

Contractor's mistakes during tendering

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Abstract. The occurrence of overrun in cost and time in a project that is usually caused by contractors, will generally make people put the blame on them. This happens as a result of the lack of knowledge possessed by the contractors in determining the solution to be undertaken due to their mistakes, especially when it comes to tendering process as what had happened in the cases that were reported in Supreme Court of Canada. This paper aims to identify the types of mistakes, factors that contribute to the mistakes and the responsiveness to the mistakes so that the contractor will be able to manage and control the mistakes, as well as the solution, along with preventing them from happening, and in making decision whether or not they may withdraw from the bidding when the fault has been discovered or whether they should request for leniency from the client for a second chance in re-submitting the bid after the discovered inaccuracy. This research has been done based on cases that were related to the contractor's mistakes during tendering which were collected from the Supreme Courts of Canada. The data have been analysed and interpreted by legal methodology, in which the result shows that the ability level of the contractors to respond to the mistake is unsatisfactory, and the fault is continuously being made. The findings are expected to educate and provide awareness to the contractors relating to the matters discussed.

1. Introduction

It is a global phenomenon in the construction industry when delay occurs in a project and it has become a real issue that continuously increases by years. Delay usually occurs when contractors fail to provide a comprehensive project management [7]. Therefore, problems such as disputes over cost and time overruns are mostly influenced by the contractors' negligence. About 17.3% of public sector's projects in Malaysia are considered sick as stated in the statistic in 2005 [7]. Occurrence of overrun in cost and time in a project that is caused by the contractors is the result produced due to the lack of knowledge by the contractors in determining the response to be undertaken owing to their mistakes especially when it comes to tendering process.

Wrong interpretation and lack of understanding in agreement and contract will commit ignorance of implied terms within the contracts [3]. Generally, mistakes may be associated with negligence, misrepresentation and fraud as the mistakes may be in a good faith or bad faith as it may cause confusion to suffered parties. The three frequent mistakes recognised by the English law contract are, common mistake where both parties commit the same mistake, unilateral mistake where only one party commit the mistake and finally, the mutual mistake where the parties have intentionally crossed the mistake.



The tendering process has been allocated with cost and time consequences, whereby the tendering process is used as it is not to burden the tenderer with the requirement of excessive information and to ensure that the tenderer can focus on necessary works required [6]. The process of tendering is to guarantee that the real competition is achieved in terms of financial strengths and technical experience related to assessment in the final submission of tendering. The tendering process is a process that involves two parties; the employer and the contractor, as a manner to achieve an offer and accepting to the agreement of works.

1.1. Problem statement

The mistakes made by contractors in tendering are unforgivable as it is clearly mentioned in the contract, that the contractors should burden the risk that is transferred to him and they should acknowledge the disclaimer provided in the contract. When the contractors make mistake, most often they will charge a higher price than previously established to cover for their mistakes. In addition, when they are at fault, they normally want to represent themselves as the innocent party who unintentionally made the mistakes and claim those blunders as misrepresentation.

Estimating the error in tendering can result in cost overrun while the project is being executed as the contractors would only realise that they are making mistakes after encountering financial difficulties during the execution of work [4]. Most often, the lowest tenderer is the person who is likely to commit mistakes and resulting in delay of the project, only then the contractor would realise that they have miscalculated, as they have submitted unreasonable low bids that is insufficient to carry out the works to the project completion [9]. The tendering method used is to provide competition and to reduce the cost of the project, therefore, many inexperienced contractors or 'low bidder' who participate in the tendering and bump into financial difficulties, would automatically force the client to pay additional cost to recover the default.

Most contractors nowadays are too confident and greedy in pursuing projects, although, as contractors they should verify and make sure that all the information or document that they receive are correct. If the contractor did not clarify the discrepancy before the submission of the tender, any mistake in the contract will be at his own risk. Therefore, all the discrepancy shall be checked and confirmed before the submission of the tender as the profit or loss of the contractor depends on his meticulousness during tendering. Mistakes in tendering are a nightmare to the contractor as the probability of being stuck in financial quandary is very high because of the mistakes. Most of the contractors who are facing problems due to their mistakes, do not know how to address those faults when they are finally being disclosed. In their point of view, the most common cause of dispute in construction is cost overrun, therefore the easiest solutions they can come up with to conceal their error, are to withdraw the bids, terminate the contractor, flee from the project and try to manipulate claim and variation order. In this situation communication plays the biggest role as both client and contractor need to contribute the best outcome for the finest solution.

1.2. Aim and objective of study

The research's aim is to identify the mistakes made by contractor as well as the contributing factors during the tendering process so that the mistakes can be managed, controlled and the parties involved will be able to use the knowledge to work on the solution.

