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Textbook

On

ADMINISTARTIVE CONTRACT LAW

Kokebe Wolde

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2011

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Introduction

The concept of the law of administrative contracts is basically related with a change in the philosophy of the role and function of the state in society. The emergence of administrative contract law is directly related with the organization and provision of public services by modern welfare states. For a long time in history the role of the state in society was believed to be limited only to ensuring internal peace and stability, guarding the national territory from external threats and expanding the national territory. Adam Smith's 18th century modern economic theory of *laissez fair* (free market economy) provided the doctrinal basis for defining the role of the state in this restrictive view. Smith proclaimed that the function of the state should be limited only to ensuring internal peace and order and guarding the national territory, and its involvement in economic activities should be limited only to a minimum of regulation and control. According to the *laissez fair* economic theory, the production and exchange of goods can be stimulated and, consequently a rise in the general standard of living achieved, only through the efficient operations of private commercial and industrial entrepreneurs acting with a minimum of governmental regulation and control. It was thought that the 'invisible hand' of competition (every individual pursuing his or her own good) will achieve the best good for all. The management of the social and economic life of society was not regarded as government responsibility. It was believed that any interference by government in competitive economic activities is not only unnecessary but also injurious. Hence, the need to limit the role of the state only to that which is necessary to ensure peace and order in society.

However, the application of pure market economic principles resulted in human misery. The promises of free market economy did not work out as planned to the benefit of society at large. The unequal bargaining power between labour and the capitalist resulted in exploitation of workers, dangerous conditions of work and child

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labour. This led to the spread of poverty and concentration of wealth in the hands of the few. The condition of the mass deteriorated and resulted in the dissatisfaction to the system and wide spread social unrest.

Thus, the apparent fallacies of pure market economy, the growth of socialism and the increasing concern for human dignity led to the recognition of the need for state intervention to ameliorate the conditions of the poor. It was essential that the state must assume positive roles to avoid the suffering, poverty and exploitation of the mass and bring about broad based economic development, social justice and equal distribution of wealth for the collective welfare. Through time, out of the dogma of collective welfare emerged the notion of 'social welfare state' which emphasized the role of the state as a vehicle of socio-economic progress and welfare of society. As a result, in the 20th century, the state, in addition to its traditional responsibilities, came to assume more and more responsibilities. It came to assume the modern responsibilities of organizing and running essential public services. So, in addition to its traditional responsibilities of maintaining internal peace and order and guarding the national territory, the provision of water and energy supplies, housing, education, health, and transport, garbage disposal services, the construction and maintenance of road network and other vital services have become the responsibilities of the state. It also carries out regulatory and stabilization acts of the market; controls quality and standard of goods, works and services; issues license, etc.

In order to discharge these ever-increasing responsibilities, the state in the first place uses its coercive or 'police' power. The state has the inherent and inalienable, but legally regulated, power to compel individuals. It can levy and collect tax, expropriate property for public purpose, order citizens to act or not to act in a certain way, etc. This aspect of the activities of the state is governed by Administrative Law.

In order to discharge its responsibilities the state, in addition to using its police power, also uses contract, the consensual method of achieving goals. In order to discharge its

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responsibilities of providing basic services, the state enters into contract for procurement of goods, works and services. And if we consider the Ethiopian case, approximately, 80 percent of the annual budget of the Federal Government is spent through contract that agencies of the government conclude for the purpose of procuring goods, works and services which enable the government to discharge its various obligations towards the taxpayer. No doubt that there is an applicable regime of law that governs contracts by the government. And the purpose of this textbook is to outline and discuss the body of rules and principles that govern administrative contracts. It is intended to acquaint students with the rules and principles governing government contracts in Ethiopia.

So, in this book the definition of the term 'administrative contract' will be provided. Since not all contracts by the government are administrative contracts, attempt will be made to outline the criteria that distinguish administrative contracts from civil government contracts. The similarities and differences between administrative contracts and civil contracts; the concept of administrative contracts in the two major legal systems of the world (Civil Law and Common Law legal systems); the *raison d'être* and historical development of administrative contract law internationally and in Ethiopia will be explored. In addition the manner of formation of administrative contracts; legal effects of a validly concluded administrative contract; variation and legal effects of non-performance of administrative contracts; the rules governing assignment and sub-contracting in relation to administrative contracts and termination of administrative contracts; the special privileges of the contracting administrative authority and remedies available to the contractor will be discussed. Moreover, the special rules designed for three main types of administrative contracts, i.e., contract of public works, contract of concessions, and contract of supplies will be elaborated. If there is contract then there is high probability of dispute between contracting parties. Administrative

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contracts are no exceptions. Hence this book will also explore the dispute settlement mechanisms in connection with administrative contracts.

In order to properly understand the course it is necessary to have a priori knowledge of general and special contract law rules, administrative law and law of public finance. So, students are advised to refresh and apply their knowledge of these laws in the study of the Law of Administrative Contracts.

The rules that are applicable to administrative contracts are found in Title XIV of the 1960 Civil Code of Ethiopia, Federal Government Public Procurement and Property Administration Proclamation no. 649/2009 and Regulations and Directives issued to implement Proclamation no. 649/2009..

There is considerable overlap between the provisions of the Civil Code on tender procedure and that of Proclamation no. 649/2009. The Proclamation is silent about its effect on the provisions of the Civil Code. Hence it is necessary to apply the latter-in-time rule of interpretation in order to avoid contradiction in the application of the provisions of the Civil Code and Public Procurement Proclamation no. 649/2009 provisions on tender procedure. Further, it must be borne in mind that the Federal Government Public Procurement and Property Administration Proclamation no. 649/2009 is applicable for almost all government contracts (contracts by government offices that are partly or wholly financed by government budget), while the Civil Code provisions are applicable only to government contracts that qualify as administrative contract.

Because of the federal setup of the current state structure, regional states have their own financial and budgetary system. As a necessary consequence of this, regional states have also their own procurement laws. In the observation of the writer, the procurement laws of the regional states are substantially similar with that of the Federal Public Procurement and Property Administration Proclamation no. 649/2009. Hence the

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discussion in this text will be limited only to the Federal law, since discussing the procurement law of the various regional states will be redundancy.

The unavailability of written materials on Ethiopian administrative contract law has made the preparation of this textbook onerous. After tiresome work, it has come to completion. Even if it might not be complete and perfect, it is the view of the author that it will help to acquaint students with the fundamentals of the law of administrative contracts and serve as starting point for future works on the subject matter.

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Learning objectives

This teaching text is prepared to respond and address the problems identified in the reform document for Legal Education and Training. At the end of the course delivered on the basis of this textbook, students will be able to;

- Understand the basic underlying principles and nature of administrative contract;
- Appreciate the legal framework governing administrative contracts;
- Handle disputes arising from administrative contracts
- Give both consultative as well as reformative services on the subject matter of administrative contract law;
- Appreciate the role of laws governing public procurement for economic and social development

Enjoy your reading!

Kokebe Wolde

Chapter One

'Administrative Contracts' and 'Administrative Contract Law': General Overview

1.1. Introduction

Since, this text deals with administrative contract law, it is essential to have some discussion of general principles and points relating to administrative contracts so that it will help us to study the law itself. In order to study the law that governs administrative contracts law, first it is essential to define what an administrative contract is and what distinguishes it from private or civil contracts. In addition to this it is necessary to address questions such as why is it necessary to have administrative contracts law distinct and separate from private contract law? What are the distinguishing features of this law, its similarities and differences with private contract law? Where and how did this type of law emerged? Its historical development and the different positions that the two major legal systems of the world (Civil Law and Common Law) have towards this branch of law will also be explored. Moreover, the place that administrative contract law has in the Ethiopian legal system and other related topics relevant for analysis of the law of administrative contracts will be discussed in this chapter.

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Chapter Objectives

A student who carefully studies this chapter will be able to:-

- Understand what an administrative contract is,
- Distinguish administrative contracts from non-administrative contracts of government,
- Distinguish the different set of rules that apply, respectively, to administrative contracts and non-administrative contracts of government,
- Understand the concept of administrative contract law and its historical development,
- Know the underlying principles of administrative contract law,

- Explain the similarities and differences between administrative contracts and private contracts,
- Understand the structure and historical development of Ethiopian administrative contract law,
- Appreciate the implications of the current federal state setup in Ethiopia on legislative power in matters relating to government procurement and contract,
- Know the sources of the Ethiopian administrative contract law.

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1.2. Meaning of 'Administrative Contract'

This section will try to answer the question 'what is an administrative contract?' by examining the test(s) that a given contract must fulfill in order to qualify as an 'administrative contract'. Since this is an important issue for the study of the law of administrative contracts, it is necessary to study this section carefully.

As the term 'administrative contract' itself tells, an administrative contract is, in the first place, a contract to which one of the contracting parties is an administrative agency. Then, if an administrative contract is a contract to which one of the contracting parties is an administrative agency, the next question is 'what is an administrative agency?' From your study of administrative law, what is an 'administrative agency'? As you might remember, all government bodies are not necessarily administrative agencies. In the first place we have to distinguish administrative agencies from public enterprises. While public enterprises are profit oriented business entities that are owned and run by the state and operate by their own capital and are outside of the state structure, administrative agencies are non-for-profit pure public bodies within the state structure and financed by annual government budget. So, normally contracts concluded by public enterprises do not qualify as administrative contract. Further, administrative agencies should be distinguished from other government bodies within the state structure. Generally, administrative agencies are organs of government other than the

judiciary and the legislature and vested with administrative and regulatory functions and having quasi-legislative and quasi-judicial power.

Thus, it is only contracts that are concluded by administrative agencies, not by public enterprises or the judiciary and the legislature that qualify as administrative contract. But it should be noted that all contracts by administrative agencies are not necessarily administrative contracts. In this regard Article 3131(1) of the Civil Code clearly states that in principle contracts by the government are to be treated as civil contract and be subject to the general and special private contract law rules. So, as indicated in Article 3131(2) of the Civil Code, it is only exceptionally that certain specific types of contracts by the government that would qualify as administrative contract and be subject to the special administrative contract law rules.

Then the question is when do we say that a contract by the government is an administrative contract? In other words, what are the criteria to determine whether a given contract by the government is administrative or civil? The answer to this question is found in Article 3132 of the Civil Code. This article lists four criteria the fulfillment of one of which would qualify a contract by the government as an administrative contract. So, if a contract fulfils one of the tests indicated in Article 3132 of the Civil Code it qualifies as an administrative contract and consequently it will be subject to special administrative contract law rules. If, on the other hand, a given contract by the government does not fulfill at least one of the tests listed in Article 3132 of the Civil Code, then it is not an administrative contract, which means that it is a private law contract subject only to the general and special private contract law rules. Now let us consider in detail each of the tests indicated in Article 3132.

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A. Intention of the Parties to the Contract

Article 3132 (a) contains two independent tests which help us to determine whether a given contract by administrative authorities is an administrative contract or not. One of the tests so contained in Article 3132 (a) relates to intention of the parties to the contract. According to this provision, if the parties to the contract have qualified their contract as an administrative contract, then the mere desire of the parties will make the contract an administrative contract without any additional requirement. If parties to a government contract want their contract to qualify as an administrative contract and be subject to the special administrative contract law rules, they have to give it the label 'administrative contract'. It should be noted that the intention of the parties to qualify their contract as administrative contract must be derived from express declaration in the contract and should not be implied by interpretation from the terms of the contract. The phrase "...it is *expressly qualified* as such...by the parties" in Article 3132(a) unequivocally tells that it is only the expressly declared intention of the parties that will make a contract by the government an administrative contract.

If parties to a government contract want their relationship to be governed by administrative contract law rules, it is always advisable that they expressly label their contract 'administrative contract' in view of the fact that the other tests, particularly those indicated in Article 3132 (b) & (c), lack precision and clarity leaving the parties in uncertainty as to whether or not their contract is administrative.[1] It should be remembered that the classification of a contract concluded by an administrative body into administrative or civil has implication on the choice of the governing law and consequently on the nature of the corresponding rights and obligations of the parties to the contract and, therefore, it is advisable for the contracting parties to make clear the administrative or otherwise nature of their contract from the outset.

[1] René David, Administrative Contracts in the Ethiopian Civil Code, Journal of Ethiopian Law, Vol.4, no. 1, 1967, p.147. [Hereinafter, René David, Administrative Contracts in the Ethiopian Civil Code]

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It should, however, be remembered that only contracting parties one of which is an administrative body can label their contract as an administrative contract. Two private individuals cannot designate their contract as administrative contract and subject it to the administrative contract law provisions of the Civil Code. In the first place, the prime requirement for a contract to qualify as an administrative contract, as seen above, is that one of the contracting parties must be an administrative authority (See Article 3131 of the Civil Code). Some of the administrative contract law provisions of the Civil Code are also of such a nature that their application presupposes the existence of an administrative body as a contracting party, which is indicative of the fact that the administrative contract law provisions are not suitable to contract between private individuals.

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B. Designation by Law as 'Administrative Contract'

The other test that is contained in Article 3132(a) of the Civil Code and which help us to determine whether a contract by government is an administrative contract or not is, designation by law. As indicated in this provision, if a certain type of contract to which a given administrative body is a party is determined by law to be regarded as an administrative contract, then that type of contract concluded by an administrative body will be an administrative contract and will be governed by the administrative contract law provisions of the Civil Code. Administrative law or piece of legislations, particularly legislations establishing administrative bodies may name one or more types of contracts to be concluded by administrative bodies and designate it as an administrative contract. So, contracts so designated by law as administrative contract are, by mere fact of that designation, administrative contracts without the need to look at additional requirements. The effect of this designation is that that type of contract so designated by law as administrative contract will be governed by the administrative contract law. The designation by the law of a certain type of contract as administrative

contract should, however, be made *expressly*. Conclusion cannot be reached as to the administrative nature of a certain type of contract by inference from or interpretation of the law. This is clear from the use of the term "...*expressly* qualified..."in Article 3132(a) of the Civil Code.

It is important to remember also that in the same way that the law may name certain type of contracts by administrative bodies and designate it as administrative contract, it may also expressly name certain type of contracts by the administration and determine them not to be considered as administrative contract thereby excluding them from the ambit of administrative contract law. An example of this is to be found in the Mining Proclamation no. 52/1993. Article 55(2) of this proclamation clearly states that contracts of concession between the Ethiopian government and mining companies for the exploration and development of minerals cannot be considered as administrative contracts. Contracts so named by law not to be considered as administrative contract, will not be an administrative contract. It also means that parties to such type of contract cannot name it otherwise.

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C. The Nature of Object of the Contract

Where the object of a contract to which an administrative body is a party relates to the running of public service, as per Article 3132(b), that contract qualifies as an administrative contract. For a contract by the government to qualify as an administrative contract according to this test, not only the object of the contract should relate to the running of public service but also it should require the permanent participation of the party contracting with the administrative agency in the execution of the contract (running of the public service). Thus for a contract to which an administrative body is a party to qualify as an administrative contract according to Article 3132(b), two conditions must be cumulatively fulfilled. These are:-

1st. The object of the contract must relate to the running of public service, and

2nd. The contract must require the permanent participation of the party contracting with the administrative authority in the execution of the contract.

If a contract to which an administrative body is a party fulfils these two requirements then undoubtedly that contract is an administrative contract. The next question then is determining the meaning of these elements.

The term 'public service' is a key term in Article 3132(b). So, what is 'public service'? Article 3207 (1) provides a definition for this term. It defines the term as follows:-

> *"Any activity which a public community has decided to perform for the reason that it has deemed it necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute public service."*

From this definition we understand that 'public service' has three elements. First, it has to be a service which is carried out by the government or its agencies acting for the public. Second, the service carried out by the government should be an essential public service, i.e. a service necessary or indispensible for a given community such as water, gas or electricity supply, health services ete. Third, the service must be one which is not supplied by the private sector. This does not, however, mean that the service be one which is totally unavailable from the private sector; it does also include cases where even if the service is provided by the private sector, it is not available in the required quantity at affordable price in a manner that will satisfy the needs of the general public to essential public services.

It should be remembered that the direct provision of a service by the government or its specialized agencies is not a necessary precondition to qualify a certain service as public service. Of course the traditional approach has been the provision of public services directly by the government or the concerned government agencies. However, the fact that a certain government agency established for taking care of the supply of a given type of essential public service is causing the supply to be made by a private enterprise

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by controlling the supply of the service in the required quality, quantity and distribution and at an affordable price will not take away the public service character of the activity. In fact in today's world where population size is increasing and the type of public services that the government is bound to supply is expanding, it is increasingly becoming difficult for the government to manage the design and organization of public service and supply it by its own. It is increasingly feeling the need to employ the specialization and managerial skill of private enterprises. As a result, it has become an increasing tendency of this era of privatization for the government to control only the organization and provision of the public service in the required quantity, quality and distribution and at affordable price for the public, by leaving, through contract of concession of public service, the actual provision of the public service for private enterprises. So it is important to note the two different roles of government in connection with the running of public services: as designer and organizer on the one hand and as direct provider of public services, on the other. The first role is inalienable from the government whereas the second one can be transferred to a private enterprise and that does not take away the public service nature of the service.

As pointed out earlier, the fact that the object of the contract is related to the running of a public service does not in and of itself make the contract an administrative contract. The contract should be also one which requires the permanent participation of the party contracting with the administrative authority in the execution of the contract. This does not, however, mean that the contractor be one who is in charge of supplying the public service for ever. Rather it only means that during the currency of the contract the contractor should be under utmost obligation to continue to supply the public service without interruption. This obligation arises from the fact that under the contract the contractor has assumed to supply an essential public service. Because public services are by their nature vital for the daily life of the public, they have to be supplied under extreme care without interruption. Imagine what will happen if water supply, transport

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service, electricity, health service etc. is interrupted even for a day. So, a contractor who has assumed, under a contract with a government authority, the obligation to supply a public service has, during the currency of the contract, to continue supplying the service without interruption.

Generally, if a party contracting with an administrative authority has by that contract entered into obligation to supply service to the public and that contract requires him to continue supplying the service with no interruption, then one can conclude that the contract is an administrative contract.

Finally, it should be noted that there is discrepancy between the Amharic and English versions of Article 3132(b) of the Civil Code, a discrepancy that seems to have occurred at the time of translation from the original French version. While the Amharic version refers to "... permanent participation of the contracting administrative authority in the execution of the contract", the corresponding English version says "... permanent participation of the party contracting with the administrative authorities..." There seems to be error in the wording of the Amharic version. When seen in light of relevant literatures on administrative contract law the English version is the correct one and the Amharic version, for the purpose of application, should be corrected by interpretation.

D. Clauses Exorbitantes

The other test that helps us to determine whether a contract to which an administrative body is a party is an administrative contract or not relates to the nature of the terms of the contract rather than to the nature of the object of the contract. According to Article 3132(c), if a contract to which an administrative agency is a party inspired by consideration of public interest imposes onerous terms on the contractor and gives more prerogatives for the contracting administrative authority in a fashion that is not common in the relation between private contracting parties, then that contract qualifies as administrative contract. The obligations assumed by the contractor will be

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considered as onerous or *exorbitantes* when the contract incorporates more burdensome terms, particularly on the contractor, which are unlikely to be found in contracts between two private contracting parties. For instance, if the contract provides that the contracting administrative authority can unilaterally terminate or vary the contract, impose financial penalties on the contractor, without priori recourse to court, for failure on the part of the contractor to perform the contract as per the terms of the contract, rescind the contract when the contractor is at fault, determine the tariffs to be collected by the concessionaire in case of contract of concession of public service, or control the execution of the contract, then this contract is most likely an administrative contract. The terms that it incorporated are of a kind that qualifies as *clauses exorbitantes* since they impose onerous obligations on the contractor which are unlikely to be found in a contract between two private contracting parties.

It should further be noted that the incorporation of *clauses exorbitantes* alone will not make the contract an administrative contract. The purpose for which the *clauses exorbitantes* are incorporated into the contract should also be considered. The incorporation of *clauses exorbitantes* will qualify the contract as administrative contract only if it is done with a view to protect public interest. *Clauses exorbitantes* may be included in a contract to which an administrative body is a party to ensure continuity and certainty in the supply of public services, ensure timely execution of works, or generally to make sure that contracts are executed only when they are in the interest of the public. It is only when *clauses exorbitantes* are included in the contract to ensure the execution of the contract in a manner that protects the public interest that will qualify the contract as administrative contract.

To sum up, so far it has been shown that the fact that an administrative body is a party to a contract does not necessarily qualify the contract as administrative contract and that there are tests which help us to determine whether a contract to which an administrative body is a party qualifies as administrative contract and these tests are

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contained in Article 3132 of the Civil Code. If a contract to which an administrative body is a party fulfils at least one of the tests indicated in Article 3132, then it is an administrative contract and it will be subject to the special administrative contract law provisions of the Civil Code (Arts 3134 ff). Even if an administrative body is a party to a contract, if the contract does not fall into any of the tests indicated in Article 3132 of the Civil Code, then it is a private (civil) contract and will be governed by the general and special private contract law rules of the Civil Code and the Commercial Code.

It should be noted that in some cases the line that demarcates administrative contracts from civil contracts is tiny and there are times where it is really difficult to categorize a contract as civil or administrative. In some countries, particularly in the *Conseil d'état* of France it has resulted in complicated decisions. This is also bound to happen in Ethiopia since especially the last two tests that we have seen above are vague and imprecise.

As one may note from the explanation made above, contracts to which the government or an administrative body is a party is not always considered as administrative contract and subjected to the special administrative contract law rules. In fact what we understand from the reading of Article 3131(1) is that in principle contracts to which the government or an administrative agency is a party are considered as civil(private) contracts and are to be governed by the general and special private contract law rules. A contract to which an administrative body is a party will be considered as administrative contract and be subjected to the special administrative contract law rules of Article 3134 and the following of the Civil Code when, as indicated in Article 3131(2) of the Civil Code, it is "... in the nature of an administrative contract." Otherwise the rule is that contracts by the government are in principle to be considered as civil contract and governed by the private contract law rules. Contracts to which the government is a party will be considered as administrative contracts and governed by administrative contract law rules only when exceptionally they fulfill at least one of the tests indicated in Article 3132 of the Civil Code. As we shall see the detail latter on, with a view to

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protect the public interest that is represented in administrative contracts, the administrative contract law rules contain rules that deviate from freedom of contract principle. So the idea is to apply this exceptional regime of law only to government contracts wherein a vital public interest is involved. Generally, administrative contract law is an exception to the rule which says that contracts by the government are in principle private (civil) contracts subject only to private contract law rules. So, by virtue of the legal interpretation maxim which says that exceptions should be interpreted narrowly, the criteria indicated in Article 3132 to determine whether a contract by the government is an administrative contract must be interpreted restrictively.

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1.3. The Concept, *Raison d'être* and Historical Development of Administrative Contract Law

In the old days where it was believed that the only responsibilities of the state were to ensure internal peace and security and guard the national territory, the state used to procure by contract the inputs necessary to maintain itself and the establishments such as police, military, courts, etc. necessary to discharge these traditional responsibilities. As the Adam Smith's classical theory of free market economy (laissez fair), which propagated that the responsibilities of the state should be limited only to ensuring internal peace and security and guarding the national territory and the free market will supply the demand of the public for goods and services and as such the state need not and should not involve in economic activities, failed to be satisfactorily workable coupled with the increased concern across the globe for human dignity have resulted, around the turn of the 20th century, in the birth of welfare state. As a result, although developments in this regard vary from one country to another and from region to region, the responsibilities of the state started to expand beyond its traditional preoccupations. Thus in addition to maintaining internal peace and stability and

guarding the national territory, the modern welfare state has assumed the responsibility to supply basic public services for its citizens. Its responsibilities are increasing from time to time. The state is supposed to provide education, health care, water, electricity, public transport and other essential public services. In order to discharge these obligations the state makes expenditures in billions of Birr from the money it collects from the tax payers. And in fact most of the expenditure from the national budget is made through contracts which the government concludes for the purpose of providing public services for the tax payer.

Obviously, unless the necessary safeguards are put in place, this kind of situation may expose the tax payers' money for wastage and embezzlement by irresponsible public officials. There may be carelessness, connivance, conflict of interest, lack of impartiality and other corrupt practices on the part of public authorities which may prejudice the tax payers' interest. So, in order to ensure that the formation and execution of contracts by the government wherein public interest is involved is done in a manner that protects the public interest, it is essential to set legal framework that govern the whole process. It is also essential to use the huge government expenditure to achieve national industrial, social and environmental policy.[2] For example, governments may use their procurement to promote domestic industry by limiting participation in government contracts to domestic firms or promote environmental concerns by procuring only from firms that adhere to environmental standards.

Legal systems of the world have responded to this fundamental policy question in their own unique way. What makes the legal systems alike in this regard is that, although the precise content of the rules vary from one legal system to another, all legal systems

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[2] Sue Arrowsmith *et al*, Regulating Public Procurement: National and International Perspectives, 2000, pp. 63, 237-322.

recognize the need to have rules that govern contracting procedure and performance of administrative contracts.[3]

In the following pages the concept and historical development of administrative contracts in the two major legal systems of the world, i.e., Civil Law legal system and Common Law legal system, will be considered.

1.3.1. Civil Law Legal System

In the Civil Law legal system, like in any other legal system, the need to govern administrative contracts by law was not doubted. The controversial question rather related to whether or not it is necessary to have special rules, different from private contract law rules, for administrative contracts. In order to decide whether or not it is necessary to have special rules for administrative contracts different from private contract law rules, it is necessary to show conceptual difference between administrative contracts and private contracts. If administrative contracts are not different from private contracts, there is no reason for developing special rules for administrative contracts.

The question of the existence or not of differences between administrative contracts and civil contracts has been a controversial issue over which Civil Law legal system scholars were unable to reach consensus. Jurists have not always agreed that an administrative contract exists as a separate concept apart from that of the private law contract. Duguit,[4] for instance, maintained that the essential elements of a contract are always the same and that if it conforms to the description of the Civil Code, it is a contract, and if it does

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[3] See generally, J.D.B. Mitchell, ***The Contract of Public Authorities***, 1965 (Herein after, Mitchell, The Contract of Public Authorities); George Langrod, Administrative Contracts: A Comparative Study, ***American Journal of Comparative Law***, Vol.4 (1955), pp.325- 364.

[4] As quoted in Alan W. Mewett, The Theory of Government Contracts, ***McGill Law Journal***, Vol.5, no. 4. (1958-1959), pp.222- 246, p. 222.[Hereinafter, Mewett, ***The Theory of Government Contracts***]

not, then it is not a contract.[5] So, a certain act is a contract if it fulfils this description and if it does not fulfill then it is not a contract. And in the observation of Duguit, government contracts are not in any way different in nature from private contracts. He criticized the move towards the recognition of a separate administrative contract which appeared towards the end of the first decade of the twentieth century. (As will be seen below Duguit's position is similar to that which is held in the Common Law legal system in connection with contracts in general.) To the contrary, Léon Blum[6] had urged the recognition of separate concept of administrative contracts, remarking that one had to look to the nature of the contract as a whole and that rules which would be applicable to some contracts are not necessarily suitable to all type of contracts.

