LEGAL ISSUES IN TENDERING PROCESS: A CRITICAL ANALYSIS OF THAI LAW AND FOREIGN LAWS*

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Abstract

The general requirement for considering a contractual formation is inevitably the offer and acceptance approach. In some cases, such approach causes some hardship in providing legal protection for the parties in the tender process. Thai courts have dealt with the contract's formation to explain the legal relationship between owner and tenderers. The courts refer to the tender process contract as the legal ground to forfeit the bid guarantee and claim damages. However, it appears that the courts grant legal protection to the owner rather than the successful tenderer by stating that there is no principal contract.

In this article, a comparative study is conducted on how other countries dealing with this specific case because of the problem. Each selected country takes a different approach in dealing with the case. Canadian legal system solves the problem with the two-contract approach, while the German legal system deals with the *culpa in contrahendo* principle. Last but not least, the Scots legal system takes a different path with the promise principle.

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Each studied approach may face theoretical problems in the Thai legal system. This article finds that the Thai court may apply the foreign legal practices or may observe some principles in the Thai Civil and Commercial Code that may solve the case, especially the promise principle.

Keywords: Tender Process, Promise, Pre-contractual Liability, Formation of Contract, Prize Competition

1. Introduction

This article aims to study the problem in the area of private law. In the area of public law, the administrative court has the power to observe the tender process for example the concession contract. The issues are whether the discretion of the public officer to reject the tender is against the law or not. The court has no difficulty to legally characterize the tender process because there is the law govern to this case[1]. While in private law, the court has to find what is the relationship between the person who made an invitation to tender ('owner') and the person who submit the tender ('tenderer').

The tender process is usually a process to procure a suitable contractor to perform the task relating to the awarded contract ('principal contract'). Usually, the tender process consists of the announcement of invitation to tender, the submission of tender document, negotiation process, the announcement of the successful tenderer and the last is the conclusion of the principal contract. The first step is to announce the invitation to tender in order to attract the interested tenderers to participate by submitting the tender documents. The tender documents shall be subject to conditions prescribed in the invitation to tender. After consideration, the owner shall announce who gets the contract. The last stage is the signing of the principal contract between the owner and the successful tenderer.

Most of the cases decided by Thai courts usually involve the last stage. The tenderer or the owner refuses to sign the principal contract. The problem is whether Thai courts can grant the damages to the suffered parties on which legal ground. The courts then deals with the tender process by stating that the tender process may create the legal obligation by means of contract ('process contract'). However, the courts face the theoretical problem with the formation of process contract. In addition, the

[1] The Decision of Thai Supreme Administrative Court no. 1/2563 (2020 A.D.). This contract was regulated by the public and private partnership B.E. 2556 (2013 A.D.)

courts grant the damages to the owner solely. The successful tenderer cannot claim the damages on the ground of process contract. The court reasons that the damages claimed by the tenderer resulting from the principal contract. However, the principal contract does not exist because of section 366 paragraph 2 of the Thai Civil and Commercial Code ('CCC'). Therefore, the tenderer cannot be claimed any damages on the ground of principal contract. It is interesting that the court does not analyze whether the tenderer may claim the relevant damages according to process contract as same as the owner do.

2. The legal characteristics of the tender process under Thai laws

As mentioned earlier, the court takes a contractual approach to legally characterize the tender process. The tender process contract is mentioned first in the Decision of the Thai Supreme Court no.931/2480 (1937 A.D.). Although the court did not analyze the formation of the process contract, the court refers to the process contract as a ground for forfeiting the bid guarantee. This remarkable case set the standard for the Thai court for dealing with the tender process.

The formation of a contract in Thai legal system is based on the offer and acceptance approach. The courts have to analyze whether the invitation to tender is an offer or not. The court decides that if the invitation to tender has the condition prescribed that the person who made the invitation to tender may cancel the tender process, or shall not be bound to establish the contract with the lowest tender or any person who submitted the tender[2]. As a result, the invitation to tender is considered as an invitation to treat. With this analysis, the submission of a tender document is considered as an offer and the announcement of a successful tenderer is an acceptance.

[2] The Decision of the Thai Supreme Court no. 2811/2529 (1986 A.D.), The Decision of the Thai Supreme Court no. 3249/2537 (1994 A.D.).

