insurance company, 1 (one) sharia general insurance company, and 1 (one) sharia reinsurance company

⁶ Consideration of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money

Accurate beneficial owner data is obtained through a *self-assessment* mechanism where corporations are required to submit corporate beneficial owners to the authorised agency through the Corporate Administration Service System.⁷ The data of the owner of the interest is submitted at the time of (a) application establishment, registration or business licence of the corporation; or (b) the corporation runs its business. In addition, data on the owner of interests can also be determined by the authorised agency, namely

- a. Ministry that organises government affairs in the field of law for limited liability companies, foundations, and associations;
- b. Ministry that administers government affairs in the field of cooperatives and small and medium enterprises for cooperatives;
- c. The ministry that organises government affairs in the field of trade for limited liability partnerships, firm partnerships, and other forms of corporations; and
- d. Institutions that have the authority to supervise and regulate the business of the Corporation.

The stakeholder data is then verified and identified by⁸ to make the data accurate. In addition, the authorised agencies cooperate to exchange information, both nationally and internationally. Up-to-date data on beneficial owners is carried out through data management by the authorised agency and the obligation of corporations to update beneficial owner information is carried out periodically every year.⁹

Beneficial owner data that is open to the public is carried out by determining beneficial owner information as public information so that anyone can request such information to the authorised agency in accordance with the provisions of laws and regulations regarding public information disclosure.¹⁰

The transplantation of provisions regarding the provision of accurate, up-to-date and publicly available information still has some weaknesses because Indonesia's legal system is different from that of FATF participating countries which generally have centralisation and data management. This is different from Indonesia where data management for each form of corporation is carried out by different ministries, which hinders verification and identification of beneficial owners who use ownership chains in several forms of corporations. For example, beneficial owners who use the chain of ownership through corporations in the form of limited liability companies and cooperatives must coordinate with the Ministry that carries out government affairs in the field of law and the Ministry that carries out government affairs in the field of cooperatives and small and medium enterprises.

Principle of Beneficial Owner Recognition for the Prevention of Conflict of Interest in the Implementation of Tender for Government Goods/Services

One of the procurement principles stipulated in PR 16/2018 is the principle of competition, which means that the procurement of goods / services must be carried out through fair competition among as many providers of goods / services that are equal and meet the requirements, so that competitively offered goods / services can be obtained and there is no intervention that disrupts the creation of market mechanisms in the procurement of goods / services.¹¹ The principle of competition is implemented through procurement ethics, namely (a) not influencing each other directly or indirectly which results in unfair business competition. and (b) avoiding and preventing conflicts of interest of related parties, either directly or indirectly, which result in unfair business competition in

Laundering Crime and Terrorism Financing Crime

⁷ Corporate Administration Service System is an administrative system organized by the Authorised Agency in providing registration, authorization, approval services, notification, business licensing, or dissolution of the Corporation, either electronically or non- electronically. See Article 1 point 4 of Presidential Regulation Number 13 of 2018 concerning the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism.

⁸ Article 12 of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Framework of Prevention and Eradication of Money Laundering Crimes and Criminal Acts of Financing Terrorism

⁹ Article 15 paragraph (2) *jo* Article 16 of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Framework of Prevention and Eradication of Money Laundering Crimes and Terrorism Financing Crimes

¹⁰ Article 29 of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism.

¹¹ Article 6 of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Framework of Prevention and Eradication of Money Laundering Crime and Terrorism Financing Crime.

the Procurement of Goods / Services.¹² One form of conflict of interest that results in unfair business competition in the process of a tender is that there are several business entities that have the same interests, participating in the same Tender/Selection, controlled either directly or indirectly by the same party.¹³

Some business entities participating in tenders are directly or indirectly controlled by the same party, as can be seen from several cases that have been decided by the Business Competition Supervisory Commission (KPPU) in Indonesia. As an institution that has the task of supervising and enforcing the law on the prohibition of monopolistic practices and/or unfair business competition, KPPU can enforce the law against unfair business competition in tendering activities for government goods/services. Tender activities for government goods/services are the authority of KPPU based on Article 22 of Law No. 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition which states that "Business actors are prohibited from conspiring with other parties to arrange and or determine the winner of a tender so as to result in unfair business competition". Such conspiracy may occur because:

- a. Vertical conspiracy is a conspiracy that occurs between several bidders to determine the winner of the tender where the conspiracy does not involve the owner of the work;
- b. Horizontal conspiracy is a conspiracy that occurs between the work owner through the Procurement Working Group and one of the bidders to determine one of the bidders as the winner of the tender;
- c. Joint conspiracy is a conspiracy that occurs between several bidders and the work owner to determine one of the bidders as the winner of the tender.