Even though this debate was made in late 19th century and early 20th century when the concepts of administrative law and administrative contract started to emerge, today we find administrative contracts recognized as separate and distinct concept from private contracts. Today the views of Duguit have no acceptance in France or other countries that follow continental European legal system (Civil Law legal system). In countries that follow the Civil Law legal system, it is well accepted that administrative contracts are not the same as private contracts. So, in the Civil law countries we find a separate law that governs administrative contracts which has its origin in France and produced by blending private contract law and administrative law percepts. And when disputes occur in connection with administrative contracts, particularly in France, they are submitted to the administrative courts, not to the regular courts.

Then what is the *raison d'être* (rationale or justification) for recognizing administrative contracts as a separate concept and develop special rules for this type of contract? Why is administrative contract law necessary? Why do not we apply the general and special

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[5] See for instance Article 1675 of the Ethiopian Civil Code which defines 'contract' as: "… an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of proprietary nature."

[6] As quoted in Mewett, ***The Theory of Government Contracts,*** supra note 4, pp. 222- 223.

private contract law rules for administrative contracts? What is special with administrative contracts? Where is the deficiency of the general and special private contract law rules which make them inadequate or unsuitable for administrative contracts?

The primary justification that is forwarded for embracing a separate concept of administrative contracts is the unequal representation of interests represented in administrative contracts. In private contract, the contracting parties have their own respective interests and they act, in the course of the formation and performance of the contract, to maximize their benefit or to get the best out of the contract. In private contract each party, as a general rule, seeks only his own interest: one party may prefer money and the other some object; one may have something to be done and the other may have service to sell. Saving factors that may affect their bargaining power, each party in the contract will do everything that he can with a view to make the terms of the contract in their favour and to get the best benefit out of the contract. The private contract law rules (general contract law rules or special contract law rules of the Civil Code), which are anchored on the freedom of contract principle, are designed to govern this kind of contractual relationship, contracts wherein the interests of the contracting parties are equally represented by parties each of whom is fundamentally interested in his own profit. When we come to administrative contracts, however, the situation is totally different. In administrative contracts the administration enters into contract not by representing its own interest, but the interest of the public, of society in general. The administrative body has nothing to gain or lose by entering into the contract. But the contractor, the party contracting with an administrative body, represents his own interest, for he will only become a party to the contract only if he thinks that it will be in some way to his advantage. So the fear is that, in a situation such as this where the party contracting with the administration is not a philanthropist who should not expect to make any profit, assimilating the contract to private contract and subjecting it to the

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ordinary contract law rules designed to apply for contractual relationships where there is equal representation of interests will jeopardize the tax payers' interest. Since the contracting administrative authority does not have its own interest it may not properly negotiate and public officials may even connive with contractors in return for illegal benefits.

So administrative contracts are different in their nature and cannot be treated in the same way as a contract between private persons. Therefore, it is necessary to design special rules that can help to ensure that the best value for money is obtained through contracts which administrative authorities conclude representing the public and using the tax payers' money. It is also necessary to ensure that administrative contracts are performed only in the public interest. The rules governing the manner of letting administrative contracts (tender procedures) as contained in the Civil Code (Arts 3147-3169) and Federal Government Public Procurement and Property Administration Proclamation no. 649/2009 have this purpose. There are also other provisions in the Civil Code which are intended to ensure the protection of public interest represented in administrative contracts.[7]

The other justification for having special administrative contract law rules relates to the need to ensure the continued operation of public services. The contracts which administrative authorities conclude are in most cases related to the supply of public services or the construction of public works. Since these are activities which are vital to the public, their continued execution has to be guaranteed. So, it is necessary to provide rules which ensure that public services are run and public works executed without interruption. To this end administrative contract law incorporates rules which impose on the contractor the obligation not only to carry out his obligations in the way that one

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[7] See for instance Articles 3143, 3168, 3170, 3171, 3179, 3180 and 3202(1) of the Civil Code. These provisions are in particular intended to ensure the conclusion and performance of contracts by public bodies only in the interest of the public.

individual must towards another in a private contract, but by doing all that which is necessary to ensure the continued and smooth running of the public service which he has agreed to operate.[8]

The need to balance the unequal bargaining position of the parties in administrative contracts is also mentioned as a justification for developing special rules for administrative contracts. In administrative contracts, the government and its agencies enter into contract for procurement of goods, works and services. And the contract is concluded with profit seeking individuals and organizations. Obviously, the bargaining position of an individual or a business organization is weak compared to the bargaining position of the government which has the monopoly of power and control over individual and organizational activities. There is the fear that the administrative authority may abusively apply its inherent coercive power in its relationship with the contractor, a relationship which is based on consent rather than on command and authority. It is also necessary to extend protection to the contractor against administrative red tape and bureaucratic procrastination which is not uncommon in Ethiopia.[9] These kinds of safeguards to the contractor not only serve to attract private individuals to cooperate in the operation of public services, but it also helps to ensure the smooth and continued execution of the contract.

In addition to these, it is necessary to protect the contractor from loss he may incur as a result of measures taken by the contracting administrative authority in the exercise of its prerogatives to ensure the execution of contracts in the public interest. In order to ensure that administrative contracts are executed only in the public interest, the contracting administrative authority is given the privilege by law to unilaterally vary the terms of the contract or terminate it when it finds that the execution of the contract

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[8] In this regard we can mention Articles 3177, 3183(1), 3195(2) and 3199 from the Ethiopian Civil Code as examples.

[9] René David, Administrative Contracts in the Ethiopian Civil Code, Supra note 1, p. 150.

is not in the public interest. As a result of such measures the contractor may incur unexpected loss. It is in line with natural justice, in such cases, to compensate the contractor. The contractor should not bear the loss that come as a result of measures taken for the benefit of the general public.

There are, therefore, provisions in the administrative contract law, which intend to safeguard the contractor from unnecessary administrative pressures and unexpected loss as a result of measures taken by the contracting administrative authority.[10]

In general, the administrative contract law concept of the Civil Law legal system is developed by taking these justifications into account and in a style that is appropriate to protect the public interest that is involved in administrative contracts and also protect and encourage contractors to engage in the operation of public services. However, as we have seen above not all government contracts are subject to this special regime of law. Only those contracts by the government that qualify as administrative contract are governed by the special administrative contract law rules. And a contract to which an administrative body is a party will qualify as administrative contract when it fulfils tests (most of which are developed from the decisions of the French *Couseil d`Ètat*) which are indicated by law. This approach is applicable in all countries that follow continental European legal system. As we have seen above, in our legal system, too, these tests are incorporated in Article 3132 of the Civil Code.

The special administrative contract law rules are made applicable only to a limited category of government contracts that qualify as an administrative contract, not because their application to other type of government contracts is not useful, it is rather because administrative contract law contains rules which deviate from the generally accepted freedom of contract principle and as an exception to the general freedom of contract

[10] See for example, Articles 3181, 3182, 3183(2), 3195(1), 3196, 3197 and 3200 of the Civil Code.

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principle they have to be applied restrictively. So, the administrative contract law rules which are exceptions to freedom of contract principle should apply only to government contracts in which public interest is directly involved and as such qualify as administrative contract. That is why we find rules (in our case Article 3132 of Civil Code) which narrow the scope of application of administrative contract law rules only to a defined category of contracts by the government.

A detailed discussion of the differences between administrative contracts and civil contracts will be made sometime later. For the purpose of this section it suffices to note that administrative contracts are by their nature different from private contracts and for this reason it is necessary to develop special rules that fit the special nature of administrative contracts.

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1.3.2. Common Law Legal System

In sharp contradistinction to the general position in the Civil Law legal system, the Common Law legal system has no separate theory of administrative contracts. Since A. V. Dicey's, the prominent British jurist, sever criticism on the recognition of administrative law as a separate concept of law at the turn of the 20th century, the Common Law legal system has remained reluctant to give recognition to the development of laws relating to administrative operations. According to the theory of Dicey which got acceptance in the common law jurisdiction, the remedies that administrative law provides are available in private law and as such it is not necessary to give recognition to a separate concept of administrative law.

In the same way, in the Common Law legal system it is said that the essential elements of contract are always the same and the identity of the parties or of the object of the contract do not make the contract any different from private law contracts. So the accepted view in the Common Law legal system is that there is no need to give

recognition to a separate concept of administrative contract law. Contracts by the government can without any problem be governed by private contract law rules. So, in the common law countries we do not find a separate concept of administrative contract law.

Even if, in principle, it is said that in the Common Law legal system there is no separate concept of administrative contracts, it does not mean that there is no differential treatment of contracts by the government in countries that follow the Common Law legal system. When we exam the laws and practices in USA and Britain, which are the principal Common Law countries, we find that even if contracts by the government are in principle governed by private contract law rules, there are special treatments applicable only to contracts by the government.[11] Observably, this is purposely done to protect the public interest that is involved in the contract. Now let us examine some of the points where contracts by the government are differently treated from that of private contracts, particularly in the US.

In the US, one of the most important features of the law of government contracts is the principle of renegotiation. In spite of the requirements as to publicity, tenders and competitive bidding, it was found that there was considerable difficulty, especially in time of war, in preventing contractors from gaining excessive profits from contracts made with the government. In time of shortage, or when the government is committed to a national defense program entailing a certain and necessary expenditure of public money, contractors are placed in an extremely advantageous bargaining position that enabled them to exploit the situation of the government. As a consequence, during World War II, certain government agencies in the US were given the power to inspect the books of account and records of war contractors, and price adjustment boards were established to secure voluntary adjustment in the contracted price, and even to secure a

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[11] Mewett, ***The Theory of Government Contracts,*** supra note 4, pp. 233-236

refund if it was found that the profits which were being made were excessive. In 1951 the Renegotiation Act was issued. The Act established a Board with the function of supervising the renegotiation of certain contracts. Section 104 of the Act requires the insertion in each contract to which the Act applies, of provision which provide for:

1. *The elimination of any excessive profit through renegotiation,*
2. *The repayment of any excessive profit already made or the withholding by the United States of any sum otherwise due,*
3. *Provision of a similar nature to be inserted in any sub-contract made by the contractor.*

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The clause so required to be inserted in the contract and providing for the submission of the contract to the Renegotiation Board is, it appears, in the nature of a standard clause to which the contractor must agree, or not contract at all. It becomes, in effect, a term of all such contracts that the contractor agrees not to make any excessive profits from contracts made with the government of the US. The contractor, thus, in effect, assumes two obligations. First, the contractor agrees to provide the government with certain goods or to furnish certain services, and the government agrees to pay him at a fixed rate. Second, the contractor agrees not to make any excessive profits. This later clause has the effect of declaring that the price to be paid by the government must not only be sufficient but that it cannot be more than reasonable, and that any amount in excess of what is reasonable is not recoverable by the contractor. Where the contractor and the Board can come to some agreement as to the amount which should be repaid, there is no juridical difficulty, since any contract may be modified by the mutual consent of the contracting parties. But, in addition to this, there is the power of the Board to fix, by unilateral action, an amount, any profit in excess of which the contractor must refund. Thus the renegotiation clause becomes a term which gives one of the parties the right to remake the contract without the consent of the other, place the contractor in an extremely subordinate position. This procedure of unilateral determination of an

excessive profit shows that government contracts are somehow deferentially treated from that of private contracts.

There is another distinguishing feature in the matter of government contracts in the US. It has long been the practice to insert into contracts made by the US government a clause providing for all disputes concerning questions of fact arising from the contract to be decided by the contracting officer and the decision of the head of the contracting government agency on appeal to be final and conclusive on the parties thereto. Such agreements in government contracts are upheld by the courts. This is not, however, true in relation to private contracts. Arbitration agreements in which a decision on the facts is submitted to an independent person are jealously supervised by the courts. There are court decisions which even go so far as to state that an agreement which attempts to make the decision of an arbitrator final and conclusive without appeal to the courts is void as being against public policy. This is yet another indication that there is differential treatment of government contracts from that of private contracts.

In addition to these, in countries that follow the common law legal system it is common to insert clauses in contracts to which the government is a party thereby empowering the contracting government authority to unilaterally modify the terms of the contract or to terminate the contract at any time. This again is done to ensure the protection of the public interest that is involved in the contract.

To sum up, we can see that in the Common Law legal system even if government contracts are in principle governed by the common law private contract law rules, government contracts are not always treated in the same way as private contracts. An examination of the laws and decisions in the common law countries, particularly in US, reveals that government contracts are in some respects treated differently from that of private contracts. This, it appears, is done because one of the contracting parties is a government body that represents public interest.

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In order to better understand the concept of administrative contracts, let us proceed to examine the similarities and differences of the two major legal systems with regard to administrative contracts.

In the Civil Law legal system, particularly in France, administrative contract is unquestionably subordinate to the administrative powers of the contracting government agency. This is to say that, whether or not the contract contain clauses which give the administration powers which are not usually found in the ordinary private law contract, certain powers are still vested in it by law by virtue of its duty to safeguard the public interest. Even if the contract does not give it the power, when it finds that the execution of the contract is not in the public interest, the contracting administrative body may unilaterally decide to terminate the contract, vary the terms of the contract, or increase the obligations of the contractor. Further, even if the contract does not provide to this effect, the contracting administrative authority can give direction regarding the performance of the work under the contract. It can order modifications on works that are done. So, we can see that in the Civil Law legal system, an administrative contract is a combination of contract and administrative discretion. No doubt administrative contracts are contracts in the ordinary sense of the term. Nevertheless, rights and obligation of the parties arise not only from the contract but also from administrative law and administrative decisions. As we shall see below, this is one of the points that distinguish administrative contracts from private contracts.

In the common law legal system the situation is different. Since the Common Law legal system starts from the principle that there is only one juridical concept of contract, it does not recognize any conceptually different rights or obligations, from an ordinary private contract. In the Common Law countries there are no special rights or privileges which administrative law gives for a government body party to a contract. In the Common Law countries, administrative law does not entitle an administrative body to unilaterally terminate or vary a contract to which it is a party. There is also no legal

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ground for the courts to give a different treatment for contracts by the administration. Then, one may ask, what mechanism does the Common Law legal system use to protect the public interest that is involved in contracts by the government?

Even if the theoretical basis on which the Common Law concept of contract is based does not allow the special treatment of contracts with the government, it has developed a different mechanism that helps to protect the public interest that is represented in contracts with the government. The mechanism that is used for this purpose is the insertion in the contract of standard terms and conditions which give special prerogative for the contracting administrative body. As we have noted above, in the common law countries it is common practice to insert in contracts with the government clauses which give the contracting administrative body the prerogative to unilaterally vary or terminate the terms of the contract. For that matter the insertion of standard conditions and terms in contracts to be concluded by the government is required by law. So, contracting administrative authorities draw standard terms and conditions to be accepted by potential contractors. The standard terms and conditions are clauses to be inserted in contracts to be concluded by administrative bodies and which contractors have to accept or not contract at all.

To summarize, while in the Civil Law legal system there is a separate body of rules at least for government contracts that qualify as administrative contract which enable the protection of the public interest represented in the contract, in the Common Law legal system which is based on a singular juridical concept of contract, the contracting administrative body derives its special prerogatives that enable it to protect the public interest not from law, but from standard terms and conditions which it causes to be incorporated in the contract. So, here we see that the basic difference between the Common Law and the Civil Law legal systems as regards government contracts relates to the source of the prerogative of the contracting administrative body on the contract. While in the Common law legal system the prerogatives arise from standard terms and

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conditions inserted in the contract, in the Civil Law legal system they emanate from administrative contract law. For the contracting administrative body in the Civil Law legal system the prerogatives are always available, in the common Law countries the contracting administrative body will be able to avail the prerogatives that enable it to protect public interest only if the prerogatives have been indicated in the contract. If no prerogatives for the contracting administrative body are inserted in the contract, the administrative body is in no different position from that of an ordinary contracting party.

The other difference between the Common Law and the Civil law legal systems as regards administrative contracts relates to the protection that is accorded to contractors. In the Civil Law legal system, particularly in France, one of the basic principles of the administrative law is that no one individual should suffer any loss or damage over and above that which is suffered by the public as a whole, through any act of the administration. Even if the contracting administrative body can, in accordance with what is provided by law, unilaterally vary or extinguish the contract, it does not mean that the contractor will be without remedy. It does not also mean that the administrative body can arbitrarily apply its prerogatives. In spite of the existence of the power of the administration to take certain unilateral action in any administrative contract, the interests of the contractor remain protected. When dispute arises in connection with administrative contracts, they are submitted to administrative tribunals. The tribunal is the check which guarantees for the contractor its protection against arbitrary unilateral action on the part of the administration. It also ensures that adjustments are made by providing compensatory indemnities when the act of the administration, although unilateral, are not arbitrary. In the Common Law countries there is no such approach. The rights of the contractor are determined by the ordinary common law contract rules.

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1.4. Similarities and Differences between Administrative Contracts and Private Contracts

When we speak about the similarities and differences between administrative contracts and private contracts, our emphasis is on the Civil Law legal system in general and the Ethiopian Legal system in particular. Since it is only the Civil Law legal system, not the Common Law legal system, that knows the classification of contracts into private and administrative, our discussion of similarities and differences takes into account only the Civil Law legal system.

Since administrative contracts are contracts in the ordinary sense of the term there are some points which make them similar with private law contracts. On the other hand, since in administrative contracts, an administrative body that represents public interest is a party, they are somehow different from contracts concluded by two private individuals. Let us now proceed to consider the similarities and differences in detail.

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1.4.1. Similarities

Even if, in the Civil Law countries, administrative contracts and private contracts are governed by two different body of rules, there are some points which they share in common. We shall now consider some of the most important points of convergence between administrative contract and private contract.

1. One of the points of similarity between administrative contracts and private contracts relates to the principle of good faith. According to this principle contracts must be concluded and performed in good faith. Administrative contracts are no exceptions to this rule. According to this principle both contracting parties in an administrative contract, i.e., the administrative authority and the contractor, must perform their respective obligations in good faith. They will be exempted from this obligation only if they can show the existence of force majeure that prevents them from performing the

obligation under the contract. Both the contractor and the administration are governed by this principle.

2. The other point where administrative contract law and private contract law converge is the principle of freedom of contract. Like what happens in the case of formation of private contracts, administrative contracts are formed through the process of offer and acceptance, through which both the administration and the contractor express their free consent. Administrative contract cannot be imposed upon a person without his consent, and with certain important exceptions which shall be explained below, it cannot be altered by either of the parties without the consent of the other. In other words, the relationship of the administration and the contractor in the administrative contract is not a superior subordinate one, but rather mutual. An administrative contract is created through the will of both parties. The administration cannot use its inherent coercive power to create an administrative contract. The contract will come into existence only if the contractor agrees to be bound by the terms of the contract. The contractor has the full freedom to negotiate with the administration and to choose to be or not to be bound by the proposed terms of the contract.
3. The consideration or price element is the other factor that makes administrative contracts similar with private contracts. In administrative contracts, like in private contracts, price is one element. For the goods, works or services that the contractor makes available, the administration assumes the obligation to pay a sum that is indicated in the contract. The contractor does not assume pro bono obligations.

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These are just some of the points of similarity between administrative contracts and civil contracts.

1.4.2. Differences

Even if, given the fact that both are contracts in the ordinary sense of the term, there are similarities between administrative contracts and private contracts, there are also basic differences between the two types of conracts. These differences spring from the basic object of administrative contracts. The administration is the guardian of the interest of

the public and every contract entered into by it, which is an administrative in nature, has for its object the performance of public services. The administration, thus, has to ensure the execution of the contract in a manner that satisfies the public interest. The administration enters into administrative contracts not just in the capacity of an ordinary contracting party. It contracts in the name of the public representing the public interest. Since the object of the contract is related to the general public interest, administrative contract is different from civil or commercial contracts. Let us now consider some of the basic differences between administrative contracts and civil contracts that spring from this fact.

1. The first difference relates to the source of the rights and obligations of the parties to the contract. Although an administrative contract contains all the terms of the contract, and all the rights and duties which are contractual in nature, the terms of the contract alone are not sufficient to determine all the rights and duties which are imposed upon the parties. An administrative contract is, in fact, a curious combination of contractual rights, duties imposed by law generally upon all contractors with the administration, and regulatory powers of the administration. From the contract arises the name of the parties, the work to be done, the price to be paid, etc. From the general public law, the contractor may find that he has assumed obligations over and above those set out in the terms of the contract, i.e., more works have to be done or more supplies to be provided than were agreed upon. From the regulatory powers of the administration arises its right to act in the interest of the public and where necessary terminate the contract, direct the mode of performance, or modify the contractual specifications in some way. The power of the administration to direct and control the mode and operation of the performance of an administrative contract is part of the general public law and in no way dependent upon some contractual terms to that effect. Any person who enters into an administrative contract becomes, merely through being in that position, immediately subject to the powers of supervision of the administration. The contract is a prerequisite to the control, but the right to control and supervise is in no way contractual. The

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powers of the government to control the manner of performance of an administrative contract are inalienable and unconditional and the government cannot restrict them by contract.

Thus, we can see that to find the rights and obligations which arise under an administrative contract we must look elsewhere than solely at the contract itself. This contrasts with the contracts of private law, concerning which it is said that legally protected agreements take the place of the laws amongst those who have entered into them. In administrative contract law, however, this maxim has no application. In every administrative contract the administration does not contract as an ordinary individual. It is not concerned to protect the interests of individuals. It contracts on behalf of a society, of the public, for the necessities of the public service, for the common general interest. Every time an individual contractor enters into an administrative contract with the government, it does something more than what a contractor does in a civil or commercial contract. Because it goes beyond this, one should not apply to it the same rules as one does to an ordinary private law contract. This is logical. In administrative contracts there is a different situation from that envisaged by the provisions of the private contract law, a situation which ought to be subject to entirely different rules.

By far the greatest right of the administration which arises in connection with public contracts which are related to the control and supervision power in relation to the execution of an administrative contract, is that the administration has the sole power of determining when a contract is properly serving the public purpose it is intended for. Thus, although a contract can only be made, in the first place, with the consent of both parties, the administration can, regardless of the terms of the contract, increase, diminish, or put an end to the obligations of the contractor, by its own unilateral act. This it has power to do when such action would be in the greatest interest of the public, and provided that any increase in the obligations of the contractor shall not be of substantially different nature from those assumed in the contract. Furthermore, failure on the part of the contractor to comply with these added directions from the administrative body is considered as breach of the contract. Thus, for example, if the

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administration contracts for the supply of provisions for an army camp, it may insist upon more than the contracted amount if the originally agreed amount appears to be insufficient, less if that amount proves to be excessive, and it may finally stop supplies altogether, if it does not think that the public interest will best be served by the continuance of the contract. This power of the unilateral action applies to all contracts, for example, to a contract for construction work, to one for the provision of supplies, and to contracts of concession of public service. This right exists in spite of any contractual term to the contrary, where for example, a concession is contracted for a definite number of years and the administration terminates it before the end of that period.

The above discussion shows the difference that exist between administrative contracts and private contracts and specifically those that spring from the special prerogatives of the contracting administrative authority. The same considerations that necessitated the development of special rules for administrative contracts have also resulted in the recognition of special protections for the party contracting with the administrative authority. This fact gives administrative contracts unique feature, distinguishing them from private contracts. Let us now consider the differences between administrative contracts and private contracts that arise as a result of the extension of special protection for the contractor in an administrative contract.

2. The first such difference relates to the effect of change of circumstances that upset the balance of the contract and make the obligation of the contractor onerous. After the conclusion of the contract unforeseen change of circumstances may upset the economic balance of the contract and make the obligation of the contractor onerous beyond that which can be envisaged on the making of the contract. In private contract law, however the obligations of the contractor which has become onerous as a result of unforeseen change of circumstances, so long as the performance of the contract is materially possible, the debtor has to perform to the terms of the contract. Of course he may negotiate with the creditor for revision, which takes into account the changed circumstance, to be made and when the creditor agrees the revision may be made.

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Otherwise, he cannot even ask the court to revise the contract. This rule is indicated in Article 1764 of our Civil Code. Of course based on the exceptions indicated in Article 1766 and 1767 it is possible to ask for judicial revision of the contract when the obligations of the debtor becomes onerous as a result of change of circumstances. Otherwise the debtor has to perform his obligations however onerous they have become as a result of change of circumstances. Of course, if the occurrence of the unforeseen circumstance has, beyond making performance onerous, made performance impossible, the debtor may be relieved of his obligations under the contract on the ground of force majeure.

In administrative contract law, the rule is different. In administrative contracts the rule in this regard is that where in the course of performance of a contract economic events arise which would impose upon the contractor a financial burden which would be totally disproportionate to that envisaged when the contract was entered into, if the contract has to be performed strictly according to its terms, the contractor has the right to perform the contract and demand from the administration an indemnity for the increased costs in carrying out his obligations. The rule that permits this for the contractor is referred to as, in French, the doctrine of *imprévision.* We shall see the detailed application of this rule in Chapter Two. Here it suffices to note that the contractor in an administrative contract has a right which his counterpart in private contract law does not have. It gives him the right to be compensated for having to perform the contract according to its letter, and this is, indeed, a marked feature of administrative contracts only.

3. The other difference between administrative contracts and private contracts relates to the doctrine of *fait du prince*. This doctrine, like the doctrine of *imprévision* operates to give the contractor, in certain circumstances, a right to an indemnity which the private law counterpart does not have. The concept of *fait du prince* revolves around the problem of what happens when, in the course of the performance of the contract, the government enacts a law which has the effect of increasing the obligations of the contractor. When a law issued by the government, either by the same branch as that

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which is the contracting party, or a different branch, increases the obligation of the contractor, the contractor is, on certain conditions, entitled to indemnity from the contracting administrative body. This is a right available only for contractors in administrative contracts.

4. The other point of difference between administrative contracts and private contracts relates to the procedure of formation of the contract. In private contract the person who wants to conclude a contract has the full freedom to choose with whom to contract. His only concern will be finding a contracting party who agrees at the most beneficial price and is effective in performance. That is, in private contract law, there is no rule that dictates a person as to how to choose his contracting party. For that matter since the private contracting party represents his own interest, he will chose the person with whom he will contract by having regard, under normal circumstances, to economic factors that help to get the best benefit out of the contract, such as price and effectiveness in performance. In any case, the law that governs private contractual relationships is not concerned with the maximization of the economic benefit the parties may get from the contract, although there are exceptions (the rule on unconscionable contracts).

   In case of administrative contracts the situation is different. In principle administrative bodies have to conclude contracts by selecting, through competitive bidding procedure, the contractor that offered the lowest price and is effective in performance. The administration cannot conclude contract with whoever pleases it. If the administration is at liberty to contract with whomever it likes to contract with, it may be prejudicial to the public interest, since there may be carelessness and corrupt practice on the part of contracting officials in picking the person with whom they contract.

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1.5. Ethiopian Administrative Contract Law

1.5.1. Origin and Historical Development

It is difficult to trace with certainty the exact time the law that governs contract by the government and its administrative agencies emerged in Ethiopian history. Obviously, such a law will be necessary and evolve when the government and its administrative

agencies use contract to meet their demands. When we consider the situation in pre-Italian occupation Ethiopia, the then existing governments were not engaged in modern provision of basic public services such as education, health, transport and other public goods. They were engaged only in ensuring internal peace and order, guarding the national territory and territorial expansion. And the inputs that the government needed to maintain itself and discharge these latter obligations were obtained by tax collected in kind. It is unlikely that the then existing governments resorted to contract to satisfy their needs. So, it is difficult to think that laws that govern contracts by the government existed prior to Italian occupation.