The question is whether offer and acceptance create the process contract or the principal contract. The process contract in this case is not actually established because the formation of a contract in this scenario is the principal contract. However, with the presumption of an unestablished contract in section 366 paragraph 2 of CCC. The principal contract is not concluded until the contract is in the written form.

The problem will arise when the successful tenderer denied to sign the contract or the owner cancels the tender process without specific reasons before the principal contract is concluded. Therefore, neither process contract nor principal contract does exist. As such, the person who made an invitation to tender may cancel the tender process without any liability or breach of contract even there is an announcement of a successful tenderer in case that the principal contract is not yet in written form[3].

2.1 The process contract and bid guarantee

Regarding the formation of the contract, Sotthibandhu[4] explained that the tender process contract could be considered in two ways. First, if an invitation to tender is not certain enough to be an offer, then the submission of tender documents will be considered as an offer made to a person who made an invitation to tender. The notice to award the contract that is recognized by the successful tenderer will be considered as an acceptance. As such, the principal contract is established, not a tender process contract.

However, most of the tender shall contain the condition that the awarded tenderer has to enter the contract with the owner in the written form. The principal contract is not valid until the contract was signed in written form, according to section 366 paragraph 2.

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[3] The Decision of the Thai Supreme Court no. 3550/2526 (1983 A.D.).

[4] Sanunkorn Sotthibandhu, Lak Kwam Rub pid Korn Sanya [หลักความรับผิดก่อนสัญญา] (3rd edn, Winyuchon 2005) 158 (ศนันทกรณ์ (จำปี) โสตถิพันธุ์, หลักความรับผิดก่อนสัญญา (พิมพ์ครั้งที่ 3 วิญญูชน 2548)) 158.

Second, if an invitation to tender is satisfied enough to consider as an offer of the tender process contract, it could be deemed that such an offer contain another invitation to treat for the principal contract. To be an offer, the courts have to examine the content of the invitation to tender. For example, the undertaking clause such as the condition to accept the lowest tender without the right to accept or to not accept any tenderer. If there is enough certainty, the invitation to tender shall be considered as an offer. In this scenario, submission of the tender document will be considered as acceptance for the tender process contract and also be an offer for a principal contract. The next question is whether the process contract is existed only for the owner or the successful tenderer?

The Thai court did not set the criteria when the tender process contract exists. The court refers to the liability clause prescribed in the invitation to tender as it is the tender process contract. Most of the liability clause shall provide the condition that if the tenderer fails to enter the contract with the owner or revoke his tender before the announcement of the tender, then, the tenderer has to pay the damages. In this sense, a process contract is established according to the liability clause[5].

Tingsabadh[6] has an annotation on this decision by explaining that the tender process contract should not exist because the obligation of the parties to sign the contract is not enforceable.

The suitable way for considering the tender process contract is to be as a stipulated penalty according to section 383 of CCC. Sotthibandhu[7] further analyzes Tingsabadh's comment that the parties both agree to sign the contract in written form, according to section 366 paragraph 2 of CCC. As long as the contract is not signed, the contract is not established. As such, the creation of a tender process contract is not useful as it is unenforceable for both parties to sign the contract.

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[5] The Decision of the Thai Supreme Court no. 320/2522 (1979 A.D.)

[6] Sanunkorn Sotthibandhu (n 4) 158

[7] Ibid

The court explained that the tender process contract would be established when the tenderer acknowledges that he won the contract. In contrast, Thai scholars explained that there is no tender process contract between tenderer and owner. However, the result of a different opinion generates the same result as the compensation to the owner is to forfeit a bid guarantee. Besides, there is no Supreme Court Decision to enforce the parties for concluding the contract. One of the reasons is that the damaged parties also claimed only the damages, not for the signing of the principal contract.

Apart from the process contract, the bid guarantee is one of the devices to ensure that certainty for each tenderer that they will not revoke the tender document and the tenderer who won the contract shall enter the contract with the owner. The status of the bid guarantee is depended on the legal status of the tender process. If the court considered there is the tender process contract, then, the bid guarantee shall be earnest. If not so, the bid guarantee will be considered as a stipulated penalty according to section 383 of CCC.

The court still rules that even the principal contract is not established; however, the person who made an invitation to tender may forfeit a bid guarantee, if the person who submitted the tender breaches the condition prescribed in the invitation to tender[8].

