

CONSTRUCTION LAW

CHAPTER ONE
THE CONSTRUCTION INDUSTRY

- The Construction Industry can be described as the sum of all economic activities related
to civil and building works: their conception, planning, execution, and maintenance.

- ***"all units mainly engaged in constructing buildings (including the on-site assembly and erection of prefabricated buildings), roads, railroads, aerodromes, irrigation projects, harbor or river works, gas, sewerage or storm water drains or mains, electricity or other transmission lines or towers, pipelines, oil refineries or other specified civil engineering projects. In general, units mainly engaged in the repair of buildings or other structures are also included…. as are***

- The construction industry has a major influence on the economic growth of a country.
- It’s also One of the main indicators of socio-economic and technological development of a country.

- Currently, in the weak construction of Eth, engineering and consultancy, and technology transfer and development capabilities that enable the reduction of dependence and promote self reliance through time are not well established in the industrial sector

Meaning and Scope of Construction Law

- Hudson defines a construction contract as

"***an agreement under which a person, called variously the builder or contractor, undertakes for reward to carry out for another person, variously referred to as the building owner of employer, works of a building or civil engineering character***."

- Article 2610 of the Civil Code of Ethiopia defines a construction contract as "***a contract of work and labor is a contract whereby one a party, the contractor, undertakes to produce a given result, under his own responsibility, in consideration of a remuneration that the other party, the client, undertakes to pay him.***"

- a construction contract is one type of ordinary contracts; its only different from ordinary contracts in that it deals with the construction of various infrastructure.
- A major distinguishing feature between construction contracts and ordinary contracts is that the latter is bilateral, affecting only two parties, whereas the former involves more than two parties.

- Article 2876 goes further to elaborate that a contract whereby one of the parties undertakes to deliver to the other party a house, a flat or another building which does not yet exist, is a contract of work and labor relating to immovable.

Pre-Contract Preparatory Works

- preparatory works, which should be done Before a person signs a construction contract, The include;

1. **Soil testing** :

soil engineers conduct a thorough investigation into the soil’s interaction with the construction

2. securing building permits:

- It is a document issued by the sub-city administration where the construction work is to be undertaken allowing persons to do the construction they seek to undertake.
- In order to secure abuilding permit, a builder is expected to submit plans, sign-offs from the architect and engineer, and soil reports showing the condition of the construction site.

3. site surveying

- Once a builder secures a building permit for the construction, he/she wishes to undertake, he/she proceeds to have the construction site surveyed.
- land surveying includes services such as mapping and construction layout surveys. Construction layout surveys refer to the process of establishing and marking the position and detailed layout of the new structures of building constructions.

4. consideration of various rights of different parties.

- a person needs to consider the various rights of different parties so that the construction he/she considers to undertake will, in no way, infringe upon other's rights.

Licensing and Registration of Contractors, Architects and Civil Engineering Consults

- Before contractors, architects and engineers undertake any construction work, they need to be licensed and registered.
- The present rationale for licensing of contractors in Ethiopia is to ensure that applicants for a project have the necessary capacity and capability.

- The current procedure of registration and
  issuance of graded licenses rely on ownership of relevant equipment and number of staff.
- For contracts works in other countries and for multilateral donor projects, this requirement is met through the requalification process for each tender.

I. Builders or Contractors

- Contractor is a firm who are responsible for constructing a building in accordance with the contract documents’
- All contractors desiring to carry out construction works are required to register with the MoWUD

- Every contractor has the **option** of submitting an application for registration as a contractor in any one of the following categories:

- 1) **General Contractors:** These are contractors who are qualified to undertake a variety of construction works such as buildings, roads, railways, bridges, etc
- 2) **Building Contractors:** These are contractors who are qualified to undertake building construction and related works.

- 3) **Road Contractors:** contractors who are qualified to undertake construction of roads and other related civil engineering works.
- 4) **Specialized Contractors:** contractors who are qualified to undertake construction activities in specialized trades such as electro mechanical installation works, painting and decorations, sanitary installation works, wood and metal works and landscaping and other related activities.

- There are 10 grades which are categorized accordingly based on the construction cost of the project that the contractor is seeking to undertake.
- Requirements are provided in the Guideline for the Registration of Construction Professionals and Contractors

General, **Building** and **Road**

Contractors can register in the ten grades based on the following criteria.

- **Grade 1** - Construction cost of Birr above 20,000,000
- **Grade 2** - Construction Cost of Birr up to 20,000,000
- **Grade 3** - Construction cost of Birr up to 15,000,000
- **Grade 4** - Construction cost of Birr up to 10,000,000
- **Grade 5** - Construction cost of Birr up to 5,000,000

- **Grade 6** - Construction cost of Birr up to 2,500,000
- **Grade 7** - Construction cost of Birr up to 1,000,000
- **Grade 8** - Construction cost of Birr up to 500,000
- **Grade 9** - Construction cost of Birr up to 250,000
- **Grade 10** - Construction cost of Birr up to 100,000

- As far as Specialized Contractors are concerned, they can register in the ten grades based on the cost of the construction or installation of the specialized trades.

