The European Proceedings of
Social & Behavioural Sciences
EpSBS

Future Academy

ISSN: 2357-1330

https://dx.doi.org/10.15405/epsbs.2018.12.03.92

UUMILC 2017
9TH UUM INTERNATIONAL LEGAL CONFERENCE

PUBLIC LAW REMEDIES IN GOVERNMENT PROCUREMENT: PERSPECTIVE FROM MALAYSIA

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Abstract

Government procurement refers to a government entity contracting to purchase goods and services from commercial supplier for the consumption of the government itself. Due to the public nature of government, procurement rules and processes based on public law principles are applicable to such purchasing. The adoption of public law affecting government procurement has been recognized in other jurisdictions such as Singapore, India, Australia and United Kingdom. Furthermore, the legal jurisprudence in Malaysia on government's power to contract is restricted to private law has failed to provide legal remedies in government contracting. Public law has no place in government procurement as the court only recognizes the parties privy to the contract and not allowing any other party to challenge the contract. The paper examines the current public law remedies in government procurement available in Malaysia. The analysis is based on the statutory laws and available court cases on the issue of public law principles relevant to government procurement. The paper argues that despite the dearth of public law remedies on government procurement, there is generally a call for a study to include public law perspective to address possible remedies in government procurement in Malaysia. The outcome for the paper supports the enhancement of public procurement processes under the Malaysian Government Transformation Plan (GTP 2.0) and enhancing public sector services under the national agenda of Eleventh Malaysia Plan.

Keywords: Government Procurement, Public Law, Remedies, Judicial Review, Government Proceedings.

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Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

1. Introduction

Accountability is a central value in the public law sphere of the Malaysian governmental machineries. Government procurement involves large sums of public money and appears to raise important questions of accountability. In the context of this paper, accountability is taken to refer to the responsibility of government procurement authorities to justify all levels of decision making and to be answerable for making decisions that purportedly adhere to stated rules and policies.

Different kinds of accountability measures may be useful to tackle different types of problems. In addition to judicial or quasi-judicial proceedings, accountability can be achieved, for example, through access to information, and through non-judicial review mechanisms. Such non-judicial review mechanisms may involve scrutiny both internally and externally to the procurement authority. Rohana (2013) has suggested that to be fully accountable, a scrutiny system of government activities must be subject to complementary mechanisms of internal, administrative (independent of the original government actor) and judicial control.

2. Problem Statement

In Malaysia, governmental actions taken under legislative instruments are potentially subject to review by the courts. Governmental actions that are not taken under legislative instruments are typically not subject to legal scrutiny. However, there is uncertainty regarding the position of governmental actions based on 'quasi-legislation' in Malaysia (Rohana, 2013). The resolution of this uncertainty will impact upon Malaysia's capacity to develop the dispute resolution system as envisaged by the governmental authorities.

The Treasury rules administering government procurement procedures and processes are considered non-legislative instruments due to their internal administrative nature. However, the Treasury Instructions have also been argued to be a type of secondary legislation as provided under the Financial Procedure Act 1957. In the event such Treasury documents are considered as secondary legislation or in fact 'quasi-legislation', there is potential of public law review being applicable to try procurement disputes arising from infringement of such Treasury documents.

The question arose as to the accountability issue of government procuring entities purported to use Treasury documents as the basis to undertake government procurement procedure and processes. Whether their decisions and actions taken under the said documents can be subject to public law review is the concern of this paper.

3. Research Questions

1. What are the public law remedies in government procurement in Malaysia?
2. Whether public law rules are applicable to disputes relating to government procurement?

4. Purpose of the Study

The paper examines the current public law remedies in government procurement available in Malaysia. The analysis is based on the statutory laws and available court cases on the issue of public law principles relevant to government procurement. The paper argues that despite the dearth of public law

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remedies on government procurement, there is generally a call for a study to include public law perspective to address possible remedies in government procurement in Malaysia. The outcome for the paper supports the enhancement of public procurement processes under the Malaysian Government Transformation Plan (GTP 2.0) and enhancing public sector services under the national agenda of Eleventh Malaysia Plan.

5. Research Methods

The discussion in this paper has been carried out using a positivist doctrinal research method (Hutchinson, 2006). Doctrinal research is also known as 'theoretical, pure academic, traditional and conventional' research. Applying the research methodology of Professor Anwarul Yakin (2007), four research methods are used, namely: historical; jurisprudential and philosophical; analytical and critical; and comparative methods where possible.

The paper also relies on secondary sources including academic texts and journal articles that discuss the impact of the primary materials relating to the constitutional law, administrative law, law of contract and government procurement law.

