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MOVING TOWARDS AN OPTIMAL REMEDY FOR PRECONTRACTUAL LIABILITY IN THAI ADMINISTRATIVE CONTRACTS

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The concept of precontractual liability has a peculiar position in Thai law. While Thai courts grant precontractual damages in their decisions, they do not expressly cite precontractual liability as their rationale, rather referring to the preexisting concepts of contract and tort. This creates a lacuna in law, particularly in the court's justification to grant damages to parties. This article aims to find a solution for courts to grant precontractual damages to parties in administrative contracts, where the state and private party do not have equal powers in setting contractual terms. It firstly introduces the concept of precontractual liability in prominent civil legal jurisdictions including German and France and compares them to the Thai approach. It then focuses on the nature of Thai administrative contracts. From these foundational concepts, the article analyses how precontractual liability can occur in each stage of an administrative contract and suggests principal solutions for the court to grant the fairest damages to parties involved.

I. INTRODUCTION

The concept of precontractual liability has been the subject of contentious academic discussion in various jurisdictions, and Thailand is no exception. Scholars argue over whether this concept, which is currently not recognised in Thailand's written laws, should be formally accepted; and, if not, whether there are alternatives that could adequately protect parties at the precontractual stage. Precontractual liability has, in particular, sparked debates within the administrative legal regime where contracts are formed based on certain formal requirements not found in private contracts. The interaction between the underlying concepts of precontractual liability and administrative contracts prompts a discussion of how the law can appropriately balance private and state interests to achieve optimal fairness. One of the most significant issues arising therein is the extent of damages the court allows each party to claim in different cases. Presently, courts tend to favour the state when adjudicating the right to claim damages, allowing the state party to claim against securities placed by private bidders as a stipulated penalty, whilst private bidders are not given the same security due to the fixed nature of administrative contracts.

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This article utilises procurement contracts as the main case study. It aims to determine a suitable doctrinal basis and establish the scope of the Thai precontractual liability regime. In so doing, the article will take on the following structure. In Part II, it will briefly explore the precontractual liability regime in Germany and France; in Part III, it will introduce the nature of administrative contracts. Following this, in Part IV, it will identify rules regarding precontractual liability in relation to Thai administrative contracts. Part V will then analyse the application of such precontractual liability rules within each phase of the administrative contract formation process. Finally, Part VI concludes with comments and recommendations in relation to the precontractual liability regime in Thailand.

II. AN OVERVIEW OF PRECONTRACTUAL LIABILITY

The idea of precontractual liability is straightforward – it is, first, a liability arising before any contractual relationship is formed between the parties; second, such liability arises from the intentional act or negligence of one party; and third, such act or negligence resulted in the other party being "damaged", in the sense that that party has acted in reasonable reliance of the former's representations or words during the negotiation phase, with an expectation that a valid written contract would soon be entered into.[1] In the fast-moving world of commerce, it is not hard to imagine that such situations happening frequently – take, for example, the organisation of a carnival. Organising a carnival requires the organisers to negotiate with multiple parties all at the same time. The assurance of important vendors, e.g. the vendor providing the tentage, that a valid contract would soon be entered into may lead to the organisers acting in reliance of such assurance to form contracts with other parties, thereby incurring costs. For such important vendors to then, completely lacking in good faith, turn around and not enter into the contract as they previously promised would result in the organisers suffering wasted costs. In such situations, justice demands that the organisers should be allowed to pursue a civil claim against the vendors who had acted in bad faith, notwithstanding the fact that strict formalities have not been completed.

Yet, the concept of precontractual liability is controversial. In general, contract law is governed by the overarching principle of freedom of contract. This principle, in turn, gives negotiating parties the liberty to negotiate, or to walk away from such negotiations at any time, in accordance

[1] Jampee Yokubon, "Culpa in contrahendo in contract law" (1999) Thammasat LJ 119 at 119; Ithiwat Methatham, *The role of good faith in pre-contractual liability* (Thailand: Thammasat University, 2019) at 109-111.

with their personal interests (or subjective desires). As such, contract law traditionally does not provide remedies for loss suffered by negotiating parties before the existence of a contract. That being said, as seen in the example provided above, there exists certain situations where pre-contractual liability is the only way to ensure that a just outcome is achieved as between two negotiating parties. This explains why several jurisdictions have developed, or attempted to rationalise, a doctrine to deal with parties' rights and entitlements at the precontract stage. For the purposes of this article, we will examine the legal positions in Germany and France, two prominent civil law systems. Thereafter, we will examine the prevailing position in Thailand.

A. Germany

Germany adopts the concept of *culpa in contrahendo* as a way to protect parties' precontractual positions. First introduced by Rudolf von Jhering, the crux of this concept is that negotiating parties come under a clear duty to negotiate with care and not lead the other to act to their detriment before a valid contract is formed.[2]

The doctrine of *culpa in contrahendo* recognises that parties are free to negotiate their terms, and walk away if necessary, but limits this freedom by holding liable parties who use this freedom to hide crucial information from the other party, or to mislead the other party to believe that a binding contract would soon be entered into, only to renege thereafter.[3] In other words, while there is a right to freely contract to further one's own economic interests and walk away if necessary, German law adopts the position that this right must be used in good faith and not contrary to public expectation. The concept of *culpa in contrahendo* is interpreted from the "duty to perform according to good faith" in section 242 of the Bürgerliches Gesetzbuch (the German Civil Code, or the "BGB"), which outlines a broad "duty to perform" that extends to the precontract stages.

Crucially, for our purpose, it is worth noting that the *culpa in contrahendo* doctrine is neither grounded on a tortious nor contractual basis. Instead, it exists as its own separate ground. This is due to two reasons. First, tortious claims are inapplicable to precontractual situations – section 823(1) BGB, the main provision on tortious liability, only governs physical loss as opposed to pure

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[2] Mitja Kovac and Ann-Sophie Vandenberghe, "Culpa in Contrahendo and Precontractual Liability: Towards an Optimal Classification" (2020) 15:1 J Comp L 245 at 249.

[3] Hein Kotz, *European Contract Law*, 2nd ed (Oxford: Oxford University Press, 2017) at 37.

economic loss.[4] Pure economic loss, in this context, includes loss of opportunity to enter into other business relationships and monetary costs incurred by relying on the fact that a contract will be formed[5]. Second, German courts do not accept a contractual basis for damages as there is simply no contract.