It is in the post-Liberation period that a modern government with multifaceted responsibilities emerged in Ethiopia. Modern finance system is also established immediately after the Liberation. It is believed that a law that governs contracts by government evolved in the post-Liberation period, following the expansion of government responsibilities and establishment of different administrative agencies.

Be that as it may, Ethiopia for the first time got a comprehensive modern law that governs administrative contracts with the promulgation of the 1960 Civil Code. Among the various issues that the Civil Code addressed were administrative contracts which are included in Title XIX of the Code. Administrative contract law by its nature belongs to the category of public law, and as such is beyond the purview of civil code. Its incorporation into the Civil Code is an anomaly. Herein below I have reproduced a note by the drafter of the Civil Code, Professor René David, from the *Journal of Ethiopian Law.* It gives you some hint as to why administrative contract law is incorporated into the Civil Code and other general issues relating to the source and drafting history of the administrative contract law provision of the Civil Code. He has to say the following.[12]

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[12] René David, Administrative Contracts in the Ethiopian Civil Code, Supra note 1, pp. 143-147. Footnotes omitted.

"The term 'administrative contract' is not used in all legal systems, but where it is used it designates contracts beyond the civil code's purview, contracts that are subject to special administrative law rules. Administrative contracts are, therefore, never dealt with in civil codes.

The Civil Code of Ethiopia is exceptional in this respect. Book V of the Code, dealing with 'Special Contracts,' includes a title on 'Administrative Contracts.' Why this anomaly in the Ethiopian Civil Code? Having prepared the preliminary draft of the Code, I may be able to answer the question. To a French jurist such as I, the distinction between public law and private law, and more particularly between civil law and administrative law, seems essential to a legal classification. Government administrators are to represent and defend the public interest and whether it is acknowledged or not, they are in fact in a different position from private individuals. It is inconformity with justice, properly understood, to subject contracts concluded by them to special rules, other than those of the civil law, at least when these contracts have the characteristics peculiar to 'administrative contracts.'

All legal systems have had to develop such special rules. The only difference among the various systems is that this development is less apparent in some than in others, either because administrative law or administrative contracts are not dealt with in a specialized treatises, or simply because there are special administrative courts with jurisdiction over litigation concerning these contracts.

This was the situation in Ethiopia when codification was undertaken. There were no, and still are not, special administrative courts. In addition, since there were no treatises on Ethiopian law, one could not be sure to what extent any of the western categories exited in Ethiopia. The choice was open as to whether or not to use the concept of administrative contract.

Given this option and conditions in Ethiopia, it seemed to me that one of two things would happen. Either rules relating to administrative contracts would be set forth in the Civil Code as guide in this area, or no such rules would be incorporated in the Code and great uncertainty would result. But the silence of the Code would not prevent these contracts from being subject to special rules; the special rules would simply not be stated in a statute.

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It was very desirable to clarify the law in this area. Because of the increased functions assumed by the state and its administrative authorities, administrative contracts have become more important in all countries in recent years. True as this is in France, the United Kingdom, and even in the United States, it is even more so in developing countries. The economic development of these countries must come from public and semi-public undertakings as much as or more than from private enterprises. Even in the framework of a liberal economy, it will often be necessary to use administrative contracts to stimulate private enterprise.

This situation clearly prevails in Ethiopia, as in all countries where capital is scarce. The country's development must be aided by concession given to domestic and foreign enterprises; It would have been possible, of course, to draw up individual charters for each concession, as was done years ago for English corporations. Each ministry could develop 'form contracts' to be used to contracts of public works. These solutions, acceptable when the government's role in the economy was limited to regulation, seem outmoded now. Modern states have abandoned this approach and become more systematic, regulating by legislation things that were formerly left to charters or to ordinary contracts. A framework has to be provided, with the understanding that within this framework there would be room for adaptation by the administrative authorities and the person with whom they contract.

Thus it was decided to provide in the Civil Code itself rules that would apply to administrative contracts. This decision was motivated by the feeling that it would lead to a security in contractual relations with the government that would enhance the country's development. It was particularly hoped that the clarification of the rules on administrative contracts would help to attract foreign enterprises and capital to Ethiopia.

Once the decision was made, how was it to be carried out? It was soon apparent that it would not be enough to insert a few rules here and there in the title on "Contracts in General" and in the various titles dealing with special contracts. Because of the peculiarity of administrative contracts, and the importance of providing a clear and coherent system of rules for them, it was apparent that, like contracts relating to immovables, they should be dealt with in special title.

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But where could one find a model for such set of rules? No previous legislation had dealt with it; in France there had been no consolidation of the case law of the Council of State into a statute or code. As in some other titles and chapters of the Ethiopian Civil Code, the basis here has to be scholarly writing. An excellent treatise on administrative contracts had just appeared in France. We had only to put into legislative terms the propositions formulated by this work, and then, of course to ask if the solution adopted by the Conseil d'État and French writers need to be modified on account of conditions peculiar to Ethiopia.

In many respects, Ethiopia differs from countries of Western Europe. No rule of any foreign law whatsoever went into Ethiopian Civil Code without our asking whether it was suitable for Ethiopia. We asked this question in drafting the title on administrative contracts just as we did for all the other titles of the Code. This is evident from the rules that were finally adopted; the regulation of administrative contracts in the Ethiopian Civil Code differs in many respects from that in French administrative law. In its organization, the concepts it uses, the style of formulation of its rules, and the methods of interpretation and application that it presupposes, the Ethiopian Civil Code is a product of French legal science, but in terms of the content of the rules it contains, it is no more French than Greek, Swiss, Egyptian, or English. Necessarily it is an Ethiopian from end to end.

Fortunately, there were checks to assure that the rules of the Code would correspond to the needs and sentiments of the Ethiopian nation. I did not work alone on the codification. I prepared the preliminary draft of the Code, but this draft, after it was translated into Amharic, was studied and revised, first by a Codification Commission made up of Ethiopians and then by the Ethiopian Parliament, which had the final power to adopt the text of the Civil Code.

For many of the titles of the Civil Code, this procedure worked well. The task of the Commission was often facilitated by an exposé des motifs that I submitted with the text of the original draft. This procedure was not followed, however, for the title dealing with administrative contracts. The title 'Administrative Contract' was one of the last that I drafted for submission to the Codification Commission and was not accompanied by an exposé des motif. It was translated

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into Amharic, but the Codification Commission was otherwise occupied and apparently did not have time to go over the text in detail. At least no comments or questions were sent to me concerning this title and it was not discussed with me. The preliminary draft became the proposal of the Commission without change, and it was adopted by parliament without amendment. This should not cause undue surprise or alarm, however, since the subject is highly technical and is not one on which there would be any customary law or any peculiarly Ethiopian feeling of what is just.

Nevertheless this is regrettable. In the case of other titles, the discussion with the Commission resulted in improvements on the preliminary draft. Quite apart from critical observations made by the Commission, imperfections in my work became apparent to me as I was called upon to present it and discuss it with others. Title XIX was not the subject of such discussion, and circumstances also prevented me from revising my preliminary draft six months or a year after finishing it. Thus, a mere preliminary draft, rather than a true proposal became law, and it is beyond doubt that various imperfections resulted from this procedural failing. Even so, it is fortunate that Title XIX was included in the Ethiopian Civil Code. This title can be improved at an appropriate time, but as it stands can play a useful role in making legal relations more secure and, thus, in the economic development of Ethiopia.

The provisions of Title XIX of the Civil Code do not apply to all contracts concluded by administrative authorities. As in France, the specialized rules only apply where they are needed, to contracts termed 'administrative Contracts' by the law. Sub-articles 3132(b) (c) provide a general definition of administrative contracts, for the interpretation of which one can refer to French treatises.

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1.5.2. Source and Structure of the Ethiopian Administrative Contract Law

As explained earlier the Ethiopian administrative contract law is contained in the 1960 Civil Code. The administrative contract law provisions that are incorporated into the Civil Code are further classified into general and special provisions.

The provisions from Article 3131- 3206 are applicable to all contracts that qualify as administrative contract. These provisions are designed in such a way as to be suitable to the different types of administrative contracts. They are devoted to the formation (Arts. 3134 – 3171) and the effects (Arts. 3172- 3206) of administrative contracts.

In addition to the general administrative contract law provisions which are applicable to all types of administrative contracts, special provisions which are applicable only to certain types of administrative contracts are also incorporated in the title of the Civil Code on administrative contracts (Arts 3207-3306). Special provisions are incorporated for three different but common types of administrative contracts. These are:-

1. Contracts for the concession of public services (Arts. 3207- 3243)
2. Contract of public works (Arts. 3244 – 3296); and
3. Contract of supplies (Arts. 3297 – 3306)

Special provisions for these special type of administrative contracts is provided not because the general administrative contract law provisions are not applicable to these contracts, it is rather because since these contracts greatly vary in their nature, it is necessary to include special provisions that are appropriate or suitable to the specific type of contract. So, contract of concession of public service, contract of public works, and contract of supplies will in the first place be governed by the special rules designed for the respective types of contracts. On matters that are not governed by the special rules, the general administrative contract law rules will apply. By the application of the rules of interpretation which says that a special provision shall prevail over the general, the special administrative contract law rules would be given precedence over the

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general administrative contract law provisions. So, if there is a dispute relating to an administrative contract for the supply of goods or for the execution of public work or concession of public service, apart from the terms of the contract itself, the applicable rules for the settlement of the dispute will be first the relevant special administrative contract law provisions and when the special rules could not help resort will be made to the general administrative contract law provisions.

The rules contained XIX of the Civil Code are not the only provisions that are applicable to administrative contracts. As indicated in Article 3131(1) & (2), general and special private contract law provisions of the Civil Code and Commercial Code are also applicable to administrative contracts. The administrative contract law provisions of the Civil Code have the effect of supplementing the general and special private contract law rules, not excluding and replacing them. So, the general contract law provisions (Arts. 1675 – 2026) and the special private contract law rules (Arts. 2179 – 3130) and contract law rules contained in the Commercial Code or Maritime Code are applicable to administrative contracts on issues that are not governed by the rules contained in the administrative contracts law section of the Civil Code.

As discussed earlier, because administrative contracts are contracts in the ordinary sense of the term, there are features which they share in common with private contracts. To the extent that they are contracts in the ordinary sense of the term and have features commonly shared with private contracts, there is no reason why the rules of ordinary contract law should not be applicable to administrative contracts. The administrative contract law provides rules only on the points where administrative contracts differ from private contracts. The administrative contract law rules do not cover all the issues that may arise in connection with administrative contracts. Title XIX of the Civil Code provides rules that govern administrative contracts by focusing only on the special feature of administrative contracts and, as such, do not provide complete rules applicable for administrative contracts. So, administrative contracts are subject also to

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the rules of private contract law. On matters that are distinctive to administrative contracts, these rules will be supplemented by the administrative contract law provisions.[13] It should, however, be noted that even if the administrative contract law provisions have supplementary role, they have big effect on the nature of the right and obligation or, in general, in the overall position of the parties to the administrative contract. In other words, the rights and obligations of the parties greatly differ when the rules of administrative contract law apply, although supplementary, than if they were governed by the private contract law rules only.

Thus, we see that in the Ethiopian legal system administrative contracts are governed by the general and special administrative contract law provisions that are incorporated in Title XIX of the Civil Code and by the general and special private contract law rules of the Civil Code. The next question, then, is determining the order of application of these different set of rules. In this case, the rule of interpretation which says that the special will prevail over the general will help us. So, we will follow the order of specificity to determine which body of rule should be give priority in application. Thus, the order of application will be first, the special administrative contract law rules, then the general administrative contract law rules, then the relevant special private contract law rules and finally, the general contract law rules. If, for example, we take a contract of supply, provided that it qualifies as an administrative contract, it will be governed first by the special administrative contract rules designed for this type of contract (Contract of Supply Arts. 3297 – 3306), then the general administrative contract law rules (Arts. 3134 – 3206) will apply, when these rules are not adequate, the special private contract law rules will apply, and for this type of contract the pertinent special private contract law is the Law of Sales (Arts. 2266 – 2367), and if these rules appear to be inadequate, the general contract law rules will be applicable.

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[13] See Article 3131(2) of the Civil Code

To sum up, the administrative contract law provisions of the Civil Code are not the only applicable body of rules for administrative contracts. Administrative contracts are contracts in the ordinary sense of the term. So, to the extent that they are similar with private contracts, they will be governed, on matters that are not addressed in the administrative contracts law section of the Civil Code, by the rules designed for private contracts. The Ethiopian administrative law is organized in this way.

In addition to the aforementioned provisions of the Civil Code, the Ethiopian Federal Government Procurement and Property Administration Proclamation no. 649/2009 and the Directives issued to implement this proclamation contain rules that in particular govern the procedure for entering into administrative contracts. The provisions of this Proclamation have the effect of modifying the administrative contract law provisions, particularly the rules governing the procedure of allocation of contracts by tender (Arts 3147 – 3169).

When we look at the scope of application of the Proclamation, it is intended to apply for all contracts by the government whether or not they qualify as administrative contract in accordance with the tests indicated under Article 3132 of the civil Code. This is clear from a cumulative reading of Articles 3(1), 2(6), (8) and (5) of Proclamation no. 649/2009. So, the scope of application of the Proclamation extends also to contracts by the governments which do not qualify as administrative contract. Contracts concluded by the executive, legislative or judicial branch of the government or any other government body are governed by this Proclamation. The scope of application of the Proclamation is, thus, wider than the scope of application of the administrative contract law provisions of the Civil Code. The administrative contract law provisions of the Civil Code are applicable only to contracts by the government which qualify as administrative contract by fulfilling at least one of the tests indicated under Article 3132 of the Civil Code while the proclamation is designed to apply to all contracts without having regard to the administrative nature of the contract. Why is this so?

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It has its own justification. As indicated above one purpose of the Proclamation is to provide the procedure for entering to contract by government bodies. The procedures are aimed at providing government bodies a system that will enable them to choose, through competitive bidding procedure, the best offer, evaluated in terms of price and performance plan, from among interested candidates. This is important since it is at the formation stage, particularly in connection with the selection of the contracting party that corrupt practice may be committed and public interest may be betrayed. The application of rules that govern the procedure for the selection of the contracting part in an impartial and transparent manner helps to protect the public interest. On the other hand the application of the procedure does not affect the freedom of contract of the parties. In view of this the application of the provisions of Proclamation no. 649/2009 to govern the process of selection of the contracting party in all government bodies is desirable. On the other hand since the administrative contract law provisions of the Civil Code include provisions that deviate from the freedom of contract principle, there application should be limited only to special cases that necessitate their application, when an overwhelming public interest that justify deviation from freedom of contract principle is involved in the contract. That is why the administrative contract law provisions of the Civil Code are made to be applicable only under restricted conditions indicated under Article 3132 of the Civil Code, and not for all contracts to be concluded by administrative bodies.

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1.5.3. Ethiopian Federalism and Administrative Contract Law

As we know currently the state structure in Ethiopia is a federal system. As you may recall from your constitutional law course, in a federal state there are two set of governments having their own sovereign power under the federal constitution. The Federal constitution apportioned government power to the federal government and

regional states of Ethiopia. The federal and regional states have their own government structure and finance system. The governments at both levels enter into contracts by their own for the procurement of good, works, and services to meet their own demand and provide basic services for the tax payers in their respective jurisdiction. The governments at both levels have their own financial administration laws and laws that govern the contract they conclude. Both the federal government and regional governments have the power to issue laws that govern the contracts that they conclude. The federal government has its own finance law and laws that govern administrative contracts. Regional states in the same way have their own respective finance law and law that govern contracts by the respective government of the different regions. Of course so far the separate legislation that the federal and regional states have relate only to the procedure of formation of government contracts. The federal government has Proclamation no. 649/2009 and regional states have the analogous legislations which are identical in content with the federal proclamation (Proclamation no. 649/2009). So far, no separate law has been issued be it by the federal government or the regional states that govern the effect and performance of administrative contracts. So, both at the regional and the federal level issues relating to the effect and performance of administrative contract are to be governed by the unrepealed administrative contracts law provisions of the 1960 Ethiopian Civil Code.

Even if both the federal and regional states have their own respective legislation that govern administrative contracts, in this text the discussion will be limited only to the rules that apply to administrative contracts concluded by the federal government. Since the legislations adopted by the regional states are identical in content with the federal public procurement law there is no need to discuss them one by one.

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Review questions

1. Why is it necessary to have administrative contract law? Why do not we govern administrative contracts by the private contract law rules?
2. Explain the points of convergence and divergence between administrative contracts and private contracts.
3. Explain the differences that exist between the Common Law and Civil Law legal system as regards administrative contracts.
4. "The fact that one of the contracting parties is an administrative body is a necessary but not a sufficient condition to qualify the contract as administrative contract." Comment on the validity or otherwise of this statement.
5. Can an administrative body label a contract to which it is a party as 'non-administrative contract' and excluded it from the scope of application of administrative contract law? Why? / Why not?
6. A dispute has arisen between Bahir Dar University and Mekab Engineering plc in connection with the execution of a construction contract entered between the two for the construction of a structure that fence the main campus of the University. Is it the administrative contract law or private contract law that should be applied by the judge to settle the case? Why? / Why not?
7. In a contract between the Black Lion Hospital and Imperial Importer plc for the supply of medical equipment, the Hospital accused the supplier of faulty performance and instituted a suit based on the administrative contract law. The supplier, however, argued by saying that his contract with the Hospital is governed not by administrative contract law rules but by private contract law rules. If you were the judge to whom the case is submitted, what would be your ruling? Why?

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Chapter Two

Formation of Administrative Contract

2.1. Introduction

One of the reasons that necessitated modern government and law is to ensure the orderly conduct of important economic, political and social relations in a society. Most of our laws are concerned in laying down the procedure for the formation of such relationships and define their legal effects.

Contractual relationships that do have economic significance are one of the areas of interactions that are subject to regulation by law. Without totally disregarding the freedom of contract of contracting parties, the formation and effects of contracts is regulated by law. Administrative contracts are no exceptions. They are governed by the laws we mentioned at the end of the preceding chapter. In this chapter we will study the requirements set by those laws to create a valid administrative contract.

Chapter objectives:

A student who carefully studies this chapter will be able to:-

- ✓ Know the requirements for the formation of a valid administrative contract,
- ✓ Know the various methods of contracting available to an administrative body,
- ✓ Understand the requirements as to capacity of the parties to administrative contract,
- ✓ Know the formality requirement for the formation and variation of administrative contracts, and
- ✓ Know the limitations imposed on the freedom of contract of parties to an administrative contract.

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2.2. Essential Requirements for the Formation of Administrative Contracts

As provided in Article 1678 of the Civil Code in order to create a valid contract four essential conditions must be fulfilled. These are: the parties must have the legal capacity to enter into contract; the parties must give their full and free consent to be bound by the terms of the contract; the object of the contract must be sufficiently defined, possible and lawful; and the contract must be made in the prescribed form, if there is any special form required by law. Since administrative contracts are contracts in the ordinary sense of the term, the requirements indicated under Article 1678 also apply to them. This is clear from the reading of Article 1676(1) and Article 3131(1) and (2) of the Civil Code. Let us now study these requirements, as they apply to administrative contracts, in detail.

2.2.1. Capacity of Contracting Parties

In general the term 'capacity' refers to the ability in law of a physical person or a body corporate to perform juridical acts. According to this principle entities who want to conclude a contract need to have the capacity to perform juridical acts and in particular to enter into the particular type of contract. If one or both of the contracting party is a physical person they have to be 18 or above years of age, not judicially or legally interdicted and, when the contract involves the transfer of ownership right over an immovable object or permanent contract of employment, the contracting party must be Ethiopian by nationality. If the contracting party is an entity other than a physical person, in order to conclude a valid contract, it must be one which is conferred with legal personality by law, registered in the appropriate government office, if that is required by law, has renewed its registration and should have the capacity given to it by law or memorandum of association that enable it to enter into the specific type of contract.

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In an administrative contract the contracting parties are on the one side the government or its administrative agencies and on the other side, as contractor, a business organization. It is also possible for individual persons (physical persons) to become a party to an administrative contract.

For a given business enterprise to be a party to an administrative contract it should be one that is established in accordance with the law governing business organizations and has renewed it registration or license. It will have the legal personality and the capacity that enable it to enter into contracts and continue to act in this capacity only if it fulfilled these requirements.

In addition to these, the Federal Government Procurement and Property Administration Proclamation no. 649/2009 Article 28(1) lays down additional requirements which a business entity must fulfill in order to be a party to a government contract. According to this sub-article in order to be a party to an administrative contract, the contractor must possess the necessary professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capability, experience in the execution of the specific type of contract, and the necessary personnel to perform the contract; and must not be insolvent, in receivership, bankrupt or being wound up, its business activities have not been suspended and is not the subject of legal proceedings for any of these. If a party contracting with administrative authority does not fulfill these conditions it results in the invalidation of the contract as per Article 1808(1) of the Civil Code.

The contracting administrative body can require the contractor to provide such appropriate documentary evidence or other information to verify if the contractor has the capacity as defined above.[14] As indicated in sub-article 3 of the same article the requirements as to the qualification of the party contracting with the administrative

[14] Ethiopian Federal Government Procurement and Property Administration Proclamation, no. 649/2009. (Hereinafter, Proc. 649/2009)

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body apply equally for all contractors and shall be set forth in the bid document or other documents for solicitation of offers. The administrative authority has to evaluate the qualification of interested contractors only in accordance with these criteria. This will help to make the process of contracting transparent and impartial and allow interested candidates to know what is required of them to qualify for participation in the contracting process. If the contracting administrative authority discovers that the document submitted by the contractor contains false information or that the information supplied by the candidate is materially inaccurate or incomplete, it shall disqualify the interested contractor from participating in the contract.[15] So far we examined the qualifications that are required from a contractor to qualify for entering into a contract with an administrative body. Now let us turn to consider the capacity required of the administrative body to conclude an administrative contract.

In order for an administrative body to perform juridical acts, and in particular to conclude administrative contracts, it has to have legal personality. The legal personality of public bodies is acquired from establishment by proclamation or regulation. So, in order to conclude contract in the capacity of an administrative body, the entity must be one which is established either by proclamation or regulation. In addition to this, it must also have the power to enter into the specific type of contract. The administrative body may get the power to enter into a certain type of contract either from an enabling legislation or an authorization by a higher authority.

Sometimes the establishing legislation of a certain administrative authority may simply confer legal personality and keep silent as to the specific capacities of the administrative body it established. In such cases the administrative body will have the capacity to perform all legal acts which are necessary to discharge the functions for which it is

[15] Id., Article 28(5).

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established. It will have functional capacity. In some other cases the law that established the administrative body may also define the specific capacities of the administrative body that it establishes. In such cases the administrative body will have the capacity to perform those legal acts that are expressly given to it by the establishing legislation.

When a certain administrative authority is established, it is presumed that it will have the capacity to enter into contracts and perform other juridical acts that relate to the purpose for which the administrative authority is established. As such it can conclude any contract related to the activities for which it is established. However, sometimes an administrative body may be required by law to secure the authorization of a higher authority before it enters into certain type of contracts. Such requirements may be indicated in the general administrative law or in the legislation that established that particular administrative body. In such cases it is necessary for that administrative authority to secure the required authorization in order to make a contract sustainable at law. For instance, if the law that established the Ethiopian Roads Authority provides that upon authorization by the Ministry of Works and Urban Development it can enter into contract for the procurement of heavy duty construction materials, then the Authority can enter into contract for the procurement of such heavy duty construction material only with the prior authorization of the Ministry. So, when there is such requirement for prior authorization to conclude certain contracts, that authorization must be secured in advance. And the authorization must be given expressly. According to Art. 3140(2) of the Civ. C. the authorization cannot be implied. According to this provision the authorization given to an administrative authority to make expenditures shall not amount to an authorization to conclude contract, where authorization is required to conclude contract. In other words, an order given to an administrative authority to undertake certain work does not amount to an authorization to conclude contract for the purpose of discharging that responsibility where authorization is required by law. For instance, in the above example, if the Ministry of Works and Urban

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Development orders the Ethiopian Roads Authority to undertake extensive work of rehabilitating the road network, it does not amount to an authorization to procure heavy duty construction machineries.

Article 3143(1) provides the legal effect of entering into contract without the required prior authorization. According to this provision a contract concluded by an administrative authority will not produce any legal effect where the authority which has concluded the contract has not received the necessary authorization required by law.

Since, in principle, it is believed that an administrative authority has the power to perform juridical acts that are necessary to discharge the functions for which it is established, the requirement of authorization should apply only exceptionally and when the law expressly requires.

In general in order for an administrative body to enter into contract on behalf of the public using the tax payers' money, it should have the power that enables it to do so. As we have seen above, the power of an administrative authority to enter into an administrative contract may be acquired from law or authorization from higher authority. If an administrative authority enters into an administrative contract without having the power to do so, it will be considered as an *ultra vires* act and the contract will have no legal effect as per Article 401(1) of the Civil Code. The conclusion of a contract by an administrative authority without having the capacity to do so is just one ground for invalidating a contract. As expressly provided in Article 401(1) of the Civil Code, acts performed by administrative authorities in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect. The contracts that a given administrative authority may make are directly or indirectly determined by law. The procedures and formalities required to conclude an administrative contract are also determined by law. The conclusion, by an administrative authority, of a contract without having the power to do so or without

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observing the procedures and formalities that are required by law will make the contract void. As provided in Article 402 of the Civil Code, the nullity of the contract can be invoked by any interested party within ten years from the date the contract was concluded.

In connection with this it must be noted that, like in some other jurisdictions such as in the United Kingdom and unlike in France, the fact that an administrative authority does not have the necessary fund to finance the contract will affect the validity of the contract. This results from a cumulative reading of Article 32(2)[16] of Federal Government of Ethiopia Financial Administration Proclamation no.648/2009 and Article 401 of the Civil Code. (Note that, this is indirectly repealing Article 3142 of the Civil Code which provides that the unavailability of fund does not affect the validity of contract).

2.2.2. Consent

For a certain contractual obligation to be created the contracting parties must give their consent. The contracting parties must express their full and free consent to create contractual obligations as between themselves and to be bound by the effect that it produces. Consent is expressed through the process of offer and acceptance that takes place between the parties. An offer is an express declaration to another person of one's intention to enter into a contract. When a person by indicating the details offers to another person to enter into contract, he is said to have expressed his consent. When the other party agrees to be bound by the offer made to him without reservation, acceptance is made, and in the process a contractual relation comes into existence.

This is the principle that governs the expression of consent in the formation of contracts in general. Administrative contracts are no exceptions to this principle. What is striking

[16] This provision reads as follows:

" 2. No contract or other arrangement requiring payment shall be entered into by any public body unless there is a sufficient unencumbered balance from the budget to discharge any debt that will be incurred during the physical year in which the contract or other arrangement is made."