- Once a contractor who wishes to register in any of the ten grades fulfills the criteria of the cost required, he/she has to have certain experience and qualification as well as staff requirements that he/she needs to fulfill.

- For all categories of contractors:
- Grades 1 and 2, the general or technical manager should be a registered as Professional Engineer IV;
- for Grades 3 and 4, the general or technical manager has to be a registered as Associate Engineer IV or a Professional Engineer III;

- for Grade 5, the general or technical manager has to be a registered as Professional Engineer or Associate Engineer III;
- for Grade 6, he/she shall be a registered as Associate Engineer or Professional Engineer I;
- for Grades 7 and 8, he/she shall be a registered Engineering Aid or Construction Superintendent with eighteen years of relevant experience;

- for Grades 9 and 10, the applicant can either be a Graduate Engineering Aide with four years of construction experience or a Graduate Associate Engineer with at least two years of construction experience or any person able to read, understand and interpret blue prints with at least seven years of practical experience in construction works.

- After fulfilling the experience and qualification requirements, a contractor has to fulfill staff requirement before he/she can be registered as a contractor

- General Contractors, Grades 1 and 2 – two Professional Engineers IV or above
  One Associate Engineer IV or above
  One Associate Engineer III or above
  One Engineering Aide III or above
  Two Engineering Aides II or above

- Once a contractor fulfills the above mentioned requirements and pays the registration fee set by the Guidelines, he/she is expected to submit a record of past performances and an audited statement of accounts along with the number, type and capacity of the equipment he/she intends to use.

- the registration shall be valid for a period of one calendar year beginning form the year of such registration.
- each contractor registration is expected to be renewed annually.

Architects and Engineers

- Architects and engineers may be registered as professional architects and engineers, graduate architects and associate engineers, engineering aides and associate engineering aides after having fulfilled the registration requirements set forth in Part II of the Guidelines.

- For registration as professional architects and engineers, applicants must hold at least a B.Sc degree or the equivalent in architecture or engineering from a recognized university or a similar institution.
- The applicant must also submit satisfactory evidence of at least four years of relevant and progressive design and supervision experience acquired after graduation.

Consulting Offices

- Applicants may also submit applications for registering as consulting offices under consulting architects and engineers, consulting architects, general consulting engineers, or specialized consulting engineers.

- Consultants registering in office for consulting
  architects and engineers may participate in the preparation of total design documents for building and civil projects befitting their categories.

- All applicants wishing to register should submit satisfactory evidence that the owner or manager at the consulting office being applied for is a registered practicing architect or engineer along with satisfactory evidence that the firm or organization has the finance, equipment, and office and office facilities required for the consulting office applied for.

- Moreover, the applying offices are required to submit satisfactory evidence showing that the firm or organization has the minimum number of registered staff set out by the Guidelines as well as a certificate of registration from the Ministry of Domestic Trade in accordance with the Commercial Code of Ethiopia.

CHAPTER TWO
FORMATION OF CONSTRUCTION CONTRACTS

- Based on the employer or owner who seeks the building project is to be completed, the construction industry is treated in two different domains:
- The Civil Construction Laws, and the Government Construction Laws

- The Civil Construction Laws refers to when a private individual or company employer enters into a contract with a contractor.
- The Government Construction Laws refers to the government department, as an employer wants to have the construction carried out on behalf of the government for the public interest.

Civil Construction Contracts

- In a conventional building contract;-
- The contractor undertakes to supply all the labour and materials and to erect and complete the building
- Its is locatio conductio operis- i.e. It is a contract by which one of the parties gives a certain work to be performed by the other, who binds himself to do it for the price agreed between them, which he who gives the work to be done promises to pay to the other for doing it.(*sequential* performance)

- ‘The locator’, the person who does the work- is an independent contractor and not an employee of the conductor
- The locator accepts the risk of loss or damage to the work until it is completed and delivered to the conductor.
- The conductor is not normally vicariously liable for any damage that the locator may cause to such a third party.

Work on Goods and Construction Contracts

- Contract of Work-on-Goods is the contract of work that results in a new chattel or goods and works of repair on an existing chattels or goods, with the necessary materials or parts thereof supplied by the workmen or the client or jointly by the workmen and the client.(it has general aptn)(2610)
- A construction contract is a contract for the supply of materials or the carrying out of work or any combination of the two, upon the land of another and which will become fixed to and part of that land, (has specific aptn).(3019)

- Written form is not mandatory. (3020)
- The work will be done according to the description given by the client.
- *There could be either Sufficient(by means of a plan, scheme or other document.) or general description*

- Price can be described either in lump sum or approximately.
- Alteration of the work is also allowed
- Payment of the price shall raise the presumption that the work has been examined and accepted by the client.