KPPU's decision related to conspiracy in determining the winner *tenders* can be seen from some cases such as:

- a. Tender for the rehabilitation/maintenance of the East Ring Road of Prabumulih City, South Sumatra Province for the 2013 Budget Year where the reported parties are the Pokja Pengadaan Barang/Jasa Pemerintah Satker Pelaksanaan Jalan Nasional dan SKPD Gorontalo Province for the 2014 Budget Year (Reported Party I), PT Kakas Karya (Reported Party II), PT Nikita Raya (Reported Party III) and PT Maesa Jaya (Reported Party IV). KPPU through Decision Number 11/KPPU-L/2015 stated that the Pokja Pengadaan Barang/Jasa Pemerintah Satker Pelaksanaan Jalan Nasional dan SKPD Provinsi Gorontalo Tahun Anggaran 2014 (Reported Party I), PT Kakas Karya (Reported Party II), PT Nikita Raya (Reported Party III) and PT Maesa Jaya (Reported Party IV) had violated Article 22 of Law No. 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. The conspiracy that occurred was a joint conspiracy because it involved several bidders and involved the owner of the work. In this case, PT Kakas Karya (Reported Party II), PT Nikita Raya (Reported Party III) and PT Maesa Jaya (Reported Party IV) were controlled by a party who was not a member of the tenderers, but the owner of the interests of the three tendering companies. In the tender process, the Working Group did not find any conflict of interest between the tenderers because there were no concurrent positions between the tenderers.
- b. Tender for the Work Package of Preservation and Widening of Bts. Riau Province- Merlung-Sp. Niam APBN Fiscal Year 2016 where the reported parties are PT Karya Dharma Jambi Persada (Reported Party I), PT Hanro (Reported Party II), PT Bina Uli (Reported Party III) and Pokja Pengadaan Barang/Jasa Satker Implementation of National Roads Region I Jambi Province Fiscal Year 2016 (Reported Party IV). KPPU through Decision Number 18/KPPU-I/2016 stated that PT Karya Dharma Jambi Persada (Reported Party I), PT Hanro (Reported Party II), PT Bina Uli (Reported Party III) were proven to have violated Article 22 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, but the Goods/Services Procurement Working Group of the National Road Implementation Satker Region I of Jambi Province for the 2016 Budget Year (Reported Party IV) was not proven to have violated Article 22 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The conspiracy that occurred was a horizontal conspiracy, namely a conspiracy involving several bidders and not involving the owner of the work. In this case, PT Karya Dharma Jambi Persada (Reported Party I), PT Hanro (Reported Party II), PT Bina Uli (Reported Party III) were controlled by a party who was not a member of the tender participants, but the owner of the interests of the three tender participating companies. In the tender process, The Working Group did not find any conflict of interest between bidders because there were no concurrent positions between bidders.

The number of cases of violation of the principles of competition and ethics of mutual influence and conflict of interest in tenders requires alternative methods to anticipate beneficial owners in several business entities participating in government goods/services tenders. Anticipation of conflicts of interest between tenderers is currently only based on the articles of association of the legal entity participating in the tender where the Board

¹² Article 7 of Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money Laundering Crime and Terrorism Financing Crime.

¹³ Article 7 of Presidential Regulation No. 16/2018 on Public Procurement.

of Directors, Board of Commissioners, or key personnel of a business entity, concurrently serves as the Board of Directors, Board of Commissioners, or key personnel of another business entity participating in the same Tender/Selection. This cannot reach conflicts of interest between tenderers because they are controlled by the same party, namely the beneficial owner.

The beneficial owner controls a legal entity through a layered mechanism of beneficial ownership chain that cannot be anticipated through the prohibition of conflict of ownership of legal entity organs recorded in the articles of association. Therefore, participants are required to declare the beneficial owners of legal entities as a form of anticipation of control of legal entities resulting in unfair business competition.

The obligation of tenderers to declare beneficial owners is not regulated in Presidential Regulation No. 16/2018 on Public Procurement. However, the implementation of the tender must also comply with the relevant laws and regulations as an implementation of the principle of accountability, which must be in accordance with the laws and regulations, including Presidential Regulation No. 13 of 2018 concerning the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating Criminal Acts of Money Laundering and Criminal Acts of Financing Terrorism where every corporation must declare the beneficial owners of the corporation. Thus, every corporation that participates in a tender for government goods/services has an obligation to declare the beneficial owner where the beneficial owner information can be used by the ULP Working Group in conducting evaluations to prevent conspiracies of tender participants controlled by the *beneficial owner*.

Article 106 of Presidential Regulation 54/2010 and its amendments have required that government procurement of goods/services be carried out electronically through the Electronic Procurement System (SPSE) which has been effective since 2015. Every company that will participate in the tender is required to have an account by registering itself as a provider. The registration requires information about company data such as name, position, company organs (management and company owner). At the time of registration to obtain the account, information on the management and *legal owner* of the company has been obtained so that it can be used to anticipate conflicts of interest between bidders as stipulated in Article 7 paragraph (2) of Presidential Regulation No. 16/2018, namely directors, board of commissioners, or core personnel in a business entity, concurrently serving as directors, board of commissioners, or core personnel in other business entities participating in the same Tender/Selection.