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in administrative contracts is that the identity of the party that makes the offer and the identity of the party that accepts the offer are predefined by the law. This results from the predefined procedure that the law provides to be followed in the formation of administrative contracts or government contracts in general. As will be explained below in detail, when an administrative body wants to enter into contract, in principle it has to use the competitive bidding system. This system of entering into contract requires the administrative authority to announce an invitation to bid and then the collection of bids from qualified bidders and the selection and approval of the successful bidder for the contract. In this process the invitation for bid is considered as invitation for offer, not an offer by itself. The submission of bid by interested and qualified contractors have the legal effect of an offer and the selection and approval of the successful bidder by the administrative authority is considered as acceptance on the part of the contracting administrative authority. So, the offer maker is always the contractor and the acceptance is to be made by the contracting administrative authority. In some cases, however, the situation will be reversed. This is in the special cases where the administration is allowed to enter into direct contract without competitive bidding procedure. In this case the administrative authority approaches the sole contractor with its own specification of goods, works or services and enters into contract to acquire it. In this case the administrative authority is the offer maker and the contractor acceptor. Of course, there may also be cases of counter-offer by the sole contractor and acceptance by the administration.

Freedom of contract of the administrative authority

An administrative body, in so far as it is conferred with its own independent legal personality, has the capacity to enter into contract under the conditions provided by law. It exercises its ability to enter into contract by utilizing its freedom to contract. In the exercise of its ability to enter into contract the administrative authority utilizes its freedom to contract. As it is the case with private individuals, an administrative

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authority will be bound by a contract only when it gives free and full consent. The law emphasizes this freedom of contract of the administrative authority.

In this regard the law provides that the authorization given to an administrative authority to conclude a contract does not oblige the administrative authority to conclude a contract. It only gives right of doing so to such authority.[17] In addition to this, according to Art. 3140 (1), the allocation of budget for a work to be carried out by an administrative authority does not compel the administrative authority to conclude contract or give private parties the right to use the budget by compelling the administrative authority to conclude contract.

Not only that the administrative authority is free to decide to enter or not to enter into a contract, it will be obliged by the contract only when it expressly gives its consent to be bound by the contract. As stated in Article 3134(1) of the Civil Code, an administrative authority will be bound by a contract when it expressly agrees to be bound by the terms of the contract. In the same way, when the conclusion of a contract is subject to approval by a higher authority in order for the contract to be deemed concluded, the approval must be given expressly (Article 3134(2)). These provisions (Article 3134(1) and (2)) reproduce to administrative contracts the principle that silence does not amount to acceptance incorporated in Article 1682 of the Civil Code. This is intended to exclude the application to administrative contracts of the Article 1683, 1684, 1685, and 1686 - exceptions to the rule that silence does not amount to acceptance. So, the silence by an administrative authority when an offer is made to it for the conclusion of a contract does not imply acceptance. As indicated in Article 3134(3), this principle applies also to variation of contracts. The silence by the contracting administrative authority or by the authority that has the power to approve the variation when an offer for revision of the

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[17] Article 3141 Civil Code.

contract price, time, mode of performance or any other aspect of the contract does not amount to acceptance or approval of the revision.

This rule is not without exception, however. If there is express stipulation by administrative law or regulations that for certain specified types of contracts silence by the administrative authority amounts to acceptance, even if the administrative authority does not expressly show its acceptance of an offer, it will be deemed as if it is accepted by silence.

The other thing that must be noted in connection with this is that, as indicated above, sometimes the conclusion of a contract by an administrative authority may be subject to approval by a higher authority. In such cases the contracting administrative authority must do all the acts necessary to get the conclusion of the contract approved by the concerned higher authority (Article 3144 Civil Code). As per Article 3145 of the Civil Code, where the approval is delayed for more than six months or such other period as has been fixed by the parties, the party contracting with the administrative authority can release himself from the contract by giving notice to the contracting administrative authority.

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2.2.3. Formality Requirement in the Formation of Administrative Contract

The other requirement which the law provides regarding the conclusion of contract relates to the form which the conclusion of the contract must comply with. As you may remember from your general contract law course, while the requirement as to consent, capacity and object apply to the conclusion of all contracts, the requirement as to form is applicable only for contracts for which the law prescribes a special form to be followed.

The general rule that governs the requirement of form in the conclusion of a contract is contained in Articles 1719 – 1730 of the Civil Code. The principle as indicated in Article 1719(1) is that, in the same way that parties are at liberty to enter into contract they have

also the freedom to choose the form for making their contract. Unless exceptionally required by law for some policy reason, the law does not oblige contracting parties to make their contract in writing or comply with other formalities. It does not also oblige them to make their contract orally. In principle it is up to the contracting parties to choose the form of their contract.

When we come specifically to the formality requirement in the conclusion of an administrative contract, Article 1724 of the Civil Code clearly provides that it has to be in writing. Not only that it has to be in writing, it has also to be registered with a court, notary or public administration entrusted to register contracts.

If it is required that a contract be made in writing, then as per Article 1727 of the Civil Code the contracting parties have to sign it before two witnesses. Since the contracting administrative authority does not have physical existence and its own volition and will, we cannot think of the administrative authority signing a contract by itself. Rather it is represented by the person that head it or by the contracting officer. It will be considered as signed by the administrative authority when the head of the administrative authority or the contracting officer, within the power given to them by law, affix their signature and put the official seal of the administrative body on the contract document.

It should also be noted that preliminary contracts which the administrative authority conclude before the main contract or revision of the administrative contract already concluded have to follow the formalities described above (See Articles 1721 and 1722 Cum. Article 1724 Civil Code).

In addition to what is provided in the Civil Code regarding the formality requirement in the formation of administrative contracts, Article 26 of Proclamation no. 649/2009 provides that all communications between an administrative authority and contractors have to be in writing. This Article requires that any communications which are not made in a written form shall be subsequently reduced into writing. As it stands now administrative authorities are not allowed, in the process of formation or execution of

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contract, to make communications by electronic (telephone, e-mail, etc.) means unless subsequently made in writing. However, as indicated in Article 26(2) of Proclamation no. 649/2009, subject to the necessary safeguards with regard to authenticity and confidentiality, the Minister of Finance and Economic Development may permit, by directive, the use of electronic means of communication in addition to or instead of writing.

The non-observance of the formality requirements prescribed for the conclusion of administrative contracts has the effect of making the contract null and void. Regarding this, Article 1720(1) of the Civil Code provides that there shall be no contract but a mere draft of contract where the special form prescribed by law for the conclusion of the contract is not observed. Article 401(1) of the Civil Code provides the same rule. In other words, it will be considered as if there is no contract. This shows that the special form is required not just only for the purpose of proof of the contract (*ad probatum*), but it is also a validity requirement (*ad validitum*). In other words, it is not possible to prove the existence of the contract by any other means, if the prescribed form is not complied with.

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2.2.4. Requirements as to the Object of Administrative Contract

As you may remember from your course on the law of contracts, the term "object of contract" refers to the corresponding obligations of the parties to a contract. One party may agree to do a certain thing, or to refrain from doing something which otherwise he could have or to give something. On the other side, the person to whom the obligation to do, or not to do, or to give is entered to also assumes, on his part, corresponding obligation(s). It is the main obligation of the parties that revolve around the obligation to give, to do or not to do that is referred to as the object of the contract.

The determination of the object of contract is directly related to freedom of contract and is left for determination by the parties. What should be the main obligation in the

contract? Once the main obligation in the contract is determined, how should the detailed execution of that obligation be made? These and other related questions are to be answered by the parties to the contract. This freedom of the parties is indicated under Article 1711 of the Civil Code.

Even if the parties have the liberty to determine the object of the contract in a manner they deem it appropriate, they have the obligation to ascertain that it is lawful and possible. This is clear from the phrase "...subject to such restrictions or prohibitions as are provided by law" in Article 1711 of the Civil Code. Furthermore, as provided in Articles 1714, 1715, and 1716 consecutively, the object of the contract must be defined, possible, and not contrary to law or morality. The object of administrative contract must, in principle, fulfill these requirements relating to the object of contract.

As indicated in Article 1717 of the Civil Code in principle the motive for which the parties' enter into a contract is not taken into account to determine the unlawful or immoral nature of the object of the contract. This is not, however, the rule in case of administrative contracts. Articles 3170 and 3171 of the Civil Code provide important requirements concerning cause of administrative contracts.

The stipulation in Article 3171 tells us that the cause for which an administrative contract is concluded is taken into account to determine the unlawful nature of the contract and results in the nullity of the contract. As provided in Article 3171(1) an administrative contract will be void where it is concluded with an unlawful object in view. The unlawfulness of a certain act is to be measured in light of laws that are in force. If the motive for which an administrative authority entered into contract contradicts laws that are still in force, the contract will have no legal effect. Sub-article 2 of Article 3131 in particular provides that an administrative contract will be void on ground of unlawful cause where it is conclude with a view to procure advantage of pecuniary nature to the contractor and not for reasons of general public interest.

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Further, according to Article 3170 of the Civil Code contracts to be concluded by administrative authorities should have a cause. This is to say that contracts to be concluded by administrative bodies should serve the interest of the tax payer public. According to this provision, an administrative contract will have no effect if at the time of the conclusion of the contract it was known for certain that it is impossible to attain the result sought by the contracting administrative authority. Thus, not only that a contract to be concluded by administrative authorities should have something to achieve for the public, but also in the prevailing circumstance it should be useful and makes it possible to attain the result sought by the administrative authority. This stipulation is in line with Professor Mitchell's theory that a government contract must have something to achieve for the public.[18]

In the words of Rene David, drafter of the Civil Code, Articles 3170 and 3171, on cause of administrative contracts, are designed to protect the public interest against administrative carelessness and against collusion between government officials and scoundrels.[19]

2.3. Manner of Letting Administrative Contracts

Another important point that needs to be discussed in relation to the formation of administrative contracts is the procedure to be followed in the selection of the party that contract with the administrative authority. In private contract the contracting parties select their contracting party based on criteria that will make them get the best economic benefit out of the transaction. Since a private contracting party represents his own interest, he selects his contracting party based on criteria that take into account the maximization of his interest represented in the contract. As we have seen in the preceding chapter, when administrative authorities enter into contract they do have nothing to lose or gain from the contract, they do not have their own interest, per se.

[18] Mitchell, **The Contract of Public Authorities**, Supra note 3, pp. 6-15
[19] René David, Administrative Contracts in the Ethiopian Civil Code, 1, p. 148

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They represent public interest and use public money. As a result there is the fear that there may be, on the part of contracting authorities, carelessness in bargaining, conflict of interest, lack of impartiality and collusion with contractors that will prejudice public interest. In order to prevent this and ensure that contracts by the government are performed effectively and efficiently and to make the contracting process transparent, impartial and fair, it is necessary to provide special rules that govern the allocation of contracts to interested contractors.

Taking this rationale into account, our law has incorporated rules that govern the procedure that should be followed in the formation of administrative contracts. These rules provide different methods of contracting. The purpose of the various contracting methods that are recognized by the law is to help the contracting administrative authority get the best value for money. In other words, they are designed in such a way as to enable the contracting administrative authority to find out the contractor that can perform, for the least possible price, effectively and efficiently the work that is intended to be executed by the contract.

The procedure that should be followed in the selection of the contractor and the conclusion of an administrative contract is provided in the 1960 Civil Code. As indicated above, the Ethiopian Federal Government Procurement and Property Administration Proclamation no. 649/2009 also contains rules that govern the process of contracting by government organs. There is overlap between the provisions contained in the Civil Code and provisions of the aforementioned proclamation. To the extent of the overlap the proclamation has amended those provisions of the Civil Code that govern the procedure of conclusion of administrative contracts (Arts.3147 – 3169). Accordingly, the discussion in this section will take into account the implied amendment to these provisions of the Civil Code.

When we come to consider the specific contracting methods that can be used by administrative authorities, we find that, according to Article 33(2) of Proclamation no.

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649/2009, administrative authorities have, in principle, to use **open bidding/tendering** procedure as the preferred procedure of contracting. According to this provision, unless otherwise provided by law, administrative authorities have to use open bidding procedure in entering into contract with private parties. The proclamation also allows the use of other methods of contracting in addition to open bidding. These other methods of contracting are to be used exceptionally only when certain conditions are fulfilled. These additional methods of contracting are provided in Proclamation no. 649/2009. These are:-

1. Restricted tendering (Articles 49 and 50)
2. Direct Procurement (Articles 51 and 52)
3. Request for Proposal procedure (Articles 53 and 54)
4. Request for Price Quotation procedure (Articles 55 and 56)
5. Two-stage bidding (Articles 57 and 58)

In principle administrative authorities have to use open bidding procedure. They can, however, also use on fulfillment of certain specified conditions one or the other forms of contracting methods indicated above. The contracting methods that are mentioned above from 1 up to 5 will be used by administrative authorities only when one of the conditions for using one or the other of these contracting methods, mentioned respectively in Articles 49, 51, 53, 55, and 57 of the Proclamation, exist.

When we look at the various contracting methods recognized by the law, we find that, in principle, administrative authorities have to allocate contracts through competitive bidding system, by inviting at least three bidders and selecting the best contractor based on preset criteria. So, we can say that tendering is an important feature of the contracting process by administrative authorities. Tendering is made the preferred method of contracting by administrative authorities because it has its own advantages. These are:-

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1. The essence of tendering is competition. And the existence of competition is advantageous to the contracting administrative authority. In the process of competition among the bidders to get award of the contract, the administrative authority will be able to get the contractor that can effectively perform the contract for the least possible price.
2. It will help to ensure transparency and accountability in the contracting process and avoid connivance, partiality and other harmful practices in the contracting process. Since the contracting administrative body is using public fund, the expenditure has to be made in a transparent and accountable way.
3. It gives equal chance of participation in public works financed by the tax payers' money. In so long as there is the capacity and desire on the part of private individuals, equal chance of participation should be given in works financed by public money. The allocation of the contract through competitive bidding system gives competent tax payers the chance to participate in contracts financed by the tax payers' money. Reinforcing this assertion, Article 24 of Proclamation no. 649/2009 provides that interested contractors (bidder) should not be discriminated against in contracting process on criterion that has nothing to do with their capacity and qualification. Of course, by way of exception Article 25 of Proclamation no. 649/2009 stipulates preferential treatment for goods produced in Ethiopia, for works carried out by Ethiopian contractors and services rendered by Ethiopian contractors. The margin of preference is to be determined by a directive to be issued by the Ministry of Finance and Economic Development.

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Even if, for reasons mentioned above, administrative authorities have to use competitive bidding system to enter into contract, there are exceptional cases whereby the use of direct contracting (non-competitive method of procurement) is allowed. We shall consider the conditions for using direct contracting latter on.

In general, when administrative authorities want to conclude contract they have to use open bidding or depending on the circumstance the procurement methods that are indicated from Article 49 up to Article 58 of Proclamation no. 649/2009. Failure to use

the appropriate contracting procedure, as required by the law, results in the nullity of the contract as per Article 401(1) of the Civil Code. Of course there are exceptions to this rule. There are certain types of government contracts to which the contracting methods and the procedure indicated in the Proclamation and the Civil Code do not apply. These are:-

1. Contracts relating to national security and defense,
2. Contracts financed by external source, and
3. Contracts between government bodies for the supply of goods, execution of work, provision of consultancy or services for consideration.

Article 3(2a) of Proclamation no. 649/2009 provides that the Ministry of Finance and Economic Development may in the interest of national security and defense permit the use of a different contracting procedure than those recognized by the Proclamation. This is justifiable. As we have seen above, the contracting methods indicated in the proclamation require contracting authorities to make the contracting process open and transparent. If contracts related to national security and defense is required to be made openly it will have negative impact on national security and defense. Taking this into account the law has provided the possibility of use of a different method of contracting for contracts relating to national defense and security. The special procedure for such type of contracts is to be determined by a directive to be issued by the Ministry of Finance and Economic Development. The contracting method to be determined by that directive should be one that ensures efficiency and economy of the contract to be concluded for the procurement of goods, works or services for the purpose of national security and defense. Efficiency in performance and best value for money are central requirements in any contracting process and procurements relating to national security and defense cannot be exceptions.

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The other type of contracts to which the contracting methods indicated in the proclamation do not apply are contracts financed by loan or grant obtained from other states and international organizations. Article 6 of Proclamation no. 649/2009 provides that to the extent that provisions of the proclamation conflict with an obligation of the government of Ethiopia arising out of an agreement with one or more other states or with an international organization, the provisions of the agreement shall prevail. This normally is related to loan or grant agreements which the government of Ethiopia enters into with other states or international organizations. In order to finance the various development projects, the government of Ethiopia enters into bilateral and multilateral loan and grant agreements with other states and international organizations such as the World Bank, Africa Development Bank, European Union, etc. Such agreements usually contain conditions for the release and expenditure of the fund obtained by the agreement. Such conditions may contradict with the provisions of the Proclamation. For instance the loan or grant agreement may provide the use of special procedure for the allocation of the contract to be financed. When, for example, the loan or grant is obtained from other states, such agreements usually incorporate a term specifying that only contractors from the donor or lending country may take part in the contract to be financed by the agreement. This is common in Ethiopia in projects that are financed by loan or grant from the government of China, Japan and Italy.

To sum up, when there exists international obligation(including obligations assumed under regional or international economic agreements, such as agreements on free trade area) that contradict with the provisions of proclamation no. 649/2009, to the extent of the contradiction the international agreement will prevail and the provisions of the proclamation will be set aside. This is purposely done to open the door wide for foreign sources of finance.

The other category of contracts that are excluded from the scope of application of the rules that apply to administrative contracts is contract concluded by an administrative

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body with another administrative body for the supply of goods or services or for the performance of work (Article 3(2b), Proclamation no. 649/2009). Can you explain why these types of contracts are excluded from the scope of application of administrative contract law rules? Try to answer this question before you proceed to read the following paragraph.

It should be noted here that there are documents that contracting administrative authorities should prepare before entering into contract by using one or the other of the contracting methods mentioned above. These are ***general terms of business***, ***specifications*** and ***bid evaluation criteria***. Let us now look at what these documents are before discussing the various contracting methods mentioned above.

General terms of business (also known as general conditions of contract, standard conditions of contract, general business terms) are general terms and conditions to be prepared by individual administrative bodies and which specify the condition of performance of the contracts that individual administrative authorities conclude normally form the terms of the contract document defining the rights and duties of the parties. Article 3135 of the Civil Code which prescribes that administrative authorities prepare general terms of business recognizes three different category of general business terms for which definition is provided under Article 3136. These are: Model specifications, General clauses and conditions, and Common directives.

The current practice is somewhat different from what is provided in Articles 3135 & 3136 of the Civil Code. In the current practice general business terms are prepared not by individual administrative bodies but centrally by the Public Procurement and Property Administration Agency (PPPAA), the government organ in charge of overseeing procurement and property administration matters across different government organs. One of the duties of the PPPAA is to prepare and update and systematically maintain general terms of business to be used by various government

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bodies when they enter into different contracts.[20] Accordingly, the PPPAA has drawn up general business terms. But there is no one set of general business terms applicable for the different types of procurements by various government organs. The PPPAA has actually prepared six different sets of general business terms suitable to the different procurement needs of the government bodies. So far the PPPAA has prepared separate set of business terms applicable for procurement of goods, procurement of services, procurement of works,[21] procurement of consultancy service, procurement of pharmaceuticals and for minor (local) purchases.[22] For the first five of these set of business terms there are two versions depending on whether the intended procurement is from international market or from domestic sources only.

The general business terms are standard terms which have to be incorporated in all the contracts to which they apply and contractors intending to participate in the contract have to accept them or not contract at all. Interested contractors cannot negotiate on the contents of the business terms described above. The general terms of business are designed to form part of the terms of contracts concluded by the administrative authorities. Matters that are specific to individual contracts (example, the price, time of performance, the type and volume of the supply or work, etc.) will be fixed at the time of the conclusion of the contract. The general terms of business deal with such general matters as the formation of the contract, manner of performance of the obligation indicated in the contract, measures to be taken by the administration in case of failure by the contractor, delivery of the work or good, and about the bonds to be supplied by the contractor.

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[20] Proc. 649/2009, Art. 15(1).

[21] It should be noted here that regarding general business terms that are to be used for procurement of works (construction contracts) in addition to the general business terms prepared by the PPPAA there is another business term prepared by the Ministry of Works and Urban Development which is intended to be used for construction contracts to be supervised by the Ministry. It is important to critically evaluate as to which of the two set of business terms will have priority in application as there is observable discrepancy between the two documents.

[22] These documents are available at: http://ppa.mofed.gov.et.

Articles 3137 – 3139 of the Civil Code deal with the effect of general terms of business. Their effect differs according to whether they relate to the conclusion of the contract (Article 3137) or to the interpretation, content and execution of the contract (Article 3138).

As provided in Article 3137, the general terms of business which pertain to the formation of the contract are binding on the parties to an administrative contract even if their applicability is not indicated in the contract. Those general terms that pertain to interpretation, content and execution of the contract must be expressly incorporated by the contract in order to have obligatory force. This distinction regarding the legal effect of general business terms does not seem to be justified. In addition, Article 3138 is hard to reconcile with Article 1686, according to which general terms of business obligate a party even if they were unknown to him whenever they have been prescribed by the public authority. Regarding this, the drafter of the Civil Code, René David, says that it was due to slip of the pen on his part at the time of drafting the Code.[23] Until such time that this provision is amended, it should be interpreted and applied in conformity with the policies and goals of administrative contract law.

Article 3139 deals with modifications to general business terms. In order to adapt to new situations and circumstances, administrative authorities can make modifications to the general business terms that they have drawn up. Such modification will not, however, affect the rights and obligations of the parties to an administrative contract where the rights and obligations of the parties is determined by reference to general business terms and the modification is made subsequently to the conclusion of the contract. In order to determine the respective rights and obligation of the parties to an administrative contract, the general business terms will be considered such as they exist at the time when the contract was concluded. Any modification to the general business

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[23] René David, Administrative Contracts in the Ethiopian Civil Code, 1, p. 148

terms subsequently to the conclusion of the contract will have no effect of modifying the rights and obligation of parties under an already concluded contract. This is intended to protect the legitimate expectation of the contractor at the time of the conclusion of the contract.

As mentioned above, general business terms are not the only documents that contracting administrative authorities should prepare to enter into contracts. In addition to this, they have to prepare ***specifications*** and ***bid evaluation criteria***.

The specification is a technical description of the requirements of the contracting administrative body as to the goods, works or services that it intend to obtain through the contract that it is about to make. While general business terms once prepared can be applied for almost all contracts that administrative authorities conclude, specifications have to be prepared each time an administrative body is to conclude a contract. In general the specification may pertain to:

- Technical specification of the good, work or service to be procured (technical specification), and
- The competence required from contractors interested in the contract (Specification as to competence)

For the purpose of providing a correct and complete description of the goods, works or services to be procured and to make the competition among bidders fair and open, contracting administrative bodies shall prepare the technical specifications laying down the characteristics of the goods, works or services to be procured under a particular contract.[24] As indicated in sub-article two of the same article, the specification shall clearly describe the administrative body's requirements with respect to quality, performance, safety and, where necessary, dimensions, symbols, terminology, packing, marking, and labeling or the process and method of production and requirements

[24] Proc. no. 649/2009, Art. 29(1).

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relating to conformity assessment procedures. The technical specification to be prepared by contracting administrative authorities shall, as far as possible, be in terms of performance rather than design or descriptive characteristics; be based on national standards, where such exist, or otherwise on internationally recognized standards or building codes; invite open competition and devoid of any statement having the effect of restricting competition (Article 29(3) Proclamation no. 649/2009). Unless it is found out that there is no sufficiently precise or intelligible way of describing the requirements of the contracting administrative authority, there shall be no requirement or reference in the technical specification to a particular trademark or name, patent, design or type, specific original producer, or service provider.[25] If there is the need to resort to this way or method of preparing the specification, phrases such as "or equivalent" must be included.[26]

As provided in Article 3152, the specification to be prepared by the contracting administrative authority may include the qualifications which are required for admission to tender and the eliminating tests (***bid evaluation criteria***) to which the tender submitted by bidders will be subjected.

Bid evaluation criteria refer to the tests by which bids submitted by interested bidders will be evaluated and the most advantageous bid will be identified. As a matter of principle and in order to bring transparency and certainty in the bidding process the administrative authorities intending to enter into contract have to prepare in advance the evaluation criteria based on which bids submitted by bidders will be evaluated and let the bidders know the evaluation criteria thus set.[27]

So far we have studied the documents that administrative authorities should prepare before they proceed to enter into contract by choosing one or the other of the

[25] Id., Art. 29(4).
[26] Ibid.
[27] Id. Article 28(3) and Art.37(i).

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contracting methods that we mentioned above. Now let us turn to examine the conditions and procedures of the various contracting methods recognized by the law.

A. **Open Bidding**

As stated earlier, open bidding is the preferred contracting method which, in principle, administrative authorities have to employ to conclude a contract. This contracting method is made to be the principal method of contracting because it gives for all interested contractors the opportunity to participate and compete and it is also the most transparent method of all the procurement methods. So, administrative authorities have to always use open bidding in entering to contract, unless the contract is one that has to be concluded using one or the other of methods of contracting provided from Article 49 – 58 of Proclamation no. 649/2009.

There are steps which administrative authorities should follow when they use open bidding method of procurement. Let us now study in detail the procedures involved.

1. Preparation of bidding documents

In order to use the open bidding method of contracting, administrative authorities have to first prepare ***bidding documents***. As per Article 2(12) of Proc. no. 649/2009, the ***bidding document*** is a document prepared by a contracting administrative body and contains a specification of the desired object of procurement. Article 37 of the same proclamation provides that, in order to make the competition among bidders on the basis of complete, neutral and objective terms the bidding documents shall contain sufficient information, and in particular it must include:

a. Instruction for the preparation and submission of bids;
b. Information about the final date for submission of bids by bidders, the address to which the bid must be sent, the date, hour and place of opening of the bid, as well as an announcement that bidders or their representatives are allowed to attend the bid opening ceremony;

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c. Bid submission forms and, where applicable, forms of bid security to be provided;
d. The number of copies to be submitted with the original bid;
e. The general and specific conditions of contract;
f. Specifications of requirements, including time limit for delivery or completion of the task, as appropriate;
g. Evidence to be provided by bidders to demonstrate its qualification as well as its fiscal and legal standing;
h. The period during which the bid remains in force;
i. The criteria and the points to each criterion for evaluation of bids and award of the contract;
j. A reservation to the effect that the contracting administrative authority may reject all bids at any time prior to the notification of the award; and
k. The price adjustments that may be made during contract implementation and the condition under which such price adjustments can be made.

Once the administrative body prepares the bidding document that contains the above mentioned and other particulars, the administrative body will pass to the next step of the open bidding method of contracting.