6. Findings

This section discusses three dimensions of public law remedies in relation to government procurement in Malaysia: access to information; oversight mechanisms that are not of a judicial or quasi-judicial nature; and judicial or quasi-judicial oversight mechanism.

6.1.Access to information

Generally, when a procuring entity decides to procure goods and services from commercial suppliers, it needs to communicate the information about the procurement to the prospective suppliers. Access to adequate information is essential to ensure effective procurement.

In Malaysia, tender documents are classified as government documents. Government documents are categorised as either 'official public documents' or 'official secret documents'. Accessibility to government information and documents can be limited by certain legislative provisions. Government documents that are classified as 'official secret documents' are governed by the Official Secrets Act 1972. The definition of 'official secret' in the legislation is extremely wide and many government documents fall within its terms (Patrick a/l MG Mirandah v Ketua Pengarah Perbadanan Harta Intelek Malaysia [2006] 6 MLJ 142). Documents relating to government procurement can be 'official public' or 'official secret' documents depending on their classification by the empowered officials.

Information on the announcement of tender advertisements (quotation and open tender) is now generally available on the websites of procuring entities and My Procurement portal. Certain federal ministries such as the Ministry of Works and the Ministry of Finance also make advertisements of tender accessible online. However, detailed information and conditions regarding tender advertisements may only be accessible to registered contractors. Other than tender advertisements, there is generally no public access (Lim Kit Siang v Public Prosecutor [1980] 1MLJ 293 at 294) to any detailed information on

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specific government procurement in cases of direct purchase, quotation or open tendering in Malaysia (Procedure No. 34.1 of the Annexure 1 of the Treasury Circular Letter No. 5/2007).

In Malaysia, the public has no right to access government information and documents unless these materials are officially released and put into the public domain. The accessibility of documents relating to procurement is therefore hampered by the absence of statutory entitlement to information in Malaysia. This in turn restricts the right of aggrieved suppliers to obtain such documents for the purpose of challenging governmental decisions relating to procurement.

6.2.Oversights mechanisms that are not of a judicial or quasi-judicial nature

6.2.1. Internal review mechanism

The current procurement complaint system in Malaysia does allow for internal complaints although the complaints system appears to have been established for governmental purposes (i.e. to allow the Treasury Department to assess compliance with its procurement instructions) rather than to protect the interests of the aggrieved suppliers. An aggrieved supplier can lodge a complaint regarding procurement directly to the procuring entity itself. The particular procuring entity will review the complaint internally and decide, for example, whether to cancel the tender (if for instance, the complaint is about violation of tender rules in respect of specification tailored to a particular brand or product) and issue a fresh specification (http://www.treasury.gov.my). The decision following the review will normally be communicated to the aggrieved supplier. In the event the aggrieved supplier is dissatisfied with the internal review decision, there is a possibility of seeking review from a body external to the procuring entity.

6.2.2. External review mechanism

According to Professors McCrudden and Gross (2006), there is no specialised procedure for aggrieved suppliers to challenge procuring entities' decisions made under the Malaysian Treasury rules on government procurement. For monitoring and control purposes, there exists a mechanism whereby the Malaysian Treasury assesses whether or not there has been compliance with its procurement instructions. This mechanism is designed to allow the Malaysian Treasury to make sure that all other procuring entities obey the Treasury-issued procurement instructions (http://www.treasury.gov.my). It appears that the mechanism is not designed for the benefit of aggrieved suppliers.

Potentially, an aggrieved supplier in Malaysia may also lodge a complaint relating to procurement decisions with the Public Complaints Bureau, a government department under the Prime Minister's Office. The Bureau will investigate such a complaint and require the affected procuring entity to reply to the complaint. A report of the investigation is to be tendered to the Permanent Committee on Public Complaint which is chaired by the Chief Secretary to the Government. Even though the Bureau is not a specific oversight body for procurement, nevertheless it has a significant role in addressing public governance issues. Indirectly, breaches by procurement officials made while conducting government procurement processes could fall under its purview.

Another control mechanism external to the procuring entity is that administered by the office of the Auditor General. The *Audit Act 1957* empowers the Auditor General or his representatives to monitor and audit procurement procedures and to order corrective actions where necessary. Section 6 of the *Audit*

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Act 1957 provides that all government departments at federal and state levels are subject to audit scrutiny and compliance. The annual audit report is presented directly to the Agong. The role of the Auditor General, however, is to ensure probity in relation to the public finances and is not directly concerned with the protection of suppliers.