As such, it is clear that German law regulates the precontractual stage with the *culpa in contrahendo* doctrine, finding parties liable should they fail in their duty of good faith, and should the "damaged" party suffer damages flowing from the breach of such duty.[6] On this basis, the German courts will award damages based on the "damaged" party's reliance interest rather than its expectation interest, the latter being the kind of damages awarded for breach of contract. Reliance interest, or interest that would not have been harmed but for the failure of a valid contract being formed, includes losses incurred by the innocent party's good faith reliance that a contract would eventually be formed. This also includes preparation and negotiation costs.[7] By limiting the "damaged" party's interest to its reliance interest, German law clearly gives effect to the overarching principle of sanctity of contract by denying the "damaged" party's entitlement to expectation interest since no binding contract was formed.

B. France

In contrast to Germany, France regulates the precontractual relationships between the parties through tort law. This is because the nature of tortious actions, as understood in France, differs from that of Germany. Under section 1382 of the Code Napoleon, "indisputable and obvious" bad faith is a valid ground for parties to make a tortious claim. Such bad faith includes, *inter alia*, breach of negotiations where one party has reason to believe that a contract will be concluded and falsely or insufficiently informs the other party of the necessary elements in the conclusion of a contract.[8] This, coupled with the French legal system's preference to strictly uphold the principle

[4] Nattapong Posakabutra, "ความรับผิดก่อนสัญญาเนื่องจากการเพิกถอนคำเสนอและการยกเลิกการเจรจาต่อรอง" (2009) 2:1 Rapee LJ at 84.
[5] Ngamjai Vaewmaneewan, *ความรับผิดก่อนสัญญา ศึกษาในเชิงทฤษฎี* (Thailand: Thammasat University Press, 1999) at 36.
[6] Ithiwat Methatham, *The role of good faith in pre-contractual liability* (Thailand: Thammasat University, 2019) at 16-17.
[7] Nattiya Tontrakulwanit, *Legal problems of precontractual obligations* (Thailand: Chulalongkorn University, 2018) at 195.
[8] Nadia E. Nedzel, "A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability" (1997) 12 Tul Eur & Civ LF 97 at 107.

of freedom of contract, creates the well-accepted practice in French law to use tort law rather than contract law, or even the doctrine of *culpa in contrahendo*.

When hearing the claim, French courts engage in a fact-centric inquiry to determine, exactly, what kinds of losses the "damaged" party suffered from his counterparty's failure to enter into a binding contract.[9] Factors include the kind of negotiations parties were in, and the extent and progress of negotiations that were achieved by parties before the "breaching" party walked away.[10] Losses that have been recognised by the French courts as "actual losses", and are therefore compensable, include: the loss of time, negotiation expenses, and profit.[11] Similar to Germany, the French courts will not extend the "damaged" party's claimable damages to his expectation interest, nor award specific performance[12], as to do so would be tantamount to the French courts stating that a valid and binding contract had, in fact, been formed. This would overcompensate the "damaged" party.

C. *Thailand*

Unlike Germany and France, there is no agreement amongst Thai scholars as to the doctrinal basis of precontractual liability,[13] although it is clear that Thai courts do protect – to some extent – parties' precontractual positions. Thus, in Supreme Court Decision No. 931/2480, the court ruled that where the parties agreed that a written contract must be entered after the selection of the successful bidder, the plaintiff's receival of the defendant's bidding certificate for a construction project does not yet bind the parties to the main contract. In this case, the Court awarded contractual damages based on the tender contract, i.e. the contract that the parties agreed to be bound by after the bidding process, not the terms of the main contract, while in other cases such as Supreme Court Decision No.1131/2520, the court granted damages based on the main contract despite the parties' agreement to make the main contract in writing. Yet, in Supreme Court Decision No.3550/2526, although the court did not award any form of damages to the plaintiff

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9 Nattapong Posakabutra, "ความรับผิดก่อนสัญญาเนื่องจากการเพิกถอนคำเสนอและการยกเลิกการเจรจาต่อรอง" (2009) 2:1 Rapee LJ 76 at 80-81.

10 *Ibid* at 82.

11 *Ibid*.

12 Nadia E. Nedzel, "A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability" (1997) 12 Tul Eur & Civ LF 97 at 147.

13 Nattiya Tontrakulwanit, *Legal problems of precontractual obligat*ions (Thailand: Chulalongkorn University 2018) 182-183; Chuthavorapong Kittipat, "Legal Issues in Tendering Process: A Critical Analysis of Thai Law and Foreign Laws" (2020) 10:1 Thammasat Bus LJ 29 at 46.

due to the fact that the defendant had reserved its right to cancel the bid before a written contract has been entered into, the court cited tort as a possible remedial basis if the elements were to be satisfied.[14] That being said, Thai courts are generally conservative in their interpretation of the law and have strictly held that the good faith principle does not apply to precontract negotiations. Thus, in Supreme Court Decision No. 3550/2526, the court dismissed the plaintiff's argument that the defendant called off the bidding process in bad faith, resulting in a wrongful act that caused harm to the plaintiff and reasoned that without a contractual relationship, cancelling the bidding process did not harm the plaintiff's rights.[15]

Due to the aforementioned inconsistency in the Thai courts' reasoning, Thai scholars remain in a heated debate on the most efficient doctrinal basis for precontractual liability cases, suggesting a range of solutions, including the borrowing of the German and French positions[16] as previously discussed. None of the proposed solutions are entirely satisfactory. First, there remains significant academic debate over the compatibility of Germany's *culpa in contrahendo* doctrine with the principle of good faith in Thai law. The duty of good faith in Thai law is governed by section 5 of the Thai Civil and Commercial Code ("CCC"). Due to the fact that section 5 of the CCC is a general principle of law, it does not directly refer to good faith in precontractual occurrences or specify what instances this "duty" refers to and to whom such "duty" is owed to. In fact, comments of the CCC's drafting committee reveal that section 5 of the CCC was intended to regulate all actions to be "moral" without further specification on its scope of application.[17] Section 5 of the CCC must therefore be applied with section 4(2) of the CCC which allows for analogous application of a principle to a situation where no direct rule governs it.[18] Yet, as section 5 of the CCC was not drafted with precontractual liability as its intention, analogous application of section 5 of the CCC

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[14] Thailand Supreme Court Decision No. 3550/2526.

[15] Thailand Supreme Court Decision No. 3550/2526.

[16] Panlapa Numnoi, "Problems about the Legal Status of The Administrative Pre–Contract" (2014) 7:1 Naresuan LJ 26 at 26-38; Pattarapas Tudsri and Pinkaew Angkanawadee, "Formation of Contract, Enforceability, and Precontractual Liability in Thailand" in Formation and Mindy Chen-Wishart, Alexander Loke, Stefan Vogenauer, ed), *Third Party Beneficiaries* (Oxford: Oxford University Press, 2018) 396 at 423; Sanunkorn Sotthibandhu, หลักความรับผิดก่อนสัญญา (2nd edn, Programme on Textbooks and Educational Materials for the Faculty of Law, Thammasat University 2002); Ngamjai Vaewmaneewan, ความรับผิดก่อนสัญญา ศึกษาในเชิงทฤษฎี (Thammasat University Press 1999); Ithiwat Methatham, *The role of good faith in pre-contractual liability* (Thailand: Thammasat University, 2019).

