

USE OF DISCRETION BY CONTRACT PRINCIPAL

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*Specially dedicated to my parents and family for your love*

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## **ABSTRACT**

Contract administrator constantly faces the challenge of selecting the right procurement method in tandem with the basic need to achieve required performance in cost, time and quality. To achieve the required performance, tender process is carried out in which the contract administrator states the requirements starting from the notice of invitation to treat. There are rules and procedure to be complied with by the tenderers in the tendering process and the tenderer that best meet all the criterion would likely be awarded with the contract. However, what if the contract administrator deviates from rules and procedure and use his discretion in view of certain circumstances in the tender process. This study seeks to find the limit on the use of discretion by the principal, contract administrator or contracting authorities in general. The scope of this study is limited to the tender process. The methodology used involves several stages starting from initial study and concluded with a write up. The data from literature review and law cases are analyzed. From the relevant law cases, it appears that use of discretion is controlled by such principles as proportionality, equality of treatment, transparency, legitimate expectation and non-discrimination.

## **ABSTRAK**

Pentadbir kontrak sentiasa menghadapi cabaran dalam memilih kaedah perolehan yang sesuai dengan matlamat asas iaitu mencapai prestasi yang telah ditetapkan dari segi harga, masa dan kualiti. Untuk mencapai matlamat tersebut, proses tender akan dilakukan yang mana melaluinya pentadbir kontrak menyatakan segala kehendak-kehendak projek bermula dari peringkat mengeluarkan notis tender. Dalam notis tender tersebut dinyatakan peraturan dan juga prosidur yang perlu dipatuhi dan petender yang terbaik dari segi memenuhi kriteria-kriteria yang telah ditetapkan berkemungkinan besar akan mendapat kontrak tersebut. Walau bagaimanapun, apakah yang akan terjadi sekiranya pentadbir kontrak yang tidak mematuhi peraturan dan prosidur tersebut dan menggunakan budi bicara dalam membuat keputusan disebabkan keadaan-keadaan tertentu semasa proses tender tersebut. Kajian ini cuba mencari jawapan kepada batasan ke atas penggunaan budi bicara dalam membuat keputusan oleh prinsipal, pentadbir kontrak atau secara amnya pihak berkuasa yang mengeluarkan tender tersebut. Skop kajian ini hanya melibatkan peringkat proses tender. Metodologi kajian melibatkan berbagai proses bermula dari kajian awal sehinggalah ke peringkat penulisan. Data dari kajian penulisan dan kes-kes mahkamah yang berkaitan telah dihuraikan dan hasilnya menunjukkan bahawa penggunaan budibicara adalah tertakluk kepada beberapa prinsip seperti kadar yang setimpal, kesamaan layanan, keterbukaan, harapan yang sah di sisi undang-undang dan tidak mendiskriminasi.

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## LIST OF ABBREVIATIONS

AC	-	Appeal Cases
ALL	-	All England Reports
BLR	-	British Law Reports
CA	-	Contract Administrator
CIDB	-	Construction Development Industry Board
CON.L.R	-	Construction Law Report
ER	-	English Reports
EU	-	European Union
EXCH	-	Exchequer Reports
ISM	-	The Institution of Surveyors, Malaysia
JCT	-	Joint Contract Tribunal
MLJ	-	Malaysian Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Work Department
S	-	Section
SCR	-	Supreme Court Reports
SO	-	Superintending Officer



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## CHAPTER 1

### INTRODUCTION

#### 1.1 Introduction

In an article by *Kensington Swan Lawyer* dated May 2010, the author states that the case of *J B Leadbitter v Devon Council* [2009] demonstrates “...a useful example of how the use of discretionary powers can create uncertainty in the tender process”.<sup>1</sup> Leadbitter brought its case to court claiming that the council had broken its legal obligation to treat each tenderer equally when, by its discretion, it made allowances for other company’s power failure by extending bid submission deadline and for alleged concessions made for a third company by allowing it to send paper back up documents in case it had not. Leadbitter argued that in changing the supposedly-strict deadline for one company and in allowing a second to submit paper backups, the council showed them a leniency that is unfairly withheld from it.

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<sup>1</sup> T. Cooley, *E-Tendering: Issues With Technology and The Use of Discretion*, Kensington Swan Lawyer, 2010

In another article, the author states that, “*Contracting authorities often find themselves in a situation where they have a discretion to decide how to act. In the interests of maximizing flexibility, tender document usually reserves the right to take certain decisions, for example, to reject tenders received after a bid deadline or which are abnormally low.*”<sup>2</sup> The same author even suggests that the use of discretion by contracting authorities may extend to the process of bid evaluation when the author states, “*.....it inevitably exercises some discretion even it uses a previously disclosed evaluation scheme.*”

The two above-mentioned articles provide the basis of this research on control mechanism on use of discretion by contracting principal in tender process.

