

THE PREPARATION OF OWNER ESTIMATE IN RIG SERVICE CONTRACTS IN UPSTREAM OIL AND GAS BUSINESS ACTIVITIES ACCORDING TO LEGAL CERTAINTY PRINCIPLES

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Abstract

As one of the vital and strategic natural resources, due to its vital role that could impact society, oil and gas is one of the sources of state revenue to support national development. To implement Article 33 of the 1945 Constitution, in particular to realize the welfare and prosperity of the people, UU Migas No 22, 2001 mandated SKK Migas to oversee upstream activity done by contractors (KKKS). Contractors conduct rig procurement processes with their Owner Estimate in alignment to Perpres No 12, 2021 and PTK 007, 2017. Due to that reason, legal certainty is needed to deal with problems at the implementation level. This journal research covers two legal issues: the regulation and implementation of the preparation of the Owner Estimate (OE) Value in the Rig contract. The theoretical basis used is agreement theory, legal certainty theory, and Per Se Illegal and Rule of Reason approach. The research analysis is using normative juridicals which are supported by empirical studies. The result of this research concludes that normatively, OE preparation guidelines provide multiple interpretations, inconsistencies and a legal vacuum. In practice, problems related to aspects of legal certainty, namely OE offers are not confidential and/or confidential, extreme price cut due to offers below 80% of OE are being allowed, the existence of negotiations even though the price offer is already the lowest and below the OE. It opens for conspiracy in the procurement. For this reason, it is necessary to amend Perpres and PTK 007 in order to achieve compliance according to the principles of agreement, legal certainty and fair business. The change in regulation will provide legal certainty, efficiency and effectiveness so that SKK Migas and KKKS and Rig Providers can carry out upstream business activities properly and optimally to support the social welfare of the Indonesian.

Keywords: *Oil and Gas, Owner Estimates Development, KKKS & Rig Provider.*

1. INTRODUCTION

Oil and gas are one of the non-renewable natural resources (SDA), and factually controls the livelihood of the people, as well as an important source of income for the state, thus oil and gas is a natural resource that is both vital and strategic.

Oil and gas are very important for the Indonesian nation and state which is part of the natural resources controlled by the state and the results are used for the greatest prosperity of the people.¹ Oil and gas production still dominates revenue for the Government of Indonesia, around 28%² of the 2021 APBN.

¹ Sihotang, Ericson, *Politik Hukum Pengelolaan Migas, Pasca-Putusan Mahkamah konstitusi*, P3DI, Jakarta, 2014, p. 37

² Ministry of Finance Indonesia, *APBN Kita Kinerja and Fakta*, Jakarta, Ministry of Finance, 2021, p. 66

The basis for the management of upstream oil and gas in Indonesia must be laid on a solid foundation, namely the 1945 Constitution.³

Law No.22 of 2001 on Oil and Gas (UU Migas) regulates the main things and principles in oil and gas management and is further detailed in more operational and technical rules, depending on the operational needs of oil and gas management. The government issued operational regulations, namely Presidential Decree No. 54 of 2010 on Procurement of Goods/Services, and several changes to the Presidential Decree to the latest one which is Presidential Decree No. 12 of 2021 on Procurement of Goods/Services. For technical operations, the Special Task Force for Upstream Oil and Gas Business Activities Republic of Indonesia (SKK Migas) publishes the Work Procedure Guidelines (PTK) 007.⁴

SKK Migas still manages oil and gas working areas with hundreds of working areas in Indonesian territory. The exploration and exploitation work area is carried out by a Business Entity or Permanent Establishment based on a cooperation contract with SKK Migas, called the of Oil and Gas Contractors (KKKS)⁵, such as: Chevron Pacific Indonesia, Medco EP, and PT. Pertamina Eksplorasi & Production, and others

KKKS manages work areas with PSC Cost Recovery and PSC Gross Split systems. KKKS with the PSC Cost Recovery system uses PTK 007 in procuring goods/services in the oil and gas environment, while PSC Gross Split does not use PTK 007.

PTK 007 4th Revision of 2017 provides a legal basis for implementing integrated and clear technical and administrative guidelines, as well as equating the mindset and understanding of all managers of upstream oil and gas business activities in the territory of the Republic of Indonesia in the procurement of goods/services, so as to realize the basic principles of chain management supply.

KKKS as Rig users, need a drilling/workover rig for exploration and exploitation activities. Where are the characteristics of exploration and exploitation activities, which are activities with high risk, high cost, high technology, and time driven.

