

THE PRESENCE OF SYUBHAH IN THE PROCUREMENT PROCESS AND PROVISIONS OF CONSTRUCTION CONTRACTS

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ABSTRACT

In the procurement of Islamic philanthropic-funded religious and socio-economic infrastructures and facilities perhaps there exist elements of *Syubhah* or “uncertain” or “doubtful” matters. Consequently, a qualitative study – combining desk research and discussions with Shariah and construction industry experts – was carried out. The study critically examines whether the construction procurement processes, and contract provisions used therein are consistent with the requirements of the *Shariah* or otherwise. The outcome of the study suggests the majority of the procurement processes and contract provisions are consistent with the principles of the *Shariah*, but some are not outright non-compliance hence, suggesting the presence of *syubhah*. The study and its findings are considered significant in the following ways: (i) a breakthrough for the construction industry’s effort to practice *Shariah* compliance in its dealings, (ii) a reference for the authorities responsible for the procurement of Islamic philanthropic-funded religious infrastructures and facilities to be more aware of the requirements of the *Shariah* and (iii) acts as a prelude in the effort to establish *Shariah*-compliant standards and guidelines on the procurement of Islamic philanthropic-funded religious and socio-economic infrastructures and facilities.

Introduction

The practice of Islamic philanthropy in either one or more of the following: *zakat*, *waqf*, *infaq*, *hibah*, *sadaqah*, *faraid* and *wasiat*, refers to the act of giving away one's wealth voluntarily irrespective of time or upon meeting the prescribed criteria (Baharin et al., 2023; Abdul Rashid, 2022; Abdul Rashid et al., 2021). Performing an act of Islamic philanthropy is akin to performing an *ibadah* (worship) with the *niat* (intention) to seek the pleasure of Allah S.W.T. Islamic philanthropy is mentioned in the Quran:

Translation: Verily Allah will admit those who believe and do righteous deeds, to Gardens beneath which rivers flow...

(Surah Muhammad, 47:12)

In Malaysia, there is an upward and continuous trend for Muslims to be involved actively in Islamic philanthropic activities, especially *zakat* and *waqf* in the provision and maintenance of religious and socio-economic infrastructures and facilities. Scholars and commentators have discussed the trend's merits and demerits and related constraints and strategies. To this end, they highlighted key *Shariah* injunctions in support of their theses and anti-theses but key technical matters on implementation and practical issues and solutions such as those related to the processes of procurement, contract provisions used therein and maintenance of the facilities are often overlooked (Husni & Khairat, 2024; Abdul Rashid, 2022; Abdel Mohsin, 2016; Abdul Rashid et al., 2019; Iffah Madihah, 2018).

This paper endeavours to expand the above discussions. Specifically, the paper's key objective is to report on a study that critically examines whether the current procurement processes and contract provisions used therein are consistent with the requirements of the *Shariah* or otherwise. If the latter is identified, then perhaps there exist elements that are non-*Shariah* compliant and/or *syubhah* (uncertain or doubtful).

Syubhah literally means suspicious, doubtful and sceptical. It is a status between *halal* and *haram* where the determining factors of both are not clear or definite. A matter is considered as *syubhah* when it is viewed as *Shariah*-compliant from one perspective and considered as *Shariah* non-compliant from another (Ismail & Jalil, 2019). *Syubhah* (uncertain or doubtful matters) refers to "... when it is uncertain as to the *haram* or *halal* of some things or being unclear as to the true meaning of its *halal* and *haram* status" (*al-Mausu'ah al-Fiqhiyyah al-Kuwaitiyyah* 25/338 in Muhammad Fathi, 2020). According to al-Ghazali, *syubhah* could arise from four main causes. The first cause of *syubhah* appears during the determination of *halal* and *haram*. Secondly, *syubhah* could arise from the mixture of *halal* and *haram*. Thirdly, *syubhah* could be caused by the sin which occurs in the process of making a *halal* matter. Fourthly, *syubhah* could also arise out of diversity of the evidence of *Shariah* such as contradictory evidence, contradictory signs, and contradictory assumptions (al-Ghazali, 1993).

The importance of observing *syubhah* is best described in a *hadith* reported by Bukhari, Muslim, Abu Daud, Ibn Majah and Darimi (Jais, 2010): What is *halal* is clear, and what *haram* is also clear, and in between those two is a dubious area which many people do not know about. So, whoever distanced himself from it, has acquitted himself (from blame). And those who fall into it, he has fallen into a state of *haram*.

The subject of *syubhah* in *al-muamalat* (transactions) has been highlighted in the works of many authors including Mohd Safian (2023), Noordin (2020), Adlie (2020) and Abdullah and Ibhram (2017). In their works, they discussed among others, the definitions, and issues of *syubhah*. It seems that *syubhah* elements are present in the supply chain of the food and beverages industry, cosmetics and beautification and in the daily transactions related to the sale and purchase of goods and services, investments and contracts.