[17] Phraya Thepvitoon (Boonchuay Wanikul), "Explanation of Civil and Commercial Law, Part 1" (Thailand: Thammasat University, 1933) at 34-35.

[18] Ithiwat Methatham, *The role of good faith in pre-contractual liability* (Thailand: Thammasat University, 2019) at 72.

opens room for the court to exercise its discretion, which may lead to a slippery slope that overly restricts freedom of contract as the court may be tempted to dispense palm tree justice. This will generate great commercial uncertainty, and increase the transaction costs for parties to negotiate and, thereafter, enter into binding agreements.

Second, it is difficult to see how the French approach might apply in Thailand. Similar to Germany, the requirements for tort law to be engaged cannot be satisfied in precontractual scenarios. In particular, the elements of unlawfulness and injury caused do not fit with the concept – it is unlikely that courts will find negotiations for one's own interest an unlawful act, as no law prohibits such actions (and freedom of contract even supports it to an extent). However, several court decisions in Thailand still attempt to justify precontractual cases with tortious damages.[19] This, it is submitted, is conceptually unsatisfactory as it artificially stretches the plain and express language of the law.

Therefore, some courts have made an interpretative attempt to circumvent the concept of precontractual liability altogether to achieve the ends of granting damages to injured parties of a precontractual cause. If the facts are applicable, some court decisions interpret the "precontractual" cause of liability as a separate contract from the main contract. This "two-contract model" will be further examined in Part V.

III. A BRIEF OVERVIEW OF THAI ADMINISTRATIVE CONTRACTS

This part will provide the readers with an introduction to Thai administrative contracts regime, with a particular emphasis on the unique features that could affect the application of precontractual liability.

A. The Distinction Between Administrative Contracts and Private Contracts

Administrative contracts must be distinguished from private contracts. Section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999) (the "Administrative Establishment Act") defines an administrative contract to be one whereby at least one party is a state agency or representative, and the contract must have the characteristic of

[19] Thailand Supreme Court Decisions No. 3550/2526, 2811/2529, and 8898/2544.

a concession, for the provision of public services, public infrastructure, or for the extraction of natural resources.

This definition of administrative contracts is further elaborated in the Plenary Session of the Supreme Administrative Court Decision No. 6/2544 dated 10 October 2001 ("Decision No. 6/2544"), which expands the definition of administrative contracts to include any other kinds of contract (not limited to specific administrative contracts such as concession as aforementioned) whereby the state contracts with a private party using its privileged status to achieve administrative objectives. Read in conjunction, these two authoritative sources of law give rise to two categories of administrative contracts:

1. The four types of legally prescribed administrative contracts under section 3 of the Administrative Establishment Act; and
2. *De facto* administrative contracts under Decision No. 6/2544.

Therefore, at the broadest level, the main considerations that the court takes to determine whether a contract is an administrative contract are: first, the parties – at least one must be a state agency or its authorised representative, and second, the substantive content of the contract, which can be divided into the aforementioned two categories. In contrast to this fixed definition of administrative contracts, private contracts are more broadly defined by a negative meaning – they refer to any contract that is not specifically defined by law.[20]

B. *The Purpose of Administrative Contracts in Thailand*

In Thailand, administrative contracts function as a tool to smoothen administrative proceedings done for the public benefit through various actions such as the procurement of resources to implement public facilities.[21] The purpose of these contracts is to choose the most appropriate and cost-efficient contractor to carry out the state's functions for public benefit, as the state may lack resources or expertise in areas required to implement public policies. In particular, to standardise administrative contracts for transparency of public projects, the law must grant the state a

[20] Panlapa Numnoi, "Problems about the Legal Status of The Administrative Pre–Contract" (2014) 7:1 Naresuan LJ 26 at 33.

[21] Patranith Maneepan, *The termination of administrative contract* (Thailand: Thammasat University, 2017) at 6-12.

privileged status in prescribing procedures of entering into an administrative contract. It is because of this that administrative contracts are governed by strict procedures and regulations to ensure accountability of the state and an equal opportunity for private bidders to bid.[22] Throughout this detailed process, several potential instances of precontractual liability may arise on the part of the state and the counterparty – for example, the former may miscarry its duties and/or abuse its powers, and the latter might withdraw from the tender process despite making some preliminary commitments. As states have the privilege of setting terms and conditions of the bid, the negotiable aspect of contract formation diminishes. In essence, there are fewer back-and-forth negotiations between the state and the private party as the state is the one who offers standardised terms which the private party is unlikely to be able to change.

Thus, the key differences between administrative and private contracts can be said to be as such. First, administrative contracts are subject to strict rules on their formation both in substantive content and form, with less room for parties to negotiate, when compared to private contracts, due to the relatively strong bargaining position of the state. Second, the purpose of contracting differs. Administrative contracts aim to provide public benefit, whilst private contracts are formed when each party is satisfied with its personal economic gains. However, despite the difference in the stringency of contract formation, administrative contracts are still governed by the general principle of contract formation; that is, a contract is formed by the meeting of minds between the state and the selected party.[23]

C. *The Unique Legal Principles Governing Administrative Contracts*

Having explained the differences between administrative and private contracts, we can now turn to discuss the unique principles that are only applicable in the context of administrative contracts. First, the principle of legality states that, without law, the state has no authority and will be found wrongful in misusing its power to carry out administrative acts.[24] Second, under the aforementioned purpose of public benefit, the state is bound to the principles of equality (i.e. all eligible private bidders are granted equal opportunities to offer bids), continuity (i.e. the process from negotiation to contractual performance must be carried out without unreasonable delay),

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[22] Yuthtana Thinnarat, *The Legal Problems of Culpa in Contrahendo in Administrative Contracts* (Thailand: Chulalongkorn University, 2006) at 79.

[23] Patranith Maneepan, *The termination of administrative contract* (Thailand: Thammasat University, 2017) at 53-58.

[24] *Ibid* at 42-45.

good faith, transparency, and efficiency (i.e. the state's actual intention to contract in an accountable manner).[25]

Third, as aforementioned in the purpose of administrative contracts, it is prescribed under sections 114-119 of the Public Procurement and Supplies Act B.E. 2560 (2017) (the "Procurement Act") that the state must have absolute privilege over private parties; for instance, under section 67 of the Procurement Act, the state reserves the right to call for the announcement in searching for bidders at any time before signing a contract and bears no liability to private bidders.[26] They hold the authority to select the contracting party as well.[27] However, this privilege of the state cannot be absolute; the scope of its privilege must be interpreted to realise the purpose of administrative contracts for optimally choosing parties for actions tailored for public benefits,[28] and the state and private parties must still be equal and unprivileged before the law. That is, the court's treatment should be the same for any precontractual breaches.