KKKS as Rig users, and Rig contractors as Rig Goods/Services Providers carry out the process of preparing the Owner Estimate (OE) for the process of procurement of Rig goods/services.

OE is the estimated result of the data on the price of goods/services calculated by expertise, which is determined by the official making the commitment which is used to determine the bid price by the procurement service unit or procurement official.⁶

The process of compiling the OE value is one of the goods/services procurement processes studied. The problem of preparing OE in Rig service contracts in upstream oil and gas activities is a crucial factor in the evaluation stage so the final OE value is the OE value and the value of the Local Content Requirement (TKDN) commitment preference to determine the winner of the Rig procurement.

³ Pudyantoro , A. Rinto , *Bisnis Hulu Migas, Mengurai Persoalan and Memahami Masa Depan Bisnis Hulu Migas Indonesia* , Gramedia Pustaka Utama, Jakarta, 2019, p. 42

⁴ *Ibid.* p. 43

⁵ https://id.wikipedia.org/wiki/Kontraktor_Kontrak_Kerja_Sama, accessed on 21/04/2020

⁶ Mudjisantosa, *Memahami Spesifikasi HPS, and Kerugian Negara*, Primaprint, Jakarta, 2013, p. 50

The government as the legislator/regulator for the procurement of goods/services together with SKK Migas must oversee the issue of rig procurement in the Oil and Gas environment. The consequences of the problem will have an impact on oil and gas production and ultimately have an impact on sources of income for the state and national economic development in the oil and gas sector.

The author refers to the beginning of Presidential Decree No. 54 of 2010 and the last Presidential Decree No. 12 of 2021 on the procurement of goods/services and PTK 007 4th Revision of 2017. The changes to the Presidential Decree between 2010 and 2021 have no significant changes to the preparation of OE.

There are several problems in the Presidential Decree and PTK 007 there are multiple interpretations, inconsistencies, and legal vacuums in the process of preparing and implementing OE values for KKKS and providers of goods/services.

The author will analyze *the difference of regulations* in Presidential Decree No. 54 of 2010 and Presidential Decree No. 12 of 2021 as follows:

- 1) *The preparation of the OE is calculated skillfully based on accountable data regarding the phrase “covering”.*
- 2) *There is no clause on the preparation of OE in Presidential Decree No. 12 of 2021.*
- 3) *The OE Value Offer is open and non-confidential;*
- 4) *The basis for determining the value of the performance guarantee for bids whose value is lower than 80% (eighty percent) of the total value of OE*
- 5) *There are indications of conspiracy in the preparation of the OE and the negotiation process;*
- 6) *There is an indication of regulation in the assessment of TKDN commitment*

The regulations below are the PTK-007 4th Revision of 2017 as follows:

- 1) *Source of price reference for the preparation of OE, regarding the phrase: “among others”;*
- 2) *The total value of OE included in the goods/services procurement document can be open and non-confidential depending on the type;*
- 3) *There is no written clause within the PTK 007 4th Revision regarding: the basis for determining the value of the performance guarantee for bids whose value is lower than 80% (eighty percent) of the OE value.*
- 4) *There is still a gradual negotiation process on the lowest OE value for the evaluation of the winner;*
- 5) *There are indications of conspiracy in the preparation of the OE and the negotiation process;*
- 6) *There are indications of setting the value of the Domestic Component Level (TKDN) by certain institutions.*

2. RESEARCH METHODS

This research method is research with normative juridical qualitative method supported by empirical juridical. Normative juridical research that is qualitative in nature, is research

that refers to legal norms contained in laws and regulations, Presidential Decrees, PTK, and expert opinions. Supported by an empirical study conducted, namely a study of its implementation (*ius operatum*) to determine with certainty the implementation of the positive law that already exists today.

The author conducted interviews with resource persons from SKK Migas, KKKS and providers of goods/services in the oil and gas environment, who are trusted and highly competent in the field of implementing the procurement of goods/services for rigs related to OE in oil and gas activities and the operational sector of drilling rig oil companies both domestically and internationally. If the data and information obtained are very accurate and have been tested with a degree of confidence test, and a certainty test, then the results of the research can really be accounted for.

This research is to find out the principle of legal certainty for the Government of Indonesia (Ministry of Energy and Mineral Resources), SKK Migas, KKKS and Rig Providers, in the preparation of OE in Rig service contracts in upstream oil and gas business activities.