Consequently, Muslims are advised to be cautious of the presence of *syubhah* in their daily transactions and that the matter should not be taken lightly notwithstanding that Allah S.W.T. is the Most Forgiving and Most Merciful. In the Quran, Allah S.W.T. says:

Translation: But there is no blame on you if you make a mistake: (What count is) the intention of your hearts: And Allah is Oft-Forgiving, Most Merciful.

(Surah al-Ahzab, 33:5)

Consequently, it is proposed that when procuring and maintaining religious and socio-economic infrastructures and facilities using Islamic philanthropy, the responsible authorities should embrace the concept of *halalan toyyiban* as what is taking place in the food and beverages industry. Thus, the ‘*halalness*’ of the food item should not be made the sole criterion but the food item’s entire supply chain—from its originating source to the final point of consumption – should also be *halal* (Mohamad Yunus et al., 2010) and therefore avoiding the issue of it being non-*Shariah* compliant and/or *syubhah*.

In the context of the current study, it would be inadequate if the procurement and maintenance of Islamic philanthropic-funded religious and socio-economic infrastructures and facilities focus only on the *Shariah* compliances of certain inputs, as often the case is the source of funding. Instead, effort should be made so that the entire supply chain of the procurement processes, from project inception to handing over, occupation and maintenance of the completed assets and facilities could be made *Shariah*-compliant and therefore, “cleaning” the entire supply chain of the procurement processes from the potential presence of elements of non-*Shariah* compliant and/or *syubhah*.

At present, the authors are not aware of the presence of formally endorsed or otherwise *Shariah*-compliant standards or guidelines on procurement processes and contractual provisions for construction works. In the case of the completed or ongoing projects funded by *zakat* and *waqf*, past studies have reported that conventional or western-styled procurement processes and contract provisions were used (Abdul Rashid & Puteri, 2017; Abdul Rashid et al., 2017; Abdul Rashid, 2019; Iffah Madihah, 2018; Nurul Natasha Amira, 2018).

Literature Review

Islamic Philanthropy in the Provision of Religious and Socio-Economic Infrastructures and Facilities

There are seven types of Islamic philanthropy namely *zakat*, *waqf*, *infaq*, *hibah*, *sadaqah*, *faraid* and *wasiat* (Abdul Rashid & Hassan, 2021). A brief description of each type is provided in Table 1.

Table 1. Types of Islamic Philanthropy (Khairuddin & Sharina Fariyah, 2021)

Type	Definition
Zakat	A compulsory contribution of a portion of one’s wealth (2.5%) on the condition that he/she meets the prescribed criteria.
Waqf	An act of voluntarily giving away one’s belonging (property, money) irrespective of its value or amount to whom he/she prescribed for the latter to enjoy the benefits derived therefrom (usufruct) indefinitely. <i>Waqf</i> may be <i>khas</i> (specific) or <i>am</i> (general) as decreed by the giver. The difference is that in the former, the usufruct must be employed as directed whereas in the latter the usufruct may be enjoyed by those at the discretion of the Trustee.
Infaq	Refers to spending (in the form of wealth either money or material) on others and doing so voluntarily to please Allah.
Hibah	The voluntary transfer of ownership of an asset without consideration (<i>iwad</i>) from one person (present owner) to another (new owner) while the former is alive.
Sadaqah	Much like <i>infaq</i> except that a <i>sadaqah</i> has a wider meaning i.e. such acts include money or material as well as non-material e.g. good deeds like a smile, physically helping another person, sharing of knowledge, volunteering, etc.
Faraid	Islamic law of inheritance or a method of distribution of wealth (money and other assets) belonging to the deceased to his/her heirs.
Wasiat	The Islamic concept of a will. A Muslim can bequeath a maximum of one-third of his/her wealth to non- <i>faraid</i> heirs.

Out of the seven types of Islamic philanthropy, only *zakat* has specific criteria for eligibility, both as a contributor and recipient. To summarise, a person has to pay *zakat-ul-fitr* for himself once a year during the month of *Ramadhan* if he/she or his/her parent/guardian could afford it, i.e. he/she or his/her parent/guardian is not classified as a poor or needy person. In the case of *zakat-ul-maal*, payment is due only when his/her savings and wealth in a year and harvest from agricultural produce (if any) exceed the *nisab* (threshold amount) prescribed by the authority in charge of Islamic affairs. The collected *zakat* amount must be disbursed to the eight specific recipients known as *asnaf* i.e. the poor and needy persons, *zakat* collectors, recent Muslim converts, those in bondage and debts, those who strive in the cause of Allah and the wayfarer (Surah al-Tawbah, 9:60).