2.3. The process contract's obligation and the relating damages

Although the Thai court analyzes the tender process as a process contract, the court still does not describe the obligation according to such a contract. The court only deems a tender process contract to be the ground for the forfeit of bid guarantee. Besides, the owner may claim the damages for the different prices. However, such conditions shall be written in the

[8] The Decision of the Thai Supreme Court no. 1943/2542 (1999 A.D.).

invitation to tender[9]. Without such a condition, a person who made an invitation to tender can not claim such damages[10].

Moreover, the court also further decides that the damages resulting from the breaches of contract, such as the damages for preparing tender documents for another bidding, the consultant cost, and the damages for the delay, are the damages directly from the principal contract, not a process contract. As such, even there is a breach of the process contract, such damages can not be claimed[11].

There is a controversy between the view from the court whether the damages from the different price comes from the principal contract or a process contract. In the first case[12], the court decided that such a different price is the damages resulting from the principal contract. Therefore, when the principal contract is not established, the plaintiff cannot claim such damages. There is one case[13] the court decided that even the conditions to claims such damages contained in the invitation to tender, the court cannot grant the damages. However, it seems the court accept the first case by stating that the damages can be claimed if the invitation to tender prescribed so and called such conditions as the process contract[14].

In conclusion, the element examined by the court whether the process contract exists is the liability clause prescribed in the invitation to tender. However, this tender process contract in this sense should be the stipulated penalty rather than the actual contract. With this result, the one who only has the benefit is the owner while most of the cases, the tenderer cannot claim any damages prior to the conclusion of the principal contract.

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[9] The Decision of the Thai Supreme Court no. 320/2522 (1979 A.D.) and no.1943/2542 (1997 A.D.).

[10] The Decision of the Thai Supreme Court no. 581/2523 (1980 A.D.).

[11] The Decision of the Thai Supreme Court no. 5486/2536 (1993 A.D.)

[12] The Decision of the Thai Supreme Court no. 931/2480 (1937 A.D.)

[13] The Decision of the Thai Supreme Court no. 1418/2529 (1986 A.D.)

[14] The Decision of the Thai Supreme Court no. 1943/2542 (1997 A.D.) and no. 8194/2543 (2000 A.D.)

Principally, the unsuccessful candidate can not claim damages, which are the purchase of tender document, operation cost, legal advisory cost because the person who submits the tender is aware that he or she may or may not win the bid. Apart from the expected damages, in some cases, such as bid-rigging, unfair cancellation of the tender process, the tricky tender process for acquiring the trade for confidential information, or trade secret, the unsuccessful candidate may suffer unexpected damage. In this case, Sotthibandhu[15] proposes that the unsuccessful candidate may claim the damages as a pre-contractual liability. Another approach to this case is to claim under tort law.

However, it is quite hard to prove whether the parties willfully or negligently as the burden of proof is fall upon the claimant. It is undeniable that negotiation is the freedom of both parties, especially both parties, who are free to end the negotiation at any time. As such, it is questionable whether ending the negotiation is unlawfully or not. Also, the application of tort law in Thailand may face the problem because the meaning of unlawfully acting as prescribed in section 420 of CCC did not cover the area of the pre-contractual phase. Besides, the right protected according to section 420 is an absolute right, which is the right involve in health, body, freedom, and property[16]. Whether the freedom of contract as to ending the negotiation shall be included in the absolute right is still left to be questioned.

For all the above reasons, the court does not define the process contract as a bilateral contract that binds the tenderer and the owner. The court applies the principle of stipulated penalty that the tenderer agrees to pay the compensation if he breaches the condition prescribed in the invitation to tender. The question is that if the process contract actually exists, what the legal obligation between the parties is.

[15] Sanunkorn Sotthibandhu (n 4) 162-164.

[16] ibid200.

2.4 Prize competition and tender process

The prize competition contains the condition specified by the method and the decision-maker to decide who will win the prize. Prize competition also requires a specified period of time for entering the contest, which differs from the promise of reward. Without a specified period of time, the prize competition is invalid, according to section 365. The prize competition shall be effective when such promise is announced publicly[17].

The invitation to tender generally specified the evaluation method, the period of time for submitting the tender, and also the decision-maker is the person who made an invitation to tender. In addition, the invitation to tender has to be announced publicly, and the person who made an invitation to tender agrees to perform the duty, which is to award the principal contract.