- Contractor are also guarantee the quality of the work

Public Construction Contracts: The Procurement Law

- Government contract placing is not left to the whim of the individual power holders at the various hierarchies of the government structure.

- Eth, has issued a procurement proclamation (430/2005 (“The Federal Procurement Proclamation”) which all government bodies should comply with in the process of their procurement needs for the supply of goods, services, and construction works.

- with the exception of the situation where the Minister for MOFED, in consultation with the pertinent body, decides to procure goods, services and works other than those procedures given under it for national security or national defense interests, all procurement needs of the Federal Government at all levels should comply with the prescribed methods of procurement.

- **The basic principles to be upheld include:**

- Transparency;
- Fairness;
- Market competitiveness;
- Non-discrimination;
- The best value for money;
- Economies of scale;
- Efficiency;
- Economy, and;
- Effectiveness.

- The Proclamation both sets up the procurement procedures in all federal government bodies and establishes a Federal body that supervises the proper implementation of the procurement procedures.
- As per Art.5(1) of the Proclamation, the Ministry of Finance and Economic Development (MoFED) issued Procurement Directives that further strengthen and clarify the procurement laws.

procurement methods:

1. **The Open Bidding (tendering): national and international;**

- The procuring entity must prepare an invitation to tender as well as tender documents.
- The invitation to tender must be brought to the attention of those who may wish to submit tenders by advertisement in newspapers that have wide circulation within the country

2. The restricted Tendering

- Available if the costs of open tendering would be disproportionate to the value of the contract and the value of the contract is below the prescribed maximum.
- Also available if there are only a limited number of suppliers.
- Its similar to “open tendering” except that the invitation to tender is given only to selected persons.

Direct procurement

- Available if there is only one supplier or if there is an urgent need, or if the procurement is for goods or services in addition to those already supplied under another contract.
- In this procedure, a Government’s department negotiates directly with the supplier.

Request for Proposals

- Available to procure services that are advisory or are of a predominantly intellectual nature
- The procuring entity invites expressions of interest by publication of an advertisement in the press.
- The Procuring entity determines which persons who express interest are qualified to be invited to submit proposals.
- The proposals that submitted are evaluated and the procuring entity negotiates a contract, subject to limitations which are set out with the person whose proposals is successful.

Request for Quotations” (*pro forma*)

- Available to procure goods that are readily available and for which there is an established market.
- In this procedure the procuring entity prepares a request for quotations and gives it to selected persons.
- The successful quotation is the one with the lowest price that meets the requirements in the request for quotations.

Micro (Low-value) Procurements

- Available only for procurement if the estimated values of the goods, works, or services are at or below the prescribed maximum

- Once the tender proceedings are carried out, and the lowest bidder or the ‘most economically advantageous tender (MEAT)’ is selected, the contract is concluded.

CHAPTER THREE

THE ROLE-PLAYERS IN CONSTRUCTION CONTRACTS AND TYPES OF CONSTRUCTION CONTRACTS

- A typical construction project involves at least five parties; the employer, **the architect**, **the civil engineer**, **the quantity surveyor**, and **sub-contractors**.

The Employer (Client)

- The employer is the person for whom the project (construction) is being undertaken.
- Employers may be divided into two categories:

1. Those who erect buildings for their own ownership and use, whether they intend to inhabit and use the buildings themselves or let them to others, and
2. Those whose intention is to sell the buildings as soon as they can, possibly even during the construction phase.

obligations of the employer

- To pay the contractor for the work carried out.
- To full cooperation contractor.
- The owner has an implied duty to coordinate the contractors, On projects involving multiple contractors’

- The employer is obliged to give possession of the site in a reasonable time so as to allow the contractor to complete the work by the tie sent in the contract.
- Accordingly, the contractor is entitled to sufficient degree of possession so at to permit execution of the work unimpeded by others.
- If the employer delays the giving of possession, then that will be considered as an entitlement for the contractor not only to an extension of time to complete the work, but also to compensation for any loss and/or expense suffered as a result of the delay.

The Architect

- Is the person who is employed by the employer so as to **design** the building and **superintend** of their erection.
- Usually, the architect enters into a contract with the employer **as an agent** of the employer.
- He is both an advisor, and an agent of his client.

The Civil Engineer

- The structural design of contemporary buildings, and the design of their mechanical and electrical installations, has become so sophisticated and complex that it is beyond the technical knowledge and experience of architects, and is, therefore undertaken by engineers trained and experienced in this type of work.

