

# USE OF DISCRETION BY CONTRACT PRINCIPAL

MOHD ZAIDI BIN TUAH

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Mohd. Zaidi Tuah

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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.