## **1.2 Background of Study**

In the above-mentioned articles an issue arising from the use of discretionary powers by the authority or principal has been put to question. As in the *Leadbitter* case, why is it the council was willing to extend the deadline due to a reported power blackout by one of the bidder and yet rejected a bid by another contractor who attempted to upload missing documents before deadline but failed due to programming design which allows only a single upload. To support its case, *Leadbitter* even argued the fact that the council had also allowed one of the bidders to send in a back-up hard copy of the same document when that bidder contacted the Council well before deadline claiming that he was uncertain as to whether or not it had uploaded required document correctly.

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<sup>2</sup> Jenny Beresford-Jones, *The Better Part of Valour?*. Mills & Reeve LLP, 2010. Available at: [http://www.localgovernmentlawyer.co.uk/index.php?option=com\\_content&view=article&id=2659:the-better-part-of-valour&catid=49:comment-a-analysis-articles&q=](http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=2659:the-better-part-of-valour&catid=49:comment-a-analysis-articles&q=) (Accessed 15 February 2011)

Does it sound familiar? In our local context such as the practice by government agencies such as the Public Works Department, technical units of various ministries and other government project implementers cum administrators, the use of discretion is not only limited to tender stage but also commonly being applied throughout a project implementation period. An example in a standard acceptance letter from the employer based on P.W.D. 203D – Rev.9/2010 would include the requirement of producing performance bond, insurances and a reminder that the employment of the contractor can be terminated if no work being carried out after two weeks of the date of the acceptance letter in reference to specific clause in the contract conditions. Being a country which has the most number of public holidays in the world, what would happen if the contractor starts one or two days after the said two-week period? Would it be reasonable to determine the contract because clearly the contractor has breached the conditions? In this instance, use of discretion involves judgment and the question of reasonable act.

Towards the end of project, the use of discretion is almost inevitable when the employer and its agent have to determine whether a project has reached a practical completion stage. Even though improvement has been incorporated in most forms of contract including that of P.W.D. 203A (2007) in order to reduce uncertainty of practical completion stage<sup>3</sup>, discretion is definitely required when in practise the employer and its contract administrator need to declare to local authorities that a project has reached a practical completion stage in order to initiate a joint inspection for issuance of certificate of fitness. Such practise is not uncommon because the issuance of such certificate, occupation permit and their equivalents by the responsible authorities have been known to be time consuming. In the end, this raises the question of whether the employer is at all constrained in how it exercises that discretion.

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<sup>3</sup> Clause 39.5, P.W.D. 203A (2007) Form of Contract

### 1.3 Problem Statement

The questions come to mind from the *Leadbitter* case and the discussion of many contract administrators and contractors concerning the use of discretionary powers by the principal or authorities calling for tender are as follows:-

- What is the limit of discretionary power?
- When discretionary power is applicable?
- Under what circumstances it is applicable?
- What is the criteria/basis used by the courts to allow for discretionary power?
- How to apply it without being regarded as abuse of authority or breach of duty or even bias in that matter which may provide grounds for a valid challenge from a bidder?
- In general, what are lessons learned from various court cases and how can the principal manage the risk?

Looking from actual practice in administrating the tender process, what if the principal in certain circumstances deviates from the established rules, be it stated either in the notice of tender or instruction to tenderer? Can that deviation be considered as part of discretionary power to be exercised freely by the principal?

In *Leadbitter*, Devon Council deviated from a strict rule of submission before deadline by allowing an extension of time due to a reported blackout. The Court decided that the extended deadline was to the discretion of the council that it saw fit in administrating the tender process. Would it be the same if for instance, a bidder who is late for a compulsory site visit and later approaches the contract administrator after completion of site briefing to sign on the attendance sheet in order not to be disqualified from the tendering process? Is it acceptable that the administrator and the employer use

their discretion to allow it based on reasoning that unexpected event happens and that discretion does not in any way jeopardize chances of the other bidders as there will be more stages to go through before a winning bid is identified?

These are the questions that come to mind during literature review and this study seeks to address them as much as possible based on the decided scope and time available.

#### **1.4 Research Objective**

The objective of this research is to identify the principles on the proper use discretion or discretionary powers during tender process by the contract principal.

#### **1.5 Methodology**

Initially, a literature review, discussions with lecturers involved and relevant court cases will be undertaken to study and understand the issues concerned. The review includes published journals, articles, textbooks and relevant law cases during the preliminary stage. Once issues are identified and objective is established, the necessary steps to complete the study were carried out accordingly.