Responsibilities of Construction engineers

- They must analyze maps, drawings, blueprints, aerial photography and other topographical information.
- They have to see the safety of all the workers undertaking the construction works.
- They make sure that the site stays clean and sanitary.
- Surveying the land while construction is in progress is also the construction engineer's responsibility.
- They also must estimate costs and keep the project under budget.
- Construction engineers have to test soils and materials used for adequate strength.
- provide construction information including repairs and cost changes to the managers of the construction work

The Quantity Surveyor

- The quantity surveyors play a key role in the organization and financial management of the construction projects.
- They manage projects to ensure that they are built on time and budget.
- Their job is to manage costs effectively and to ensure that they get the best value from contractors and suppliers.
- This involves obtaining tenders, arranging contracts, and managing costs for the client while the works are being undertaken.
- It is also their job to negotiate with the client’s representatives on payments and the final settlement.

- The quantity surveyor is a person who calculates the quantity of labor and materials that are required to erect the building and compiles this information in a document known as a bill of quantities, which is used by tenderers as a basis for estimating the cost of the project and formulating their tenders.
- As an agent of the client, the quantity surveyor prepares preliminary estimates of cost, advises on the value of interim payment certificates, evaluates claims for extras and determines the proper value of the final account.

- During the course of the contract, he predicts the employer's cash flow in respect of monthly payments to the contractor, and continuously informs the employer about on variations to the contract price caused either by cost fluctuations or changes to the design, or specification.

Sub-Contractors

- Subcontractors are persons employed by the contractor so as to undertake part of the construction work.
- The contractor has to first secure the consent of the employer before he/she can hire any sub-contractors.

- Although the construction contract is made between the employer and the contractor, subcontractors are the ones that do most of the work.
- As a general rule, the contractor is the one liable for the work carried out by the sub contractor.

Types of Construction Contracts and Risk Allocation

- The different types of construction contracts vary primarily with regard to who
takes the risks involved, which party has to pay for the cost over runs and who keeps the
savings if the project costs are less than that of the estimate one.

Lump Sum Contracts

- Lump sum contract envisages an entire contract and a fixed price contract.
- it is a fixed price contract in which where the contractor takes the risk of the work becoming more extensive than that of the estimated previously.
- In developing a lump sum bid, the builder estimates the costs of labor and materials and adds to it a standard amount for overhead and the desired amount of profit.
- Keating defines a lump sum contract as a contract to complete the work for a lump sum, i.e. whereby the contract promises to build X project for Y dollars.

- the contractor must finalize the work in
  accordance with the contract before he/she entitled to the payment agreed upon.
- Lump sum contracts require complete plans and specifications setting forth detailed directions to enable the contractor carry them out.

Re-Measurement Contracts

- Keating defines such type of contracts as one where the amount of work, when completed, is **to be measured** and **valued according to a schedule, or formula**, or **at cost plus a fixed fee**, or **a percentage of the cost**, or at **a reasonable price**.
- The price to be paid for the whole work is to be ascertained by measurement in detail of the various parts of the work and the valuation thereof **by reference to a schedule of prices included in the contract.**

- This type of contract is usually entered into when the extent and scope of the work to be
done is not known at the time of entering into the contract.
- Therefore, in this type of contract, it is usually immaterial whether any particular piece of work that the contractor is required to do is included in the contract or not.

- The contractor is entitled to payment for the piece of work **at a stipulated rate**, whenever applicable, **or at a reasonable market price** whenever the stipulated rate is not applicable.
- Re-measurement contracts imply that price is agreed for each piece of work and the quantities are counted or measured either as the work proceeds, or at the end of the completion of a particular item.
- Profit rate is included in the rate settled, or separately as a percentage agreed upon.

Cost-Reimbursable Contracts

- In a cost reimbursable contract the contractor's profit is set at a fixed amount.
- Under this arrangement, the contractor is reimbursed for **the actual cost** of labor and materials, plus charges fee (typically an agreed-upon lump or percentage of the total costs) for overhead and profit.
- If actual costs are lower than that of the estimated, the owner keeps the savings. If actual costs are higher than that of the estimated, the owner must pay the additional amount.

- The great advantage of a cost reimbursable contract is that, generally speaking, the project will result in the building that was envisioned, even if costs run high.
- The contractor is less likely to cut corners, or argues, for less expensive materials since his profit is not in jeopardy.

- This type of contract is advantageous in the fact that, where the employer wants to have open reign to select materials and workmanship as the project proceeds, this arrangement can be extremely flexible and accommodating.

CHAPTER FOUR

BASIC CONCEPTS AND THEORIES IN CONSTRUCTION LAW IN ETHIOPIA

Why we study public construction Laws

- Proliferation of infrastructural project
- ✓ Either by Government or grants
- Operation: public construction contract
- Administration of the k: Dispute
- ✓ Private Vs Public interest

Administrative contract

- Contract in which one of the party is a government body $ presumed by Law: Administrative contract
- ✓ Public Service Concession Contracts,
- ✓ Contracts of Public Works, and
- ✓ Government Supply Contracts.

theories in Government Construction Contracts

1. The Theory of *l'imprévision*

- Article 1764; unforeseen circumstances

✓ ***Change in Condition of performance***

✓ ***Makes obligation burdensome***

✓ ***Contracts remain un affected (performance still remains possible)***

- Failure to discharge:- breach of contract and its effects

✓Specific performance

✓Cancellation

✓Damage

✓Proportionate reduction

- ***Effects of the change***

✓***Regulated by the parties***

- Incase of Commercial and Civil contracts law
- Exceptions: 1766, 1767, 1768

Unforeseen circumstance incase of administrative contract

- **Unforeseen circumstances:** Article 3183-3189
- Occurrence of unforeseen circumstance: makes performance burden some

✓ Unforeseen: not envisioned by the parties at the time of contract

➢ The circumstance resulted due to the act of the beneficiary

✓ Disturbing balance: imposition of additional obligations which surpass expected extreme limits

- The party shall perform his obligation

Theories Con...