The size of the Malaysian Islamic philanthropy market is enormous. The status of *zakat* and *waqf*, the two most active types of Islamic philanthropy confirm this notion. For example, in 2016 the amount of *zakat-ul-maal* collected exceeded RM2.5 billion while the total value of *waqf* assets in 2021 was worth RM1.3 trillion (Abdul Rashid, 2022; Abdul Rashid & Hassan, 2021).

In terms of disbursement, *zakat* monies are spent on the *asnaf* for their much-needed daily sustenance. In addition, the respective State Islamic Religious Councils (SIRCs), the authorities entrusted with managing *zakat* funds, disburse *zakat* monies in the form of further assistance to the *asnaf* such as scholarships, building or repair of homes and religious schools, education and the likes (Abdul Rashid et al., 2014). In the case of *waqf*, the funds and assets are often spent on the provisions of burial grounds for Muslims, the building of *surau* and mosques and contributions to *tahfiz* institutions (Islamic religious schools) and the development and administration of socio-economic infrastructures and facilities (Azman & Saidatolakma, 2012; Abdul Rashid et al., 2017). Such developments include building hotels, shop lots, offices and low-cost housing which are then rented out or leased to businesses or individuals. In return, the businesses and individuals pay rental charges that in turn provide a steady income stream for the SIRCs (Yayasan Waqaf Malaysia, n.d.).

It is observed that in the procurement of the aforementioned religious and socio-economic infrastructures and facilities, higher emphasis has been placed on the permissibility under the *Shariah* that focuses on aspects including funding, income derived therefrom, ownership and inheritance. However, the significance of other aspects of the procurement of the facilities' supply chain, from the processes of inception to completion and maintenance, i.e. whether the processes adopted are consistent with the requirements of *Shariah* or otherwise have been given less attention (Abdul Rashid, 2022; Iffah Madihah, 2018).

Conventional Procurement Process and Contract Provisions

Abdul Rashid (2002) developed a conceptual model of the processes involved in the procurement of a built facility (building, infrastructures, etc.). In the context of Malaysia and following the conventional mode of procurement, he identified seven key processes of procurement namely project initiation, funding, design, statutory approval, tendering, construction and allocation of risks amongst the parties involved therein. Each of the seven processes of procurement is defined in Table 2 below:

Table 2. The Process of Procurement (Khairuddin, 2002)

No	Process	Definition
1	Initiation	The process of recognizing the need for a facility.
2	Funding	The provision of finance required for the project to be undertaken.
3	Design	The translation of the requirements of the initiator into drawings and specifications to facilitate construction.
4	Statutory Approval	The process of obtaining permissions from the relevant authorities to initiate and construct a facility and upon its completion occupy and/or use the completed facility.
5	Tendering	The process that is used to obtain offers leading to a contract between a client and contractor, a client and consultant or a contractor and subcontractor.
6	Construction	The process of physically fitting together the various components of a facility to form a final structure.
7	Risk Allocation	The susceptibility of each of the above generic functions to varying degrees of risks.

The conventional construction supply chain starts with the client initiating a project and ends when the project is completed, and the facility is handed over to the client. The procurement processes often consumed a considerable time, working on the bespoke design, involving a considerable number of resources: money, materials, machinery, manpower, etc. and exposure to the elements. In almost all cases, the most critical guiding principle of the conventional process of procurement is simply to achieve efficiency, effectiveness and profit maximization.

During the process of initiation, the concerns include the facility to build, and its mode of delivery i.e. how could the facility be completed with the lowest possible costs, quickly but with the highest level of quality; the ultimate aim is profiting maximization. The process of funding concerns the effort to secure project financing that would enable the client to fund the project from inception until the project is

completed and able to attract income either through selling or leasing the completed building. Moving on, the process of design concerns how to realize the client's requirements within the ambit of the prevailing laws whereby again the key objective is profiting maximization.

Obtaining statutory approvals involves complex bureaucracy notwithstanding the government's effort to simplify the processes. Clients must endure a longer duration from when an application is submitted to when approval is granted. In addition, media reports suggest that the process of obtaining statutory approvals often involves unhealthy activities including corruption.

The conventional process of procurement separates those who design the facility from those who build it. Thus, tenderers are invited to submit offers from contractors based on their interpretation of the completed design and related documents. Contractors are to price the works and assume all risks related thereto. Whatever risks a contractor allows in his tender, if they do not happen, he pockets them as profit but should the tendered price fall short of his actual costs then he bears the losses. His sources of funds to finance the project until he receives interim payments is his own doing. In almost all cases, the contractor with the lowest tendered price and shortest construction duration will be awarded the contract. Up to a point, it would be not unwise to contend that the process of tendering bears characteristics of a win-lose scenario akin to gambling. A contract binds the contractor's offer with the client's acceptance. In addition, the contract also contains provisions defining the responsibilities, liabilities and rewards to both contracting parties as per the Contracts Act 1950. It is common practice for one of the presently available standard forms of contract such as the P.W.D. Form 203A (Rev. 1/2010) (Government of Malaysia, 2010) or PAM Contract 2018 (Pertubuhan Arkitek Malaysia, 2018) to be used by the contracting parties.