Therefore, the invitation to tender should be considered as aprize competition when such an invitation to tender is announced to the public. The person who made an invitation to tender undertakes to legally bound to every contestant that submit the qualified tender document on a specified period of time. The main condition is that only one contestant shall gain the prize by the method prescribed in such an invitation.

3. The foreign legal perspective of the tender process

3.1 The two-contract approach

The Common law system recognizes that the tender process, in some situations, creates the legal obligation. The unilateral contract in English law is introduced to protect the party's right to some degree that a person who submits the tender has the duty to not withdraw the tender before the specified time and date as prescribed in the invitation to

[17] Sanunkorn Sotthibandhu (n 4) 303.

tender[18]. From that point, the court also finds the solution to deal with the invitation to tender by imposing the implied duty for a person who made an invitation to tender for considering the tender fairly and equally.

The Canadian legal system takes a contractual obligation approach by establishing the process contract[19]. This approach is to create the precedent contract (Contract A) in which the obligation of both parties before the conclusion of the principal contract (Contract B). The condition of the Contract A depends on the condition prescribed in the invitation to tender. Usually, the tender procedure, evaluation method, submission date and time, bid guarantee, indemnity clause, and other conditions will be contained in the invitation to tender. New Zealand and Australia's legal system also apply the two-contract analysis to the tender case in which the consideration doctrine in particular.

It could be concluded that the first factor to consider the tender process contract is whether the tender documents conform with the invitation to tender. After the first criteria pass, then, the court will consider the condition of the tender process. For example, the evaluation process, the requirement for submitting the bid deposit, the correspondence between the tenderer and the tenderer regarding the evaluation criteria, and the bidding process's complexity[20]. The purpose of those mentioned factors is to consider whether the tender process has the intensity for binding both owner and tenderer or not. If so, then, the process contract is established with both parties' duty to oblige the condition set in the invitation to tender. if there is a breach of the process contract, both parties can claim damages based on the process contract.

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[18] *Harvela Investments Ltd v. Royal Trust Company of Canada (CI) Ltd* [1986] AC207 and *Blackpool and Flyde Aero Club v. Blackpool Borough Council* [1990] 1 WLR 1195

[19] *Ontario v. Ron Engineering & Construction (Eastern) Ltd* (1997) 146 ALR 1 (FCAust) and *Martel building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 SCR 860

[20] Ronald W Craig, 'Controversial Aspects of Commonwealth Construction and Engineering Procurement Law' (DPhil, Loughborough University 2000) 218.

3.2 The pre-contractual liability

The concept of *culpa in contrahendo* is based on the duty of care between parties before they entered the contract. Before the reformation of Burgerliches Gesetzbuch (BGB) in 2002, this duty is considered an implied duty between parties[21]. Such an implied duty is based on the ground of the good faith principle. To clarify, the duty of care is about the duty to protect other parties' rights and interests before the conclusion of the contract. If one fails to perform the duty, such as the disclosure of the essential information that affects the contract, such a party is liable to other parties. This duty of care is now prescribed in section 311(2), which refers to section 241(2).

The German legal system recognizes the concept of negotiation that both parties may end the relationship any time before the conclusion of the contract, which may result from the change of scenario such as the change of cost, profit. However, such freedom will be restricted if one of the party convince another party that the contract will be concluded or one of the party fails to inform some situation that might affect to the conclusion of the contract to another party. Therefore, it breaches the duty to break off the negotiation[22].

In the author's view, it could be explained that the negotiation process between a person who made an invitation to tender and a successful tender is protected by the duty of care by section 311 (2) and 241(2). Interestingly, the application of section 241(2) may be interpreted in the broad sense as it prescribed that the obligation depends on the content, which means that the obligation between the person who made an invitation to tender and the person who submit the conformed tender is depended on the condition prescribed in the invitation to tender as the

[21] Xiao-Yang Li, 'The Legal Status of Pre-Contractual Liability: Contrasting Response from German and English Law' (2017) 12 NTU L Rev 127, 143-144.

[22] Hein Kotz, *European Contract Law* (Gill Mertens and Tony Weird trs, 2nd edn, OUP 2017) 37.

section 311(2) prescribed that the duty of care come to existence by the initiation of a contract[23].

Besides, the submission of tender documents is considered the beginning of the pre-contractual obligation between the person who made an invitation to tender and the person who submitted the tender[24].