The data submitted by the bidder can identify the management and formal owner of the company (legal owner) but cannot identify the actual *beneficial owner* of the bidder. Obtaining information about a bidder's *beneficial owner* can be done through 2 (two) methods:

- a. Information Exchange Method where the ULP Working Group is the agency requesting information on the beneficial owner to the Authorised Agency. Through this method, the data used by the ULP Working Group is not *updated*. However, this method has weaknesses such as (a) the obligation to declare beneficial owners which came into effect in 2018 so that the number of corporations that provide beneficial owner data is very low; (b) the minimal amount of resources from the Authorised Agencies to fulfil data requests from all tender activities in Indonesia.
- b. Declaration method by tenderers in SPSE where tenderers are required to make a declaration when registering as a provider or when registering as a bidder for a tender package. This method has the advantage that every corporation participating in the tender is obliged to declare the beneficial owner so that corporations that do not declare then the corporation cannot participate in the tender. However, this method has a weakness if the data of the beneficial owner of the corporation provided is different from the data submitted by the corporation in the Corporate Administration Service System.

According to the author, the better method used for the introduction of beneficial owners at this time is the declaration method by tenderers in SPSE with the consideration that (a) the ULP Working Group has a very limited duration to evaluate bids, including evaluation of the beneficial owners of each tenderer, so that data on beneficial owners must be immediately accessible so that the ULP Working Group; (b) the number of corporations that have declared beneficial owners is very low; (c) the number of unverified and unindicated data on beneficial owners of corporations is still very high; (c) the amount of resources is still minimal from the Authorised Agencies to fulfil data requests from all tender activities in Indonesia.

IV. Conclusions

Based on the above description, it can be concluded that the principle of competition in public goods/services tendering activities can be implemented if there is no conflict of interest between tender participants. Therefore, the job owner is required to identify conflicts of interest between tender participants. The identification of conflicts of interest in tender activities for public procurement of goods/services in Presidential Regulation No. 16 of 2018 concerning Government Procurement of Goods/Services is different from the identification of beneficial owners in Presidential Regulation No. 13 of 2018 concerning the Implementation of the Principle of Identifying Beneficial Owners of Corporations in the Context of Preventing and Eradicating

Criminal Acts of Money Laundering and Criminal Acts of Financing Terrorism. The identification of conflicts of interest in government procurement tender activities in Presidential Regulation No. 16/2018 on Government Procurement of Goods/Services focuses on concurrent positions between tenderers so that the job owner cannot identify conflicts of interest arising through the chain of interest owners. Therefore, the identification of conflicts of interest in public procurement tender activities should be carried out through the identification of the owner of the interest as follows regulated in Presidential Regulation No. 13/2018 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Preventing and Eradicating the Criminal Acts of Money Laundering and the Criminal Acts of Financing Terrorism. In this case, the prohibition of participating in the same tender is not only carried out against concurrent positions between tenderers but also concurrent owners of interests between tenderers. Identification of multiple beneficial owners can be carried out through the information exchange method or the declaration method, but given the limited time of the tender and the data sources of the competent authority as well as the quality and quantity of data on beneficial owners, it is recommended that the identification of multiple beneficial owners be carried out by the declaration method by tenderers.

Literature

- [1]. The Financial Action Task Force, 2014, *Fatf Guidance, Transparency And Beneficial Ownership*, October 2014.
- [2]. Law Number 5 Year 1999 On Prohibition Of Monopolistic Practices And Unfair Business Competition
- [3]. Law Number 12 Year 2011 On The Formation Of Legislation Law Number 40 Year 2014 On Insurance.
- [4]. Presidential Regulation No. 13/2018 On The Implementation Of The Principle Of Recognizing Beneficial Owners Of Corporations In The Framework Of Prevention And Eradication Of Money Laundering Crime And Terrorism Financing Crime.
- [5]. Presidential Regulation No. 16/2018 On Government Procurement Of Goods/Services. Financial Services Authority (Ojk) Regulation No. 39/Pojk.03/2017 On Ownership Single In Indonesian Banking
- [6]. Financial Services Authority (Ojk) Regulation Number 57/Pojk.04/2017 On The Implementation Of Corporate Governance Of Securities Companies Conducting Business Activities As Underwriters And Broker-Dealers.
- [7]. Decision Of The Business Competition Supervisory Commission (Kppu) Number 11/Kppu-L/2015. Decision Of The Business Competition Supervisory Commission (Kppu) Number 18/Kppu-I/2016. Decision Of The Business Competition Supervisory Commission (Kppu) Number 03/Kppu-L/2018.
- [8]. Kiagus Ahmad Badaruddin, 2018, Remarks By The Head Of Ppatk At The Dissemination Of Presidential Regulation No. 13/2018 On The Application Of The Principle Of Identifying Beneficial Owners Of Corporations In The Context Of Preventing And Eradicating The Criminal Acts Of Money Laundering And The Criminal Acts Of Financing Terrorism, Jakarta, 27 March 2018.
- [9]. Corruption Eradication Commission, Anas Urbaningrum Case Trail, Accessed Via <https://acch.kpk.go.id/id/jejak-kasus/8-anas-urbaningrum>.