During construction, the contractor is responsible to build and complete the facility either directly or through his appointed sub-contractors. The organizing of the works, materials to be used and their suppliers, machinery and equipment, costing of works done, claims for payments and variation works, workers and their welfare, workmanship, health and safety on the construction site, etc. until completion of the works are all under his sole responsibility. It is a known fact that construction works are exposed to a variety of risks, principally risks concerning time (time overrun and non-completion by the contractor), the risk concerning price (price over-run and non-payment by the client) and quality of the completed works. In short, the current practice of conventional lump-sum contracting means that all these risks are transferred to the contractor, notwithstanding whether he is the most appropriate party to accept and shoulder them. Consequently, a systematic risk allocation approach in managing the entire process of procurement is of paramount importance.

Shariah Principles in Business Transactions (including Construction)

The *Shariah* principles on the conduct of business transactions or *al-muamalat* lay emphasis on the concepts of justice, moral obligation, accountability, and equality (Qal'ahji, 2005; Billah, 2006; Abdul Rashid, 2009; Maulidiana & Famulia, 2023). The following are some of the verses from the Quran reiterating the importance of these concepts:

Translation: Give measure and weight with (full) justice.

(Surah al-An'am, 6:152)

Translation: If your debtor is in straits (in difficulties), grant him a delay until he can discharge his debt; but if you waive the sum as alms, it will be better for you, if you knew it.

(Surah al-Baqarah, 2:280)

Translation: O ye who believe! Eat not your property among yourself in varieties: but let them be amongst you traffic and trade by mutual goodwill.

(Surah an-Nisa' 4:29)

Translation: And fulfil (every) engagement, for (every) engagement will be enquired into (on the day of reckoning).

(Surah al-Isra' 17:34)

According to Qal'ahji (2005) and Abdul Rashid (2009), some of the basic principles for business transactions have been identified. They are: business transactions are not *haram* unless there is a *nass* stating to that effect, business transactions should draw benefits for society (*maslahah*), actions leading to *iktinaz* (hoarding, black marketeering) and *talaqqi al-rukban* (middleman) causing inflation in prices of goods and services are *haram*, transactions involving *riba* and trading in alcohol, gambling, prostitution and the likes are *haram*, monopoly or *al-ikhtikar* must be avoided, *gharar* (uncertainty) and *maisir* (gambling) such as market manipulation and harmful speculation are *haram* (Alias et al., 2024). Allah S.W.T commands contracting parties to fulfil their obligations as thus,

Translation: O ye who believe! Fulfill the contractual obligations.

(Surah al-Mai'dah, 5:1).

In addition, the contract or *al-aqad* for the transaction should comprise the elements of *ijab* (offer) and *qabul* (acceptance) with both parties thereto to be persons of sound mind, *aqil baligh* and are free to enter a contract (i.e. not a bankrupt). Furthermore, the subject matter of the *al-aqad* should be in existence at the time, legally owned, beneficial to the contracting parties and have commercial value by Shariah; and the consideration that has value (*mutaqawwim*), is certain (*mawjud*), permissible (*halal*) and valid (*sahih*). Moving on, it is imperative for the contract to be signed and witnessed. These requirements are stated in the Quran:

Translation: O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing... and get two witnesses.

(Surah al-Baqarah, 2:282)

One key feature of a construction contract is that the contracting parties enter into an agreement in which the subject matter is non-existent at the time of the contract. Instead, the subject matter is as described or illustrated in the contract documents: drawings, specifications and/or bills of quantities. However, a Shariah-compliant contract requires the physical presence of the subject matter. This is to allow the contracting parties to satisfy themselves with the subject matter before entering into the contract.

In this respect, Muslim scholars concur that *Istisna'* or *al-Muqawalah* is considered the most appropriate Shariah-compliant contract agreement to be used. *Istisna'* means making, manufacturing, or constructing something. An *Istisna'* contract is, therefore, "a contract with a manufacturer to make something (Al-Amine, 2001). References to *Istisna'* as an act of making or manufacturing can be found in the Quran and *Sunnah*.

Translation: The work of Allah who perfected all things.