The compensation for breaching section 241(2) is prescribed in section 280(1), which grants the damages for the damage that comes from such breach of duty. Moreover, if the requirement in section 280(1) is satisfied, the party may also claim the damages due to performance if it can be seen that such duty of performance cannot be fulfilled.

3.4 Promise approach

Apart from the *culpa in contrahendo* principle, there is the case that the court applies the promise principle to the prize competition, which has an element as same as the invitation to tender[25] as it is the prize competition. The fact for this case[26] is that the defendant made an architectural competition with the DM 22,000 prize for the winner. Two qualified contestants submit the product on time. However, the defendant error rejects the contestant on the ground that he submit lately. It turns out that the court decided that there is a contractual duty, according to section 661 of BGB. Therefore, the defendant breaches the duty to perform competition impartially.

The promise principle, under Scots law, itself can be considered as the unilateral obligation. This unilateral obligation is recognized in Scots law, and it is enforceable, which differs from English law. A promise creates an obligation to the promisor to perform what he undertakes. Failures to do so,

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[23] J Cartwright and M Hesselink (eds) *Precontractual Liability in European Private Law* (Cambridge University Press 2009) 289.

[24] BGH [1998] NJW 3636 at 3636 citation from Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC - A Guide for Practitioners* (Springer-Verlag Berlin Heidelberg 2010) 96.

[25] Hein Kotz (n 22) 35.

[26] BGH 23 Sept. 1982, [1983] NJW 442.

the promisor will be liable and may be sued for enforceability of the obligation from what he promised.[27]

The Scots law recognizes the tender process's legal characterization into two types, depending on the condition prescribed in the invitation to tender. One is an offer, and another is a promise. However, the result from the contract approach or the unilateral obligation approach produces no different outcome. Also, the unilateral obligation concept does not face the theoretical problem like an English law that applies the unilateral contract. The damages also can be claimed on the ground of breaches of contract or promise.

4. The analysis of a suitable approach for Thai law

4.1 Two-contract approach

When observing the two-contract approach as introduced in the Canadian case, this approach is to create Contract A to set the obligation between the owner and the successful tenderer before the conclusion of Contract B. So the proposal is that the invitation to tender may constitute the process contract depending on the complexity of the tender process.

The question is whether the actual tender process contract can be established under Thai law or not. When considering the offer and acceptance approach, the invitation to tender contains the conditions that both owners and tenderers have to follow. Therefore, it is certain and precise enough. In the author's opinion, the invitation to tender is the offer made to the public, and the tender process contract should be established when submission of tender documents and binds to every candidate that submit the qualified bid. The obligation between the parties is to follow the conditions in the invitation to tender. Both parties of the tender process contract must oblige with the condition prescribed in the invitation to

[27] David M Walker, *The law of Contracts and related obligations in Scotland* (2nd edn, Butterworths 1985) 24-25.

tender. If the owner breaches of such duty, therefore, the person who submits the tender should claim the damages by the general obligation of law.

The next question does the obligation to enter the principal contract is existed or not. As mentioned, the Thai court does not mention the duty to enter the principal contract in the process contract. Tingsabadh and Sotthibandhu believe that both parties cannot force each other to conclude the contract. In the author's opinion, the nature of the tender process is also to select a suitable candidate in which the qualification is prescribed in the invitation to tender; therefore, the essential factor for the whole tendering process is the party's qualification. Thus, the specific performance for entering the contract cannot be enforced. The only option for both parties is to receive compensation for the loss.

The duty to enter the principal contract did not exist because the principal contract did not exist according to section 366 paragraph 2, and that is why the court also struggles to grant the damages to the parties when it appears that there is no contractual obligation between the parties[28]. Besides, it is a remarkable aspect to consider if the court can force the parties to enter the principal contract by the ground of the process contract while the parties refuse signing the contract. That decision shall interrupt section 366 paragraph 2 as both parties already declare the intention to make a contract in written form. The enforceability of the process contract to sign the contract will nullify both parties' intention that the parties have to enter the contract in the written form.