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2. *Advertising invitation to bid*

Once the contracting administrative body prepares the bidding document, it shall advertise an invitation to bid. The invitation to bid has to be advertised at least one time in a national news paper of general circulation which is published in the language the bidding document is prepared or, where appropriate on a national radio or television.[28] As per Article 36 of Proc. no. 649/2009, the invitation to bid must as a minimum contain the following particulars:

a. The name and address of the administrative body making the invitation to bid;

[28] Proc. no. 649/2009, Art. 35 (1&2).

b. A brief description of the goods, works or services to be procured;
c. The means and conditions for obtaining the bidding documents and the place from where they may be obtained;
d. The place and deadline for the submission of bids; and
e. The place and time for opening of bids, along with an announcement that bidders or their representatives are allowed to attend at the opening of bids.

Once the invitation to bid is advertised the bidding documents must be available to interested contractors free of charge or at a price not exceeding the cost of reproduction and delivery of such documents to interested bidders. The bidding documents shall be available to interested bidders on working days between the date of the publication of the invitation to bid and the closing date of the bid (Article 38, Proc. no. 649/2009).

Normally, once the invitation to bid is advertised the contracting administrative authority cannot freely modify the bidding documents. However, there may be situations which necessitate the modification of the bidding document after the invitation to bid is advertised. Since contracts that administrative authorities conclude have to be in the interest of the public, the necessary modification can be made to the bidding document when that is necessary to protect the interest of the public. So, at any time prior to the deadlines for submission of bids, the public body may, on its own initiative or in response to an inquiry by a candidate having purchased the bidding documents, modify bidding documents by issuing an addendum, which becomes an integral part of the bidding documents. The modification shall immediately be communicated to all interested bidders having purchased the bidding documents and when appropriate a reasonable extension of the deadline for submission of bid shall be made (Article 39, Proc. no. 649/2009).

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3. *Receipt of bids*

In open bidding method of contracting once the invitation to bid is advertised, the next step is receipt by the contracting administrative authority of bids submitted by bidders. Bidders have to submit their bid in writing, signed and in sealed envelope, to the place and before the deadline stated in the invitation to bid (Article 41(1), Proc. no. 649/2009). Normally bidders have to put their bid document in the bid box to be prepared for this purpose by the administrative body that advertised the invitation to bid. But, where it becomes impossible to put the bid document in the bid box due to its large size, the administrative authority shall give receipt to the bidder indicating the time and date on which the bid document was submitted (Article 41(2), Proc. no. 649/2009).

The bid that interested contractors submit should consist of the following items:

a. Declaration of intention to tender (see Articles 3153 and 3154, Civil Code). This is a kind of cover letter to the bid that individual bidders submit and represents a formal declaration of intention to take part in the tender. The declaration of intention to tender shall indicate the full name, qualification and address of the bidder, and references shall be annexed thereto.
b. Bid document (see Article 3155 and 3156, Civil Code). The bid or tender document is the document in which the bidder specifies his offer of the price and the terms and conditions which he is willing to be bound by.
c. Bid bond/security (see Article 40, Proc. no. 649/2009). As provided in this article, bidders have to submit together with their bid a bid bond or security. The purpose of the bid bond is to discourage irresponsible bidders. The amount of the bid security should be such as to discourage irresponsible bidders. From a reading of what is stipulated in Article 40 of proclamation no. 649/2009, it is clear that bid security is not required for all types of contracts. Sub-article 3 of the same article provides that contracts in respect of which bid security is required and the amount of the bid security thereof shall be determined by a directive to be issued by the Ministry of Finance and Economic Development. The bid security can be in the form of cash deposit or bid guarantee. The

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bid security that is to be made in the form of bid guarantee can, depending on the preference of the bidder, be in the form of casher's certified check (CPO) from a recognized bank, letter of credit (LC) or bank guarantee.

The bid security will be forfeited if a bidder withdraws his bid within the validity period of the bid or in case of a successful bidder, if he repudiates the contract or fails to furnish performance or contract security (Article 40(3), Proc. no. 649/2009).

The submission of bid in the manner described above has its own legal effect on the bidders that submitted the bid. Since submitting bid indicating one's desire to participate in the bid is considered as making an offer, the candidate that submitted a bid cannot withdraw or modify until the result of the bid is known (Article 3156(1) Civil Code). As indicated in Article 3167(3) of the Civil Code, it is the designation of the successful bidder that will release other bidders from the obligation they entered into by submitting bid. However, a bidder may expressly limit in his bid the period for which he binds himself by the tender he submitted. In such cases the bidder will be bound by the offer he made in the bid only for such period as he fixed in the bid.

It should be noted that Article 3156 of the Civil Code reproduces the general contract law rule which provides that whosoever offers for another to enter into contract shall be bound by his offer until the time limit he fixed expires or until such time when he reasonably expects the offeree to decide on the offer expires.[29]

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4. Opening of bids

After the deadline for the submission of bids, the next step in the open bidding process is the opening, evaluation and examination of bids. This task and the process of procurement in general is entrusted to the Public Procurement and Property Administration Department to be established within each government body as per Article 8(a) of Proclamation no. 649/2009.

[29] Arts. 1690 & 1691 Civ. C.

All the bids received before the deadline for submission of bids shall be opened by the staff(s) of the Public Procurement and Property Administration Unit who is/are in charge of carrying out procurement activities of the administrative body. The opening of the bid shall be done immediately after the deadline for submission of bids and in the time and place indicated in the bidding document or in the invitation to bid (Article 42, Proclamation no. 649/2009).

As provided under Article 3158 of the Civil Code the opening of the bid shall be held in public. The process of opening the bid involves unsealing of the envelops that contain the bids, reading aloud the name of the bidder and the total amount of each bid, discounts offered and any such information that is necessary to let the bidders know their relative rank and record the facts (Article 42(2), Proc. no. 649/2009). Where, however, technical and financial proposals are submitted in two separate envelops, the envelope containing the price offered by the bidder shall be read after the evaluation of the technical proposal.

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5. Examination and evaluation of bids and selection of the successful bidder

Once the opening of the bids submitted and identification of the content of each bid is made, the next stage is examination and evaluation of each bid. The purpose of the examination and evaluation of bids is to identify the responsive bids and select the most advantageous bid and award the contract to the successful bidder. Unlike the bid opening stage, the processes in this stage has to be confidential. Information relating to the examination, clarification, and evaluation of bids and recommendations for award must not be disclosed to bidders or other persons not officially concerned with the process until the successful bidder is announced (Article 44, Proc. no 649/2009).

In the process of examination and evaluation of bids, the official in charge of this task can ask bidders for clarification of their bids in order to assist in the examination and

evaluation of bids. However, no change in the substance of the bid, including change in price, shall be sought, offered or permitted. Arithmetic errors can, however, be corrected by notifying to the bidder (Article 43(1&2), Proc. no. 649/2009).

After the examination and evaluation of each bid, those bids that are found to be responsive will be taken for comparison and identification of the most advantageous bid. A bid will be considered as responsive only if it conforms to the salient requirements set forth in the bidding document prepared by the contracting administrative authority (Article 43(3), Proc. no. 649/2009). A bid may still be considered as responsive even if it contains deviations that are minor and do not materially alter or depart from the characteristics, terms, conditions and other requirement set forth in the bidding documents or if it contain errors or oversights that are capable of being corrected without touching on the substance of the bid. Any such deviations shall, however, be taken into account in the comparison and giving of points to bids (Article 43(4), Proc. no. 649/2009).

The assessment of whether a bid is in conformity with the salient requirements indicated in the bidding document and decision to admit or to exclude a bid, as non-responsive, from comparison is the power of the contracting administrative authority through the contracting officer in charge. In no case can, however, the administrative authority admit into competition when a) the bidder failed to demonstrate that he is qualified, b) the bidder does not accept correction of arithmetic errors, and c) the bid is not responsive (Article 43(5), Proc. no. 649/2009). These cases are out rightly excluded by the law maker.

In general, in the process of selecting the successful bidder, the contracting administrative body shall only consider substantially responsive bids for further evaluation and comparison in accordance with the criteria set forth in the bidding document. No criterion shall be used that has not been set forth in the bidding documents. Nor may a bidder be required to change the price offered in his bid or

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otherwise modify his proposal or to assume obligation to do so except as provided in the bidding documents prepared by the contracting administrative authority (Article 43(6 &7), Proc. no. 649/2009).

At the end of the evaluation and comparison of the responsive bids the best bid will be selected. The successful bid will be (Article 43(8)):-

a. the bid that is found to be responsive to the technical requirements and with the lowest evaluated price;
b. where this is stipulated in the bidding documents by the contracting administrative authority, the bid offering better economic advantage ascertained on the basis of factors affecting the economic value of the bid, other than price, which have been specified in the bidding documents and which are quantifiable and can be expressed in terms of money;
c. where it is ascertained in post evaluation of bids that the legal, financial and technical standing of the candidate conforms to the requirements stated in the bidding documents prepared by the contracting administrative body.

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Normally, at the end of bid process the administrative authority has to designate the successful bidder. The notification of award to be given to the successful bidder shall specify the time within which the contract must be signed. The unsuccessful bidders shall also be informed as to who the successful bidder is and why they have lost the bid (Article 46(1) Proc. No. 649/2009). The bid bond of the unsuccessful bidders will also be released.

In some cases, however, the administrative authority need not designate the successful tenderer. This is when the bidding document prepared by the contracting administrative authority stipulates that the administrative authority does not intend to contract beyond a certain price (Article 3165(1) Civil Code). Sometimes administrative authorities, for budgetary or other reasons may in advance determine the price at which they will enter into a contract. After the evaluation of the tenders submitted by bidders

it may be found out that all the prices offered by the bidders are above that maximum price predetermined by the contracting authority. In such cases the administrative authority may decide not to designate the successful bidder. Rather it will cancel the bid and decide to float new tender or cancel its procurement plan.

Sometimes at the end of the evaluation and examination of bids it may be found out that two or more bidders have the same points or result. In such cases, obviously it will be difficult for the administrative authority to designate the successful tenderer. In such cases there are two options for the administrative body. If the bidding documents that the administrative body prepared or the rules governing the tender procedure provide that in such cases the successful bidder shall be selected by lot, then the administrative authority will designate the successful tenderer by lot from among the bidders that have equal points. Absent such stipulation in the bidding documents, the administrative authority has to announce a new bid (See Article 3166 Civil Code).

As explained above, in principle, the administrative body that caused the tender to be made should announce the successful tenderer. However, the designation of the successful tenderer shall not constitute the conclusion of the contract (Art. 3167(1) Civil Code). In other words the identification of the successful bidder has no the effect of concluding the contract. It has only the effect of the identification of the best offeror with whom the contract may be concluded (Art. 3167(2) Civil Code). It has also the effect of releasing the other tenderers from the obligation they entered into by submitting tender (Art. 3167(3) Civil Code).

The administrative body that caused the tender to be made has the discretion to approve or to refuse to approve the result of the tender. The contract will be deemed concluded where the administrative authority approves the result of the tender (Art. 3168 Civil Code). Since the designation of the successful tenderer at the end of the tender process has the effect only of identifying the best offer for the administrative body, the contract is deemed to be concluded when the administrative authority

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approves the process and the final result of the tender. In other words, the approval by the administrative authority of the successful bidder has the effect of acceptance of the offer of the successful bidder.

Although Article 3168(2) of the Civil Code provides that the approval of the successful tenderer constitutes the conclusion of the contract, it does not mean that that is the end of the conclusion of the contract. There may be matters that may require detailed negotiation before the formal conclusion of the contract. It is possible for the administrative authority to negotiate with the successful bidder on matters that are not addressed in the bidding documents and in the general terms of business. It is, however, prohibited for the administrative authority to negotiate with the successful bidder on the price offered and on other issues related to price (See Art. 45, Proc. no. 649/2009).

Once the administrative body approves the result of the tender, the successful bidder has to supply contract security (Art. 47 Proc. no. 649/2009). The purpose of the contract security, also known as performance bond, is to make good any damage the administrative body may sustain as a result of default by the contractor under the contract. In fact contract security is not required for all types of contract. The type of contracts for which contract security is required and the type and amount of contract security is to be determined by the directive to be issued by the Ministry of Finance and Economic Development. As seen in practice, the contract security may be submitted in cash or in the form of guarantee from financial institutions. The guarantee to be produced from financial institutions may at the successful bidder's option be in the form of a certified cheque (CPO), letter of credit (LC), or a bank guarantee from a recognized bank.

So far we have seen the process involved in the use of open bidding method of contracting. Now let us turn to see the procedure of the other methods of contracting.

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A. Restricted tendering

Dear student as explained above, the main method of contracting for administrative authorities is open bidding. Since restricted tendering as well as the other methods of contracting are to be used only under the conditions specified by the law, let us now see the conditions for the use of restricted tendering.

As provided in Article 49 of Proclamation no. 649/2009, restricted tendering method of contracting will be applied by administrative bodies when one of the following conditions is fulfilled.

a. When it is ascertained that the required object of procurement is available only with limited suppliers. For a variety of reasons some goods, works and services may be available only from restricted number of contractors. For instance, by reason of its highly complex and specialized nature, the desired goods, works or services may be available from only limited number of suppliers. In such cases, it is not necessary to engage in open bidding which is more costly in terms of time and money. Rather it is preferable to engage in the tender process by inviting the limited number of potential bidders to bid.
b. When the cost of procurement does not exceed the threshold specified in respect of restricted tendering in the procurement directive to be issued by the Ministry of Finance and Economic Development. Sometimes the time and cost required to examine and evaluate a large number of bids in open bidding would be disproportionate to the value of the goods, works or services to be procured. In such cases, to be efficient, restricted tendering should be conducted by inviting only small number of bidders, even if the goods, work, or service to be procured is available from large number of suppliers.
c. Where a repeated advertisement of open bidding fails to attract bidders.

These are the conditions for the use of restricted tendering. When we come to the procedure of restricted tendering, basically it is the same as open tendering except that it involves the following special procedures stipulated in Article 50 of Proclamation no. 649/2009. These are:-

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1st, regarding the invitation to bid, the manner of communication to interested bidders is different from open bidding. As we have seen above in case of open bidding invitation to bid is made by advertising in a news paper of national circulation or over the national television or radio. In case of restricted tendering, the method of invitation to bid is different. It is made not by way of advertisement using the mass media, but by sending letter of invitation to bid to potential bidders. Where the object of procurement is available only with limited suppliers in accordance with Article 49(1), the letter of invitation to bid will be sent to all such suppliers. Where, however, restricted tendering is used for the reasons stated in Article 49(1) & (2), the letter of invitation to bid shall be sent to limited number of suppliers chosen among those registered in the suppliers list and the selection for the invitation shall allow equal opportunities for the registered suppliers and the number of suppliers to whom the invitation to bid is sent shall be such that it is sufficient to ensure effective competition and shall not as far as possible be less than five competitors.

2nd, as regards the time allowed for the preparation of bids by the invited bidders, it shall not be less than the minimum number of days stated in the procurement directive for this method of procurement. If, however, all the suppliers invited to participate in the bid have submitted their bids before the closing date, the administrative body can open the bid before the minimum number of days expire, by giving bidders prior notice (Art. 50(3), Proc. no. 649/2009).

Except for these special procedures, restricted tendering involves the same procedure as open tendering. The documents to be prepared by the administrative body in connection with the intended procurement, opening of the bid, the process of evaluation and comparison of bids and designation of the successful bidder and its effect at law is the same as that of the case of open bidding.

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B. Request for Proposal Method

The other method of contracting that is recognized by proclamation no. 649/2009 is request for proposal method. As provided in Article 53 of Proclamation no. 649/2009, administrative bodies will have to use the request for proposal method of procurement for the conclusion of contracts intended to obtain consultancy services or contracts for which the component of the consultancy services constitutes more than 50% of the contract. For the purpose of procurement of consultancy service price cannot be the sole factor in selecting the right contracting party. Apart from the price element, it is important to ascertain the potentials of the candidates to provide quality consultancy service. Unlike contract of supplies and allied contracts, in case of contract for the procurement of consultancy service, it is usually difficult for the contracting administrative authority to formulate detailed specification of its requirements as regards the consultancy service it seeks to obtain. So, what is advisable in such cases is to provide potential bidders with terms of reference as to the desired type of consultancy service and invite them to come up with their own proposal. By this approach, the administrative body will be able to identify the consultant that fits its requirements.

The procedure of request for proposal method of procurement is stipulated in Article 54 of Proclamation no. 649/2009. Basically the open bidding procedure is also applicable to request for proposal method of procurement. In relation to request for proposal method of procurement, the provisions under Article 54 supplement those provisions that govern open tendering.

According to Article 54(2) the administrative body should send request for proposal to not less than three and not more than seven candidates selected by the administrative body itself. Where the value of the contract is above a threshold to be determined by the procurement directive to be issued by the Ministry of Finance and Economic

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Development, the request for proposal shall be sent after inviting candidates to express their interest for participation in the bid and only to those candidates that expressed their interest (Art. 54(1), Proc. no. 649/2009).

As required under Article 54(3), the request for proposal that is to be addressed to candidates shall contain the following information:-

a) The name and address of the contracting administrative authority;
b) Description of the services required by way of terms of reference (ToR);
c) In case of consultancy assignments which may involve potential conflict of interest, a reminder that candidates for such assignments must exclude themselves from procurement of goods and works which may follow as a result of or in connection with the consultancy agreement;
d) The criteria for evaluating the proposals, the relative weight to be give to price and other criteria, and the manner in which they will be applied in the evaluation of the proposals; and,
e) Place and deadline for the submission of proposals.

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The candidates should be given adequate time to prepare their proposals. The time that should be allowed will be determined in the procurement directives (Art. 54(4), Proc. no. 649/2009).

The administrative body has to select the candidate whose proposal is most advantageous determined in accordance with the criteria and procedures set forth in the request for proposals (Art. 54(6), Proc. no. 649/2009). The contracting administrative body can negotiate with the successful bidder with respect to the nature, volume and organization of the services to be provided under the contract (Art. 54(5), Proc. no. 649/2009).

C. Price Quotation Procedure (*Pro forma* procurement)

As stipulated in Article 55 of Proclamation no. 649/2009, for administrative bodies to use price quotation method of contracting two cumulative conditions must be fulfilled.

1st the procurement must relate to readily available goods or works or services for which there is an established market, and

2nd the estimated value of the contract should not exceed the amount stated in the procurement directive.

Provided these conditions are fulfilled at the same time, administrative bodies can use price quotation procedure to enter into a contract. The procedure that price quotation involves is outlined in Article 56 of Proclamation no. 649/2009. When using price quotation procedure, administrative bodies have to request price quotations from as many candidates as possible, but from at least three candidates and these must be from the registered suppliers list. The request shall contain a clear statement of the requirements of the administrative body as to quality, quantity, terms and time of delivery of the goods, works, consultancy or other services as well as other special requirements. The contracting administrative authority shall give adequate time to the candidates in which to prepare their bid (price quotations). The administrative body will conclude the contract with the candidate who meets the requirements of the administrative body stipulated in accordance with Article 56(3) of Proclamation no. 649/2009.

Finally, in relation to the price quotation procedure it should be noted that where it is frequently used, so long as other suppliers, who can supply the same goods, services or works are available, administrative bodies are required not to repeatedly invite the same suppliers to submit their quotations. The administrative body shall ensure that equal opportunity of participation in public procurement is given to all candidates engaged in the business (Art. 56(2), Proc. no. 6649/2009).

D. Two-Stage Bidding

Article 57 of Proclamation no. 649/2009 provides four independent conditions for the use of two-stage bidding. Accordingly, two-stage bidding will be used:

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1) When it is not feasible for the procurement body to formulate detailed specifications for goods or works and in the case of services to identify their characteristics, in order to obtain the most satisfactory solution to its procurement needs;
2) When the administrative body seeks to enter into a contract for the purpose of research, experiment, study or development except where the contract includes the production of goods in quantities sufficient to establish their commercial viability and to recover the research and development costs;
3) Where bid proceedings have been initiated but no bids are submitted as a result of the nature of the object of procurement not being clearly described or where all bids are rejected due to failure on the part of the administrative body concerned to draw up a clear and complete specification;
4) Because of the technical character of the required goods or works or because of the nature of the consultancy or other services it is necessary for the public body to negotiate with the suppliers.

The procedure that two-stage bidding involves is indicated in Article 58 of Proclamation no. 649/2009. Thus,

1. In the first stage of the two-stage bidding proceeding, the contracting administrative body shall call upon suppliers to submit initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposal relating to the technical, quality, or other characteristics of the goods, works, or services as well as the contractual terms and conditions of supply, and where relevant the professional and technical competence and qualification of bidders.

   Based on the proposals submitted at this stage, the administrative body shall identify the responsive bids by evaluating the proposals submitted by bidders against its requirements. For this purpose the administrative body may hold discussion with candidates on the contents of their proposal. It shall then, based on the experience and knowledge obtained in this stage of the two-stage bidding proceeding, draw up a specification which is more appropriate to its requirements. In formulating the revised

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specification the administrative body may delete or modify any aspect, originally set forth in the solicitation documents of the technical characteristics of the goods, works or services to be procured and any criterion originally set forth in those documents for evaluating and comparing bids and for ascertaining the successful bids and may add new characteristics or criteria. Any such modifications or additions shall be communicated to suppliers in the invitation to submit final bids.

2. In the second stage of the two-stage bidding, the administrative body shall proceed to communicate the revised specification to the candidates who submitted responsive bids at the first stage and invite such candidates to submit proposals on the basis of the revised specification.
3. In order to ascertain the successful bidder at the second stage of the two-stage bid proceeding, the administrative body shall evaluate the bids pursuant to Article 43 of Proclamation no. 649/2009. The administrative body that caused the two-stage bid proceeding may engage in negotiation with the first ranking bidder concerning any aspect of the conclusion of the contract except price.

This is, thus, the procedure for two-stage bidding. Let us now consider direct procurement method.

E. Direct Procurement

Direct procurement is a method of contracting which administrative bodies can utilize. Unlike the other methods of contracting discussed above, direct procurement does not involve competitive bidding. In other words, it does not require the procedure of invitation for submission of bids, evaluation and comparison of bids and selection of one candidate from among the bidders. The procurement methods that we discussed above involve the invitation of at least three candidates to submit bids and the selection of the best bid for the contracting administrative body by evaluating and comparing the bids submitted by bidders. As discussed elsewhere in this material, this competitive bidding system has immense benefits for the taxpaying public. That is why, although

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the precise application may vary depending on the object of procurement, competitive bidding system is made the preferred method of public procurement. There are, however, instance where competitive bidding may not be feasible or desirable. In such cases it is necessary to resort to direct procurement method. It should be noted that this method of contracting is an exception to the general rule that competitive bidding must be used in public procurement.

Article 51 of Proclamation no. 649/2009 outlines the conditions for the use of direct procurement. Accordingly, administrative bodies can use direct procurement only under the following conditions and it should not be resorted to with a view to avoiding possible competition or in a manner which would constitute means of discrimination among suppliers.

a) When the goods, works or services is available only from one candidate;
b) For additional deliveries of goods by the original supplier which are intended either as parts of replacement for existing supplies, services or installation or as the extension of existing supplies, services or installation, where a change of supplies would compel the administrative body equipment or service not meeting requirements of interchangeability with the already existing equipment or services;
c) When additional works, which have been not included in the initial contract have, through unforeseeable circumstances, become necessary since the separation of the additional works from the initial contract would be difficult for technical or economic reasons;
d) For new works consisting of the repetition of similar works which conform to a basic project of which an initial contract has been awarded on the basis of open or restricted tendering;
e) For continuation of consultancy services, where the original contract has been satisfactorily performed and the continuation is likely to lead to gains in economy and efficiency;

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f) When the need for procurement is one of pressing emergency in which delay would create serious problems and therefore injurious to the performance of the public body;
g) Where situations arise in which shopping becomes necessary to meet the special needs of the administrative body;
h) For purchase of goods made under exceptionally advantageous conditions which only arise in the very short term. This condition is intended to cover unusual disposal by firms, which are not normally suppliers.
i) Micro procurements- minor procurements the value of which does not exceed the amount to be stated in the procurement directives.

The procedure to be followed in direct procurement is indicated under Article 52 of Proclamation no. 6449/2009. Accordingly, when an administrative body engages in direct procurement it shall prepare a description of its needs and any special requirement as to quality, quantity, terms and time of delivery and is free to negotiate on price and conditions of offer with the sole candidate. The agreement reached to conduct the procurement shall be confirmed by a contract signed by both parties.

2.4. International Procurement (Contracting)

By international procurement we mean procurement process by administrative bodies which involve multinational companies, companies registered in other countries or nationals of other countries. The national policy is public procurement from domestic contractors and supplier so that domestic contractors can build up their capacity and capital will not flow out of the country. However, it is not always possible to find the required type of goods, works or services from the domestic market. There are also limitations on the part of domestic companies in capacity and technology. In order to complement the limitation in the capacity of domestic companies and to facilitate transfer of technology it is desirable to allow foreign nationals and companies to take part in contracts to be performed in Ethiopia. Sometimes donor and lending agencies

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and countries may require the participation of foreign companies in works to be performed in Ethiopia. Taking this into account, Proclamation no. 649/2009 provides the conditions and procedures of international procurements. According to this Proclamation (Article 59), administrative bodies can enter into international procurement contract by using, depending on the circumstance, one or the other of the contracting methods discussed above. In case of international procurement again the preferred method of contracting is open bidding. Let us see the conditions and the procedure of open international bidding.

a. Open International Bidding

Article 59 (1) of Proclamation no. 649/2009 provides two independent conditions for the use of open international bidding. These are:

1. When it is clear that in national open bidding an effective competition cannot be obtained unless foreign firms are invited; or
2. When the value of the procurement is above the threshold to be fixed by the procurement directive. A contract may, however, be concluded by means of open national bidding notwithstanding that the cost of the procurement exceeds the threshold established in the directives when it is ascertained that the required object of procurement is available only from the domestic market.

The procedure of open international bidding is basically the same as that of open bidding discussed above. It shall, however, comply with the following procedures that go together with its international nature.

a) The invitation to bid and the bidding documents shall be in the English language;
b) The invitation to bid shall be advertised in a news paper published in English language which has worldwide circulation and attracts foreign competition;
c) The time allowed for submission of bids shall be sufficient for the invitation to reach candidates and for enabling them to prepare and submit bids. In any case it shall not be less than the time prescribed in the procurement directives;

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d) Technical specification of the goods, works and services shall be compatible with national requirements, and conform as far as possible to international standards or standards widely used in international trade;
e) Candidates shall be permitted to express their bids, as well as any security documents to be presented by them in Ethiopian Birr, in a currency widely used in international trade and stated in the bidding documents;
f) General and special conditions of contract shall be of a kind generally used in international trade.

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b. Other methods of International Procurement

In the same way that methods of procurement other than open bidding are used in domestic public procurement, an administrative body can also use in international procurement methods other than open international bidding. Provided the conditions for other methods of procurement than open bidding are satisfied, administrative bodies may conduct procurement through international competitive bidding by means of restricted tendering, request for proposal, request for quotation or direct procurement where it is ascertained that it is impossible to carryout effective procurement without the participation of foreign companies. In order to resort to international procurement using these methods of procurement, the value of the procurement has to be above the threshold to be determined by the procurement directive (Art. 59(4), Proc. no. 649/2009.