(Surah an-Naml, 27:88)

This is further substantiated in a hadith where it was reported that the Prophet *s.a.w* had ordered a craftsman to make a ring for him (Al-Amine, 2001; Qal'ahji, 2005). In addition to the general conditions of *al-muamalat* applicable in a business transaction as previously mentioned, key conditions for the legality of *Istisna'* includes that the object to be built must be clearly defined, illustrated, quantified and specified to avoid ambiguity or misrepresentation; the object is something that people normally deal with; time of completion must be specified; materials for the works should be supplied by the contractor (if the client supplies the materials then it becomes an *Ijara* contract). Furthermore, advance payment to the contractor is permissible; payment to the contractor for the works may be made in instalments or at the end of the contract; liquidated damages (LAD) i.e. payment of damages for breach of the contract is also permissible so long as prior agreement between the parties was made; and provision is made for circumstantial changes and its effects such as exceptional events or unforeseeable events arising from

general circumstances that occurred during the contract and disputes between the contracting parties to be resolved through arbitration or *tahkim* (Al-Amine, 2001; Qal’ahji, 2005).

Istisna’ is terminated once the contractor completes the project and hands it over to the client and the latter pays the former. However, termination during the progress of the works may take place upon the death of one of the parties (Al-Amine, 2001).

Methodology

The key objective of the current study is to assess whether the current procurement processes and contract provisions used therein are consistent with the requirements of the *Shariah* or otherwise. If the latter is identified, then perhaps there exist elements that are non-*Shariah* compliant and/or *syubhah* (uncertain or doubtful). This study employed the qualitative research method. It involved a three-stage research process combining a critical review of literature, content analysis and in-depth face-to-face interviews with *Shariah* and construction industry experts. Figure 1 provides an overview of the research.

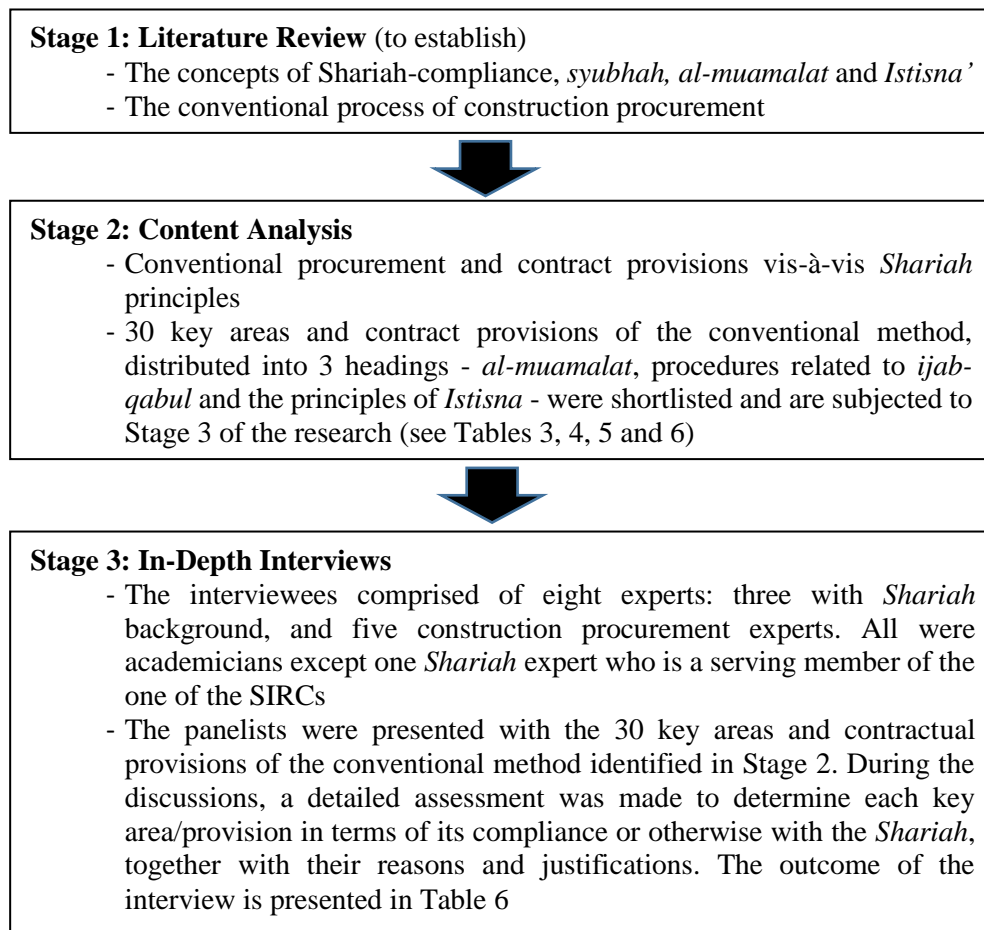


Figure 1. Overview of the three-stage qualitative research process

Referring to Figure 1, in Stage 1 of the research, a critical review of the literature was carried out. The *Shariah* review focused on establishing the concepts of *Shariah*-compliance, *syubhah*, *al-muamalat* and *Istisna’* while the review of the conventional process of procurement was concerned with establishing how procuring constructed facilities including those procured via Islamic philanthropy were carried out in Malaysia.