Academically, legal research is a scientific activity, which is based on certain methods, systematics, and thoughts, which aims to study one or several certain legal phenomena, by analyzing them. Furthermore, an in-depth examination of the legal facts is carried out, to then seek a solution to the problems that arise in the phenomenon in question.⁷

This legal research uses several approaches, in order to obtain information from various aspects according to the research problem, namely the principle of legal certainty as the basis for preparing OE in Rig service contracts in Oil and Gas business activities.

In legal research, there are several approaches. In this approach, the author will get information from various aspects regarding the problem that is being tried to find the answer⁸.

There are several research approaches used, as follows:⁹

1) Legislative Approach

This is done by reviewing laws and regulations related to the legal issues being handled. The author can analyze the suitability between the Oil and Gas Law, PTK007 from SKK Migas, and the regulations that apply in the preparation of OE, namely the Oil and Gas Law No. 2 of 2001, Presidential Decree No. 54 of 2010 and Presidential Decree No. 12 of 2021. The results of this study are an argument for solving problems faced.

2) Conceptual Approach

The conceptual approach departs from the views and doctrines that develop in the science of law.

This conceptual approach is used to analyze and solve the problems of the OE drafting concept in the Rig service contract in the upstream oil and gas business activities, so that it is in accordance with the principle of legal certainty. The author analyzes the concept of OE preparation used by KKKS, providers of goods/services in Indonesia, and the concept of OE preparation used by oil companies in foreign countries.

3) Comparative Approach

This comparative approach is carried out to compare the law or Presidential Decree or PTK on how to prepare OE in the environment of Oil and Gas activities with the regulations for the preparation of OE in oil companies outside Indonesia, and oil associations in Indonesia and outside Indonesia.

⁷.Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta, Universitas Indonesia, 2014, p. 43

⁸ Peter Mahmud Marzuki, *Penelitian Hukum, Edisi revisi*, Jakarta, Prenada Media Group, 2015, p. 133

⁹*Ibid*, p. 133

In this study, the authors use the method of reviewing library materials from various sources, the 1945 Constitution, Law No. 22 of 2001 on Oil and Gas; Presidential Decree No. 54 of 2010 on the Procurement of Goods/Services; amendments to Presidential Decrees to the last Presidential Decree. No. 12 of 2021 on the Procurement of Goods/Services; PTK 007, 1st Revision, 2nd Revision, 3rd Revision, and finally PTK 007 4th Revision 2017.

The American Association of Cost Engineers (AACE), Oil and Gas Recommended Guideline for User Costs for Mobile Rigs/Drill Ships, Norwegian Oil and Gas Recommended Guideline for User Costs for Mobile Rigs/Drill Ships, articles or circulars published by APMI (Indonesian Association of Oil, Gas, and Geothermal Drilling Companies). Comparing the legal regulations regarding the preparation of OE in global oil business countries such as the United States, Europe, and the Middle East to find a comparison of the process of preparing OE in upstream oil and gas activities.

3. ANALYSIS AND DISCUSSION

3.1. Preparation and implementation of the OE Value based on the reference source of the phrase “covering” or the phrase “among others”

According to Presidential Decree No. 54 of 2010, the preparation of the OE Value is based on local market price data obtained based on survey results prior to the implementation of procurement by considering information using the phrase "covering" some information from agencies.

Goods/service providers for compiling OE Value are expected to follow information from nine (9) reference sources as follows:

- 1) BPS information on unit costs officially published from “related associations”¹⁰ in the environment of responsible Rig service contract activities;
- 2) Unit cost information officially published by related associations and other reliable data sources;
- 3) A list of costs/tariffs for Rig equipment and Rig tools; expert services issued by the sole manufacturer/distributor;
- 4) providers of goods/services evaluate the costs of previous or ongoing contracts by considering the cost change factor;
- 5) must take into account the inflation of the previous year;
- 6) current interest rate and/or Bank Indonesia middle rate;
- 7) costs which are the result of comparison of similar Rig contracts (Onshore Rig and/or Offshore Rig), planning consultant rental fee (engineer's estimate);
- 8) index norm¹¹ is the range of the lowest price value and the highest price of an item/service issued by the relevant national technical agency (Rigs equipment & Tools manufacturer or Agent);
- 9) and/or other reliable information.

The analysis of Presidential Decree No. 16 of 2018 and Presidential Decree No. 12 of 2021 does not contain reference sources for the preparation of OE, meaning that there is a legal vacuum. Meanwhile, Presidential Decree No. 54 of 2010 and amendments to Presidential Decree No. 35 of 2011, Presidential Decree No. 70 of 2012, Presidential

¹⁰ Related associations are expert associations, both domestically and overseas. The published unit cost information includes data sources from data sources from the international community website which displays international unit cost information for experts abroad including the location where the HPS is compiled., Amik Tri Istiami, *Cara Lebih Mudah Membaca Peraturan Pengadaan Barang and Jasa Pemerintah* (Presidential Decree 54,35 And 70), Yogyakarta, Primaprint,2014 , p. 110.