So far we have discussed the procurement methods which an administrative body should follow in entering into contracts by representing taxpayers. As pointed earlier, the various procurement methods discussed above are intended to protect the public interest from betrayal of public interest and carelessness by administrative authorities, connivance and ensure transparency, accountability, efficiency and economy in public expenditures. Even if the rules governing the manner of letting of administrative

contracts are designed with a view to ensure these, it does not mean that the rules will be always observed by the participants in the process. In the process, administrative authorities may act contrary to the law. They may commit acts that may affect the rights and interests of candidates. Candidates may also act in a manner that is prejudicial to the interests of the contracting administrative authority. Recognizing the possibility of occurrence of irregularities in the procurement process the law has provided mechanisms for corrections.

So, any candidate who alleges that an act or omission which violate the provisions of the public procurement proclamation is committed by the administrative body in the process of public procurement is entitled to submit complaint to the head of the administrative body and if not satisfied with the decisions of the head of the administrative body, to the Board established under Article 70 of Proclamation no. 649/2009 to review, among other things, complaints relating to public procurement (See Articles 73, 74 & 75 of Proclamation no. 649/2009).

Where the administrative body finds that an unlawful act or an act prejudicial to its interest has been committed it can take measures in accordance with the general terms and conditions that govern the bidding process. It can also submit complaint for measures to be taken by the Public Procurement and Property Administration Agency (Art. 76, Proclamation no. 649/2009).

Penalty provisions are also included in the public procurement proclamation as a sanction for acts by officials, candidates or third parties that contravene the provisions of the proclamation in the tendering process (See Article 77, Proclamation no. 649/2009).

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Review Questions

1. Explain the points where, as regards formation, administrative contracts differ from private contracts?
2. Explain the rationale why competitive bidding is made the preferred method of contracting for administrative contracts.
3. Suppose that the Ethiopian Radiation Prevention Agency wants to employ contractors to undertake a study of the extent of ultra violate ray infiltration into the atmosphere which method of contracting is appropriate to conclude the contract?
4. Ato X was vice president for business affairs of Bahir Dar University. He was authorized and did regularly make contract of supplies for students' cafeteria. He felt himself underpaid and so often contracted with certain suppliers at price more than the normal, thus profiting the other party preferentially. The supplier then paid him part of this special profit as 'friendship gift.'

   Later on the corrupt vice president was transferred to and was replaced by a crusading reformer who wanted to clean up the university and perhaps become a president himself. The new vice president declared that he would refuse to recognize all the contracts entered into by his predecessor at prices greater than ought to have been charged.

   Question

   What legal ground does the vice president have for his action? Is his action sustainable at law?

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Chapter Three

Effect and Termination of Administrative Contracts

3.1. Introduction

The previous chapter has outlined the rules governing the formation of administrative contracts. This chapter will explore the effect of those validly formed administrative contracts. The manner of performance, the effect of non-performance and other issues that arise in connection with performance of administrative contracts will be dealt in this chapter. From the outset it must be noted that general contract law principles governing performance of contracts will substantially apply to performance of administrative contracts. There are also substantially different rules of administrative contract law that govern performance of administrative contracts, and which are in fact the source of the distinctive feature of administrative contracts.

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Objectives

A student who studied this chapter

- ✓ Will understand the legal effect of validly concluded administrative contract;
- ✓ Know the manner of performance of administrative contracts;
- ✓ Understand when and how revision may be made to administrative contracts;
- ✓ Know the special prerogatives of the contracting administrative authority and the special rights of the party contracting with the administrative authority;
- ✓ Know the effect of non-performance of administrative contracts;
- ✓ Know the conditions for and effects of assignment and sub-contracting of administrative contracts; and
- ✓ Know how administrative contracts terminate;
- ✓ Be able to give advice on matters related to performance of administrative contracts.

3.2. Effect of Administrative Contracts

As you might recall from your general contract law course, broadly speaking contract is one of the juridical acts. Not only that it is an act that has the backing of the law but also it is an act given the force of law. This is recognized by the law under Article 1731 of the Civil Code which provides that "[t]he provisions of a contract lawfully formed shall be binding on the parties as though they were law." There are two important elements in this stipulation of the law: "lawfully" and "on the parties."

The term 'lawful' in Article 1731 indicates that for a contract to have its intended effect it must be in conformity with mandatory provisions of the law. And this pertains to requirements as to capacity, consent, object of the contract and observance of formality requirements when provided by law. If they fulfill these requirements the parties have the freedom to determine the main object and specifics of the contract. If they fulfill the requirements of the law and reach agreement by specifying their respective obligations, a contract exists and it will have legal effect. It will become a law on the parties to the contract. It is this recognition that the law gives to such acts that is referred to as the effect of contract.

The effect of contracts is such that the terms incorporated in the contract have to be complied with by the parties thereto. Failure on the part of the contracting parties to honor the terms of the contract produces its own legal effect for the parties. This obligation to observe the terms of the contract is binding only on the parties to the contract. It is this idea that the above mentioned phrase 'on the parties' conveys. This is one of the differences that exist between contract and law. A contract in principle binds only the contracting parties, while law creates rights and obligations for all members of a given community. Thus, a contract is law only as between the contracting parties, while a law is law for all members of the community to which the law addresses itself.

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Reinforcing this assertion Article 1952(1) of the Civil Code provides that "...contracts shall produce effects only as between the contracting parties."

What we have seen above briefly is the general principle governing the effect of contracts in general. It is the same principle that governs the effect of administrative contracts. Since an administrative contract is concluded with the consent of the contracting administrative authority and the contractor, provided that it conforms to the mandatory provisions of the law that govern formation of administrative contracts, it will have effect before the law and bind the contractor and the administrative body as if it were law. In so long as it is formed by complying with the general and special contract law rules that apply to administrative contracts, it entails on the contractor and the administrative body the obligation to perform according to the terms of the contract and failure to do so entails liability.

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3.3. Performance of Administrative Contracts

3.3.1. Some Points on the Interpretation of Administrative Contracts

One of the issues that arise in connection with performance of administrative contracts is interpretation of the terms of the agreement. Interpretation refers to the art or technique of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms in statutes, contracts, wills, etc. Interpretation as applied to contract is the process of discovering and expounding the intended meaning of the language which the authors of the contract intended to convey. The interpretation of contract is a fundamental one in the performance of contracts. Normally, contracting parties are expected to exert at most effort in their choice of words and construction of the terms of the contract with a view to avoid ambiguity and obscurity from their contract. The fact of the matter is that how hard they may try to be careful in preparing their contract

document due to the nature of language they may not succeed hundred percent in avoiding ambiguity from the contract.

When a dispute occurs between the contracting parties as regards the intended meaning of a word, phrase or statement in the contract, they may settle it by mutual agreement. If the parties do not reach agreement as to the intended meaning, the case will be referred to judges or arbitrators for ascertaining the intended meaning by interpretation. Since interpretation involves ascertaining the intention of the parties at the time of the conclusion of the contract and since the judge or arbitrator was not there at the conclusion of the contract, the task of interpretation is a difficult one for the judge or arbitrator called on to interpret the contract. In order not to override the free will of the parties to the contract, the judge or arbitrator called on to interpret the contract has to exhibit utmost care. To help him in this effort, the law has provided rules that guide the interpretation process.[30]

The vice that exposes other contracts to the necessity of interpretation also affects administrative contracts. After the conclusion of the contract the contracting administrative authority and the contractor may have different positions as regards the intended meaning of words, phrases or statements contained in the contract. This is even more so with administrative contracts which are complex by their nature and incorporates many documents. So, interpretation of administrative contracts is inevitable.

There are, however, no special rules that govern the interpretation of administrative contracts. The general rules of interpretation of contract (Articles 1732- 1739) apply also to interpretation of administrative contracts. It must however be noted that as provided in Article 3138(2) the administrative body may incorporate special rules of interpretation in the general terms and conditions of contract which the administrative

[30] Articles 1732-1739 of Civ.C.

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authority draw. Excepting this, it is the interpretation rules that are contained in the general contract law that govern the interpretation of administrative contracts. Since administrative contracts are adhesive by their nature (general terms of business and specifications are drawn by the administrative body and accepted by the contractor without negotiation) the rule of interpretation which is provided in Article 1738(2) and which provides that "[s]tipulations inserted in general provisions, models or forms of contracts prepared by one of the party shall be interpreted in favour of the other party" will have special significance in the interpretation of administrative contracts.

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3.3.2. Modality and Time of Performance of Administrative Contracts

If the contract is concluded by fulfilling all the legal requirements and the respective obligations of the parties is well defined or is ascertained by interpretation, the next step is performance by the parties of their respective obligations. And performance has to be made as per the terms of the contract. Since a contract is a juridical act, each contracting party has the obligation to perform as per the terms of the contract. Since the obligation that may be created by the contract is either to do a certain thing, or refrain from doing or to deliver a certain thing, the mode of performance will be doing what is agreed to be done, refrain from doing what is agreed not to be done and delivering the thing agreed to be delivered.

An administrative contract imposes the obligation of either the supply of goods or services or the performance of some public work on the contractor and the obligation to pay the agreed price on the contracting administrative authority. In so long as the conclusion of the administrative contract fulfils all the legal requirements it imposes legally binding obligations on the contractor and the contracting administrative authority. As stipulated in Article 3172(1) of the Civil Code the contractor and the contracting administrative authority shall perform their obligations in the manner

provide in the contract. In particular, the contractor has to perform its obligation diligently in a correct manner, deemed to be satisfactory according to the rules of art prevailing at the time and in the kind of activity concerned (Article 3172(2&3) Civil Code).

The freedom of the contractor to choose the suppliers for the purpose of buying materials and recruit the workmen and employees necessary for the performance of his obligations is recognized in Article 3173 of the Civil Code. As per this article unless there is contrary agreement in the contract concluded between the administrative authority and the contractor, the contractor is free to choose his suppliers of materials and the workmen necessary to perform his obligations under the contract. From this we understand that at the time of the conclusion of the contract the parties may incorporate clauses which provide for the supply of the materials or the recruitment of the workmen to be made by or in consultation with the administrative authority. These may be done to control the quality of the work or to achieve at the same time by the same work some other goal. For instance a municipality that entered into contract for the construction of sidewalks and stone pavements of public places may also want to create job or market opportunity for microenterprises it organized. For this purpose the municipality may undertake the obligation to choose the supplier of materials or to recruit the workmen necessary to discharge the obligation by the contractor.

What we have seen above is how administrative contracts are to be performed. The question that arises in connection with the performance of administrative contracts relates not only as to how the contract is to be performed but also as to when it is to be performed. Regarding the time for the performance of administrative contracts Article 3174(1) of the Civil Code stipulates that both the contracting administrative body and the contractor shall perform their obligations within the time fixed in the contract. Where no time is fixed in the contract each of them is obliged to perform their obligations within a reasonable time. The reasonable time that is necessary for the

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performance of contract depends on the circumstance of the case and the nature of the obligation assumed under the contract.

In connection with this it must be noted that unless the contract incorporates clause to this effect, the contracting administrative authority cannot impose unilaterally on the contractor a time which has not been agreed upon in the contract for the performance of the contract (Article 3175 Civil Code). If the contract so provides, the administrative authorities may unilaterally impose on the contractor by requisition orders a time limit for the performance of his obligations. Absent such stipulations in the contract the administrative authority cannot prescribe for the contractor the time for the performance of his obligations, even if the contract do not fix the time for the performance of the contract. Article 3175 is intended to call to the attention of the authorities, at the time of the conclusion of the contract, the possible usefulness of such stipulations and protect the contractor from arbitrary measures by the administrative authorities.

The contractor has to perform his obligation within the time fixed in the contract or within the time prescribed by the administrative authority by way of requisition order on the condition mentioned above, or where there is no time specified in the contract or by the administrative authority within reasonable time having regard to the nature and volume of the work and the circumstance of the case. In this regard the obligation of the contractor is more onerous than his counterpart in a private contract. As provided in Article 1758(3) of the Civil Code a party to a contract may refuse to carry out his obligation under the contract where the other party clearly shows that he will not perform his obligations or where he is declared insolvent. This rule which is referred in Latin as the doctrine of *exceptio non adimpleti contractus* enable a party to a contract to refuse performance when there is anticipated breach of contract on the part of the other contracting party. Article 3177 clearly indicates that the contractor in and administrative contract cannot avail this rule. According to this article, the non-performance by the

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administrative authorities of their obligations shall not entitle the contractor to refuse or suspend performance of his obligations. The only instance where the contractor can refuse or suspend performance of his obligations as a result of the non-performance by the administrative authorities of their obligations is when such non-performance makes impossible the performance of his obligations. Since the administrative authority does not have its own interest in the contract it may be careless in the performance of the contract. If the contractor is allowed to refuse or suspend performance of his side of the contract every time the administrative authority failed to discharge his obligations in the contract it will be prejudicial to the public interest and may result in the interruption of basic services. So, so long as performance of the contract is still possible despite failure on the part of the administrative body in discharging its obligations, the contractor has to continue performing according to the terms of the contract and seek, latter on, compensation from the administrative authority in default.

The price payable by the administrative authority to the contractor under the contract has to be effected in accordance with the rules of finance (Article 3176, Civil Code). The contractor can invoke set-off except for tax debts (Article 3178, Civil Code).

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3.3.3. Revision/Variation of Administrative Contracts

As explained above, administrative contracts that are established by law by fulfilling the essential requirements provided by law are binding on the contracting parties, i.e., the contracting administrative authority and the contractor. This does not mean that once concluded administrative contracts cannot be modified or varied. In due course, there may be change in the desire of the contracting parties or unforeseeable events that may or may not relate to one of the contracting parties may upset the balance of the contract thereby imposing additional obligations on one of the contracting parties and this may cause reconsideration and revision of the terms of the contract.

Recognizing this possibility, rules that govern the condition and the manner of revision are incorporated in the general contract law provisions of the Civil Code. Since administrative contracts are different from private contracts additional special rules are provided in the administrative contract law provisions of the Civil Code that govern the variation of administrative contracts. Generally revision of administrative contracts may be made by

a. agreement of the parties,

b. unilateral action of the contracting administrative authority, and,

c. court of law

3.3.3.1. Variation by Agreement of the Parties

Variation of a contract by the agreement of the parties is a manifestation of their freedom of contract. In the same way that they entered into the contract by their own full and free consent, there is no reason why they cannot by their consent vary the contract that they created. The contractor and the administrative authority may agree to revise the contract when that is necessary either because there is change in the procurement requirements of the administrative body or change of circumstance that upset the balance of the contract.

3.3.3.2. Unilateral Variation of the Contract by the Administrative Authority

The other way by which revision of administrative contracts is to be made is through the unilateral action of the contracting administrative authority. While it is normal that the power to unilaterally vary the terms of a contract may arise from a stipulation in the contract to this effect, it is difficult to think of a possibility whereby a right to unilaterally vary the terms of the contract emanates from the law. This is a corollary of freedom of contract principle. A contract that is established by the free consent of the

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parties can only be varied by the consent of both parties and no law can give the power to unilaterally modify the contract to one of the contracting parties only.

When we come to administrative contracts the rule is somewhat different. As repeatedly stated elsewhere in this text, the administrative authority enters into administrative contract representing the public interest. The contracting administrative authority has to make sure that the conclusion and performance of the contract is always in the interest of the public. After the conclusion of the contract, modifications to it may be necessary so as to ensure that it is performed in the interest of the public. In most civil law jurisdictions the power of the contracting administrative authority to unilaterally modify the terms of the contract under such conditions is recognized by law. The same rule is recognized under Article 3179 of the Ethiopian Civil Code.

Thus, although the contract can only be made, in the first place, with the consent of both parties, the contracting administrative authority can, regardless of the terms of the contract to this effect, increase or diminish the obligations of the contractor by its own unilateral act. This it has power to do when such action would be in the greatest interest of the public. Furthermore, any increase in the obligations of the contractor shall not be of substantially different nature from those assumed in the contract. Since the relationship of the contractor and the administrative authority in the first place emerge from the contractual relationship that they created by their full and free consent, the administration should not be allowed to change the essential nature of the contract by its unilateral action and oblige the contractor to perform what he has never agreed to perform. Further, failure on the part of the contractor to comply with the revisions made by the administration results in his committing breach of contract. Thus, for instance, if a certain city municipality contracts for the supply of gas for its inhabitants, it may insist upon more than the contracted amount if this latter proves to be insufficient and less if the amount proves to be excessive. This power of unilateral action applies to all administrative contracts, for example, to a contract for construction

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work, to one for the provision of supplies, and to concessions for the running of, for example, a public transport system. This right exists in spite of any contractual term to the contrary.

Corresponding to the right of the administration to unilaterally vary the terms of the contract are remedies of the contractor which also arise from the law. The contractor's chief right against the unilateral variation of the contract which has been taken by the administration is the right to be indemnified against any loss which he might have suffered (Article 3181(1), Civil Code). In case of diminution of his contractual obligations, this right to an indemnity will include not only the expenses which he has incurred in preparing the materials for the performance of the contract, but also a sum representing any loss which might have been caused through the diminution of his contractual obligations (Article 3181(2), Civil Code). In the case of any extension of the contractual obligations, the indemnity will, of course, cover any added expenses.

The wording of Article 3179 indicate that the contracting administrative authority does not possess unlimited power to unilaterally vary the terms of the contract even if it is willing to offer the contractor an indemnity for his losses. There are some acts which the contractor is perfectly entitled to refuse to perform without becoming liable for breach of contract. First, in every case the administration must show that the action is for the benefit of the public. That is the very basis of all its powers, and unless this is present, it has no power to modify the contract at all. In the second place it has to be remembered that the right of the administration to demand extra work only arises when there is already a contract in existence, so that this right is limited to what is reasonable in the circumstance and having due regard to the terms of the original contract. A contractor who has agreed to supply certain materials is not obliged to supply others of a totally different kind. One who has agreed to perform certain work cannot be compelled to do work of a different kind, or beyond a reasonable extra amount.

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To recap, the unilateral variation by the administration may have one of the following features.

- The variation of the contract by the administration may be in a situation where it is not necessary in the interest of the public, or
- The unilateral variation of the contract may be in the interest of the public but it may have the effect of substantially altering the nature of the obligation of the contractor and upset the balance of the contract, or
- The unilateral variation of the contract by the administration may be necessary in the interest of the public and without substantially changing the nature of the obligation assumed by the contractor. In other words the unilateral variation of the contract by the administration may be made in conformity with the requirements of the law.

In each of these cases the contractor has corresponding remedies or rights.

In the first case the contractor can challenge the unilateral variation by the administration of the contract by showing that in the circumstance the measure of revision is not justified by the public interest. The administrative body can make unilateral modification to the contract only when that is necessary in the interest of the public. Since that is the source of all its powers to unilaterally vary the terms of the contract, if in the circumstance the variation is not justified by the general interest of the public, the contractor can refuse to accept the revised terms of the contract.

Where, however, the variation is justified by the public interest but substantially alters the obligation of the contractor beyond what he contemplated at the time of the conclusion of the contract, the contractor can, as per Article 3182(1) ask for the termination of the contract and claim indemnity as per Article 3181 of the Civil Code. When the measure of unilateral variation of the contract by the administration has changed the nature of the obligation of the contractor or upset the economic balance of the contract, the termination of the contract has to be sought from court of law. Unless the contract expressly gives the power to do so to the contractor, the contractor cannot

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by his own declare the termination of the contract (Article 3182(3), Civil Code). Since the determination of whether the variation, by the administration, of the contract has resulted in change in the economic balance of the contract is controversial and one which the parties may not reach agreement, the power to determine and declare the termination of the contract is give to the courts under Article 3182(2) of the Civil Code.

Where, however, the unilateral variation of the contract by the contracting administrative authority is justified by the public interest and is done without substantially changing the nature of the obligation assumed by the contractor, the contractor has to accept the modifications and ask indemnity to the extent of the extra costs he incurred and the loss of expected profit (Article 3181, Civil Code).

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3.3.3.3. Judicial Variation of Administrative Contracts

What we have seen above is the conditions under which the contracting administrative authority can unilaterally vary the terms of the contract. Whenever it finds that modification to the contract is necessary in the general interest of the public, the administrative authority can, by unilateral action, make the necessary modifications without the need to go to court. In this section, in turn, we will examine the conditions under which the court can modify the contract upon request by the party contracting with the administrative authority. In other words we will study the rules that enable the contractor to seek judicial variation of the terms of the contract.

There are two doctrines that enable the contractor to ask for judicial variation of the contract. These are:-

A. unforeseeable events (the doctrine of *imprévision*), and
B. Act of government (the doctrine of *fait du prunce*)

A. Unforeseeable Events (the Doctrine of *Imprévision*)

As you might recall from your general contract law course, the occurrence of unforeseeable event that upset the economic balance of the contract and make the obligation of one of the contracting parties more onerous than thought at the time of the making of the contract, cannot be a ground for seeking the termination or judicial variation of the contract, unless the occurrence of the event constitutes force majeure within the meaning of the Civil Code. Even if the occurrence of new events which were not contemplated by the parties at the time of the conclusion of the contract make the obligation of one of the contracting parties more onerous than he foresaw at the time of the conclusion of the contract, he has to perform his obligation according to the strict letters of the contract so long as performance is materially possible despite the occurrence of the unforeseen event. When we come to administrative contracts the rule is somewhat different. When in the course of the performance of an administrative contract, economic events arise which would impose upon the contractor a financial burden which would be totally disproportionate to that envisaged when the contract was entered into if the contract has to be performed strictly according to its terms, the contractor has to discharge his obligations according to the terms of the contract so long as performance is materially possible (Article 3183(1), Civil Code). He can however demand from the administration an indemnity for the increased costs in carrying out his obligations (Article 3183(2), Civil Code).

The rule that allows this right to the contractor is known as the doctrine of *imprévision* and has its origin in the works of the *Conseil d'état* of France. The purpose of this rule is to ensure the continued operation of public services and public works and protect the contractor who is cooperating in the operation of public services by assuming more obligation than his counterpart in a private contract. One must remember that the primary object of an administrative contract is the performance of a public service of

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some type and the contractor becomes to some extent a participant in this service. It is the cardinal rule of the law of administrative contracts that no one individual should suffer damage in the course of the operation of some public service over and above that which is suffered by the public at large. The doctrine of *imprévision* arises through the necessity of ensuring the continued operation of these public services. The contractor is obliged to continue the performance of the contract, but his own interests are protected as far as possible by the award of an indemnity.

As indicated in the above paragraphs, when the economic balance of the contract is upset and performance of the contract become more onerous to the contractor as a result of the occurrence of unforeseeable event, the contractor has to continue discharging his obligations so long as performance is materially possible, and claim compensation from the contracting administrative authority for the loss he sustained. The question then is when do we say that the economic balance of the contract is upset? When is a certain occurrence said to be an unforeseeable event? What is the extent of compensation payable to the contractor? What will be the fate of the contract if the economic balance of it is not restored? Articles 3184-3189 of the Civil Code provide detailed answers for these questions.

As stipulated in Article 3184 of the Civil Code, the economic balance of the contract is said to be upset where new circumstances impose on the contractor additional obligations which he never contemplated at the time of the making of the contract. The economic event which arises in the course of the performance of the contract must be quite exceptional and beyond the contemplation of the parties when they made the contract, so that any ordinary price variation would not be ground for invoking the doctrine of *impévision*. War or inflation may be an example. On the other hand an event will be considered as unforeseeable where the event that upset the economic balance of the contract was not envisaged by the parties at the time of the making of the contract (Article 3185(1), Civil Code). Sometimes even if the event has occurred at the time of the

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conclusion of the contract in due course its effect or consequence may extend beyond what is contemplated at the time of the conclusion of the contract. Unforeseeable consequence or extension of events which had already occurred at the time of the making of the contract and which upset the economic basis of the contract is also assimilated to unforeseeable events (Article 3185(3), Civil Code).

The event that upset the economic balance of the contract must be extraneous to the parties, i.e., the contractor and the administration (Article 3185(2), Civil Code). If it is a result of the fault of the contractor, he is nevertheless bound by it for he cannot benefit from his own fault, whilst if it is the fault of the administration, it might be covered by the doctrine of *fait du prince*, which we are about to examine below. The doctrine of *imprévision* applies when an event unforeseen at the time of the conclusion of the contract and not attributable to any of the parties changes the economic conditions that were thought to enable the contractor perform his obligations and impose on him disproportionate economic loss.

Further, it must be noted that the economic event that arise and affect the economic balance of the contract must be of such a nature as not to render the contractor literally incapable of performance. If the unforeseen event that occurred renders performance of the contract impossible it will fall not under the rule of *imprévision* but under the general contract law rules governing force majeure (Articles 1791(2)-1794, Civil Code).

In addition to this, the occurrence of the unforeseen event must give rise to a grossly disproportionate financial loss in terms of the contract. Mere loss of expected profits will not suffice (Article 3187).

When this situation occurs the contractor can ask the court to make adjustments on the contract. Of course the power of the court to make adjustment on the contract does not go to the extent of revising and fixing new terms of the performance of the contract. The role of the court is limited only to determining the existence of an unforeseeable event that resulted in disproportionate loss to the contractor and fixing the amount of

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compensation due to the contractor until the balance of the contract is restored or the contract is cancelled by the court failing agreement by the parties to revise the terms of the contract in light of the unforeseen event.

The unbalancing of the contract that may result from the unforeseen event may be temporary or definitive. Where the unbalancing of the contract is temporary the balance of the contract will be re-established and performance will continue on the originally agreed terms. The contractor will, however, be paid indemnity for the loss he sustained during the currency of the unbalancing of the contract. Where however the upsetting of the balance of the contract appears to be definitive the contractor or the administrative authority can ask the court to ascertain the situation. After the ascertainment of the definitive nature of the upsetting of the balance of the contract, the parties can set solution to the problem by revising their contract. Failing agreement to revise the contract by mutual consent the court will declare the termination of the contract (Article 3189(2&3), Civil Code). The contractor cannot continue the performance in such situations.

As indicated above when the balance of the contract is upset as a result of unforeseen events thereby making the obligations of the contractor more onerous, the contractor has to continue performing his obligations under the contract. He can however ask for indemnity from the contracting administrative authority for the loss he sustained as a result of the unforeseen event. However the administrative authority is not obliged to cover the whole loss the contractor sustained as a result of the occurrence of the unforeseen event. In the first place the administration is not supposed to cover loss of expected profit by the contractor (Article 3188(1). The contractor is entitled to claim indemnity from the administrative authority only for the increased costs he sustained beyond loss of expected profit. And the administrative authority is obliged to cover only a part of the loss that the contractor sustained as a result of the unforeseen event (Article 3183(2) and Article 3188(1), Civil Code). The contractor is made to bear half of

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the loss he sustained. In fixing the amount of compensation to be paid to the contractor the court shall have regard to the effort made by the contractor to overcome the difficulties, the general position of the contractor and all other equitable elements (Article 3188(2), Civil Code).