- Remedies
- Existence of provision for variation of contract
- ✓ Such provision has not been enforced
- ✓ Not sufficient to redress the loss
- Require for compensation
- Compensation only for the loss, not for the profit
- Amount of compensation 3188
- Cessation of the event- Reestablishment of the balance 3189
- Failure due to force majeure: change makes performance totally impossible 1792)

2. The Theory of *fait du prince* (Act of Government)

- the doctrine of '*fait du prince*' is involved when the economic basis of the contract is upset by the act of government department itself.
- According to this doctrine, unless the governmental act some general legislation affecting all citizens equally, the contractor is be entitled to a monetary indemnity or to increase the charge to the consumer.

Theories Con…

3. The Non-applicability of the Doctrine of exceptio non adimpleti contractus

- One party may suspend performance of his part of obligation if the other party fails to perform Art 1757 (2)
- Non applicability of the doctrine/defence
- Contractor continue its work
- Indemnified later on
- Unless failure of the public authority makes the performance of the contractors impossible

✓ To ensure non interruption of public services

- Continuity of the service for the public interest must be ensured so that the public and the Government will be able to function smoothly without disruption.

- *Art.3177. _ Exceptio non adempleti contractus*

The non-performance by the administrative authorities of their obligations shall not entitle the other party to fail to perform his obligations unless it makes impossible the performance of such obligations.
In other cases, the other party may not avail himself of the failure by administrative authorities to perform their contractual obligations in order to suspend the performance of the contract.

Theories Con…

4. The Doctrine of Specific Performance

- Obtaining actual subject matter agreed up on court order (creditor)
- Exceptional remedy 1776 (General Contract)

✓ Special interest for the creditor

✓ Personal liberty of the debtor

- Sale contract (2329-2335)
- Failure to deliver:- buyer may request forced performance (purchase in replacement)
- Failure to pay: forced payment (Compensatory sale)

- Failure by administrative authority (3194)- the court cannot order specific performance against government body
- Order of compensatory damage (the authority may prefer to perform)

Theories Con...

5. The Theory of *Immixion*

Variations in construction contracts are permitted by law and are common in practice.

- The degree or threshold of the variation orders may depend largely on the type and breadth of the construction project.
- Nevertheless, it may amount to abuse by the employer,
- The theory of immixion relates to an unacceptable interference of the employer or his agent in the performance of the contractor's obligations

Theories Con…

- Especially when the employer's interference disrupted the organization of the contractor as compared to the normal expectation that an experienced contractor would have had at the time of contracting.

- *Art. 3284. — 2. New works.*
  (1) The administrative authorities may, against payment of an additional remuneration, require the contractor to perform works which were not mentioned in the contract.
  (2) They may not, however, require him to perform a work which by its object would be totally different to the work mentioned in the contract or which would have no relation to such work.
  (3) Nor may they require him to perform a work under conditions entirely different to those which have been mentioned in the contract

- *Art. 3285. — Rights of the contractor.*
  (1) Unless otherwise provided in the contract, the contractor may cancel the contract where the increase or reduction of the works as a whole required by the administrative authorities involves a variation of more than one-sixth of the cost mentioned in the contract.
  (2) In the case of reduction of the works as a whole, he shall be entitled to a compensation equal to the loss suffered by him and profit of which he is deprived by reason of the variation of the contract.
  (3) The court may limit the amount of compensation for deprivation of profit where it appears that the variation is due to extraneous circumstances and not to the default of the authorities having made the contract

Public Policy Considerations

- Quantum meruit
- The employer is not obliged to pay to the contractor unless and until the latter performs his contractual obligations (*exceptio non adimpleti contractus)*.
- When do we say that the contractor has performed his contractual obligations?
- Partly performed work

✓ Claim on quantum meruit base

✓ Substantial performance

✓ Strict performance to the letter

- ***Quantum meruit*** is the basis for a claim or a remedy sought for the payment of a reasonable remuneration for work done or services rendered.
- Striking balance between the two interests

- Some jurisdiction require substantial performance.
- **Substantial performance**
- The contractor in good faith has attempted to fulfill his contract
- Majorly succeeded, except few minor details
- He shall not be compelled to loose the contract price
- Imposing duty to **remedy the defect** or **to make some allowance to such defect**
- Recovery prevented

✓ willfully and negligently failed to perform or

✓ abandoned the contract entirely

- The law tolerates slight or **unsubstantial deviations**
- **However, substantial performance is not clear**
- Does it depend upon the cost necessary to remedy the defects in relation to the total cost of the building? or
- upon the number of defects?
- upon the character of the defects?