1.3. Scope of the research

The scopes for this study will focus on the aspects where the research will be a depth study on the mistakes made by contractors during tendering but post contract will not be touched as mistakes can be found in many stages of construction. Next, this study will also cover law cases that are related to the mistakes in tendering and contractors' awareness of the importance of cost estimation during tendering, along with their responsibility in addressing the issue. The research will most probably collect data from legal cases in Canada and the researcher will focus on faults in tendering, as well as specifically delving into the bidding during tendering process. Canada Courts is selected because the

author finds that there are no case recorded involving bidding mistakes and tender error in Malaysia courts through LexisNexis (also known as Malaysian Law Journal). However, related cases was found recorded in Canada Court and they are practicing English Common Law.

2. Literature review

Tendering is a common process for a client to select the best contractor to execute the works. In selecting a contractor, a negotiation can be used even though the tendering is fused with competition, a traditional open tender method is popular and widely used as the procurement in most construction procedure [1]. The tendering process is to make sure that the concurs is fair and square as the client, most often than not, will award the contract to the lowest bidder considering that they always seek for cheaper price offered, in order to save more money. In a simpler word, the tendering can be understood as a process or activity that involves two parties; the employer and the contractor in a manner to achieve an offer and to agree on an arrangement of the works.

However, the implementation of open tender can create confusion to the contractors as many unfamiliar organisations will take part and it will generate risks for the client in finding a genuine contractor to run the project [8]. This situation is bad news for the industry as people will perceive the industry as money making industry thus will downgrade the quality of the construction. Recently the implementation of open tender is seen to decline as the process doesn't guarantee a 100% success rate in the construction industry. If we take a look in the aspect of competition, the contractor may submit a dishonest bid since sometimes the bid submitting is not a bona-fide submission and this process has been criticized since 1940 and the selective tender has taken over the open tender process [2].

The case of "M.J.B. Enterprises Ltd. V. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619" has proven that the use of this clause in this case, initiated an action for breach of contract, claiming that its bid should have been accepted as the lowest compliant bid. In defending its acceptance of the qualified bid, the owner relied on a privilege clause in the tender documents which stated that "the lowest of any tender would not necessarily be accepted." At the Supreme Court of Canada, the central issue was whether the privilege clause allowed the owner to disregard the lowest bid in favour of another tender, including a non-compliant bid.

Generally, contractors can be categorised in various background. They may be professional contractors who may have come from academic background and specific skills related to construction, politician contractors that become contractor after being awarded a project by political activities, a business man contractor who enters the construction for the sake of business diversification or the nouveau riche contractor. Today, construction industry is seen as one of the fastest money-making industries, therefore the contractor business has grown rapidly and the major challenge has to be faced by the contractors is tough competition. Most of the contractors who encounter problems that are related to the mistakes do not know how to counteract to the issue after it is being discovered. As the competition is tight, it will influence the contractor to submit unrealistic cost, if we look from the competition's point of view, the contractor may submit a dishonest bid as sometimes the bid submitting is not a bona-fide submission and this process has been criticised since 1940 and the selective tender has taken over the open tender process [2].

3. Methodology

3.1. Preparation of research proposal

Problem statement was identified by observing the current trend and issue. Based on the problem statement, formation of aim, objective and scope of research to be determined.

3.2. Literature review

In this chapter the researcher uses secondary data that is provided from journals that have mostly been retrieved from Sciencedirect as the main source. Other than that, researcher has developed the topic through readings of journals, books and trusted webs. The researcher has organized the literature

review into parts to present the content as the researcher tries to synthesis the data in which he will reshuffle and re-organize to recap the important data according to the guiding concept of research.

3.3. *Method of data collection*

Document analysis is identified as the most appropriate method to be used in collecting data as it is in qualitative form which allows the data to be interpreted to coordinate to the research objective. The method is suitable for this research due to the necessity of the researcher to assess the law journal in meeting the research objective. The purpose of document analysis is to study the analysed data using text analysis to find themes and descriptions which is implied into the scope of the study. The Primary data was collected from Lexum which is the tool for the main data collection. Lexum is a site that provides the main public source of Supreme Court of Canada in the original published format, content of decision and judgement for the courts hearing. The data collected from Lexum is through legal cases and legislation where the legal cases referred to the transcripts that contain published written legal opinions. The written legal opinion is an issue of law in which the case is being litigated in judge's courtroom as the data is needed to fulfil the significance and the scope of the study. Lexum is a database that is designed to deliver services of hosting data from many Canadian legal institutions, including the Courts Administration Services, Canada's Department of Justice and The Federation of law Societies of Canada. For this research the researcher uses the keyword of "Contractor's Mistake", "Bid Mistake", Error in Tendering" and "Unilateral Mistake in Tendering" to access the law case in order to collect data based on the theme and scope of the research. The Cases were gathered from the Courts of Canada, including Supreme Courts of Canada, Ontario Courts, British Columbia Courts Manitoba Courts and Saskatchewan Courts as seen in Table 1 and Table 2.