The Malaysia Anti-Corruption Commission (MACC) has power to investigate alleged abuses of power (corruption) by procurement officials and can initiate criminal proceedings under the *Malaysia Anti-Corruption Commission Act 2009*. The Public Accounts Committee of the Malaysian Parliament (PAC) also has power to institute investigation into any disputed financial status or accounts of government or government-linked projects including government procurement projects. The PAC examines the Auditor General's yearly reports and may summon government officials to appear before the PAC to clarify matters raised in the Auditor General's report. Again, the MACC and the PAC mechanisms are designed to monitor the internal affairs of the government including matters relating to procurement. These mechanisms do not, however, exist to allow aggrieved suppliers to protect their interests. The mechanisms exist to allow the Malaysian government to protect its own interests against corruption. However, it is possible for aggrieved suppliers to seek to protect their interests through proceedings commenced before the ordinary courts.

6.3.Judicial and quasi-judicial oversights mechanisms

6.3.1. Merits review

Malaysia does not provide for merits review of administrative decisions in procurement. Malaysia has not established a general tribunal system for reviewing the merits of government decisions impacting on citizens and others (Jain, 2011). The lack of a general quasi-judicial - administrative tribunal in Malaysia restricts Malaysia's capacity to provide to suppliers protection against unfair procurement decisions.

6.4.Judicial review

Judicial review is concerned with ensuring that those who exercise public power stay within the limits of that power and those subject to public duties are required to perform those duties (Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 at 148). Judicial review can be sought by persons aggrieved by decisions exceeding the limits of the public power conferred on the decision maker or where there has been a failure to perform public duties (Wan Azlan & Nik Ahmad Kamal, 2006). Judicial review involves the supervisory jurisdiction of the superior courts and can be contrasted to appellate jurisdiction. Judicial review most readily applies to statutory powers and duties (Wylde v Waverley Borough Council [2017] EWCH 466 (Admin); and Bailey, 2005); however, it would also appear to apply to non-statutory prerogative powers and duties (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, and R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170). The courts in Malaysia, however, have not developed the law of judicial review in the context of procurement (Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12; Cf Sim Siok Eng v Government of Malaysia (1978) 1 MLJ 15) in the same way as their English and Australian counterparts. There is, nonetheless, at least the potential for similar developments in Malaysia.

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On one view of public law, judicial review is only available where statutory powers and duties are involved. Exercises of private power, such as contractual power, are also said to be unreviewable relying on public law. Procurement power lies at the intersection of private law and public law. This is because procurement involves the combination of the use of contractual power to buy goods and services from commercial suppliers, whilst at the same time involving decisions to expend public funds made by governmental entities (whose powers are generally regulated by public law), where the expenditure of those public funds impacts upon interests broader than those of the contracting parties (Shell Canada Products Ltd v Vancouver [1994] 1 SCR 231 at 239-241).

The reviewability of procurement decisions relying on public law appears to depend on the prevailing view as to the basis for judicial review. The courts in different common law jurisdictions have identified different bases for judicial review. These have included the 'source' of power (, the 'nature of power', the 'function' of the decision-making body, and whether there is a 'justiciable matter'. Public law in common law jurisdictions (including Malaysia, Singapore and Australia) appears to still be in the process of development (Parker, 2017; Browne, 2017). This development, in Australia (as in England), has already recognized the application of public law to procurement decisions (for example the Government Procurement (Judicial Review) Bill 2017 (Australia)).

Order 53 of the Rules of Court 2012 provides the procedural law governing an application for judicial review. The remedies regulated under the rule are the prerogative orders of habeas corpus, mandamus, prohibition, quo warranto and certiorari (public law remedies), and, in appropriate circumstances, declarations, injunctions and damages (private law remedies).

In the context of applying for judicial review in relation to procurement, two procedural issues appear to be relevant under Order 53, namely the status of the procuring entity and the standing of an aggrieved supplier in respect of decisions taken by the procuring entity.

According to Order 53 r 2(4) any person who is adversely affected by the decision of a 'public authority' shall be entitled to apply for judicial review. The term 'public authority' has been addressed by the Malaysian courts, for instance in Tang Kwor Ham & Others v Pengurusan Danaharta Nasional Bhd & 5 Others [2006] 5 MLJ 66, the Court of Appeal decided that Danaharta was financed by public funds and that the affairs of Danaharta were under the control of the Minister of Finance, representing the federal Government. Furthermore, the powers of Danaharta were, apart from its Memorandum of Association, governed by a statute, the Pengurusan Danaharta Nasional Berhad Act 1998. Hence, Danaharta was held to be a type of 'public authority' within paragraph 1 of Schedule to the Courts of Judicature Act 1964 (Malaysia) and, accordingly, it was amenable to judicial review. The court held that decisions made under the Danaharta Act were decisions of a 'public authority' and therefore fell under the old O 53 r 2(4) of the High Court Rules 1980.