NB. The rule should not be extended beyond the purpose in view i.e. the sake of justice and honest intention to perform

Substantial performance in Ethiopia

- To give, to do, and not to do
- In Ethiopia, the object of construction contracts can be classified as one of ‘to do’ obligations.
- This can easily be gathered from Article 2610 & 1712 of the Civil Code.

- *Art. 1712. - Obligation to give, to do or not to do.*
  (1) A party may undertake to procure to the other party a right on a thing or to do or not to do something.
  (2) The party who undertakes to do something may undertake to procure to the other party ***a specified advantage*** *or* ***to do his best*** *to procure such advantage*. [Emphasis supplied]
- *Art. 2610. — Definition.*
  A contract of work and labour is a contract whereby one party, the contractor, undertakes ***to produce a given result****, under his own responsibility, in consideration of a remuneration that the other party, the client, undertakes to pay him.*

- Thus we can say that full performance (substantial performance) of the work is expected from a contractor, to claim any payment.
- The contractor is not entitled to claim on ***Quantum meruit*** basis where we have a validly concluded construction contract, and that he/ she is only entitled for payment from the employer when he/she produces a given result (complete the work)((substantial performance)),

Liquidated Damages

- In advance regulation of potential damage, results for non performance of the other party
- **Common Law: Liquidated Damages**
- **Civil Law: Penalty Clause**
- Common in todays construction industry

English Law

- As per the English law, the amount specified can be interpreted either as liquidated damages or penalty.

- **Liquidated damages**: If the amount fixed by all parties is **a genuine estimate of the loss by a future breach of contract**, then it is liquidated damages. Thus, all parties to the contract agree that the amount is **fair compensation for the breach.**

- A certain author defined '**Liquidated Damages**' as:
  … a sum fixed up in advance, which is a fair and genuine pre-estimate of the probable loss that is likely to result from the breach.

Liquidated damage Con...

- The provision **for liquidated damages excludes the employer's right to claim additional damages** even if it can show that the damage it has actually suffered exceeds the provision for liquidated damages in the contract.
- It is important that the sum fixed for liquidated damages accurately reflect the extent of loss the employer will suffer if there is a delay in the performance of the contract.
- If it is not a genuine pre-estimation of loss: stuck out- since it amounts to penalty

Penalty clause

- '**Penalty**' as follows :
  …***a sum fixed up in advance, which is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.***
- As it can be easily gathered from the Civil Code Article 1889 cum 1892, **penalty clauses**
  are not consistent with the idea of applying the liquidated damages clause, in Common
  Law as a genuine pre-estimate of the loss that may be suffered by the creditor.
- Articles
  1889 and 1892 provide thus:

- *Art. 1889. — Penalty.*
  The parties may fix the amount of damages which will be due, should a party fail to discharge his obligations or to discharge them completely and in due time.
- *Art. 1892. — Actual damage.*
  (l) The penalty shall be due notwithstanding that no actual damage was caused to the creditor.
  (2) Damages may not be claimed above the amount of the penalty ***unless nonperformance is due to the debtor's intention to cause damage*** *or to* ***his gross negligence*** *or* ***grave fault****.*
- Article 1893 of the Civil Code is also worth mentioning here in light of the discussion above.
  Art. 1893. — Variation of penalty.
  The agreed amount of the penalty due for non-performance may not be reduced by the court unless partial performance has taken place.

- It should be clear, thus, that penalty clauses are not supposed to be ‘genuine pre-estimates of a potential loss’ as it is strongly demanded of the liquidated damages clause.
- Article 1892 (2) provides that the creditor can claim above and more than the amount that is fixed in the liquidated damages clause.
- This is also contrary to the view that is held for liquidated damages in the Common Law Countries.

- The only remedy for the non-performing party to avoid the payment of the amount of money so fixed in the penalty clause is to invalidate it on the grounds of vitiation of consent, lesion, etc.
- Article 1894 of the Civil Code, however, establishes the ‘severability or separability’ doctrine of the penalty clause and the main contract.
- This is to say that the fact that the penalty clause is invalidated does not mean that the main contract is necessarily invalid.

Liquidated damage in Ethiopia

- In our country, whilst the penalty clause is regulated under the Civil Code Articles 1889- 1894, there is no rule, directly or indirectly, regulating the doctrine of liquidated damages clauses.
- Recent developments in Ethiopia, however, witness that in all major Government Construction Contracts, the liquidated damages clause is incorporated.