In some cases, the court further analyzes that if there is any action according to the contract, such as the land handover without the signing of the principal contract. The court interprets that the party deems to agree to omit the condition to signing the contract in a certain period because there

[28] Nattiya Tontrakulwanit, Panha Thangkotmai Reung Nhikornsanya [Legal Problems of Precontractual obligation] (Masters of Law Degree Thesis, Chulalongkorn University 2018) 164 (นัฐติยา ต้นตระกูลวาณิชย์ ,ปัญหาทางกฎหมายเรื่องหนี้ก่อนสัญญา) (วิทยานิพนธ์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย 2561)) 164.

is a specific performance to hand the areas to be protected by other parties. The court explained that other damages could be claimed (if any)[29]. It is quite controversial because that appears the principal contract is already concluded without mentioned the process contract.

4.2 Prize competition

The concept of unilateral obligation, observing from the Scots law, is that only the promisor binds himself solely to perform what he undertakes. Therefore, the prize competition binds only the owner in the condition to award the contract to the tenderer who passing the condition set in the invitation to tender.

One of the benefits for application of the prize competition in the tender process is to grant the legal protection in the case where the person who is the winner of the tenderer wishes to claim the damages for the breaching of the condition as prescribed in the invitation to tender especially in the case where there is a cancellation of tender process at the time when it appears that the contestant is the winner.

Apart from that, the successful tenderer may claim the damages when there is a breach of the condition of the invitation to tender by the person who made an invitation to tender. Moreover, the court may apply to grant the damages to compensate when the owner denied signing the contract without any proper reason.

If the successful tenderer denied to sign the contract, the owner still recovered the loss from forfeiting the bid guarantee and also claim the damages according to the indemnity clause. Moreover, the owner can ask the second tenderer to enter the principal contract. Therefore, the promise principle balances the right and the duty between owner and tenderer more than two contract approach.

[29] The Decision of the Thai Supreme Court no. 6828/2557 (2014 A.D.)

4.3 Pre-contractual liability

Another approach that is worth considering for applying to the tender process is the *culpa contrahendo* or the pre-contractual liability. There is no *culpa in contrahendo* directly prescribed in the Thai legal system; it is the presumption that the Thai legal system did not recognize such a doctrine. the *culpa in contrahendo* can be used in Thai law in the form of the general principle of law. While the good faith principle did not create the obligation, however, it can apply to the case in order to be a tool for reviewing whether the parties exercise his right in good faith or not. Another way is to amend the Civil and Commercial Code to codify the concept of *culpa in contrahendo*.

If the court applies the *culpa in contrahendo* principles to the case. This application would generate a reasonable outcome as the submission of tender creates the duty of care to all the parties. The court, then, has the power to observe the circumstance in order to protect the interest of the parties. However, as mentioned earlier regarding the acknowledgment of such principle, the court may find the hardship to apply section 5 to the tender process because if the court confirms that there is no tender process contract between the parties, as such, how would the court apply section 5 to the case when there is no legal ground. However, if the court perspective changes to acknowledge the tender process contract or the prize competition according to the author's proposal. It would generate a better result.

5. Conclusion

To conclude, the two contract approach, the prize competition approach and *culpa in contrahendo* approach has the advantage and disadvantage depending on each scenario. The two contract approach established the firm contractual relationship between the owner and the tenderer but faced problems regarding the formation of a contract and the duty to enter the contract. The prize competition generates a better outcome in the circumstance that the owner denied signing the contract as

the duty to sign the contract can enforceable on the ground of prize competition. The *culpa in contrahendo* covers the case where there are breaches of the duty of care, which including the scenario where the owner acts in bad faith. However, such a concept still faces the main problem regarding the acknowledgment of such a principle in the Thai legal system because this concept did not prescribe in the statute law.

When compared with the criteria specified above, the prize competition still is the preferable approach because it does not face the theoretical problem regarding the offer and acceptance approach and duty to enter the contract. At the same time, it is arguable that the court has no case that is decided in the area of prize competition to the tender process while the court already acknowledges the tender process contract. This reason is sound; however, when considering the damages concept and section 366 paragraph 2, the court still finds the hardship to consider the tender process contract as to be the ground for claiming the damages, especially the damages relating to the duty to enter the contract. The suggestion to amend the CCC by adding the concept of *culpa in contrahendo* is quite interesting as it is the direct concept dealing with the pre-contractual phase. The author is not against that suggestion; however, it is more proper to apply the specific law that governs this case, which is the prize competition or the two-contracts approach rather than the general principle of law, which in accordance with the Thai legal jurisprudence.

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