¹¹Mudjisantosa, *Memahami Spesifikasi HPS, And Kerugian Negara,Op.Cit*, p. 55

Decree No. 172 of 2014, and Presidential Decree No. 4 of 2015 contain a reference source for the preparation of OE with the phrase "covering". Compared with PTK 007 1st, 2nd, 3rd, and 4th Revisions as guidelines for KKKS and Rig Providers for the preparation of OE. PTK 007 contains reference sources for the preparation of OE with the phrase "among others". This gives rise to multiple interpretations and different understandings of the phrase "covering" and the phrase "among other things".

According to Legal Drafting and the Fifth Edition of the Great Dictionary of the Indonesian Language (KBBI V) the phrase "among other things" contains the meaning of "for example" which means choosing one of the price references sources, while the phrase "covering" contains a different meaning of "covering" (consisting of). In other words, the phrase "among other things" with the phrase "covering" contains different meanings.

Analysis of the implementation of regulations regarding the preparation of OE Value in Rig service contracts from several world oil companies (one of the KKKS); oil companies abroad and Rig providers in Indonesia are described as follows:

- 1) Implementation of the preparation of OE Value from outside oil companies that carry out upstream oil and gas activities in Indonesia, including KKKS. KKKS organizes and implements OE Values from several reference sources using the phrase "among others".

The preparation and implementation of the preparation of OE Value are as follows: labor costs, equipment costs (high technology Rigs tool & equipment), and indirect costs. Furthermore, the calculation of the OE Value is submitted to the corporate officer of the Rig procurement for adjustment of the OE Value. OE Value adjustment is based on the results of the analysis of the unit price of work, the results of market analysis (market assessment), and the results of the analysis from the Association of Indonesian Oil and Gas and Geothermal Drilling Companies (APMI).

Then the oil company submitted the OE Value to SKK Migas for approval. If approved by SKK Migas, this OE Value is determined as OE Value for the Rig procurement process.

The preparation of the OE Value is made by oil companies outside Indonesia, for example in the United States, in procuring rigs in worldwide oil activities, it does not require approval from state institutions (similar to Indonesian SKK Migas). This oil company compiles the OE value based on the company's internal, there are no guidelines from state institutions. This is certainly different because of the Indonesian constitution and the Oil and Gas Law. The composition of the OE Value is taken from Market Intelligence (MI). Where information is analyzed from market prices so that the OE value can be accurate and reliable. An example of supply-demand considerations is either because of purely supply-demand effects or other external factors, such as when global crude oil prices escalated and dropped significantly.

Market information is very important because it has the latest price data. This market information is obtained from the presence and skills of contractors, the latest market developments and trends in the market, similar projects with other oil companies, as well as external environmental aspects that will influence the current contract strategy.

In other words, market information is obtained from various sources, namely communicating with Rig contractors directly to obtain information and provide activity plans, regional problems, availability of labor, equipment, and continuity of

contractors in the future. The next stage is to discuss their willingness for the type of contract to be implemented.

The preparation and implementation of the OE Value of oil companies participating in the procurement of rigs in Indonesia is different from the procurement of rigs in America. The procurement of rigs in Indonesia follows PTK 007 4th Revision of 2017 using reference sources with the phrase "among other things" by asking for approval from SKK Migas.

Meanwhile, in America, oil companies have internal procedures for compiling OE without seeking approval from other institutions. The preparation of the OE Value using 9 (nine) reference sources with the phrase "among others" is the same as the preparation of the OE Value carried out by Oil Companies in America.

2) Implementation of Compiling OE Value from KKKS in Indonesia ¹²

National oil companies in Indonesia carry out upstream oil and gas activities in Indonesia and outside Indonesia. KKKS in the procurement of rigs in upstream oil and gas activities carry out the preparation and implementation of the OE Value following PTK 007 out of 9 (nine) reference sources with the phrase "among others" and are free to add other reference sources, with the approval of SKK Migas depending on the size of the budget.