✓ The Doctrine **might have** made its entry into the Ethiopian Construction Laws via the FIDIC (Red Book) Form.

❖ (FIDIC (Red Book) is one of the International standard form of contract prominently applicable in Ethiopia)

✓ Through the MoWUD Standard Conditions of Contract for the Construction of Civil Work Projects (May 19940, all Government Construction Contracts, include the liquidated damages clause

Liquidated damage in Ethiopia

- How should we treat it?
- Should we treat it in the way that it is treated in the Common Law Countries?
- Should the Ethiopian Courts let the parties use them interchangeably?

Assignment and Sub-contracting

A. Assignment

- In Ethiopia, the basic provisions regulating the principle of assignment are the Civil Code Articles 1962-1985.
- Particularly regulating assignment in the construction contracts are provided under the Civil Code Articles 3201-3205, and 3293-3296.
- Scattered rules in other enactments

B. Sub-contracting

- The sub-contracting agreement is growing in an ever increasing pace in the construction industry; because of the following reasons.

1. Non-wage costs of employment such as training, pension rights, redundancy payments and sick pay;
2. The increasingly diverse skill base required for the growth in complexity;
3. The rising expectations of workers and a concomitant shift to free lancing;

4. The choice every firm faces between diversifying and contracting out;
5. The perceived threat posed by trade unionization of permanently employed labor;
6. Off-setting the risks associated with responsibility by transferring them; and
7. The need to employ specialists of proven reliability and repute;

- **Sub-contracting has been given of recognition** in the construction industry in Ethiopia under the Civil Code of Ethiopia of 1960.

- Art. 3201(2) provides thus:
  A sub-contract is a contract whereby the party having contracted with the administrative authorities substitutes a third party for himself for the performance by the latter of ***a part only*** *or of* ***an item*** *of the contract.*

- However, where there is a contract between A and B, A may not simply decide to be replaced by C is one of the basic principles of contract.

- If A wishes to hand over part of the total work to C, then it should be done upon a prior authorization by the contracting authorities, or party. Art.3202(1); and the authorities should give its decision on the subcontracting request within a reasonable time. Art.3203(1)

- The contracting authorities have the discretion to approve, or refuse to approve the sub-contract. Art. 3203(3)

- What happens when and if the main contractor sub-contracts without the authorization?

❑Art. 3204 provides the sanctions thus:

An unauthorized … sub-contract shall not affect the administrative authorities. It shall ***constitute a contractual fault justifying the cancellation of the contract through the fault of the party*** *having contracted with the administrative authorities.*

- Article 3206 of the Civil Code provides:

1) ***The approval given by the administrative authorities*** *to the sub-contractor* ***shall not affect the contractual bond*** *between the administrative authorities and their contracting party*
2) ***The original party shall remain liable*** *for the works done and supplies* ***made by the sub-contractor*** ***as though they had been done or made by himself.***
3) ***The approval of the sub-contractor*** *by the administrative authorities shall however* ***imply the exoneration*** *of the contractant* ***from the penalties for delay,*** *where such delay is attributable to the sub-contractor.*

- **Regarding the form of approval;**

- Art.7 of Federal Standard Bidding Document for the procurement of works provides that approval is **not required to be written**,
- On the other hand, the **MoWUD Standard Conditions of Contract**, under Article 4 provides that Contract, demands **a written** approval.
- Both provide that **the Engineer**, the agent of the employer, is the person who **can give the approval without the need to refer it to the Employer**.
- The latter standard mentions that **the contractor cannot sub-let the whole of the works.**

- In some contacts, nearly all the work can
  be carried out under sub-contracts,
  the main contractor is limiting himself to managing
  and controlling the process.

Acceptance of the Works

- Once the contractor has **completed the work** the employer will accept the work, if he found that it that it has been **accomplished as per the strict contractual obligations** and, hence, **to the best satisfaction of the employer.**
- Poorly carried out construction projects

✓ Contractor
✓ Consulting engineer
✓ Sub contractor
✓ Employees

Provisional acceptance 3274-3278

- Joint ascertainment of the work:- immediately after completion
- Results from effective taking of possession
- Effect of provisional acceptance
- Shall not exonerate the contractor from defects to appear
- Tacit acceptance to made modification of defects
- Marks the beginning of period of warranty

Provisional acceptance 3274-3278

- Period of warranty: a period before final acceptance
- ✓ The authority has the possibility of controlling proper performance of the work
- ✓ During this period the contractor shall maintain the works
- ✓ Liable for the defects and repair them
- ✓ Destructions and damages resulting from force majeure is covered by the authority

Final acceptance 3279-3281

- Acceptance of the work after ascertaining that the contractor has performed his obligation in the entirety
- Default of administrative authority: the contractor may require the court to ascertain that the work is in a condition to be accepted
- Final acceptance deemed to have been made:-

✓On expiry of period of warranty or

✓On the day fixed by the court

Effects of final acceptance

- Release the contractor from his obligation to maintain the work
- The contractor entitle to:-

✓ Payment of the balance of the price

✓ Reimbursement of the amount retained as a guarantee or the security

- During ‘Provisional Acceptance’, therefore, the employer examines the work whether or not it conforms to the contractual agreement and if it is tainted with any defect at all.
- Thus, the period of examination is extended up to one year so as to enable the employer to check the work diligently and reasonably without forcing him to do it in haste or under the influence of infatuation due to the lures and snares of the new building.