A final noteworthy characteristic, especially in procurement contracts, is the state's use of security to ensure the good faith of bidding parties. This includes: (i) the bid security, which is placed during the submission of bids by private parties to ensure that private parties will not back out of the bid selection process; (ii) the contract security, placed by the selected private bidder to ensure that they will formally sign a written agreement with the state to further their performance as agreed; (iii) the advance payment security; and (iv) the performance security. Of these, the first two are relevant in any discussion of precontractual liability as several Supreme Court decisions have taken the view that these securities are stipulated penalties under section 381 of the CCC, which are claimable as damages before a contract is formed. This will be subsequently elaborated upon in Part V.

IV. PRECONTRACTUAL LIABILITY AS APPLIED IN ADMINISTRATIVE CONTRACTS

[25] *Ibid* at 42-45.

[26] Siravich Teevakul, *Administration contracts: a comparative study on EU public contracts, French and Thai administration contracts* (Thailand: Thammasat University, 2016) at 341.

[27] Panlapa Numnoi, "Problems about the Legal Status of The Administrative Pre–Contract" (2014) 7:1 Naresuan LJ 26 at 35.

[28] Thailand Supreme Administrative Court Decisions No. 426/2547, 1543/2547, 1618/2547 and A.63/2546.

Administrative contracts are created to serve public benefits through the rigorous use of procedures to ensure that the most competitive option is chosen. At the same time, one must also consider the concepts undergirding precontractual liability, *viz.* its aim to protect one party's reasonable reliance on another party's representations during negotiations. Concurrently, it is important to note that – prior to a binding contract being formed – parties are free to walk away from negotiations in an exercise of their contractual freedom. This part will thus explore the various grounds on which precontractual liability can be attached to the "breaching" party, as well as the powers that might be used by the Administrative Courts to attach such liability and award damages. The latter will first be explored.

A. *Provisions Under the Administrative Establishment Act Establishing the Court's Jurisdiction and Powers*

In addition to the general rules under the CCC, administrative contracts are also governed by a separate set of administrative rules. This includes the general administrative regime such as the Administrative Establishment Act and the specific rules prescribed for different types of administrative contracts. As this article focuses on procurement contracts as a basis for its analysis, the Procurement Act will also apply. It must be noted that before the creation of the Administrative Courts, contractual disputes in administrative contracts fell under the Civil Court's (hereafter "Supreme Court") jurisdiction. While there remains some overlap in each court's jurisdiction over the cases, the main institution responsible for administrative precontractual liability is the Administrative Court.[29] Because of the different applicable rules and different nature of parties and contracts in dispute, these two courts tend to justify their decisions differently.

The main applicable rule for Administrative Courts not available in Civil Courts is found in the Administrative Establishment Act. Section 9 of the Administrative Establishment Act outlines the jurisdiction of the Administrative Court. Subsections (1) to (4) are relevant to the precontractual discussion (and any two-contract models thereof). In particular:

1. Under section 9(1) of the Administrative Establishment Act, the court can accept disputes related to an administrative organ or officer's unlawful or unauthorised action, or action which is contrary to the legally prescribed process, good faith, fairness, or unnecessary steps which cause excessive burden.

[29] Yuthtana Thinnarat, *The Legal Problems of Culpa in Contrahendo in Administrative Contracts* (Thailand: Chulalongkorn University, 2006) at 2

2. Under section 9(2) of the Administrative Establishment Act, the court can accept disputes on the administrative organ or officer's delay or neglect in carrying out its duties.
3. Section 9(3) of the Administrative Establishment Act governs the specific liability regime related to tort or other liabilities of the administrative organ or officer arising from the use of power under the law or from rules, administrative orders, or other orders, or delay or neglect in carrying out its duties. That is, wrongful actions under other subsections, in particular section 9(1) of the Administrative Establishment Act, will result in tortious liability under section 9(3) of the Administrative Establishment Act. As section 9(3) of the Administrative Establishment Act requires there to be an *administrative order or other order*,[30] extra analysis must be taken to determine what constitutes such orders.
4. Finally, section 9(4) of the Administrative Establishment Act governs disputes arising from administrative contracts.

Notably, the Administrative Court is more willing to interpret the existence of a contract not only from those falling under the required written form, but also *de facto* contracts in which the bid announcement has already been made regardless of whether the parties have formally signed it.[31] This, in turn, gives the Administrative Courts a lot more discretion than that afforded to the Civil Courts. The author sees this as a divergence in interpretation between legal regimes, which will be subsequently elaborated on in Part V.

Finally, it must be noted that if any administrative cases – for whatever reason – do not fall under any of the above subsections, the general rules under the CCC on tort and contract law remain applicable.[32] In the case that any administrative case falls under the ambit of contract and tort rules under the CCC, bidders and state-callers are on unequal grounds in terms of remedies, as the state's terms and conditions in a bid usually contain clauses providing a ground for the state to collect securities from bidders in case of breach by the private bidder, and such securities are calculated amounting to the value of the contract if entered into (i.e. positive damages).[33] There is

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[30] Thailand Administrative Establishment Act, s 9(3).

[31] Thailand Supreme Administrative Court Orders No. 352/2548, 660/2548, 355/2550, 658/2551, and 95/2552.

[32] Note that the Germany's culpa in contrahendo will not be discussed, as it is not sufficiently founded in the Thai administrative law regime, and according to German jurisprudence, it only provides reliance interest, which would not solve the problem of fairness in remedies as aimed by this article because reliance interest merely includes those arising from costs done in expectation that a contract will be formed, not from positive damages.

[33] Jirunya Reantongkham, *ความรู้เกี่ยวกับสัญญาและการบริหารสัญญา* (Department of Health, 2010) at 8-9 and 14-15.

also a further risk that a breach by the state will allow the private party to only claim for reliance damages, if such damages are claimable at all. Here, it is obvious that the state has an upper hand in administrative contracts. However, this superior position should not be excessively used, as bidders need to be incentivised to participate in such bids. Further, since the state's main objective is to facilitate the public with definite procedures, the state's economic interests are less focused on administrative contracts. Therefore, this article aims to identify a possible method to equalise the bargaining inequality between the private bidder and the state, in order to allow bidders to claim damages on equal grounds to ensure that they are not discouraged from bidding because of unprotected economic risks.