3) Implementation of Compiling OE Values in Foreign Countries

Several oil companies located in America, Europe, and the Middle East carry out procurement of rigs by compiling and implementing OE Values for offshore and onshore activities. Basically, it is almost the same as what is stated in PTK 007 4th Revision using 9 (nine) reference sources with the phrase "among others" namely the main costs regarding labor, Rigs equipment and tools costs, indirect costs (costs not included in Rigs operating costs, such as: office, management, telephone, consultant, etc.). Oil companies operating in the Middle East compile OE values or cost engineering (the term for the oil company) using references from AACE International (The Association for the Advancement of Cost Engineering), references from Market Intelligence of Drilling Rigs and reference sources from the Infrastructure and Projects Authority. in the UK on Cost Estimating Guidance. Oil And Gas Recommended Guideline for User Costs for Mobile Rigs/Drill Ships, Norwegian Oil and Gas Recommended Guideline for User Costs for Mobile Rigs/Drill Ships. These companies do not seek approval regarding the preparation of OE Values from government agencies.

4) Implementation of OE Value Preparation by Rig Providers in Indonesia

Analysis of three companies providing goods/services that participate in the procurement of goods/services (contractors from KKKS) have their own OE Value preparation system and follow requests for information from KKKS by considering the following: market price, contract period carried out, investment in additional Rigs tools and equipment, labor costs, price information from the Association (APMI), and reference to the OE Value of the KKKS, information on unit costs of goods/services, cost of OE Value in previous contracts or ongoing contracts; considering the cost change factor; inflation information for the previous year; current interest rate and/or Bank Indonesia middle rate; the result of comparison of similar contracts carried out by other KKKS and the estimated cost calculation is carried out by the consultant

¹² Memorandum from the President Director of Pertamina, Karen Agustiawan No.37 Tahun 2013 *Mengenai Manajemen Pengadaan Barang/Jasa*

(engineer's estimate). Goods/services providers do not require approval from KKKS and SKK Migas.

Presidential Decree No. 12 of 2021 does not contain an article regarding the preparation of the OE Value. To avoid a legal vacuum and multiple interpretations, the Presidential Decree must be amended so as to provide strong legal certainty for SKK Migas, KKKS and Rig Providers.

Making articles on the preparation of OE Values by maintaining the phrase "covering", so that the preparation of OE is comprehensive, accurate, professional, and accountable which is obtained from local and global sources of information. In the hierarchy of legislation, Presidential Decree No. 12 of 2021 follows the above rules, namely the Oil and Gas Law as a policy for implementing the management of oil and gas business activities based on benefits; Justice; balance, equity; prosperity and welfare of the people; and legal certainty. Thus, PTK 007 Revised 04 of 2017 must follow the above rules, namely the amendment of Presidential Decree No. 12 of 2021 (*lex superior derogate legi inferior*).

3.2. The OE Value Offer is non-confidential or confidential in the procurement of goods/services

Presidential Decree No. 54 of 2010 contains regulations for the procurement of goods/services, at the time of the tender offer the OE value is open and not confidential, while the amendments to Presidential Decree No. 35 of 2011, Presidential Decree No. 70 of 2012, Presidential Decree No. 172 of 2014, Presidential Decree No. 4 of 2015 and Presidential Decree No. 16 of 2018 still contain: "OE value" is open and not confidential. Finally, Presidential Decree No. 12 of 2021 states that the OE value is non-confidential and the OE details are confidential.

The regulations under it, PTK 007 1st, 2nd, and 3rd Revision are not confidential (open) but in PTK 007 4th Revision the OE value can be "not confidential" and/or "confidential" depending on the type of contract, the details are confidential for the procurement participants. Therefore, there is a discrepancy between Presidential Decree No. 12 of 2021 and PTK 007 4th Revision of 2017 in the rules for the procurement of goods and services.

The characteristics of upstream oil and gas activities are high-tech, high-risk, high-cost, and time-driven operational activities that require specific equipment, materials, labor, and require certification. For this reason, the procurement of goods/services in upstream oil and gas activities requires an undisclosed offer of OE Value in accordance with the Oil and Gas Law for efficient and effective procurement. Implementation of Presidential Decree No. 12 of 2021, users of goods/services give instructions to participants in the procurement of goods/services and offer OE Value openly and not confidentially in tender documents. The offer of OE Value can be closed and confidential depending on the kind of contract, although KKKS implements the procurement of goods/services inconsistently when providing instructions to participants in upstream oil and gas activities. The PTK 007 Fourth Revision of 2017 regulations are implemented in accordance with KKKS's policies. As a result, KKKS violates the Presidential Decree No. 12 of 2021 (*lex superior derogate legi inferior*).

With the openness aspect in tender offers, it is easier for Rig providers to analyze Rig price information from the market or other sources so that the OE Value preparation process is more efficient, effective, and accurate and avoids indications of conspiracy.