- Defects can be classified as “Latent” and “Patent” defects.
- The employer is duty bound to examine and communicate “Patent” defects to the contractor within a year,
- “Latent” defects can still be remedied by the contractor any time they appear, if reported without delay, within 10 years. This is called the ‘Decennial “Liability” Period’.

- Thus, Articles 3282 and 3039 of the Civil Code of Ethiopia provide to this effect for Government Construction Contracts and Private Construction Contracts respectively, as reproduced hereunder:

  Art. 3282. — Warranty in respect of defects of construction

  (1) Unless otherwise provided, the contractor shall be liable to the administrative authorities for the defects of construction of the works during ten years from the day on which they have entered into possession of the works.

  (2) The warranty shall not be due, however, in respect of the defects which were apparent at the time of the final acceptance of the works.

  (3) The warranty shall apply to such defects only as prevent the works from being used for the purpose mentioned in the contract or as render such use more onerous or less profitable.

- *Art. 3039, — Warranty due by contractor.*
  (1) The contractor shall guarantee during ten years from its delivery the proper execution and the solidity of the work done by him.
  (2) He shall be liable during this period for such loss or deterioration of the work as is due to a defect in its execution or to the nature of the soil on which the work has been done.
  (3) Any provision shortening the period laid down in sub-art. (1) or excluding the warranty due by the contractor shall be of no effect.

Guarantees in Construction Contracts

- Businessmen have always wanted to remain guarded against non-performance risks
- Hence, they need security

- In the construction industry, therefore, there are a number of security devises that are used to attain this objective. The following can be mentioned as examples:
  - Performance Bonds;
  - Bid Bonds;
  - Advance Payment Guarantees;
  - Retention Money Bonds, and
  - Maintenance or Defects Liability Bonds,

Contract Security (Performance Bond)

- Is a payment bond or performance bond
- Given on behalf of the contractor
- To the public authority
- To make good any default by the contractor
- ✓ Non performance: the bond covers the loss suffered by non performance
- ✓ Delay: the bond covers the loss suffered due to delay
- The type of procurement for which contract security is required
- The amount and type of contract security (federal procurement directive)
- Termination of contract and substitution of another contractor

Bid Security

- Is a bid bond or security deposit given by a contractor to the PE
- To guarantee:-

✓ He will stay in the bid until the valid period

✓ Entry into the contractor, if the contract is awarded to him

- To discourage irresponsible bid
- Guarantee loss or damage to the PE results from withdrawal of a bidder of his bid/repudiate his contract

Bid Security

- “Once the bidder has offered his bid to the PE, is it possible to withdraw from the bid”?
- For how long the bidder remains bound by his bid?

Bid Security

- When?
- ✓ Offer with time bound- until expiry of the time
- ✓ Offer without time bound- reasonable period of time required to reach on decision
- Tenderer will not withdraw/modify his tender until allocation has been declared
- He may fix the period for which he binds himself (3156)
- Once award is granted for successful tenderer (3167)
- Amount of the bid bond and conditions of their use (procurement directive)

Advance Payment Guarantee Bond

- What is advance payment?
- To cover start up costs
- ✓ Plant, materials, and man power
- ✓ Usually by the client
- The client in return seek security
- To be released on payment of advance payment
- Usually deducted from installments periodically paid/ settlement payment

- *Art. 3271*

✓ *guarantor or other security*

✓ *Covering at least half of the advance payment*

✓ *The usual by way of C.P.O. or an unconditional bank guarantee*

Retention Money Bonds

- Money deducted from each payment to the contractor as a security for quality of the construction work
- It also extended to the concept of defect liability bond, if the contractor fails to fix the defect once told
- Is a type of performance bond
- Performance:- guaranties performance of the work
- Retention:- guaranties quality of the work

Variations

- Variation clause which empowers the employer to vary
- ✓ The form
- ✓ Quality
- ✓ Quantity of the work to be carried out
- By way of:-
- ✓ Addition
- ✓ Modification or
- ✓ Omission
- Absence of variation clause empowers the contractor the power of refusal of any variation request

Civil construction variation

- In civil construction work variation is allowed irrespective contractual clause 3031-3034
- But, with certain limitations on exercise of the wright (3033 – refusal of altaretion)

✓ If alteration can be technically made and

✓ Cannot impair solidity of the work

- Effect

✓ Request for reduction of price:- client

✓ Request for increment of price:- contractor

Public construction variation

- 3283-3285