B. Two Potential Avenues for the Court's Award of Precontractual Liability

There are two considerations in choosing the optimal remedy: (i) that the required characteristics to apply such remedy are met, and (ii) that the remedy brings about the fairest result (particularly to bidders). Fairness in this sense refers to the event that all parties – state and private – are subject to the same consequences for their damaging actions, disregarding the state's privileged status in setting terms of bid selection. In this regard, there are two potential avenues that Thai courts can rely on to make an award of precontractual remedies: the first is purely based on contract law; while the second is based upon tort law. Both will be discussed in turn.

Contractual liability is judged based on the parties' agreed terms. This includes the agreement on stipulated penalty, as well as reciprocal performance which could result in positive damages, or damages arising from the expectation of benefits that would have been derived should a contract be concluded, such as the loss of profits from entering into a new contract when the original bidder refuses to do so. Under section 222 of the CCC, this type of "special damages" is claimable if proven that the party foresaw or ought to have foreseen the circumstance causing damage. There are still debates on the extent of liability covered. Certain Supreme Court Decisions adopt the view that only negative interest should be awarded, as the actual profit should only be derivable from the main contract.[34] However, other courts have been willing to extend this to positive damages, especially in the context of administrative contracts.[35] It is argued that as administrative contracts have systematic procedures, a reasonable party should at least foresee the consequences of the next steps upon their action and thus be able to understand the kinds of damages that may result

[34] Thailand Supreme Administrative Court Decision No. A.43/2546.
[35] Thailand Supreme Court Decision No. 1131/2520.

from their actions. Moreover, by normal practice, as the state is the only party with the right to claim securities laid out in the terms of the bid announcement, contractual liability would allow the private party to be on an equal footing with the state in terms of available remedies for the same type of breaches, since both parties would be equally entitled to positive damage for the other's wrongful action. (However, the Court should be cautious not to apply contractual remedies to the extent that it overcompensates the "damaged" private party.) This is not normally available in tort, as tortious liability requires actual injury to occur first. Moreover, in this relation, causation between tortious acts and the damages and losses arising from it is difficult to prove.[36] It also does not require parties to prove unlawfulness of actions under section 420 of the CCC, which saves costs and time. Thus, with these interpretational challenges, contractual liability would provide a more consistent and predictable scheme of remedies.

Regarding tortious liability, one must recall an impediment faced by Thai courts in granting tortious remedies – that precontractual actions do not satisfy all elements of tort, in particular, the element of unlawfulness. However, considering the applicable rules to administrative contracts, the unlawfulness condition can be satisfied as certain rules expressly prohibit administrative organisations and officers from using their power in a certain way during and after negotiations; hence, it is argued that when administrative organisations and their officers wield their powers in a prohibited manner, such acts should *prima facie* fulfil the "unlawful" requirement needed to establish a tort. It will be recalled that for administrative bodies to be subject to tortious liability, the tortious act must arise from grounds under section 9(1) of the Administrative Establishment Act as aforementioned. Therefore, subject to these conditions, the disputed "unlawful" requirement of section 420 of the CCC may be satisfied due to the explicit bar imposed by these administrative rules. The satisfaction of section 420 of the CCC's conditions would in effect qualify such actions as torts committed under section 9(3) of the Administrative Establishment Act. This contributes to the fair assignment of liabilities to the actual party at fault. Although contractual remedies have advantages regarding their efficiency and certainty in proving damages and the courts' increased likelihood of granting positive damages for administrative cases under section 9(4) of the Administrative Establishment Act, tortious remedies should still be considered as such remedies are an efficient method to fill any remedial lacuna that might exist before the bid announcement stage. Further, under section 438 of the CCC, the court may use its discretion to

[36] Pattarapas Tudsri and Pinkaew Angkanawadee, "Formation of Contract, Enforceability, and Precontractual Liability in Thailand" in Formation and Mindy Chen-Wishart, Alexander Loke, Stefan Vogenauer, ed), *Third Party Beneficiaries* (Oxford: Oxford University Press, 2018) 396 at 423.

decide on the amount of damages based on the circumstances and magnitude of the tortious act. This further augments the tortious approach, as courts have more discretion in adjusting damages to reach the fairest outcome.

V. CRYSTALLISING HOW THE CONTRACT AND TORT MEASURE OF DAMAGES WILL OPERATE IN THE BID PROCESS

As discussed in the foregoing, there are two potential avenues for precontractual liability to be attached on a "breaching" party – the first based upon contract law; and the second being based upon tort law. This part will now endeavour to demonstrate how both bases might apply throughout the various stages of the bidding process. In the case where it is found that both bases might apply, this article will state which is preferred.

Generally, the bidding and tender process in Thailand, like most other jurisdictions, can be divided up into the following stages: first, the relevant state agency will make an announcement inviting private parties to file their bids; second, interested parties will submit their bids; and finally, the state agency will select and announce the winning bid.

A. Bid Announcement

The key action taken in this step is the state's announcement to open bidding; this must be openly announced to all relevant potential bidders in the industry in an equally widespread manner. The state will prescribe conditions of the bidder and the goods or services it wishes to procure and request that private parties submit their proposals if they are interested.[37] The main issue here is the state withdrawing its bid announcement late in the process, i.e. near the due date for submissions to be made, where certain earnest parties have already acted in reliance on certain representations made by the state to their detriment.

In general, Thai courts agree that the state's announcement of a bid is an invitation to treat in the main procurement contract as it merely prescribes the required characteristics of bidders and products. The mere fact that the state has expressed its requirements for certain specifications of the exact product is insufficient to qualify as an offer for the purposes of Thai contract law; thus,

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[37] Yuthtana Thinnarat, *The Legal Problems of Culpa in Contrahendo in Administrative Contracts* (Thailand: Chulalongkorn University, 2006) at 87-90, 94-97.

bidders must bear the risk that announcements will be called off. In this regard, sections 354, 355, and 356 of the CCC which prohibits the withdrawal of an offer in cases where the period of acceptance is specified (section 354 of the CCC), the period of acceptance is not specified and the offer is made from a distance (section 355 of the CCC), or the period of acceptance is not specified and the offer is made to a person in presence (section 356 of the CCC) does not prevent the state from withdrawing its announcement and cancelling the bidding process as there is no offer to begin with. The state's announcement of the bid process is rather an invitation to treat, which is not barred from withdrawal by the aforementioned provisions.

That being said, there might be situations where the state has acted in bad faith, or contrary to the prescribed processes under section 9(1) of the Administrative Establishment Act, such as where the state has acted in a procedurally unfair manner. It might well be the fact that the announcement was made, and not withdrawn, but the state failed to open the bid up to all qualified parties in the industry. In such situations, it is submitted that the "damaged" party – which is admittedly going to be rare in such situations – should be allowed to rely on the tort law to commence an administrative claim against the state agency who has acted in bad faith.