In Stage 2, a critical examination of the conventional procurement and contract provisions in terms of their consistency with the *Shariah* or otherwise was carried out. This part of the research was carried out through the content analysis method. Data collected from the literature review on key principles of *syubhah*, *al-muamalat*, and *Istisna’* was compared and contrasted with the key procurement processes and contractual provisions, the latter was extracted from the standard form of contract currently in use by most public sector clients in Malaysia i.e. P.W.D. Form 203 A (Rev. 1/2010) (Government of Malaysia, 2010).

It would not be feasible under the current study to identify and critically examine the entire processes of construction procurement, and all the contract provisions contained in the P.W.D. Form 203A (Rev. 1/2020). The standard form alone contains 81 main clauses plus several appendices and addendums. Consequently, 30 key areas of the construction procurement processes and contract provisions were distributed into three headings – the basic principles of *al-muamalat*, procedures related to *ijab-qabul* and the principles of *Istisna* – that were deemed critical and appropriate for detailed examination, were shortlisted in an attempt to fulfil the objective of the study (refer to Tables 3, 4, 5 and 6 respectively).

Table 3. Shortlisted Construction Procurement Process and Contractual Provisions

Heading	No of process / provisions	%
Basic principles of <i>al-Muamalat</i>	12	40
Procedures related to <i>Ijab-Qabul</i>	5	17
Principles of <i>al-Istisna</i>	13	43
Total	30	100

Table 4. Basic Principles of *al-Muamalat*

1	Business transactions are not forbidden
2	A contract is to facilitate business transactions
3	<i>Iktinaz</i> and <i>talaqqi al-rukban</i> (leading to deception or inflated prices of goods/commodities) are forbidden
4	<i>Riba</i> (interest charges) is forbidden
5	Trading in alcohol, gambling, prostitution etc. is forbidden
6	Avoidance of monopoly
7	Business transactions should be conducted with patience and tolerance
8	Upholding the concepts of truthfulness, ethics, integrity and accountability at all times
9	Avoidance of corruption
10	<i>Gharar</i> and <i>maisir</i> are forbidden
11	Parties to a contract must fulfil their respective obligations
12	Be diligent and persevere in conducting businesses

Table 5. Procedures of *Ijab-Qabul*

1	<i>Sighrah</i> : <i>ijab</i> and <i>qabul</i> (offer and acceptance)
2	<i>Aqidan</i> (qualifications of the contracting parties)
3	<i>Ma' aqud Alaid</i> (subject matter and consideration)
4	Contract documents
5	Contract in writing

Table 6. Principles of *Istisna*'

1	Subject matter needs manufacturing
2	Contract duration stated
3	The Contractor may ask others to perform the works on his behalf (sub-contract)
4	Guarantee of works and obligations – a performance bond
5	Insurances
6	Liquidated damages
7	Circumstantial changes
8	Materials for the works supplied by the Contractors (if by the Client then it is <i>Ijarah</i>)
9	The place of delivery is specified
10	Advance payment
11	Dispute resolution by arbitration
12	Dispute resolution by applying Shariah
13	Termination upon completion

In Stage 3, the results from the content analysis comprising the 30 key areas of the construction procurement processes, and contract provisions carried out in Stage 2 were presented to eight individuals comprising three *Shariah*, and five construction experts in a series of in-depth interviews. At the material time, seven of the experts interviewed were serving as senior academicians at one of Malaysia's public universities and the interviews were conducted face-to-face. The remaining expert was a serving officer at one of the SIRC's in Malaysia.

During the interviews, the said 30 key areas were defined and described in detail to the expert interviewees. In the ensuing discussions, the interviewees were able to assess and determine each key area in terms of its compliance or otherwise with the *Shariah*, together with their reasoning and justifications. Rich qualitative data was gathered, and the data was analyzed thematically.

Results and Findings

The results of the current study are summarized and detailed in Tables 7 and 8 respectively. In the tables, the requirements of *Shariah* were attested (denoted by the symbol √); and their presence, observance and compliance or otherwise by the current practice were presented (the symbol √ denotes compliance).