In summary, the process and method of approach act as guidelines so that the study could be carried out in a systematic manner in order to achieve the research objective. This can be illustrated in Figure 1.1. The study process consists of four stages as follows:

Stage 1: Initial study and finding the research topic, objective, scope and outline

Stage 2: Collecting data and research design

Stage 3: Analyzing and interpreting data

Stage 4: Write up

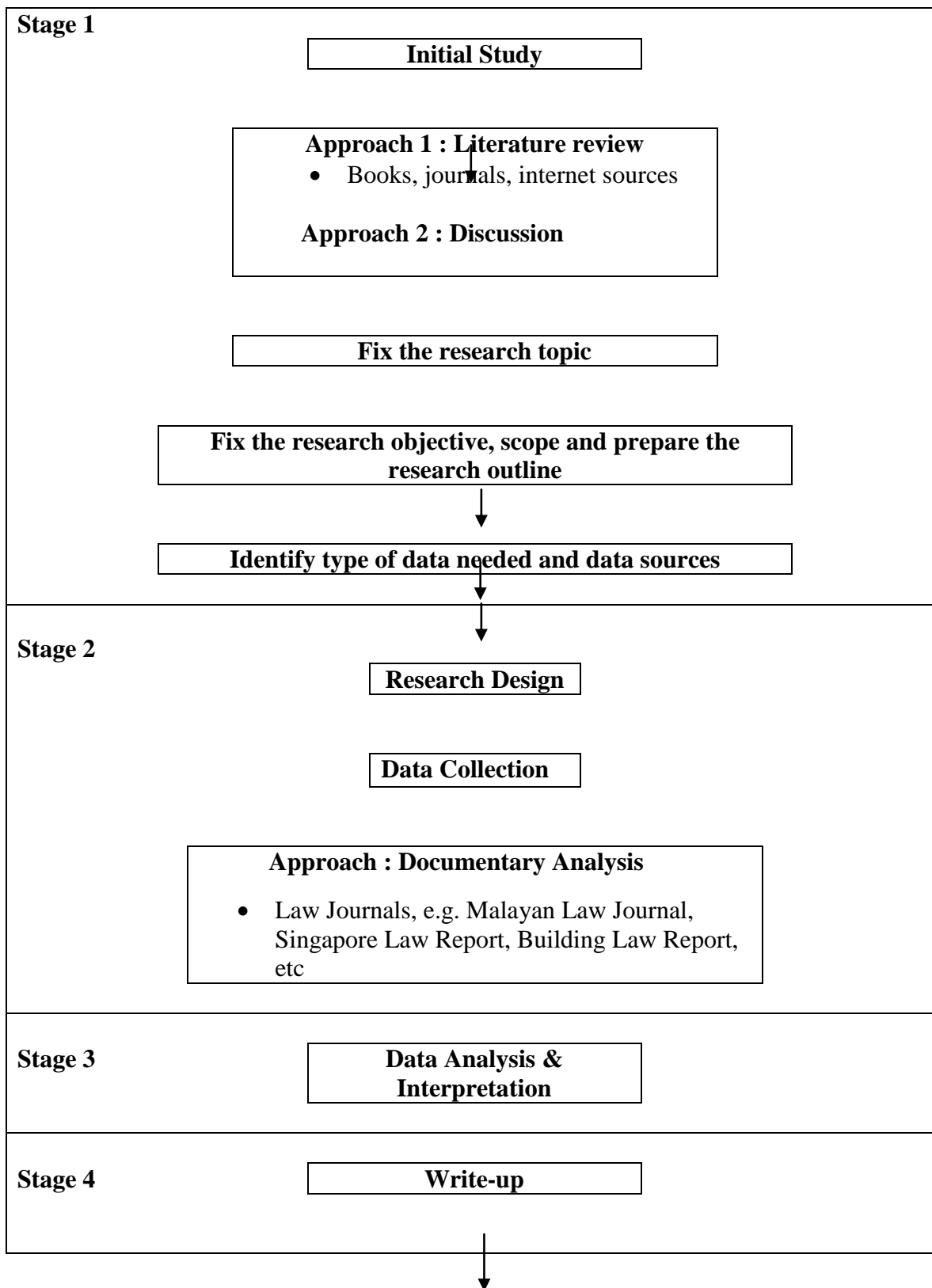


Figure 1.1 : Research Methodology Flowcharts



### **1.5.1 Stage 1 : Initial Study and Finding the Research Topic, Objective, Scope and Outline**

Stage 1 of the research involves initial study through discussion with lecturers and colleagues regarding what research topic can be done. Initial literature review is also done to help get the idea of the research topic. After the initial study, the rough idea of the research topic is formed. The objective and scope of the research are fixed then. Subsequently, a research outline will be prepared in order to identify what kind of data will be needed in this research as well as data sources.