An illustrative example can be made as follows: a state university announces the bid for the supply of new computers, but only a selected number of computer manufacturers are informed privately about the bid, as the state university believes that they produce the most updated computers. Under the elements of tort under section 420 of the CCC, there must be (i) a tortfeasor – in this case, the state university; (ii) an act – in this case, the private announcement of the bid; (iii) the wrongfulness or contrast to the law of such act – in this case, the private announcement of the bid is contrary to section 9(1) of the Administrative Establishment Act; (iv) intention or negligence – in this case, it is the state university's intention to announce the bid only to manufacturers who it subjectively believes produces the newest computers; and (v) injury to the other party – in this case, it is arguable that the unnotified computers of the computers miss the opportunity to fairly compete in the bid. Therefore, all elements of tort under Thai law can be satisfied.

Thus, when the act of bad faith or contrary to prescribed processes occurs at the announcement stage, leading to certain parties being "damaged" by the state, it is argued that the state should allow parties to rely on tort law as a remedy.

B. Submission of Bids

The key action taken in this step is the bidder's bid submission, containing the specifications of goods, bidders, and other terms required. Moreover, the bid security, in which the bidder undertakes to not withdraw the bid until a successful bidder is chosen, is placed by bidders and can only be returned after the results are announced.[38]

Bid submissions are seen as offers from bidders, as a contract will be formed with the successful bidder based on terms in the subject matter of this offer, such as the price and characteristics of goods. The bid guarantee is a stipulated penalty under section 383 of the CCC, which the state can confiscate if the bidders breach bidding terms.[39] The possible issues which may attract precontractual liability at this stage is the state's bad faith in conducting the bidding process, such as accessing the confidential information about the bidding party which would not otherwise be available to the state but for the fact that the bidding party is participating in the bid. Such use would be unlawful if the state is not using it to open negotiations with the bidding party.[40] Other unlawful acts might include the state setting conditions that intentionally exclude certain bidders.[41] Further, the state may unreasonably collude with certain bidders to refuse another bid or share insider knowledge to eliminate prospective bidders from bidding, thereby eliminating fair competition for the most efficient bidder.[42]

Pre-contractual liability at this stage can attach to a bad faith act, on the basis of contract and tort laws. That being said, it is argued that tort law should be used, as it affords the courts the greatest discretion to achieve fairness as between parties.

1. *Tortious Liability*

From the perspective of a state, this stage qualifies as an administrative order under Ministerial Regulation no.12 B.E.2543 (2000) promulgated under the Administrative Procedures Act

38 Chulasingh Vasantasingh, *Government Contracts* (Thailand: Winyuchon, 2011) at 46-47.
39 Thailand Supreme Court Decisions No. 1825/2522 and 80/2526.
40 Pattarapas Tudsri and Pinkaew Angkanawadee, "Formation of Contract, Enforceability, and Precontractual Liability in Thailand" in Formation and Mindy Chen-Wishart, Alexander Loke, Stefan Vogenauer, ed), *Third Party Beneficiaries* (Oxford: Oxford University Press, 2018) 396 at 421-422.
41 Yuthtana Thinnarat, *The Legal Problems of Culpa in Contrahendo in Administrative Contracts* (Thailand: Chulalongkorn University, 2006) at 143.
42 Thailand Act on Offences Relating to the Submission of Bids to the Government B.E. 2542 (1999).

B.E.2539 (1995), as it concerns the acceptance or rejection of a bid, or cancellation of the bid call during announcement.[43] Therefore, this non-binding offer does not amount to contractual liability, and tortious liability may instead arise under section 9(3) of the Administrative Establishment Act. Even if there are terms in practice allowing the state to withdraw the bidding process or select bidders based on a margin of discretion, in normal practice, the offeror must always bear the risk of rejection from the offeree. Supreme Administrative Court Decisions (on administrative contracts) have more than willingly ruled that unjustified or negligent rejection or acceptance of a bid in bad faith could give rise to tortious liability than the Supreme Court (on private tenders).[44] This is because, in the context of administrative contracts, bidders generally expect that the state will carry out the process as announced, and in accordance with the standard practice of, administrative contracts of the same type.[45] Such expectations do not arise in private contracts, where parties do not have expectations flowing from the law governing the exact steps towards contract formation.

This mirrors section 421 of the CCC, which provides for the tortious liability arising from the exercise of rights with the purpose of causing injury to another person. In this regard, the state's exercise of rights under its terms in the bid announcement to exclude or include particular bidders into the selection process could cause injury to the unreasonably excluded bidder.[46] In fact, certain actions by the state may also fall under specific unlawful acts under the Act on Offences Relating to the Submission of Bids to the Government B.E. 2542 (1999), such as the sharing of inside knowledge to make confidential pre-agreements on bidding prices and agreements to prescribe favourable qualifications of certain bidders, which would give rise to section 420 of the CCC's characteristics of tort and thus fall under section 9(3) of the Administrative Establishment Act. Such right of the state to set their own bid terms and conditions is not the "right to freedom of contract", which many scholars believe is a special administrative right by law that the state cannot freely set, rather than a right protected by tort law.[47]

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[43] Thailand Ministerial Regulation no.12 B.E.2543 (2000), s 1.

[44] Thailand Supreme Administrative Court Decisions No. 267/2547 and 427/2546.

[45] Thailand Supreme Administrative Court Decision No. 47/2542 exemplifies certain scenarios considered as justifiable withdrawal of offer, such as an announcement in search for skilled bidders without specifying the required skills in such announcement.

[46] Yuthtana Thinnarat, *The Legal Problems of Culpa in Contrahendo in Administrative* Contracts (Thailand: Chulalongkorn University, 2006) at 143.

[47] Ithiwat Methatham, *The role of good faith in pre-contractual liability* (Thailand: Thammasat University, 2019) at 42.

On the other hand, a private bidder could similarly be subject to tortious liability, but on different grounds. A bidder withdrawing its bid after the state's announcement causes injury to the state, as the state bears the cost of setting up the bidding process to find the most suitable bidder to contract with and bears the loss from the delay of public services if bidders withdraw from the bid without the state's expectation.[48] In fact, the withdrawal of an offer (i.e. the bid) is unlawful under sections 354-356 of the CCC, which stipulates the prohibition of withdrawal of offer, forcing the offeror to remain bound should there be any acceptance from the offeree. This satisfies the unlawfulness condition under section 420 of the CCC and leads to the same ground of tortious liability as the state.[49] For this step, tortious liability is the most preferable option as contractual remedies are not available without the meeting of minds. What is more, the presence of administrative rules makes it easier for parties to prove the wrongfulness element required in tortious claims.