Table 1. Table shows the result for keywords 'Bid Mistakes' in Lexum

NO	CASES	REFERENCING	Court of Judgments
1	The Queen (Ont.) v. Ron Engineering	[1981] 1 SCR 111	Supreme Court of Canada
2	Corpex (1977) Inc. v. The Queen in right of Canada	[1982] 2 S.C.R. 643	Supreme Court of Canada
3	Calgary v. Northern Construction co.	[1987] 2 SCR 757	Supreme Court of Canada
4.	Toronto Transit Commission v. Gottardo Construction Ltd	[2005] O.J. No. 3689 (C.A.),	Court Of Appeal For Ontario
5.	Derby Holdings Ltd. v. Wright Construction Western Inc	[2003] SKCA 87	Court of Queen's Bench of Saskatchewan

Table 2. Table shows the result for keywords 'Tender error' in Lexum

NO	CASES	REFERENCING	Court of Judgments
1	M.J.B. Enterprises Ltd. V. Defence Construction (1951)	[1999] 1 SCR 619	Supreme Court of Canada
2	BG Checo International Ltd. V. Bristish Columbia Hydro and Power Authority	[1993] 1 S.C.R. 12	Supreme Court of Canada
3	Bank of Montreal v. Bail Ltee	[1992] 2 SCR 554	Supreme Court of Canada
4.	Nova Scotia Construction Co. v. The Quebec Streams	[1933] SCR 220	Supreme Court of Canada

5.	Comission Doe et al. v. Canadian Surety Co.	[2003] SCR 1	Supreme Court of Canada
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4. Results and Discussion

Ten (10) legal cases in Canada Courts were distributed, only five (5) were relevant to discussion which are the cases that use “Tender error” as the keyword in table 1 meanwhile another five (5) cases that are not relevant to be discussed are the cases under “Bid Mistakes” keyword in table 2.

Table 3. Table shows the summary of the data

Case Referred	Water Resources Commission. V. Ron Eng. [1981]	Corplex V. The Queen Canada, [1982]	Calgary V. Norther n Const [1987]	Tt Commissi on V. Gottardo Con [2005]	Derby Hold V. Wright Const [2003]	Total
Contract	A	N/A	B	B	A	N/A
Type of Mistake						
Bid Calculation	√	√	√	√	√	5
Assumption		√				1
Clerical Error			√			1
Provide Document				√		1
Factor of Mistake						
Carelessness	√		√			2
Competitiveness	√		√	√	√	4
Rely to Client	√	√				2
Communication					√	1
External Factor		√				1
Less Information		√			√	2
Decision						
Won	√	√			√	3
Lost			√	√		2

Table 3 describes the type of mistakes, contributing factors and the response to the mistakes. There are four mistakes to be identified that can be classified as the most frequent mistakes to happen during tendering. The four mistakes are mistake in bid calculating, which contributed about 62% in the percentile and this mistake is followed by wrong assumption in information, 13%, clerical error, 13% and errors that are related to documents, the final 12%. Next, there are six factors to be identified as the main factor of the mistakes. The main factorsthat contributed to the mistakes are competitiveness in winning the bid which is 33%, followed by carelessness of the contractor in submitting the bid and making assumption, 17%, too relying on the information and budget provided by the client which is 17%, providing incomplete information in tendering, 17%, lack of communication, 8% and external factor contributed the less, which is 8%. Most of the time, the contractors are not too trustful to own up to their mistakes as eventually two out of five cases lost as the contractors do not know whether or not they can withdraw the bids when they made some mistakes and the fact that they should be responsible in taking risks while preparing tender. In this case, the contractor should acknowledge the kind of situation where they can withdraw their participation and when can they be declared as non-compliant bidder. The tender participant could not withdraw the tender for a particular period of time as provided in the instructions. If the tender was not accepted within that period of time, the partaker could not recover any deposit or tender bond that had accompanied the tender.

5. Conclusion

Based on the study conducted, it shows that the top four most common mistakes made by contractors as regards to the sample of cases in Canada were bid calculation mistake, clerical error, wrong assumption and documents error. It can be clearly distinguished that, the top four mistakes can usually occur in normal practices of tendering process in building construction. As an informed contractor, one should have the knowledge in the interpretation of form of tender as they should be able to fulfil the terms provided, the specification requested and also in pricing the items, soft or hard cost. Also, contractors should be aware about the importance of proposing a low bid as to give a higher chance of winning the bid in a competition. Even so, based on the data collected, none of the contractors managed to adapt to real costing technique as the contractors seem to make mistake by omitting the important cost that should be maintained in the cost estimation. The presumptuous contractors who are too confident in winning the tender competition finally resulting in disappointment as they mistakenly omitted the real cost that could influence the total cost of the contract and it led to the failure in performing the execution of the works. The desperation in getting the project and facing such big competitors, the contractors may submit unrealistic cost. It shows that the contractors take things a little too easily by allowing the cost to go over the previously estimated cost and charge the client without hesitation for a cover up rather than doing a detailed calculation. The contractors are not aware when they discover their mistakes, therefore it is usually a little too late for the contractors to withdraw their submission. Based on the sample case, three out of five contractors won the case regarding the matters discussed. It is not such a positive result as it can be seen that the contractors do not know whether they are bound to the bid when no contract has been signed or whether they can withdraw their submission.

6. References

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