Table 7. Summary of Shortlisted Construction Procurement Process and Contract Provisions and their Compliance or otherwise with *Shariah*

Heading	Shariah			Total
	No definition in Shariah	Compliance √	Prohibition not stated	
Basic principles of <i>al-Muamalat</i>		6	6	12
Procedures related to <i>Ijab-Qabul</i>	1	3	1	5
Principles of <i>Istisna'</i>		10	3	13
Total	1 (3.33)	19 (63.33%)	10 (33.33%)	30

Table 8. Assessment of Construction Contract Provisions and Their Compliance with *Shariah*

Key Areas of Procurement Processes and Contract Provisions		Shariah requirements	Current contract provisions
		(√ denotes requirements under the <i>Shariah</i> and its compliance thereof)	
Basic Principles of <i>al-Muamalat</i>			
1	Business transactions are not forbidden	√	√
2	A contract is to facilitate business transactions	√	√
3	<i>Iktinaz</i> and <i>talaqqi al-rukban</i> (leading to deception or inflated prices of goods/commodities) are forbidden	√	Prohibition is not expressly stated
4	<i>Riba</i> (interest charges) is forbidden	√	Prohibition is not expressly stated
5	Trading in alcohol, gambling, prostitution etc. is forbidden	√	Prohibition is not expressly stated
6	Avoidance of monopoly	√	Prohibition is not expressly stated
7	Business transactions should be conducted with patience and tolerance	√	Prohibition is not expressly stated
8	Upholding the concepts of truthfulness, ethics, integrity and accountability at all times	√	√
9	Avoidance of corruption	√	√
10	<i>Gharar</i> and <i>maisir</i> are forbidden	√	Prohibition is not expressly stated
11	Parties to a contract must fulfil their respective obligations	√	√
12	Be diligent and persevere in conducting businesses	√	√
<i>Ijab-Qabul</i>			
1	<i>Sighrah</i> : <i>ijab</i> and <i>qabul</i> (offer and acceptance)	√	√
2	<i>Aqidan</i> (qualifications of the contracting parties)	√	√
3	<i>Ma'aqud Alaid</i> (subject matter and consideration)	√ <i>Istisna'</i>	The subject matter is not physically available
4	Contract documents	Documents and style are not defined	Conventional: drawings, specifications, bills of quantities
5	Contract in writing	√	√

Table 8. Assessment of Construction Contract Provisions and Their Compliance with *Shariah* (continued)

<i>Istisna'</i>			
1	Subject matter needs manufacturing	√	√
2	Contract duration stated	√	√
3	The Contractor may ask others to perform the works on his behalf (sub-contract)	√	√
4	Guarantee of works and obligations – a performance bond	√ Shariah-compliant bonds	The requirement of <i>Shariah</i> is not expressly stated. Options: Conventional bond/ <i>takaful</i> / conventional insurance/bond under the concept of <i>kafalah</i>
5	Insurances	√ <i>Takaful</i>	The requirement of <i>Shariah</i> is not expressly stated. Options: Conventional insurance or <i>takaful</i>
6	Liquidated damages	√	√
7	Circumstantial changes	√	√
8	Materials for the works supplied by the Contractors (if by the Client then it is <i>Ijarah</i>)	√	√
9	The place of delivery is specified	√	√
10	Advance payment	√	√
11	Dispute resolution by arbitration	√	√
12	Dispute resolution by applying <i>Shariah</i>	√	<i>Shariah</i> is not expressly stated
13	Termination upon completion	√	√

The results in Tables 7 and 8 suggest that the majority (19 out of 30 or 63%) of the 30 key areas of construction procurement processes and contract provisions which were critically examined, complied with the requirements of the *Shariah*. In other words, these 19 areas of construction procurement processes and contract provisions which were currently being practised were consistent with the key *Shariah* prerequisites.

The remaining 11 key areas (11 out of 30 or 37%) were indefinite in terms of compliance with the requirements of the *Shariah* and instead, fit into the category of being “uncertain” or doubtful” (see below). They comprised of six key elements under the heading of basic principles of *al-muamalat*, one under the heading of procedures related to *ijab-qabul* and the under the heading of *Istisna'*. One key element under the heading of *ijab-qabul* appeared to be at an impasse.

It was acknowledged that the study principally involved examining key documents that were standard in nature. As per the methodology adopted for the study, neither the actual projects’ contract documents were reviewed, nor were the parties involved with the procurement processes interviewed. Therefore, it was considered inappropriate to label these 11 key areas as non-*Shariah* compliant, and instead, they were considered as *syubhah*.

Discussions

The following discussions focus on the 11 key areas of construction procurement processes and contract provisions that have been considered *syubhah*. With reference to Table 8, the six key areas under the basic principles of *al-muamalat* considered as *syubhah* relates to the core *Shariah* principles on prohibitive elements i.e. (i) *iktinaz* and *talaqqi al-rukban*, (ii) *riba*, (iii) involvement with alcohol, gambling and prostitution, (v) monopoly, (v) patience and tolerance in conducting transactions and (vi) *gharar* and *maysir*. A review of the documents applied under the current practice show that such documents appeared to be devoid of express statements of prohibition of these elements. Consequently, modifying the current contractual provisions by carefully inserting express statements denouncing/avoiding them would be a step in the right direction towards making the practice *Shariah* compliant.