As explained above when an unforeseen event upsets the economic basis of the contract thereby making the obligation of the contractor more onerous than he foresaw at the time of the conclusion of the contract, he has to continue performing as per the terms of the contract but can claim indemnity from the administrative authority. Where however there is a clause in the contract for variation of the contract in the event of the occurrence of unforeseen events, the contractor cannot claim indemnity under the doctrine of *imprévision*, since the contractor will be protected from financial loss by the application of the price variation clause. For the contractor to claim indemnity from the administrative authority first there has to be financial loss sustained by the contractor as a result of an unforeseen event. But in the case where there is price variation clause incorporated in the contract, since the contractor will not sustain loss he will not be able to claim indemnity from the administration.

The existence of price variation clause, however, does not preclude the right of claiming indemnity from the administration in the following cases (Article 3186, Civil Code). These are:-

1. Even if there is price variation clause in the contract if it is not enforced he can claim compensation from the administration as per Article 3183(2) of the Civil Code. Though there may be price variation clauses inserted in the contract, by the time the unforeseen event arises the contractor and the administrative authority may not reach agreement on the extent of the increase to be made on the price or on the detailed condition of the revision and as a result the contractor may not benefit from the price variation clause. In such cases the contractor can claim indemnity from the administration under the doctrine of *imprévision* (See Article 3186(a), Civil Code).

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2. Sometimes, even if there is price variation clause and attempt is made to enforce it when an unforeseen event occurs, it may appear to be insufficient to remedy the economic upsetting of the balance of the contract or the unforeseen event may touch factors that have not been indicated in the price variation index. For example in the contract it may be indicated that when there is increase in the expenses of the contractor as a result of increase in the price of raw material or the unforeseen difficult nature of the work but the contractor incurred extra and disproportionate financial loss not as a result of this factors but due to inflation that hit the economy, the contractor will not be protected by the price variation clause inserted in the contract. In such cases, then, he can invoke the doctrine of *imprévision* (Article 3186(b), Civil Code).

What we have see above is the right of the contractor in case where he sustain disproportionate financial loss as a result of events affecting the balance of the contract and which were not foreseen at the time of the conclusion of the contract. To sum it up, the contractor who sustained financial loss in the course of engaging in an activity related to public service as a result of an unforeseen event which upset the economic balance of the contract, in order to ensure the continued operation of public works and public services, the contractor has to continue discharging his obligations under the contract, but he can claim indemnity from the contracting administrative authority for the loss he sustained as a result of the unforeseen event. This rule which is referred to as the doctrine of *imprévision* has as its purpose ensuring the continued operation of public services and public works.

B. Act of Government (the Doctrine of *fait du prince*)

The other ground that enables the party contracting with the administration to seek judicial variation of the contract is government measures which have the effect of changing the economic basis of the contract. This relates to the question what happens when in the course of performance of a contract the government issues proclamations,

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regulations or directives that have the effect of increasing the obligation of the contractor. For instance, after the conclusion of the contract a proclamation that increases the taxes on the materials to be used by the contractor may be issued and consequently increase the cost of the contractor. The effect of such kind of government measures on administrative contracts is regulated in Articles 3190-3193 of the Civil Code under the doctrine of *fait du prince*. Articles 3190-3193 specify the consequence of new legislations or administrative regulations that upset the economic balance of a contract concluded by administrative authorities. Since this measures are not a direct modification or termination of the contract, the situation is different from that provided for in Article 3179-3182. Nevertheless, it seems impossible to ignore the fact that they emanate from an organ of the same state as the contracting administrative authority. The community of interest of the various organs of the state justifies some protection of a person who has contracted with administrative authorities. To go too far in this direction, however, might create instability in all government contracts and prevent administrative authorities from effectively protecting the public interest. The Civil Code provisions from Article 3190-3193 are an attempt to compromise these two interests. According to these provisions when a government measure upsets the general economy of the contract and resulted in damage to the contractor, the contractor can claim indemnity from the contracting administrative authority. Unlike in the case of *imprévision*, in this case the contractor is not required to show that he has incurred exceptional financial loss. It suffices for him to show that the measure has resulted in the diminution or loss of his expected profits.

In addressing the legal effect of government measures on administrative contracts, the law makes distinction between general measures and special measures. General measures are legislations or administrative regulations which have wide and general scope of application, while special measures refers to decisions of an administrative organ or the executive body and are narrow in their scope of application. The remedies

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of the contractor greatly vary depending on whether the government measure that upset the general economy of the contract qualifies as general measure (Articles 3190 & 3191, Civil Code) or special/particular measure (Articles 3192 & 3193, Civil Code).

For the purpose of defining the remedies of the contractor the general measures that have the effect of upsetting of the economy of the contract, a further distinction is made according to whether the general measures affect the very terms of the contract or just make the performance more onerous. The remedies of the contractor vary accordingly. If legislations and administrative directives that have general application have the effect of directly modifying the terms of an administrative contract or prevent the enforcement of some provisions of the contract or prematurely put an end to the performance of the contract, the contractor has the right to claim indemnity from the contracting administrative authority (Article 3190(1), Civil Code). Unless the government measure of general application itself provided that no compensation shall be due in the circumstance there is nothing that prevents the contractor from claiming indemnity from the contracting administrative authority (Article 3190(2), Civil Code). On the other hand if the government measures of general application without modifying the terms of the contract simply make performance of the contract more onerous, the contractor cannot claim compensation for the loss he may sustain as a result of such measures (Article 3191(1), Civil Code). In such cases the contractor will be able to claim compensation only under exceptional situations, that is when the measure of general application itself or the contract provides for the payment of compensation (Article 3191(2), Civil Code). Article 3191(2) of the Civil Code helps to remind the contractor of the usefulness of bargaining for the inclusion of such clause in the contract so that his interest will be protected.

Generally seen, the contractor will be able to claim compensation based on the upsetting of the economic balance of the contract as a result of the effect of government measures of general application, if the general measure as its effect has modified the

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provisions of the contract or prevented the enforcement of some provisions of the contract or resulted in the termination of the contract. In other words, if the government measure of general application simply made performance of the contract more onerous to the contractor without affecting the substance of the contract, the contractor, in principle, has no right to ask for indemnity unless either the contract or the measures of general application itself stipulate such right to the contractor.

Regarding particular measures, the law makes further distinction not based on the effect of the measure on the performance of the contract; it is rather based according to the authority from which the measure emanated. The particular measure may emanate from the contracting administrative authority (acting by a procedure- using its general regulatory power- other than the direct modification of the contract provided for in Article 3179), or it may be from a different administrative or governmental authority. The remedies available to the contractor vary accordingly. If the particular measure is taken by the contracting administrative authority the contractor will be able to claim compensation from the administration for the loss he sustained as a result of the particular measures taken by the authority itself (Article 3192(1), Civil Code). The particular measure taken by the administrative authority may make performance of the contract more onerous to the contractor, modify the provisions of the contract or prevent the enforcement of some provisions or entirely put an end to the contract. In all these cases the contractor can claim compensation for the loss he sustained. Where, however, the particular measures taken by the contracting administrative authority is merely the ascertainment or the inevitable consequence of economic facts extraneous to the parties no compensation shall be due to the contractor even if the measure has resulted in financial loss (Article 3192(2), Civil Code).

The particular measure to be taken by the administrative authority and which we are talking about here is different from the measures that the contracting administrative authority takes as per Article 3179 of the Civil Code. Under Article 3179 of the Civil

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Code the contracting administrative authority has the power to unilaterally modify the terms of the contract when it finds such modification to be in the interest of the public. The administrative authority has this power precisely because it is a party to the contract. The administrative authority will be able to exercise its power under Article 3179 only when it is a party to an administrative contract. The measure which is referred to in Article 3192, however, is not dependent on the administration being a party to an administrative contract. The administrative body has the inherent power to take different administrative measures as part of its regulatory duty. So, Article 3192 refers to measures which are not aimed directly at modifying the contract, but measures which the contracting administrative authority takes in connection with its regulatory activity but which by the interconnected nature of things may have the effect of modifying the terms of the contract or make the obligation of the contractor more onerous than he foresaw at the time of the conclusion of the contract.

Where, however, the particular measure that affected the substance of the contract or made the performance of the contract more onerous emanated from an administrative authority other than the contracting administrative authority the contractor will not be entitled to compensation (Article 3193(3), Civil Code). He can, however, claim compensation based on the doctrine of *imprévision* under Article 3183 (Article 3193(2), Civil Code).

What we have seen above is the conditions under which the doctrine of *fait du prince* operates to the benefit of the party contracting with the administrative authority. The application of this doctrine in Ethiopia is defined in Articles 3190-3193 of the Civil Code. By way of final words it must be noted that the doctrine of *fait du prince* only applies where the government measure, general or particular, which has been issued is such as to have special repercussions on the contractor, for in such case it is assumed that, the parties intend to contract on the basis of the existing law, and the new legislation or administrative measure increases the obligation of the contractor

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specifically in his capacity as a party to an administrative contract. An indemnity will only be allowed by the courts, if the contractor can show that his position is different from the ordinary private contractor or that he sustained the loss precisely because he was in the capacity of a party to an administrative contract.[31] For example, where there is a contract specifying that work will be completed for a certain sum and in the course of the contract a law is passed which raises the minimum standard of wages so that the contractor does not make the expected profits, he cannot demand an indemnity from the administration. In this case the contractor is in no different position from any other employer. If the legislation resulted in total financial upheaval for the contractor he can invoke the doctrine of *imprévision* to recover an indemnity according to the relevant rules of the Civil Code. On the other hand if the contractor agreed to supply at fixed fee electricity for the city of Addis Ababa, and during the course of the performance of the contract the government passed a law prohibiting the use of coal to generate electricity thereby forcing the contractor to resort to other costly source of electricity and thereby increased the cost of the contractor, then the contactor is entitled to an indemnity from the contracting administrative authority under the doctrine of *fait du prince*.

We have seen above the conditions for judicial variation of administrative contracts. As explained above there are two doctrines that permit judicial variation of administrative contracts. These are: the doctrine of *imprévision* (unforeseen event) and the doctrine of *fait du prince* (act of government). According to the doctrine of *imprévision* if an unforeseen event extraneous to the parties upsets the economic balance of the contract causing disproportionate financial loss to the contractor, the court can order the payment of compensation to the contractor. The contractor must however show that he has incurred extra loss beyond mere loss of expected profits. In the case of the doctrine of *fait du prince*, if a government measure, general or particular in application, has as its

[31] This requirement is to be found only in the French administrative contract law which is the source for our administrative contract law and it is not anywhere indicated in our Civil Code. It is important to think whether this requirement should also be applied in Ethiopia.

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effect the upsetting of the economic balance of the contract, the contractor can claim indemnity on certain conditions and need not show that he has incurred extra loss; it suffices for him to show that the government measure has resulted in the diminution or loss of his expected profit.

According to the doctrine of *imprévision*, the contracting administrative authority is obliged to cover only a part of the loss that the contractor sustained as a result of the unforeseen event. Thus the amount of indemnity that the contractor is entitled for the loss he sustained as a result of unforeseen event equals to half of the extra cost he incurred. He cannot claim the whole loss to be shifted to the contracting administrative authority. Of course where the upsetting of the economic balance of the contract appears to be definitive and the administrative authority is not willing to agree on the revision of the contract, the contractor can ask the court to cancel the contract.

When the events that potentially give rise to the application of the doctrine of *fait du prince* or the doctrine of *imprévision* materialize, the contractor and the administrative authority can avoid the intervention of the court by revising the contract to adapt to the new situation. After all, a case relating to contractual relationship will be taken to court only when the parties are unable to settle their differences by agreement. If the contractor and the administrative authority are unable to settle their differences by agreement and the matter is taken to the court, the role of the court is limited only to fixing the amount of compensation that is due to the contractor. The court is not empowered to fix new terms and condition for the performance of the contract affected either by unforeseen event or government act or create new obligation for the contractor and the administration.

There is one important question worth rising in relation to the doctrine of *fait du prince* and the doctrine of *imprévision*. As seen above, even if there are restrictions to them, the doctrine of *imprévision* and *fait du prince* are remedial devices for the party contracting with the administrative authority. Now the question is, is it possible to stipulate in the

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contract for these rules not to apply in the relation between the contractor and the administration? The Civil Code does not provide answer. But it is possible to give answer to the question based on the general purpose of these doctrines.

The first purpose of these rules is to ensure the continued and uninterrupted running of public services and works. So, even if on the face they appear to benefit only the contractor, indirectly they have also the purpose of protecting the public interest. They have the purpose of making the contractor stand strong in terms of his financial capability and continue the operation of the public service entrusted to him despite the financial loss he encounters as a result of government measure or unforeseeable event. This helps to ensure that vital public services are supplied without interruption and public works are properly completed without delay.

Second, these doctrines have the effect of balancing the inequality in the contractual position of the contracting parties. As any one might notice, the contractor and the administrative authority do not have the same position in the contractual relationship. Since the government to which the contracting administrative authority belongs is the holder of all power, it is necessary to protect the contractor from the undue effect of measures taken by the government on the contractor. The doctrine of *fait du prince* is aimed at this.

Finally, these doctrines serve as incentive to attract private enterprises to cooperate in the operation of public services. As noted elsewhere in this text, a party contracting with an administrative authority assumes more burdensome obligations than his private contract counterpart. Even if an unforeseen event has occurred, he has to continue performing the contract smoothly so long as that is materially possible despite the unforeseen event. Over and above this, the contractor has to accept any unilateral modification to the contract by the administration which may even result in increase in his obligations. In general an administrative contract is a contractual relationship wherein the administrative power of the contracting administrative authority is greatly

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felt. It is essential to provide incentive to private individuals or business organization that are willing to cooperate in the running of public service despite the added inconvenience that associating in such undertaking may bring to them. This also guarantees the use of contracts as one administrative means to provide public services.

In general, the provisions of the Civil Code that reflect the doctrines of *fait du prince* and *imprévision* are public policy provisions and are, as such, non derogable by the agreement of the parties. Also in French jurisprudence-the main source of Ethiopian administrative contract law-, these rules are held to be non-derogable. In one case, for example, the sum fixed by the contract was expressed to be "not subject to revision" for any reason, and there were to be "no rights of that nature" whatsoever. The *Counseil d'Etat* held, nevertheless, that the contractor was not prevented from asking for compensation under the doctrine of *imprevision*, when the increase in the price of the materials to be used was so large that neither party could have contemplated it when the contract was entered into.[32]

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3.4. Non-Performance of Administrative Contracts and its Effects

In this sub-section we shall explain what non-performance of administrative contracts means and its effects. As with the topics previously dealt with, the discussion in this section also requires basic knowledge of general contract law. So, in this section also avail yourself of your general contract law knowledge.

When do we say that there is non-performance of contract? To answer this question it is necessary to see how contract is to be performed. So, in the following paragraphs we shall briefly see how contract is to be performed and what non-performance means.

[32] Quoted in Mewett, ***The Theory of Government Contracts,*** P. 230.

As you might remember from your general contract law course and also noted in this material in the section on performance of administrative contracts, contracts have to be performed according to the terms of the contract. A contract is said to be performed according to its terms when one or more acts are performed by the parties to the contract and which have the effect of extinguishing one or more of the obligations stipulated in the contract. The seller delivers the thing he agreed to sell and the buyer pays the agreed price; the person who agreed to give service does the work accordingly and the person who hired the service pays the agreed price, etc. Performance of contract may be effected by such simple acts. But most of the time performance of contract is not as simple as it appears from this exemplification. There are complicated issues that arise in connection with performance of contracts. Recognizing this reality the law has provided rules that govern issues related to performance of contract with a view to avoid or minimize disputes in the course of the performance of the contract. 'A contract has to be performed according to its terms is the governing principle of the rules that deal with performance of contract.

The maxim that 'a contract has to be performed according to its terms' is a corollary of the rule which make a contract law between the parties. Once a contract is concluded its performance has to follow the letters and spirits of the contract. Unless the party assuming obligation under the contract discharges his obligation in this manner, he will not be released from the obligation he has assumed. The Civil Code provisions from Article 1745 - Article 1748 affirm this principle.

In general the party assuming obligation under a contract has to perform his obligations in the manner provided in the contract. Deviations from the type, quality, quantity, design, mark, time, etc., specified in the contract amount to non-performance.

What we have seen above is the general contract law principles that govern performance of contract and define what non-performance is. This same principle applies to performance of administrative contracts. Basically the undertaking of the

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party contracting with the administrative authority may be to run public service or execute public work or supply goods. The contractor has to perform his obligation in accordance with the quality, quantity, type, design, specification, time etc. specified in the contract and according to the rules of art prevailing at the time and in the type of activity concerned. Deviation from these requirements amounts to non-performance on the part of the contractor. Normally the obligation that the contracting administrative authority assumes towards the contractor is the payment of the agreed price in the time and under the conditions specified in the contract. If the administrative body failed to pay the price to the contractor in the agreed time or within a reasonable time, the administration is in default.

What is then the effect of non-performance on the part of any of the parties to an administrative contract? As you might remember from your contract law course and noted elsewhere in this material, a validly concluded contract is law as between the contracting parties. This qualification of a contract as law arises from the effect that the contract has on the contracting parties. For that matter a contract differs from ordinary agreement by virtue of its effect on the contracting parties. A contract is not only the manifestation of the will of the parties but it is also an act which has the backing of the law.

So, failure by one of the contracting parties to discharge his obligations as per the terms of the contract, will give rise to rights for the other contracting party who is willing to discharge his side of the obligations arising from the contract. Article 1771 of the Civil Code which enshrines this principle and which is also applicable to administrative contracts, provides that the party having right to claim performance have the following alternative remedies. These are:-

1. Asking forced performance of the contract, or
2. Cancellation of the contract, and
3. Asking for compensation

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The party affected by non-performance can ask for one or a combination of these remedies. The creditor can ask forced performance of the contract either by the creditor himself or by a third party and ask compensation for the added expenses that he sustained as a result of the delay in performance and the procedure of forced performance or, alternatively, he may ask cancellation of the contract and payment of compensation for the loss he sustained from the non-performance of the contract. As indicated in Article 1772 of the Civil Code, the party invoking one or the other of these remedies has to first place the other party in default by giving notice to perform his obligations according to the terms of the contract. Of course, there are cases where giving of notice is not necessary (See Article 1775, Civil Code).

In principle, these rules of general contract law that govern the effect of non-performance apply to administrative contracts as well. Let us briefly see the rules that apply in case of administrative contracts.

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3.4.1. Forced Performance of Administrative Contracts

The concept of forced performance of contract refers to the act of compelling the debtor to perform the obligation he assumed under a contract and the time of performance of which has lapsed. This kind of performance takes place only when ordered by court and with the help of law enforcement officials. The creditor cannot physically force the debtor to perform his obligation.

The party in default will be obliged to discharge his obligation either by physically forcing him or by execution order to be given on his property. In order not to let the debtor become a slave of the debtor, the circumstances under which the debtor may be compelled physically to perform his obligations are restricted by law. As stipulated in Article 1776 of the Civil Code forced performance of contract will be ordered only when

the performance of the contract by the debtor is of special importance and the contract can be enforced without affecting the personal liberty of the debtor.

In principle the same rules govern forced performance in case of administrative contracts. What is unique in case of administrative contracts, however, is that as enacted under Article 3194 of the Civil Code the contractor cannot ask for forced performance by the contracting administrative authority.

When an administrative authority enters into contract in addition to its obligation to pay the agreed price, it may also assume other obligations towards the contractor. For instance it may have assumed the obligation to supply the materials or the workmen which the contractor needs for the performance of his obligations, or it may have agreed to clear the site for the construction of a certain work. If the administrative body fails to discharge one or the other of these obligations or cancels the contract, the contractor cannot ask the court and the court cannot also order forced performance of the contract by the administration. The court can, however, order the payment of compensation to the contractor unless the administrative authority is not willing to perform its obligations (Article 3194(2), Civil Code).

A related point worth considering here is that the administrative authority cannot invoke its right not to be forced to perform its obligations to avoid its duty to pay the agreed price for works already completed by the contractor. Its right not to be forced to perform will only helps it to refuse forced performance of contract which it has unilaterally cancelled as per Article 3180 of the Civil Code or forced performance of its obligation to supply material or work-men which are necessary for the performance of the contract by the contractor.

When we see the matter from the side of the contractor, his position is not different from a party in a private contract. If the contractor fails to discharge his obligations then forced performance can be ordered against him in all the circumstance where the law permits forced performance against a defaulting party. He can however be forced to

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perform his obligation only and only by the court. In this regard it must be noted that the contracting administrative authority does not have the power to order, by way of requisition order, the contractor to perform his obligations (Article 3195(1), Civil Code). The administrative authority can however compel, by requisition order, the workers of the contractor who is engaged in the running of a public service to stop strike (Article 3195(2), Civil Code). This is intended to ensure the continued supply of essential public services.

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3.4.2. Cancellation of Administrative Contracts

As you might, again, remember from your contract law courses, the term cancellation of contract refers to the act of putting an end to a contract before it is performed. If one of the parties to a contract failed to perform his obligations according to the terms of the contract, the other party affected by the non-performance can ask the court to terminate the contract or he can declare the termination of the contract by himself where such power is given to him under the contract.

It should be remembered that the right of cancellation of contract is not a right that can be utilized every time there is an allegation of non-performance or breach of contract. In the first place it is a right that, in principle, has to be exercised through court of law. Where it is stipulated in the contract or by law, the party affected by the non-performance of the contract can also unilaterally declare the cancellation of the contract. In both cases not only the existence but also the substantial nature of the non-performance has to be ascertained (Article 1785(3), Civil Code). Measure of cancellation cannot be invoked for minor deviations in performance; these may only lead, may be, to claim of compensation.

These are the rules that govern cancellation of contract in general. These same rules also apply to administrative contracts. In this regard administrative contracts are no different from private contracts. There is one question worth considering here. Is the

contracting administrative authority required to go to court to exercise right of cancellation of the contract when the contractor fail to discharge his obligations under the contract? Article 3180 of the Civil Code indirectly gives us the answer. According to this provision even if the contractor is not at fault the administrative authority is empowered to unilaterally terminate the contract without the need to get the permission of the court. If the administrative authority is empowered to unilaterally terminate the contract in the absence of any fault on the part of the contractor, then there is no reason why it cannot proceed to unilaterally cancel the contract when there is fault on the part of the administration. The phrase "...notwithstanding that the other party has committed no fault..." in Article 3180 of the Civil Code implies this. See also Article 3204(2) of the Civil Code. The right to unilateral cancellation by the client in case of non-performance is also recognized under the private construction law.[33]

3.4.3. Damages

Just as in the case of other contracts, the other remedy that a party affected by non-performance of contract has is the right to claim compensation from the party in default. As used in contractual relationships, the term damage refers to the economic loss that the non-performance of the contract by one party entails for the other party who has discharged his obligation or is ready to perform his obligation. The failure of the debtor to perform his obligations entitles the other party the right to claim compensation from the debtor. The purpose of the damage is to compensate the party that sustained economic loss as a result of the non-performance of the contract. So, in fixing the amount of damage to be paid, regard will be had to all the economic benefits which the party affected by the non-performance could have derived had the contract been performed as it is. As pointed above damage may be asked together either with cancellation or forced performance (Article 1790(1), Civil Code).

[33] See Arts. 3035 and 3038 of the Civil Code.

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The party intending to ask for damage shall show that there is non-performance of contract, that he has sustained economic loss and that there is a direct cause and effect relationship between the non-performance of the contract and the economic loss sustained. This is implicit from the reading of Article 1790(1) of the Civil Code.

This should not, however, imply that the person against whom a claim for compensation for non-performance is brought has to always pay it. There are defenses that may validly be raised. He can defend by saying that I have discharged my obligations according to the terms of the contract, that there is no damage, or the claimant is responsible for the damage. He may admit non-performance but may say that he is not liable to pay compensation under the circumstance. The defendant who raises this defense will be successful if he can show that he was prevented from performing his obligations due to force majeure as defined under Article 1791(2) of the Civil Code. In order to bring clarity and certainty Article 1793 of the Civil Code lists circumstances which could be considered as force majeure while Article 1794 of the same code mentions circumstances which, for various policy reasons, cannot be considered as constituting force majeure. Article 3199 of the Civil Code provides two additions to the list of circumstances which are not considered as force majeure. According to this article the delay or default of the suppliers of the contractor cannot be raised as force majeure releasing the contractor from liability for non-performance.

The loss which the creditor sustained may be actual loss or loss of expected profit. That is, as a result of the delay or default of the debtor, the creditor may have incurred expenses. Or, as a result of the delay or default of the debtor, the creditor may have lost expected and certain gains. The amount of damage to be paid to the party affected by non-performance will take these into account.

The amount of damage payable to the party affected by the non-performance will normally be determined by the agreement of the parties which they stipulate in the contract by way of penalty clause in accordance with the provisions of Articles 1886-

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1895 of the Civil Code. Failing stipulation in the contract to this effect, the amount of damage payable to the party affected by the non-performance will be determined by the court in accordance with the relevant provisions of the law (Articles 1789-1805, Civil Code).

In general the damage that is payable to the party affected by non-performance of contract will be determined based on either the stipulation of the parties in the contract by way of penalty clause or, in the absence of such stipulation by the court based on the guiding provisions of the Civil Code. The same rules apply also in case of administrative contracts. In this regard the administrative authority which is the possessor of all powers and custodian of the public interest is not given the power to unilaterally determine the amount of damages to be paid by the contractor in case where the latter is in default. It is the same point that is emphasized in Article 3200 of the Civil Code. The contracting administrative authority cannot unilaterally decide that the contractor is liable to penalty for non-performance and fix the amount of compensation payable by the contractor for delay or default in performance. If the contractor has delayed or defaulted in the performance of his obligation under the contract, the damage payable to the contracting administrative authority will be determined either by the terms of the contract or by the court, but not by the administrative body. If the administrative authority has taken any such measure contrary to this stipulation of the law, the court can cancel the action thus taken and order the payment of compensation to the contractor for the damage caused to him as a result of the measure of the administrative authority contrary to the law (Article 3200(3), Civil Code).

In this sub-section the effects of non-performance of administrative contracts have been explored. From the explanation made one can notice that the rules governing non-performance of administrative contracts are not substantially different from the analogous rules of the private contract law.

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3.5. Assignment and Sub-Contracting of Administrative Contracts

The other issue that is worth considering in relation to administrative contracts is the possibility or otherwise of assignment and sub-contracting the performance of an obligation assumed under an administrative contract. There are few provisions in the administrative contracts law section of the Civil Code that are devoted to regulate the conditions and effects of assignment and sub-contracting of administrative contracts. These rules will be explained in the following paragraphs.

The section of the law that deals with assignment and sub-contracting of administrative contracts starts by providing definition for the terms. According to Article 3201(1) of the Civil Code assignment is an act whereby the contractor substitutes a third party for himself for the total performance of the contract. Whereas, according to Article 3201(2) sub-contracting is defined as an act by which the contractor substitutes a third party for himself for the performance by the third party of a part only or of an item of the contract. From these definitions, we understand that both assignment and sub-contracting are about transfer by the contractor of the performance of the obligations assumed to a third party. The difference between the two relates to the extent of delegation of the obligations assumed by the contractor. While in the case of assignment the contractor is transferring the performance of the whole contract, in the case of sub-contracting the contractor is delegating the performance only part of the contract to a third party called the sub-contractor. For instance, if a certain contractor agreed to undertake construction of road it may decide to transfer the performance of the entire work to another contractor (assignment) or may delegated the construction of the bridges to another contractor and continue performing the other works (sub-contracting).