2. *Contractual liability*

The contentious legal issue here is whether this stage can be deemed a contract for an injured party to base their claim for compensation contractually, as only an offer has been made by the bidder. This offer has not been accepted by the state. Therefore, there is *prima facie* no binding contract. One must thus explore the possibility of any ground for contractual liability by reframing the legal status of certain actions during the process. It is argued that the announcement of the bid, although seen as an invitation to treat to the main procurement contract, can be interpreted as an offer for another contract (henceforth, the "Tender Contract"). The bidder's submission of its bid can, in turn, be seen as an acceptance of the Tender Contract. Minimally, this will allow the "damaged" party to claim, against the "breaching" party, the damages in relation to the Tender Contract.

The subject matter of the Tender Contract entails both the bidder's obligation to remain in the tender process with the intention to contract with the state-caller should it be successful, as well as the state's reciprocal obligation to carry out the tender process under the announced terms.[50] Thus, acceptance of this offer would happen when the bidder submits its bid. The agreed contract terms are the terms in the state's announcement of bid, including characteristics, qualifications,

[48] Yuthtana Thinnarat, *The Legal Problems of Culpa in Contrahendo in Administrative Contracts* (Thailand: Chulalongkorn University, 2006) at 151-152.
[49] Thailand Civil and Commercial Code, s 420.
[50] Chuthavorapong Kittipat, "Legal Issues in Tendering Process: A Critical Analysis of Thai Law and Foreign Laws" (2020) 10:1 Thammasat Bus LJ 29 at 42.

and process of bidding. Thai courts have generally shown a willingness to adopt this two-contract model, one being the Tender Contract and the other being the actual administrative contract (e.g. procurement contract). Several Supreme Court Decisions have recognised Tender Contracts, although damages do not cover grounds arising from the main contract, and no positive damages arising from opportunity losses are awarded.[51] Having regard to the privileged status of the state, the Supreme Court has acknowledged that the state is able to set terms and conditions of the bidding process, thus safeguarding its right to withdraw the bidding process at any time before the successful bidder is announced. Such conditions in the Tender Contracts places an obligation on the bidder to remain in the process, while the state remains largely exempted from this obligation. As a result, bidders have no choice but to agree to the state's terms and conditions in order to progress to the next steps of the bid.[52] As more cases are being referred to Administrative Courts rather than the Supreme Court, the Administrative Court has increasingly made use of section 9 of the Administrative Establishment Act to hold the state liable should the stated terms and conditions be used in bad faith or in a wrongful manner.[53] For instance, under Supreme Administrative Court Order No. 1547/2547, when the state-caller rejected the bidder's bid wrongfully (i.e. not in accordance with the relevant rules) the court decided that the state-caller was tortiously liable for, *inter alia*, preparation costs that the bidder paid to participate in the bidding. Despite this, it should be noted that both courts still do not allow positive damages from Tender Contracts. Therefore, it is argued that tortious remedy is still the better option to retain fairness for the private party as it could potentially fill this gap by making use of the court's discretionary power under section 438 of the CCC.

C. Selection and Announcement of Successful Bidder

After the state considers the bids that have been tendered, it selects the successful bidder as the contracting party. Once selected, the successful bidder places a further contractual security to commit to entering a formal contract with the state. Like the bid security, the contractual security is seen as a stipulated penalty which can only be claimed by the state, upon default of the successful

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[51] Thailand Supreme Court Decisions No. 931/2480, 1418/2529, and 8898/2544.

[52] Pattarapas Tudsri and Pinkaew Angkanawadee, "Formation of Contract, Enforceability, and Precontractual Liability in Thailand" in Formation and Mindy Chen-Wishart, Alexander Loke, Stefan Vogenauer, ed), *Third Party Beneficiaries* (Oxford: Oxford University Press, 2018) 396 at 422.

[53] Thailand Central Administrative Court Decision No. 426/2547 and Supreme Administrative Court Orders No. 1543/2547, 1618/2547, and A.63/254.

bidder.[54] At this stage, no valid contract has been formed yet,[55] as section 366 of the CCC states that if the parties agree to make a contract in writing, then no contract is formed until it is made in writing. Such a clause – agreeing to make a written contract – often exists in administrative contracts. Thus, the successful bidder and the state must formalise a written procurement contract for there to be any legal effect.[56] Due to this, there exists a gap between the announcement of the successful bidder and the formal contract signing where either party can withdraw from the process. The state might withdraw during this "gap", as it does not have much to lose (because it did not furnish any security in favour of the successful bidder), to the detriment of the successful bidder who might have taken some steps in reliance of formalities being completed.

At this advanced stage in the bidding process, it is argued that – even if tort law can be used[57] – the private bidder should be allowed to claim for the contractual measure of damages. This is because, notwithstanding the fact that a written contract has not been entered into, it can still be viewed as an unwritten contract that has as its subject matter the entry into the main administrative contract. For the avoidance of doubt, such contracts must still abide by the fundamental principles of contract formation under Thai law, *viz.* (i) a clear and unequivocal offer; and (ii) a valid and timely acceptance with mutual intentions. Thus, so long as there is clear evidence that parties jointly intended to enter into the main administrative contract sometime after the successful bid was announced – which can be evidenced by the written notice from the state of the selection of the successful bidder – a contract would come into existence.

Admittedly, such an approach is not without its critics, many of whom opine that there cannot be a legally binding enforcement of a contract to enter into another contract, as this would undermine the parties' freedom of contract.[58] Against this, supporters of this approach have raised the argument that the subject matter is not to enter into another contract, but for the state to select qualified bidders.[59] However, this approach is to be questioned – the selection of qualified bidders is done in taken at the previous stage, when the state considers the bidders' various applications. At this stage, *i.e.* announcement, the state is simply announcing the outcome of such process, and

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54 Panlapa Numnoi, "Problems about the Legal Status of The Administrative Pre–Contract" (2014) 7:1 Naresuan LJ 26 at 31-32.

56 Thailand Civil and Commercial Code, s 366.

57 The analysis is similar to Part V(b)(i) above.

58 Sanunkorn Sotthibandhu, หลักความรับผิดก่อนสัญญา, 2nd edn (Thailand: Thammasat University 2002) 158.

59 Chuthavorapong Kittipat, "Legal Issues in Tendering Process: A Critical Analysis of Thai Law and Foreign Laws" (2020) 10:1 Thammasat Bus LJ 29 at 43

there are the contractual clauses of the main contract are principally set and agreed between the state and the successful bidder. As such, the author proposes an alternative reasoning – although the subject matter of a Tender Contract to enter into another contract is opposed by several scholars, this should be allowed in (i) cases where it is obvious that freedom of contract is not adversely impacted by such agreement, or (ii) cases where the main contract requires a tedious process which would create a gap in time.