Rig procurement providers in compiling OE Value are critical to be a benchmark for the success of contract implementation because they can calculate OE Value

accurately and professionally from the start so that Rig Providers can measure their ability to carry out the tender and not worry about indications of conspiracy.

The non-confidential OE Value offer in the procurement of goods/services provides the legal force with the following considerations:

- 1) Comply with the principles in Article 2 of the Oil and Gas Law No. 22 of 2001, namely integration, justice, balance, equity, and legal certainty.
- 2) Comply with the Article 3 of the Oil and Gas Law No. 22 of 2001 which states that ensuring the effectiveness of the implementation and control of upstream oil and gas business activities in an efficient, effective, highly competitive, and sustainable manner for oil and gas through an open and transparent mechanism.
- 3) Comply with Article 22 of Law No. 5 of 1999 on the prohibition of conspiracy in tenders: mentioning that tenders that have the potential for unfair business competition are tenders that are closed or not transparent.
- 4) Ensure that the tender complies with the concept of fair business competition where the tender is not discriminatory and can be participated by all providers of goods/services having the same competence.

The implementation of the procurement of goods/services in the international world is transparent (open) and non-discriminatory, following the basic principles of the Government Procurement Agreement (GPA). This agreement requires its members to create transparency in procurement procedures to ensure the achievement of fair business competition. The procuring entity is required to disseminate information openly in the overall procurement process.¹³

Taking into account the principles of the Oil and Gas Law; Article 22 of Law No. 5 of 1999 on the Prohibition of Conspiracy in Tenders states that tenders that have the potential to create unfair business competition are tenders that are closed or non-transparent and discriminatory in nature.

The author makes the case that the OE Value bidding procedure should be non-confidential in the procurement of goods/services written in Presidential Decree No. 12 of 2021 and must be followed by the regulations below, such as PTK 007, and based on best practices from foreign nations that adhere to the GPA, WTO, UNCITRAL, World Bank, and the outcomes of interviews with sources from SKK Migas, KKKS, and providers of goods/services. (The principle of "lex superior derogate legi inferior").

The author considers it necessary to update PTK 007, Fourth Revision of 2017, to include the following legal certainty principle:

- a) Adhering to the legal and regulatory hierarchy. The development of national law must be done in a planned, sustainable, and integrated manner within the national legal system for Indonesia to become a state of law.¹⁴
- b) The rule of law is established in accordance with the requirements, namely by making regulations openly in order to have a fair legal orientation for the welfare of the community, in accordance with the legal certainty theory of Gustav and Kelsen and the principle of Pacta Sunt Servanda (legal certainty).
- c) Any suggestion of collusion between the goods/services procurement committee and the goods/services procurement provider would be avoided by an open and non-confidential offer of OE Value. The provisions of Law No. 5 of 1999 against

¹³ Y.Sogar Simamora, *Hukum Kontrak, Prinsip-Prinsip Hukum Kontrak Pengadaan Barang and Jasa Pemerintah di Indonesia*, LaksBang PRESSindo, Surabaya, 2017, p. 86

¹⁴ Ahmad Redi, *Hukum Pembentukan Peraturan Perundang-undangan*, Jakarta, Sinar Grafika, 2018, p. 89

monopolistic behaviors and unfair business competition are carried out by KKKS and Rig Providers.

- d) In accordance with the Oil and Gas Law, the implementation of oil and gas business activities must ensure the effectiveness of the implementation of the procurement of goods and services for users of goods and services (KKKS) and providers of goods and services through an open and transparent mechanism.

With the modification to PTK 007 4th Revision of 2017 regarding the rule for providing OE Value with an open and transparent mechanism for all types of contracts, from the procedure in the goods/services procurement document (tender) to the opening of the cover of the offer for the OE Value offer in upstream oil and gas activities, KKKS and Rig providers get a more effective, efficient, and legal procurement process for goods/services.

3.4. Offer OE Value whose value is lower than 80% (eighty percent) of OE Value

Presidential Decree No. 54 of 2010 contains the regulation on OE Value as the basis for determining the amount of performance guarantee value for bids whose value is lower than 80% (eighty percent) of the OE Value. Meanwhile, changes to Presidential Decree No. 35 of 2011, Presidential Decree No. 70 of 2012, Presidential Decree No. 172 of 2014, Presidential Decree No. 4 of 2015, Presidential Decree No. 16 of 2018, and Presidential Decree No. 12 of 2021 still contain OE used as a basis to determine the value of the Performance Guarantee for bids whose value is less than 80% (eighty percent) of the OE value.