There is also Malaysian authority in support of a 'functional' approach to determining the scope of judicial review. The Court of Appeal in England held in 'Datafin' that where a body performs a public function, it will be potentially subject to judicial review (R v Panel on Takeovers and Mergers, Ex p. Datafin plc [1987] 1 QB 815). The principle in Datafin has been cited without disapproval by the Malaysian courts (Petaling Tin Bhd v Lee Kian Chan [1994] 1 MLJ 657; Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange & Another [1988] 1 MLJ 174).

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On the issue of standing, the definition of 'a person who is adversely affected' has been recognized in the case of QSR Brand Bhd v Securities Commission ([2006] 3 MLJ 164). In this case, the Court of Appeal has taken a flexible approach to define the phrase 'adversely affected' to mean an applicant must fall within the factual spectrum that is covered by those words. At the one end of the spectrum, which is reviewable, the applicant shows that he has sufficient personal interest in the legality of the alleged action (Watt, 2017). At the other end of the spectrum, the court may disregard the case as de minimis because the link between the applicant and the legality of the challenged action is weak.

In the context of procurement, decisions of procuring entities appear to involve a balancing exercise between various interests affected by procurement and an aggrieved supplier (obviously not the successful supplier). On any analysis, however, an aggrieved supplier can be described as a person who is 'adversely affected' by a procurement decision.

Based on the above authorities and the relevant statutory context, it appears that the Malaysian courts have jurisdiction to review governmental decisions that exceed statutory powers or fail to follow mandatory statutory procedures (Jain, 2011). There must, in other words, be some form of legal error. Judicial review is not available in Malaysia to review the merits of a decision (Tanjung Jaga Sdn Bhd v Minister of Labour and Manpower [1987] 1 MLJ 125). In Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1984] 1 MLJ 363, 371, the Federal Court of Malaysia emphasized that '[a] clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.'

The rules of natural justice have also been invoked in Malaysia as a ground in determining the legality of governmental decisions (National Land Finance Cooperative Society Ltd v Ketua Pengarah Hasil Dalam Negeri [1998] 4 CLJ Supp 232). The common law principles of natural justice (right to be heard and rule against bias) have evolved into a wider concept of 'procedural fairness' in Malaysia (Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308, 315). The Malaysian courts have introduced procedural fairness as a ground of judicial review (Lembaga Jurutera Malaysia v Leong Pui Kin (2008) 2 CLJ 466). According to Kamal Halili (2006) the concept of procedural fairness in Malaysia has been developed by taking into consideration the constitutional principles entrenched in the Federal Constitution (Malaysia). It appears that the exercise of procurement powers could also be reviewed by the courts on the ground of failure to accord procedural fairness (Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 145).

Judicial review in the context of procurement appears most likely in Malaysia in cases where a procuring entity has failed to follow procurement procedures set out in legislation or subsidiary legislation. The Financial Procedure Act 1957 specifically gives power to the Finance Minister of Malaysia to issue Treasury instructions that dictate the financial and accounting procedures to be applied by government departments and entities both at federal and state levels. According to s 4 of the statute:

Every accounting officer shall be subject to this Act and shall perform such duties, keep such books and render such accounts as may be prescribed by or under this Act or by instructions issued by the Treasury in matters of financial and accounting procedures not inconsistent therewith: Provided that a State accounting officer shall in addition be subject to any instructions of the State financial authority not inconsistent with the foregoing.

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Section 3 of the Financial Procedure Act 1957 (Malaysia) defines an 'accounting officer' to include:

Every public officer who is charged with the duty of collecting, receiving, or accounting for, or who in fact collects, receives or accounts for, any public moneys, or who is charged with the duty of disbursing, or who does in fact disburse, any public moneys, and every public officer who is charged with the receipt, custody or disposal of, or the accounting for, public stores or who in fact receives, holds or disposes of public stores.

'Public stores' has been defined as meaning 'chattels the property of or in the possession or under the control of the Federation or of a State' in Malaysia.

Treasury instructions have been created that spell out detailed procurement procedures to be applied by procuring entities at both the federal and state level. These include the requirement for creating procurement boards within federal and state procuring entities, tender conditions, the process of tender and quotation, and tender publication (Malaysian Treasury Instructions, 2007). A failure to follow such procedures would appear to be a violation of the obligations contained in section 4 of the Financial Procedure Act 1957. Whilst there is no direct judicial authority on point, such a failure could potentially form the basis for judicial review proceedings in Malaysia. Against this, one can contrast the developments in other common law jurisdictions which allow for judicial review where there has been a failure to follow statutory procurement procedures (Arrowsmith 1988; Seddon, 2009; Bailey, 2015).