### **1.5.2 Stage 2 : Collecting Data and Research Design**

Collection of all relevant data and information is done during this stage. Data will be collected mainly through documentary analysis. Data collected are mainly from Googles, the Malayan Law Journal, Singapore Law Report, UK Cases & Combined Courts, Malaysia & Brunei Cases and Law Reports from Wales and England. It is collected through the Lexis-Nexis online database. All the cases relating to the research topic will be sorted out from the database. Important cases will be collected and used for the analysis at the later stage.

### **1.5.3 Stage 3 : Analyzing and Interpreting Data**

This stage of research involves data analysis, interpretation and data arrangement. This process is to convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process writing of the paper.



#### **1.5.4 Stage 4 : Write-up**

This stage is the final stage of the research process. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis.

In pursuance of the aim or objective as stipulated above, the primary method to be used to complete this project is mainly research by literature review.

#### **1.6 Scope and Limitation of Study**

This study is limited to the tender process within a project life cycle. The provisions applicable to the issues at hand will be referred to the Public Contracts Regulations 2006. The primary data of this research is based on court cases relating to principal's discretionary power or use of discretion over established set of rules in tender invitation process for construction contract. The relevant court cases are limited to those reported in the Malaysian Law Journal (MLJ), UK and Combined Cases, Singapore Law Report, Brunei and Malaysian Cases and Law Report from England and Wales which are available in the database of Lexis-Nexis website.

It is to be noted here that the term principal is in reference to the employer, the contract owner, its agents or any of the appointed contract administrator.

#### **1.7 Significant of Study**

As much as the principal wanting to achieve competitive bidding, to guard against favouritism, improvidence, extravagance, fraud and corruption in awarding of contracts by means of rules and requirements in the tendering process, the same is also expected by the bidders that the principal may not resort to abuse of discretionary power, unequal

treatment or even breach of duty in consideration to the bids. In particular to what extent the principal may deviate from the set of rules in tendering process and on what ground those exceptions would be considered legal?

The principals involved are inevitably exposed to the risk of unequal treatment, discrimination, and lack of transparency. As such, when considering to exercise discretion, the principal should consider the merit of each case and determine if the case, given its unique circumstances, warrants the use of the discretion. Improper use of discretion would definitely affect the integrity of tender process and eventually may fail its main objective which is to achieve value for money in government spending.

In addition, the findings could be used to improve the conditions and terms in the standard invitation to treat and instruction to tenderer. It is important because the Government of Malaysia through its various ministries, agencies and departments spend considerable sums of public money reaching billion of ringgit every year. For example, the Prime Minister announced in October 2010 that additional RM6 billion will be spent in providing basic infrastructure in Sabah and Sarawak for the 10<sup>th</sup> Malaysian Plan. As such, it is essential that no money and time wasted in the event of disputes arising from principal's use of discretionary power during the tendering process.

In the end, having a better understanding in the use of discretion and its application may lead to a better and efficient way of achieving the main purpose of calling for tender that is to facilitate the delivery of quality services and value for money in all government tender.

## **1.8 Organization of Thesis**

The objective of the study acts as a guide to direct the research approach, and as such, the topics of chapters reflect the relevant area of concern. The outline of the relevant chapters includes:

### **1.8.1 Chapter 1: Introduction**

This chapter is the proposal for the study. It contains the background of the problem, problem statement, the objectives of the research, scope of study, significant, methodology and the organization of thesis chapters

### **1.8.2 Chapter 2: Discretion**

This chapter will explore the basics of '*discretion*' such as its definition, its nature and several aspects relevant to it in order to have a general idea of its operation. We also seek as much as possible to find answers to questions as set out in the first chapter under problem statement.

### **1.8.3 Chapter 3: Tender Process**

The focus of this chapter is to put into perspective the importance of tendering within the whole process of project life cycle. We would examine the particulars of tendering process and its various elements so that the audience may comprehend the background setting on which the exercise of discretion may be carried out by the relevant contracting authorities who are the principal or employer in this study.

The essentials of tendering process such as its purpose, its legal aspects, the required information in its notice, various types of procurement forms and the type of work or services that can be tendered out. It is important to note here that tender process is not necessarily limited to construction process but it is part of the process that make daily routine possible. The law cases presented in this study will illustrate the varied scope of work or services being tendered out and how in administering tender process, discretion by the principal becomes a matter of dispute by the parties in contract.

#### **1.8.4 Chapter 4: Analysis of the case law**

This chapter will present the data and analysis to address the objective which has been formulated. Here, analysis will examine how the courts apply the relevant principles and to verify whether the law cases confirm the findings from literature review in Chapter 2.

#### **1.8.5 Chapter 5: Conclusion and Recommendation**

This chapter presents the recommendations and conclusions and suggests further research that is needed in the profile of construction disputes. It also addresses some implications of the research recommendations to the construction industry.

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