Under the heading of procedures related to *ijab-qabul*, one key area is considered as *syubhah* i.e. *ma'aqud alaid* (subject matter and consideration). Under the current practice, the parties entering into a contract do so in the absence of the subject matter i.e. the facility is yet to be built. The situation is somewhat critical as it concerns the legality of the contract itself. However, based on available literature, the way forward in attempting to make the practice *Shariah* compliant is to include and adhere to the principles of *Istisna*.

Further, one key element under the heading of *ijab-qabul*, which relates to contractual documents, is identified to be at an impasse. Under the basic principles of *al-muamalat*, contracts must be in writing. This requirement is stated in the Quran, Surah al-Baqarah 2:282 (Ali, 1996). However, clear definitions and specifications as to what or how the contractual documents should be are lacking. Under the current practice, a contract for construction works should comprise, among others, a Form of Tender, a Letter of Acceptance of Tender, Contract Drawings, Bills of Quantities (BQs) or a Schedule of Rates, Specifications, etc. (Government of Malaysia, 2010). The impasse stems from the fact that while the current practice provides a complete list of what a set of contract documents should be, it is unclear to the expert interviewed whether the set of documents fully satisfies the requirements of the *Shariah*. Currently, what constitutes *Shariah*-compliant contractual documentation specifically for construction works has yet to be developed. The set of documentation proposed by Bank Negara Malaysia (2015, p26), intended to facilitate Islamic Financial Institutions (IFI) in their dealings on matters related to Islamic financial products and services appears to be sparse in contrast to the list of documents spelled out in the P.W.D. Form 203A (Rev.1/2010). In addition, there is a further argument on what constitutes a *Shariah*-compliant Form of Tender, a Letter of Acceptance of Tender, Contract Drawings, Bills of Quantities (or Schedule of Rates), Specifications, etc which reflects the need for divine principles as part of the legal foundation (Djumikasih et al., 2021). In addition, in some construction contracts, Bills of Quantities are not made mandatory, hence the quantification aspect of the contract is therefore devoid. Abdul Rashid (2019) recommends that *Istisna'* for construction works contracts should include the Drawings, Specifications and BQs as part of the contract.

Under the heading of *Istisna'* 3 key areas of construction procurement processes and contractual provisions have been considered as *syubhah*. They are (i) the guarantee of works and obligations in the form of a performance bond, (ii) the provision of insurance for the works, workmen and other liabilities and (iii) dispute resolution. They are considered *syubhah* because there are no express statements in the current contractual provisions specifying that guarantees or performance bonds, insurance and dispute resolution should meet the requirements of the *Shariah*. However, in practice and given that *Shariah*-compliant guarantees or performance bonds and insurances are readily available in the market, clients and contractors alike do have options either to procure the conventional guarantees or performance bonds and insurances or opt for the *Shariah*-compliant ones under the various *kafalah* and *takaful* products. With regard to dispute resolution, there is no express provision in the contract provisions requiring disputes between the parties in a contract to be resolved based on *Shariah*.

Conclusion

The procurement of religious and socio-economic infrastructures and facilities using Islamic philanthropy, so long as they meet the requirements of the *Shariah*, is a noble practice. The practice should be expanded, and its processes and procedures strengthened. However, the nobleness of the practice may be weakened if the processes of procurement and contractual provisions used therein are not consistent with the requirements of the *Shariah* or elements of *syubhah* are suspected to be present.

This paper argued that it would not be adequate for the procurement and maintenance of Islamic philanthropy-funded religious and socio-economic infrastructures and facilities to focus only on the *Shariah* compliance inputs of a few selected items with the most often mentioned being the source of funding. The entire supply chain, from inception to the handing over of the completed facilities and their occupation and maintenance should also be *Shariah* compliant.

This paper has identified the key areas of construction procurement processes and contract provisions that are normally used in the procurement of religious and socio-economic infrastructures and facilities using Islamic philanthropy. In addition, it has identified the provisions that are consistent with the requirements of the *Shariah* and also those that are considered *syubhah*.

The study reported herein is considered exploratory. It has several limitations especially in terms of the scope of the study, the *Shariah* scrutiny of the construction procurement processes and the contractual provisions, as well as the methodology used. Consequently, the findings presented herein should be interpreted within these limitations. A further and in-depth study involving *Shariah* and construction experts is strongly recommended and it should be commissioned in earnest.

To conclude, the study and its findings are considered significant in the following ways: (i) a breakthrough for the construction industry to practice *Shariah* compliance in its dealings but more importantly, (ii) a reference for the authorities responsible for the procurement of Islamic philanthropic-funded religious and socio-economic infrastructures and facilities to be more aware of the requirements of the *Shariah* and their inclusion into the processes of procurement and the contractual provisions used and (iii) acts as a prelude to establishing *Shariah*-compliant standards and guidelines on the procurement of Islamic philanthropic-funded religious and socio-economic infrastructures and facilities.

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