The regulations below, PTK 007 1st and 2nd Revision contain implementation guarantee regulations for OE offerings whose value is less than 80% (eighty percent) of OE, increased to at least 5% (five percent) to 10% (ten percent) to 80% (eighty percent) OE. PTK 007 3rd Revision contains implementation guarantee regulations for OE bids whose value is less than 80% (eighty percent) of OE, which is 5% (five percent) of OE. PTK 007 4th Revision of 2017 does not contain regulations regarding "The value of performance guarantees for OE offers whose value is less than 80% (eighty percent) of OE.

The bid value is below 80% of the OE value, meaning that any bid below 80%, gives an opportunity for a "slashing price" process to occur. This is because both the Presidential Decree and PTK 007 do not contain regulations regarding the limit for offering OE Value. This means that regardless of the OE value offered if it is below 80%, the process of procuring goods/services will continue.

The implementation of the OE Value offer whose value is lower than 80% (eighty percent) in the procurement of rigs in upstream oil and gas activities from PTK 007 1st, 2nd, and 3rd Revision provides regulatory requirements whether to continue the procurement process or not.

The implementation of PTK 007 1st Revision, that is the OE whose value is lower than 80% (eighty percent) of the OE is disqualified. However, there are requirements with certain considerations that the Procurement Committee can clarify and verify the procurement participants to gain confidence in the reasonableness of the bid price.

Implementation of PTK 007 2nd and 3rd Revision is that the procurement committee will clarify and verify the procurement participants to gain confidence in the fairness of the bid price. If the committee is sure of the reasonableness of the price, the bid will not be rejected, if not sure, the bid will be declared void.

Implementation of PTK 007 4th Revision is that the procurement committee conducts gradual negotiations with procurement participants on the lowest price offer even though it does not include "The implementation guarantee value for OE bids whose value is less than 80% (eighty percent) of OE.

Allowing the offer of OE Value below 80% creates a "price cut" process that it sacrifices and harms the providers of goods/services and KKKS in the implementation of Rig contracts. The "cutting price" process is a process that is not in accordance with the principle of agreement, the principle of legal certainty, and the principle of unfair competition.

According to Kelsen's Theory¹⁵, the law is a system of hierarchically regulated norms where lower laws should not conflict with higher laws. In analyzing the opportunity for a "slashing price" process from PTK 007 1st, 2nd, 3rd, and 4th Revision to the legal regulations above it, namely Presidential Decree No. 12 of 2021. The conclusion is that PTK 007 1st, 2nd, 3rd, and 4th Revision doesn't comply with the regulation that has a higher position in the legal hierarchy. The procurement committee is still engaged in negotiations, thus the OE value provided by rig providers during the tender is already the lowest and is below the OE tender made by KKKS.

The author in this case argues that this is not in accordance with the principle of propriety in Article 1338 of the Civil Code. Where the goods/services provider has compiled the OE Value based on the reference source from PTK 007 4th Revision of 2017 and below the OE value offered by the goods/service users. By negotiating again, the offer of the lowest OE Value and below the OE Value, the provider/service will experience a sense of injustice and legal uncertainty.

According to Article 7 of Indonesian Anti-Monopoly Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, "business actors are prohibited from entering into agreements with competing business actors to set prices below the market price, which may result in monopolistic practices or unfair business competition," price fixing below the market is considered predatory pricing. KKKS carry out staged negotiations with procurement participants who offer the lowest OE Value and below 80% of the OE Value. Bidding on the cheapest OE Value, will be continued to procurement participants until they get the cheapest OE Value from all procurement participants.

Therefore, KKKS engages in staged negotiations with bidders who provide the lowest OE Value and less than 80% of the OE Value. Participants in the procurement process will keep bidding for the lowest OE Value until they have received it from all of the other participants.

The implementation of this regulation provides an opportunity for indications of collusion between the KKKS goods/service procurement committee and the goods/services provider. Where the winner of the tender can be a procurement participant whose bid has an OE Value exceeding 80% of the OE Value and/or the highest OE Value offer.

Conspiracy in this case is a collaboration between two or more parties who jointly carry out unlawful acts. Conspiracy in tenders as referred to in Article 22 of Law No. 5 of 1999 is cooperation between two or more parties to win certain tender participants.¹⁶

¹⁵ Muhammad Syukri Albani Nasution dkk, *Hukum Dalam Pendekatan Filsafat*, Jakarta, Prenada Media Grup, 2016, p. 119.