A major difficulty in the context of judicial review of procurement in Malaysia arises where there is no statute or subsidiary legislation setting out procurement obligations for procuring entities. In such cases, the question arises whether the existence of quasi-legislation (non-statutory) governing the process and procedures of procurement in Malaysia can be relied upon as a basis for judicial review.

During the course of a tender process, a procuring entity may fail to follow advertised procedures or may fail to act fairly as between different tenderers. A tender committee might exclude a certain tenderer from submitting its tender document. A procurement board might apply selection criteria that are not provided for in the tender advertisement. A procurement contract might have been awarded to a contractor that failed to fulfil the requirements of the tender documents. These types of tender processes may be specified in quasi-legislation. There have been no cases in Malaysia where a court has determined that failure to follow tender procedures set out in quasi-legislation could provide the basis for successful judicial review.

According to Rohana (2013) in Malaysia, Treasury circulars relating to government procurement are arguably 'quasi-legislation'. It is apparent from the text of these circulars that they are formal in the sense that they set out procedures that all procuring officials at federal and state governments are to follow. The consequences under public law of a procuring entity's failure to follow procurement procedures set out in a Treasury circular are unclear. This field of law is still underdeveloped (Bari, 2002).

It is arguable if the conduct of the procurement process generates legitimate expectations about the way the process will be followed and the steps to be taken by the procuring entity, then it is possible for a challenge to be brought where the procuring entity has departed, for example, from the advertised or announced procurement rules or procedures. Despite the non-statutory basis of these rules or procedures,

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public law principles may still operate to review such administrative decisions which effectively fall under the prerogative or common law powers of the government.

According to Jain (2011), 'since directions are issued under administrative power, they should be subject to judicial review on such grounds on which a discretionary decision may be judicially reviewed.' The English case of Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC 112 where the Law Lords were confronted with the issue of reviewability of a decision made under guidance (a type of quasi-legislation). The guidance concerned was issued by the Health Authority to medical practitioners. The question arose as to whether decisions taken by medical practitioners based on the said guidance are subject to review. Some of the Law Lords were of the view that guidance was purely advisory, having no statutory force so it was not subject to judicial review. Other Law Lords stressed that judicial review would extend to decisions under guidance.

The Gillick case has been referred to (with approval) in Malaysian cases (Government of Malaysia v Lim Kit Siang [1988] 1 MLJ 50; R Rama Chandran v The Industrial Court of Malaysia & Another [1997] 1 MLJ 145; Tan Kheng Guan v Pendaftar Hakmilik Johor: Teo Ah Bin (Intervener) [2000] 8 CLJ 593; and Prudential Assurance Malaysia Bhd. v Government of Malaysia [2003] 6 CLJ 28). In light of this view, there appears to be at least the potential for judicial review in Malaysia to challenge the procurement decisions of the executive on the grounds that they have failed to follow quasi-legislative circulars. It can be argued that procurement decisions are discretionary decisions made by procuring entities exercising general administrative power, and failure on the part of the procuring officials to follow quasi-legislation in their decisions can be subject to review.

As noted above, the High Court can issue orders in the nature of the prerogative writs. If judicial review is available in respect of procurement decisions, then the High Court would possess the power to quash a procurement decision relying on the remedy of certiorari and could prevent the continuation of a procurement process with the remedy prohibition. Declaratory relief sought via Order 53 of the Rules of Court 2012 may also be available. Although s 29 of the Government Proceedings Act 1956 provides that no injunctive relief is available against the government in legal proceedings, it appears that this exclusion does not extend to judicial review proceedings (Wan Azlan & Nik Ahmad Kamal, 2006). In the context of procurement, it therefore appears that interim measures in the form of an injunction may be available to an aggrieved supplier that is bringing a public law challenge to a procurement decision.

7. Conclusion

The current state of public law mechanism in Malaysia with respect to challenge in government procurement appears to be underdeveloped and has potential to be explored by the courts. In order to gain respect for rule of law, the Malaysian government, in particular the Treasury department under the Ministry of Finance, must embrace public law principles in controlling and maintaining fair and non-discriminatory procedures and processes of government procurement. The aggrieved suppliers in any tender competition have legitimate expectations that their bids are fairly evaluated and assessed based on their qualification, track record and capability to deliver the desired result out of the procurement exercise.

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Acknowledgments

Authors would like to thank the Ministry of Higher Education Malaysia and Universiti Utara Malaysia for funding the study under the Fundamental Research Grant Scheme 2016-2018)

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