In the same vein, Sterk states that the aim of entering into a contract should not be to force a party to enter into an agreement without knowing the full terms; instead, it should be done to allocate risks of precontractual liability.[60] Since parties are aware of and fully agree to the terms in the contract, it is justified to interpret the announcement of bids as a contract to later enter into the main administrative contract. There have been cases where the CCC has been supportive of this principle, for example in agreements to enter into a sale of immovable property under section 456 of the CCC. In such cases, the parties' intention to enter into the sales must be ascertained, as a sale of immovable property requires registration of the transfer with the Land Office, which takes time.[61]

Furthermore, it is argued that similar agreements to enter into any other contracts should be allowed as well. For example, an agreement to enter into an administrative contract aligns with the rationale of an agreement to enter into a sale of immovable property. Firstly, there is already a clear meeting of minds of the parties – after the acceptance from the state, there is no further negotiation process, and the terms are set as agreed upon. This is concludable due to the fixed nature of administrative contract procedures. Therefore, this agreement is not an enforcement of one party upon another to enter into the contract against their will, but rather an iteration of the parties' true intention which is only subject to certain preparatory steps for contract formation to be effective. Secondly, in both cases, there are tedious steps to take before the actual contract is entered into. Similar to how a sale of immovable property requires the registration of transfer, administrative contracts require preparation of documents for the signing. Therefore, in order to preserve parties' intention and prevent parties from backing out during the preparation process, the two-contract model, should be recognised.

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[60] Mitja Kovac and Ann-Sophie Vandenberghe, "Culpa in Contrahendo and Precontractual Liability: Towards an Optimal Classification" (2020) 15:1 J Comp L 245 at 254.

[61] Pattarapas Tudsri and Pinkaew Angkanawadee, "Formation of Contract, Enforceability, and Precontractual Liability in Thailand" in Formation and Mindy Chen-Wishart, Alexander Loke, Stefan Vogenauer, ed), *Third Party Beneficiaries* (Oxford: Oxford University Press, 2018) 396 at 405-406.

This is in line with jurisprudence from the Administrative Courts that is more inclined towards interpreting the announcement of successful bidders as a contract, as compared to the Supreme Court.[62] This could be attributed to the fact that the Administrative Courts have an additional legal tool other than the CCC, which the Supreme Court does not: the former can apply administrative laws, in this case section 9(4) of the Administrative Establishment Act. Additionally, the nature of administrative contracts is such that the intention ov the parties in a procurement contract is factually settled from the announcement of the successful bidder, even though there is yet to be a written agreement. Perhaps it is this ability to apply administrative rules, coupled with the nature of administrative contracts, that allows the Administrative Courts to interpret the announcement of successful bidders as a contract with greater ease than the Supreme Court, which is bound to the traditional interpretation of private contracts under general CCC rules. This makes Administrative Courts more likely to award positive damages (since the subject matter is the same as the main contract).

VI. SUGGESTIONS

With the findings above, each step of an administrative procurement contract process is assigned a ground for remedy based on its status as an administrative order or not, and the nature of actions taken under it. To maintain consistency and fairness in granting damages, parties, regardless of being the state or the bidder, acting on the same wrongdoing should be subject to the same liability and grounds of remedies as the other. However, there may be other actions which do not fall within the scope regulated by the applied administrative laws, or actions that are not considered administrative orders or other orders under section 9(3) of the Administrative Establishment Act and are not in the stage of a possible administrative contract under section 9(4) of the Administrative Establishment Act. Cases not governed by these provisions should refer back to general CCC provisions on contracts.

While the above are possible solutions to deal with the uncertain concept of precontractual liability in administrative contracts, more concrete solutions directly addressing cases of liability arising before an administrative contract has been concluded should be laid down in Thai law. The author views that the outright acknowledgement of precontractual liability is not a viable option

[62] Thailand Supreme Administrative Court Orders No. 352/2548, 660/2548, 355/2550, 658/2551, and 95/2552.

in the near future, as it is a concept not recognised in the Thai legal regime. Including a ground of liability for precontractual cases only in administrative law will cause contradictions with other areas of law, particularly private law in the CCC. Rather, it would be more systematically logical to address particular instances of liability in the specific legal regime of administrative law.

Consistent with the findings above, the author suggests that new subsections be added to section 9 of the Administrative Establishment Act to address cases that the Administrative Court can accept. This should be based on liabilities that could arise in specific stages throughout the bidding process as discussed earlier: (i) unlawfulness or inequality in the process of bid announcement; (ii) damages caused by a party withdrawing its bid, cancelling the bid, or causing harm to another party during the submission of bids; and (iii) damages caused by a party withdrawing or causing harm to another party after the selection and announcement of a successful bidder.

This specific recognition of liabilities that could arise in different stages of the bidding process would allow for a more direct application of the law and a more straightforward interpretation of elements of relevant provisions to the facts of a case. Instead of having to search for unlawful grounds in other provisions to satisfy the requirement of a tortious act under section 420 of the CCC, for instance, a new subsection in section 9 of the Administrative Establishment Act will directly provide unlawful grounds. Furthermore, instead of having to interpret the existence of a contract, for instance after the announcement of a successful bidder but before a formal written contract is concluded, a new subsection will provide direct grounds of liability based on whether the facts satisfy the conditions, rather than spiralling into a theoretical debate on the formation of contract.

VII. CONCLUSION

Precontractual liability is still an unsettled concept in the Thai legal regime. Critical discussion of its application, especially on which path courts should standardise rulings on the determination of remedies, is therefore crucial for the fairness of parties. The above analysis reveals that a single path of remedy is insufficient in achieving optimal fairness, especially in administrative contracts where the state has elevated status in relation to its private counterparts. Rather, remedies should be determined from the stage at which such precontractual liability occurs.

This article finds that for stages before successful bidder announcement, all parties should be subject to the same tortious liability under section 9(3) of the Administrative Establishment Act and Section 420 of the CCC. Tortious remedies allow courts, which have been increasingly willing to grant more damages to injured private parties, to be flexible, and flexibility for the courts to grant the fairest remedies is needed in this underdeveloped area of law. From the stage of the successful bidder announcement onwards, parties should be equally subject to contractual liability under section 9(4) of the Administrative Establishment Act with the interpretation that includes positive damages. Although the two-contract model may not be the most ideal doctrinal basis for precontractual liability (as it circumvents dealing with precontractual liability itself by interpreting that another contract has been created before the main contract), it is one of the most useful ways in ensuring that parties are granted equal remedies before the law as of now. The intersection of administrative law and private law concepts promote each other by creating a solid foundation of the precontractual regime for future cases to follow – perhaps one day, consistency achieved in administrative rulings can translate into private contracts as well.