¹⁶ The Business Competition Supervisory Commission Regulation No.2 Tahun 2010 on Guidelines for Article 22 of Law No. 5 of 1999 on the Prohibition of Conspiracy in Tenders, Jakarta, 6 januari 2010, Chief of KPPU, Benny Pasaribu.p. 7

Tenders that could potentially foster unfair corporate competition or obstruct it are:¹⁷

- 1) Tenders that are closed or non-transparent and are not widely announced, resulting in business actors who are interested and meet the qualifications unable to take part;
- 2) Tenders are discriminatory in nature and cannot be followed by all business actors with the same competence;
- 3) Tenders with technical or brand requirements and specifications that lead to certain business actors so as to prevent other business actors from participating.
- 4) Indications of conspiracy at the time of determining the self-estimated price or the base price of the auction, among others include:
 - a. The existence of two or more self-estimated prices or the base price for one product or service being tendered/auctioned.
 - b. Self-estimated prices or base prices are only given to certain business actors.
 - c. Self-estimated price or market price is determined based on unclear and unreasonable considerations.

The impact of Conspiracy in the Procurement of Rig goods/services in the upstream Oil and Gas activity environment is as follows:

- Users of procurement of goods/services will get a higher OE value;
- Providers of goods/services provide "poor quality" from the Rig so as to provide low Rig performance results and high work accidents.
- Does not provide opportunities for Goods/Services Providers who have a high reputation for both performance and HES.
- Obtaining a high OE value so as to provide high-cost recovery for the country of Indonesia.

Conspiracy is a form of unfair business competition, the institution authorized to deal with unfair business competition is the Business Competition Supervisory Commission (KPPU). KPPU is a special organization that has a dual task, namely, apart from creating order in business competition, KPPU also plays a role in creating and maintaining a conducive business competition climate.¹⁸

With the amendment of Presidential Decree No. 12 of 2021 and PTK 007 4th Revision of 2017 regarding the offer of OE Value which has a lower and upper limit of OE Value in the procurement of goods/services in upstream oil and gas activities. This means that the procurement of goods/services is efficient, effective, legal certainty, and minimizes indications of conspiracy.

SKK Migas is free to carry out the principle of freedom of contract, the principle of consensualism, the principle of Pacta Sunt Servanda and the principle of good faith to make changes in PTK 007, namely making a lower limit and an upper limit on the OE value per working area of KKKS operations, thus providing legal certainty for SKK Migas, KKKS and providers of goods/services. This is in accordance with the opinion of the legal expert Gustav that the law must contain three basic values, namely the value of justice, the value of expediency and the value of certainty. Likewise, Kelsen stated that the most important aspect in the legal system is legal certainty. Only with the law that applies for sure, the community also has legal certainty.

¹⁷ *Ibid*, p. 9

¹⁸ Mudjisantosa, *Catatan Aspek Hukum Pengadaan And Kerugian Negara*, Yogyakarta, Primaprint, 2014, p. 18

4. CONCLUSION

Nominee Arrangement in the possession of land rights manifested in the form of beneficial ownership, namely, the nominee is not regulated in the Indonesian Law but there is a prohibition on using nominees stipulated in Article 26 paragraph (2) of Law Number 5 of the Basic Agrarian Law of 1960 and Article 33 paragraph (1) of Law No. 25 of 2007 concerning Investment, therefore the Nominee Agreement can be categorized as legal smuggling because the nominee loan agreement aims to avoid the provisions of the prohibition of Foreign Nationals having land rights as stipulated in Article 21 paragraph (1) of the Law Number 5 of the Basic Agrarian Law of 1960. How to avoid it is to make nominees or borrow names so that foreign nationals can own land in Indonesia even though indirectly. Government efforts in dealing with investment practices related to ownership of land rights i.e. The Government can cease or annul the granting or extension of the right to the land if the land to be used by the investment company or foreign nationals is abandoned, detrimental to the public interest, not by its purpose and purpose, and contrary to the Law on land. The implementation that must be done to overcome and prevent the act of land ownership nominees is law enforcement through both civil and criminal means can be done eradication of land ownership by WNA through nominee agreement and the return of land to the State can be done by the prosecutor through criminal means by filing charges so that the land that is the object of nominee practice is returned to the State. Then legal efforts through civil means by canceling the nominee agreement because the nominee agreement in land ownership by WNA is essentially contrary to the constitution and Law Number 5 of the Basic Agrarian Law of 1960 which determines the enduring nature of the Indonesian nation's relationship with Indonesian land and the prohibition of land ownership by WNA.

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