The assignment or sub-contracting of rights or obligations arising from contracts is common practice in contractual relationships. The question, however, is that when we

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apply these to administrative contracts, would not it negate the purpose of the procedures for the allocation of administrative contracts by tender? As you have studied in the section on the formation of administrative contract, in principle an administrative body has to select his contracting party by applying one of the different types of competitive bidding procedures. As seen above, this is done to protect the public interest and find out the contractor who can efficiently and effectively perform the contract for the least possible price. Then, if we allow the contractor to assign or sub-contract the obligation he assumed to any third party who is not selected by following the competitive bidding procedures, would it not be prejudicial to the public interest?

The law seems pragmatic. Once a contractor entered into a contract with an administrative body he may face different difficulties which may prevent him from performing the obligations by his own. He may encounter financial difficulties, or may loss his experts just after the conclusion of the contract or strike by workers may prevent him from discharging his obligations smoothly. Allowing the contractor to transfer the performance of the contract in part or in whole to another contractor when circumstances prevent him from performing as per the contract is beneficial both for the contractor himself and the public.[34] Since the substitute contractor is selected by the contactor and approved by the contracting administrative authority, the permission of assignment or sub-contracting will not be that much prejudicial to public interest that is protected by the rules governing the allocation of contract by tender. As provided under Article 3202 of the Civil Code a contract for the assignment or sub-contracting of an administrative contract has to be always approved by the contracting administrative authority or by higher authority competent to approve the conclusion of that specific type of administrative contract. A contract made for the assignment or sub-contracting

[34] Of course, it should be noted that the law does not restrict assignment and sub-contracting of administrative contracts only to cases where the contractor is prevented from performing the contract by himself.

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of an administrative contract without the requisite authorization does not necessarily lose its validity. Its effect as provided under Article 3204(1) of the Civil Code is that it will not bind the administrative authority which means that the original contractor will still be bound towards the administrative authority despite the fact that he has either in whole or in part transferred the performance to another contractor. It is rather considered as contractual fault on the part of the contractor justifying the cancellation of the main contract (Article 3204(2), Civil Code).

So, in order to conclude a valid contract of assignment or sub-contracting the contractor has to first secure the authorization of the contracting administrative authority. The administrative authority to which the request for approval of contract of assignment or sub-contracting is made is required to make his decision within a reasonable time (Article 3203(1). There are no criteria provided by the law and which the administrative authority could base its decision on to reject or approve the proposed grant of sub-contracting or assignment. From the reading of Article 3203(2) & (3) of the Civil Code we understand that it is a discretionary act. This discretionary power of the administrative authority is limited only in case of contracts for the concession of public services. In this case the administrative authority can refuse to approve the assignment or sub-contracting only for reasons related to the financial or technical position of the proposed grantee (Article 3203(2), Civil Code).

The approval that the administrative authority gives for the proposed assignment and sub-contracting has its own effect. The effect varies depending on whether the approval relates to assignment or subcontracting.

The approval given by the administrative authority to the contract of assignment has the effect of substituting the assignee for the original contractor and, unless otherwise agreed, the original contractor will be released from liability for the performance of the contract (Article 3205(1) & (2), Civil Code).

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The approval given by the administrative authority to the sub-contract will not affect the original contractual relationship. The original contractor stands as guarantee for the works done and supplies made by the sub-contractor (See Article 3206, Civil Code).

3.6. Termination of Administrative Contracts

In the preceding sections we have studied the formation, variation, performance, assignment and sub-contracting of administrative contracts. In this section, we shall study about termination of administrative contracts. For better understanding of the discussion in this section, please revise the rules governing termination of contracts in general.

No contract concluded by an administrative authority lasts forever.[35] A contract once concluded will come to an end for one or another reason. When we examine the relevant rules of general contract law and the special administrative contract law rules we learn that administrative contracts may terminate by:-

1. Decision of the parties,
2. By operation of law, and
3. Decision of court of law

So, one way by which administrative contracts may terminate is by the decision of the parties to the contract. The decision of the parties that brings to an end administrative contract may be bilateral or unilateral.

In the same way that the contractor and the administrative authority created the contract, they can also by their agreement extinguish their contractual relationship. This is one aspect of their freedom of contract. This is also clear from Article 1675 of the Civil Code which provides that "a contract is an agreement whereby two or more persons

[35] An administrative contract that may last for a long time is a contract for the concession of public service, and that is only for a maximum of sixty years (See Article 3227(2) Civil Code).

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agree as between themselves to create, vary or *extinguish* obligations of proprietary in nature."

The other way by which administrative contracts may terminate is by the unilateral decision of the contracting parties. Very noticeable in this regard is the power of the administrative authority to unilaterally terminate the contract. When we examine the administrative contract provisions of the Civil Code we see unusual and extensive power of unilateral termination of contracts given to the contracting administrative authority. There are two independent grounds that enable the contracting administrative authority to unilaterally declare the termination of the contract. These are first, the fault of the contractor and second the requirement of public interest.

The contractor may have committed fault(s) in the course of the performance of the contract. He may have failed to perform the contract in the manner specified in the contract and according to the instructions given by the administrative authority. He may have assigned or sub-contracted his obligations without securing the permission of the contracting administrative authority. The commission of these and other type of faults on the part of the contractor entitles the contracting administrative authority to unilaterally terminate the contract without the need to go to court to seek the declaration of the termination of the contract.

The other ground that enables the contracting administrative authority to unilaterally terminate the contract is the requirement of public interest. Even if there is no fault committed on the part of the contractor in the course of the performance of the contract, the termination of the contract might be justified when the continued performance of the contract is not in the interest of the public. As provided under Article 3180 of the Civil Code, when the continued performance of the contract is not necessary for the interest of the public, the administrative authority can unilaterally terminate the contract. Of course, the administrative authority does not possess an unlimited power of unilateral termination. The authority has to show that the continuation of the

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performance of the contract is no longer necessary for the public interest. In addition the administrative authority has to compensate the loss, including loss of expected profit, which the contractor sustained as a result of the termination of the contract (Article 3181(1), Civil Code). Please note that the measure of unilateral termination of the contract by the administrative authority as a result of the requirement of public interest is technically referred to as *unilateral cancellation* whereas the unilateral termination due to the fault of the contractor is referred *rescilation*.

We have just seen the two grounds, requirement of public interest and fault of the contractor, that enable the contracting administrative authority to take unilateral measure of termination of the contract. It should also be noted that rescinding of the contract due to the fault of the contractor and cancellation of the contract when the public interest requires the termination of the contract have different legal effects. If the contracting administrative authority terminated the contract due to the fault of the contractor in the performance of the contract, the contractor will not be entitled to compensation from the administrative authority. In this case, it is rather the administrative authority that will be entitled to ask compensation from the contractor for the fault he committed in the performance of the contract. Of course as we noted earlier, the administrative authority cannot unilaterally decide the amount of compensation to be paid by the contractor. That is a power given to the courts. On the other hand, if the administrative authority took the unilateral measure of termination of the contract because of the requirements of the public interest, the contractor will be entitled to compensation, including compensation for loss of expected gains, which the contractor sustained as a result of the termination of the contract (Article 3181(1), Civil Code).

What we have seen above is the special prerogatives of the contracting administrative authority to unilaterally terminate the contract. When we see the case from the side of the contractor, his position is not different from a party to a private contract. The special

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administrative contract law rules do not allow the contractor to unilaterally terminate the contract. This does not mean that the contractor is not at all allowed to terminate the contract. If the contract so stipulates or those conditions that are mentioned in general contract law as a ground for unilateral termination of contract, i.e., Articles 1787, 1788, and 1789 are fulfilled, the contractor can exercise unilateral termination of contract.

What we have seen, in this section, is the conditions under which an administrative contract can be terminated by the action of the parties and its effects. Since the rules that apply in case of termination of administrative contracts by the operation of the law and by court decision are those of general contract law rules which are already studied in other contract law courses, we need not repeat it here.

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Review Questions

1. Explain the different ways of revising administrative contracts.
2. Explain the difference relating to revision of administrative contracts and civil contracts.
3. Some commentators argue that since the doctrines of *fait du prince* and i*mprévision*, as recognized in the Civil Code, are full of conditions and restrictions, they are not that beneficial for the party contracting with the administrative authority. Do you agree with this assertion? Why?
4. Following the appropriate procurement procedures, Bahir Dar University has entered into two contracts with Habesha Trading for the supply of goods to be used for students' cafeteria service. The first contract was for the supply of 100 (one hundred) tons of wheat flour at a price of 5 Birr per kilogram. The second contract was signed for the supply of 2000 litres of edible oil at an agreed price of 15 Birr per litre.

   The contractor has started delivering the goods as agreed. However, unfortunately, things have started to change. The price of wheat in the market has increased so sharply that the contractor found it too costly to continue supplying the wheat flour at the agreed price. Worried by the situation the general manager of Habesha Trading contacted the president of the University through the phone and proposed for him a revision on the originally agreed price for the supply of the wheat flour and after painstaking conversation on the phone they reached an agreement for the remaining 70 tons of wheat flour to be supplied at a price of 6.50 Birr per kilo. The supplier, accordingly, continued to supply the wheat flour.

   Immediately after the contractor supplied 50 tons of the wheat flour from the remaining 70 tons of wheat flour supply, the contractor received a letter from the University indicating that it no longer wants the remaining (20 tons) flour supply.

   On the other hand the Ethiopian Standards and Quality Authority (QSA) has issued a directive prohibiting the importation of the specific type of edible oil that the contractor has been supplying to the University and as a result the contractor has been forced to import and supply a different brand of edible oil which costs it much and results in loss.

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Questions

1. Can the contractor claim for compensation from the University for the loss it sustained in connection with the supply of the edible oil? Why/why not?
2. What remedies are available for the contractor who is affected by the termination of the contract for the supply of flour?
3. The contractor has asked the University to make payment for the 50 tons of wheat flour it supplied after the revision of the contract calculated at 6.50 Birr per kilo. The University has accepted the claim for payment but it insisted that it will pay only at the originally agreed price of 5 Birr per kilo. If you were called on to rule on the row between the University and the contractor what will be your ruling? Why?

5. Explain the similarities and differences between unilateral cancellation of administrative contract by a contracting administrative body and rescinding of an administrative contract.
6. Ato A, a business man owned a large building and rented office space in it to the Federal Police Commission. In the contract it was stated that the Commission would rent the office for five years at a price of 8000 Birr per month. After one year the Commission told ato A that it has decided it has terminated the contract and would pay no more rent. What remedy is available to ato A?

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Chapter Four

Special Kinds of Administrative Contracts

4.1. Introduction

From Chapter One through Chapter Three a detailed discussion of the meaning of administrative contract, the similarities and differences between administrative contracts and private contracts, the *raison d'être* for a separate concept of administrative contract law, the place of the concept of administrative contracts in the Civil Law and the Common Law legal systems and its historical development, the source and structure of Ethiopian administrative contract law, the requirements for the formation of a valid administrative contract, the rights and obligations of the parties to an administrative contract, the manner of performance of administrative contracts, the effect of non-performance of administrative contracts, and the modality of termination of administrative contracts has been made. The discussions made in the preceding chapters concern administrative contracts in general. In addition to those rules which are discussed in the preceding chapters and which apply to all administrative contracts we also find incorporated in the Civil Code specialized rules which are meant to be applicable to certain special types of administrative contracts which administrative authorities regularly conclude and which by their nature require some specialized rules suitable only to the particular type of contract. The special administrative contracts to which special rules are designed include;

1. Contract for the concession of public service (Arts. 3207- 3243)
2. Contract of public works (Arts. 3244 – 3296), and
3. Contract of supplies (Arts. 3297 – 3306)

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The rules in these three sections are designed to adapt the general principles that underlie the concept of administrative contract law to fit to the unique features of these three different types of contracts. As such, except that they are specific, the underlying principles of the rules in these three different sections are the same as those that inspire the general administrative contract law rules. In this Chapter we will have a closer look at these special rules.

Objectives:-

After studying this Chapter you will be able to:-

- ✓ Understand the concept of public service,
- ✓ Know what contract of concession of public service mean and who the parties thereto are,
- ✓ Understand the legal relationship that exist among the parties to the contract of concession of public service, i.e., the grantor (administrative authority), concessionaire (contractor) and users (consumers),
- ✓ Know what a contract of public work mean and the parties thereto,
- ✓ Know how a contract of public work is to be formed and the effect of non-performance,
- ✓ Understand the manner of performance of contract of public works,
- ✓ Appreciate the special prerogatives of the contracting administrative authority in supervising and directing the performance of contract of public works,
- ✓ Know how acceptance of works done is made and the warranty assumed by the contractor for works he completed and delivered,
- ✓ Know the special rules that apply to contract of supplies,
- ✓ Give legal advice on issues related to contracts of concession, public works, or supply, and,
- ✓ Draft contracts and memoranda on matters related to the above types of contracts.

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4.1. Contracts for the Concession of Public Service

One of the main types of administrative contracts concerning which special rules are designed for is contract for the concession of public services. Without entirely setting aside the applicability of general administrative contract law and pertinent provisions of general and private contract law rules, special rules that are suitable to the peculiar features of contracts for the concession of public services are provided for in the Civil Code from Arts. 3207 – 3243 of the Civil Code. In this section attempt will be made to closely examine these rules.

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4.1.1. Meaning of Contract for the Concession of Public Service.

Before delving to discuss the law regulating contracts for the concession of public service it is essential to define what we mean by the terms 'public service' and 'concession of public service'. The law has also provided definition for these concepts under Article 3207 of the Civil Code.

Art. 3207. Definition

1. *Any activity which a public community has decided to perform for the reason that it has deemed it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute a public service.*
2. *The concession of a public service is the contract whereby a person, the grantee, binds himself in favor of an administrative authority to run a public service getting remuneration therefore by means of fees received on the use thereof.*

Regarding the concept of 'public service' an extensive discussion has been made in Chapter One, pages 13 – 15. The reader is referred back to these pages. What concerns us here will be the concept of `concession of public service' and we will take it up in the following paragraphs.

As stipulated under Art. 3207(2), 'concession of public service' refers to a contract whereby a person or company called the grantee or concessionaire enters into agreement with an administrative authority to supply public services for the public in return for fees to be paid by the user of the service. For various reasons the government authority in charge of ensuring the supply of a given service may not be able to provide the service by its own. The responsibilities of the welfare state are expanding from time to time. In particular, the government is assuming the obligation to supply more and more types of services that qualify as public service. Provision of these ever expanding services by the government by using its own capital and other resources is becoming a daunting task. Added to its duty to regulate, the day-to-day administration of the provision of such services is headache for the government which is not organized on a business model, thereby implying the need on the part of the government to employ the managerial expertise of private enterprises. It is also believed that in terms of cost effectiveness and quality of service the private provision of services is preferable. In view of all these there are situations where the government by limiting itself only to the role of monitoring the proper provision of the services, delegates the actual delivery of the service to a private enterprise.

So, for one or the other of the considerations mentioned above an administrative authority can enter into a contract with a private company whom it thinks will effectively deliver a given service. The concessionaire, i.e., the company or the individual who under the contract agreed to supply the service, assumes the duty to properly supply the services to users. In return for the service it assumed to supply, the concessionaire exacts payment not from the contracting administrative authority but from the users of the service by way of fees for the service they use. There is no price to be paid by the administrative authority to the contractor in return for the services rendered by the later. We cannot however rule out any possibility of payment by the administrative authority to the contractor. The service to be provided by the contractor

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may be one that is subsidized by the state. So, in that case the concessionaire will be entitled to claim the subsidy from the contracting administrative authority. In addition to this, there may be other obligations which the administrative authority assumes towards the concessionaire. Even though the particulars may vary depending on the individual contracts, there are obligations which the administrative authority will normally assume towards the concessionaire the proper discharge of which will enable the later to effectively deliver the service. For instance the contract may stipulate that the recruitment of the personnel is the responsibility of the administration or that it is up to the administrative authority to initially provide the contractor with fully furnished facility or undertaking that will be used for the running the service. In such cases the administrative authority has to discharge its obligation towards the contractor. In short, concession of public service is a contractual arrangement whereby an administrative authority entrusts the running of a public service to a private enterprise by reserving the right to control the proper deliver of the service.

It is important, however, to note that the use of concession contracts as a device to make public service available to the public is not a common practice in Ethiopia. Some public services are provided by business entities that are organized by the government in the form of corporations. For instance the provision of electricity, telecommunication, and railway is provided by state owned corporations. Other services are provided in-house, i.e., the government body in charge to make sure that the service is provided for the public may by its own supply the service. In general the use of concession contracts is not that common in Ethiopia. The absence of a well developed private sector capable of providing public services and the command economy system we have been briefly in during the *Derg* era may be taken as explanation for the absence of such scheme. This does not mean that the system is totally inexistent in Ethiopia. One traditional instance of a concessionary arrangement for the provision of public services is the relationship of public transport bus owners with the Ministry of Transport. Looking at all the

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legislations issued since the 1950s regulating the organization of road transport service, it is easily observable that there is concessionary arrangement between cross country transport service providers and the Ministry.

For the future the outlook for the use of concessionary arrangements as a tool for delivery of public services is changing. Public-private partnership (PPP), another term used to denote concession arrangements, has become the most dominant mode of organizing and providing public services in the beginning of the 21st century.[36] The increasing public infrastructural needs and public budgetary constraints have made ppp the most preferred method of providing public services in countries around the world.[37] The same trend is expected to surface in Ethiopia in the years to come particularly as the Five Years Growth and Transformation Plan (GTP) envisages the use of ppp as one tool for achieving the stated development objectives particularly in the realm of public services provision. In the newly enacted law governing public procurement and property administration there is also reference to the potential use of ppp.[38]

Be that as it may, for the purpose of clarity it is important to distinguish concession contracts from other similar types of contracts which the government concludes, i.e., privatization, contracting out management, and leasing contracts.

Privatization refers to the transfer of ownership title of a business entity which previously used to be under government ownership and management (public enterprise) to a private entrepreneur. Once the government transferred the ownership of the enterprise as per the privatization law, except as part of its power to regulate the market (i.e. private business ventures or economic activities), the government will not

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[36] Wettenhall, R, The public–private interface: Surveying the history, in ***The Challenge of Public–Private Partnerships: Learning from International Experience*.** Eds. G. Hodge and C. Greve. Cheltenham, U.K.: Edward Elgar, 2005, pp. 22–43.

[37] Martin, L., and Stutte, C., Public-Private Partnership, in ***International Handbook of Public Procurement***, Ed. Khi V. Thai, CRC Press, 2009, pp. 708- 709.

[38] See Art. 2(27) and Art. 34, Proc. No. 649/2009.

normally interfere in the management affairs of the enterprise or retake the enterprise. A contract for the concession of public services, however, is different from privatization. A concession scheme is not about the transfer of ownership title over a given business entity. In case of concession agreements only the responsibility of running or providing public services is transferred to a private entrepreneur and such arrangement is temporary by its nature.[39] When the time agreed for the concession expires or the government wants to take and run by its own or transfer it to another concessionaire, it can terminate the arrangement. Unlike in case of privatization, in case of privatization the government authority in charge of looking after the proper provision of the service will follow up the day-to-day operation of the concession.

The other type of contract by the government which has close resemblance with contract for the concession of public service is contracting out the management of its business entities. In order to enhance the effectiveness of its enterprises and bring into the country the latest science in management, the government sometimes engages in contracting out the management of some of its business entities. Few years ago there was an unsuccessful attempt to contract out the management of Ethio-Djibouti Rail Way Enterprise to a South African company. Recently, the government has contracted out the management of Ethio-Telecom, the newly organized telecommunications service provider in Ethiopia, to a French company, France-Telecom. Such measures by the government are different from concession contracts which the government concludes. In case of contracting out management it is only the managerial expertise of the contractor that is sought and a fixed fee is paid to the contractor by the government as remuneration for the service it rendered. And such contracting out is not limited only to enterprises that run services which qualify as public service within the context of the above definition. In case of concession of public services no-less-than the managerial

[39] As can be seen from Art. 3227(2) of the Civ. C., a contract for the concession of public service may not in any event last for more than sixty years.

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skills of the contractor, the capital and asset of the contractor is needed. In concession scheme the contractor assumes the responsibility to provide a public service by using its own capital and infrastructure. Indeed one of the reasons why the government resorts to concessionary arrangements to ensure the provision of public services is to make use of private capital and infrastructure. And the remuneration (profit) for the concessionaire is derived not from a price to be paid by the government but from the fee it collects from the service users and government subsidy, if any.

The other type of contract that may be take to be akin to contract for the concession of public service is leasing contract. There are occasions where the government or its administrative authorities lease premises under their possession for commercial purpose (to be used for example as cafeteria or restaurant by private persons). The government also leases land for individuals and organizations. Even though these contracts like concession contracts do not involve transfer of ownership and are made for a limited duration, they are pure commercial relationship between the lessee private individual and the lessor government body, and are in no way related to the obligation of the administrative body to provide public service. The government body entering into the contract transfers the premises to the lessee and the lessee pays the agreed rent price. So, lease contracts of the government are an arms length give and take relationship. In case of contract for the concession of public service there is no price that the contracting government body exacts from the concessionaire.

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4.1.2. Formation of Contract for the Concession of Public Service

No doubt, like any other contract, contracts for the concession of public services must be formed by fulfilling the legally prescribed substantive and formality requirements. In this regard it must be noted that the formation of contract for the concession of public service must fulfill the requirements as to consent, capacity of the parties, object of contract and form discussed in detail above in connection with the formation of

administrative contracts in general. In these regard there is no requirement that is especially applicable to the formation of contract for the concession of public service.

As regards the procedure or method of allocation of contract, it should be noted that none of the contracting methods provided for in Proclamation no. 649/2009 are in principle intended to be applicable to contracts for the concession of public service. As stipulated under Art. 34 of this same proclamation the rules governing the procedure for the formation of contracts for the concession of public service (alias known as public-private partnership) are yet to come in the form of a directive to be issued by the Ministry of Finance and Economic Development. But it does not mean that till then the government will not conclude contract for the concession of public service. Article 34 of the Proclamation itself provides that "[t]he Minister may issue directive prescribing the rules governing the formation of public private partnership…", it seems, when the Minister finds issuing a different procedure for the formation of public-private partnership necessary. Thus it may be concluded that until such time that the Minister comes up with the said directives, depending on the situation one or the other of the procurement procedures stipulated in Proclamation no. 649/2009 will apply to the allocation of contract for the concession of public services. Of course, because of the size and type of procurement they are aimed for, price quotation and request for proposal methods do not seem to be suitable for the allocation of contracts for the concession of public services.

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4.1.3. Performance of Contracts for the Concession of Public Service

Once a valid contract for the concession of public service is formed, like any other contractual undertaking it has a binding effect on the parties thereto. As such the parties are required to perform their respective obligations strictly and in good faith.

It should be borne in mind that contract for the concession of public service forms an exception to the principle of privity of contract, one of the fundamentally principles in

contract law. According to the principle of privity of contract, a contract in principle creates rights and obligation only to the parties thereto, not for third parties that have not consented to the terms of the contract. A contract for the concession of public service, however, deviates from this basic rule of contract. The contract concluded between the concessionaire and the administrative authority has the effect of creating rights for the public, i.e., users of the service to be provided by the concessionaire. Under the contract the concessionaire assumes obligation to provide services not directly to the contracting administrative authority, but to the public, potential users of the service. It is this tripartite relationship, i.e., the relationship among the concessionaire, the contracting administrative authority and the users of the service that the law on the concession of public service governs. In the following paragraphs attempt will be made to elaborate how this law regulates the performance of concession contracts in a manner that centers all three parties.

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4.1.3.1.Right of Control of the Administrative Authority

As pointed out earlier in connection with the definition of the concept of public service, once an administrative authority transfers by contract the supply of a public service to be run by a private enterprise, it does not mean that the administrative authority will stop following up the proper delivery of the service. Since public services are fundamental for normal life of society, ensuring that public services are provided in the required quality, quantity, at affordable price and without any discrimination among users is one of the fundamental responsibilities of the modern welfare state. We know that the state has the obligation to provide public services. This it can do so either by organizing and providing the service by its own or by causing it to be provided by private enterprises. When the public service is to be supplied by private enterprises, because of the fundamental nature of the service the state has to make sure that the

services is being properly supplied by the firm that is in charge of supplying the service. Even if the day-to-day administration of the service is entrusted to a private firm, ensuring that the service is being provided in the required quality, quantity, distribution at an affordable price without discrimination of users still remains to be the responsibility of the state, particularly the administrative authority established to ensure the supply of the particular type of service. It is the same point that is provided in Article 3208(1) of the Civil Code. Thus we understand that the government body that is in charge of ensuring the provision of the service has, during the currency of the concession contract, the inherent power to control and check whether or not the concessionaire is providing the service appropriately. Corresponding to this right of the contracting administrative authority the concessionaire has, under Article 3208(2) of the Civil Code the duty to cooperate with the administrative authority in order to make the control by the latter effective. Whenever the administrative authority requests, the concessionaire has the obligation to provide the administrative authority with an account of his work and give it access to necessary facilities to facilitate the control over the service provision venture. This does not however mean that the administrative authority can do the supervision activity arbitrarily and without limitations. The administrative authority exercises its power to control the activity of the concessionaire in accordance with rules and regulations and there are also limitations imposed on its power to control. This is provided in Articles 3209 and 3210 of the Civil Code.

According to the stipulations of Article 3209(1) the contracting administrative authority has to exercise the control over the concession in accordance with regulations governing the concession and the provisions of the contract itself. In addition to these the provisions of the Civil Code governing contracts for the concession of public service contain some mandatory provisions concerning the exercise of control power by the administrative authority, i.e. Articles 3212- 3243. These provisions are applicable even if there is contrary stipulation in the contract. Thus the control by the administrative

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authority of the activities of the concession is to be made in accordance provisions of the law provided for this purpose, regulations[40] governing the concession, and the provisions of the contract itself.

The other point that must be raised here is the extent of the power to control of the contracting administrative authority. Even if the administrative that entrusted the running of the public service to a private firm has the power to control the operation of the service, it does not mean that there are no limits on its power to do so or that it can maneuver it as it pleases itself. In this regard it should be noted that the concessionaire has in principle the freedom to determine the manner of the performance of the contract. The power of the administrative authority to control the activities of the concessionaire should not impair this freedom of the contractor. It is the same point that is emphasized in Article 3210 of the Civil Code. In particular the administrative authority should not interfere in the day-to-day operation of the concession in a manner that has the effect of bringing the concession under the direct management of the administrative authority. For that matter the need for creation of concessionary arrangement for the running of public service in the first place is necessitated by the desire to relieve the administrative authority of the day-to-day operation of the service and limit itself to the task of making decisions concerning the overall organization of the service. If the contracting administrative authority interferes in the day-to-day activities of the concessionaire in addition to impairing the freedom of the contractor to plan the manner of performance of the contract it will also defeat the very purpose of entering into a concessionary arrangement for the provision of public service. Thus the contracting administrative authority has no right to interfere in the day-to-day operation and management of the concession. In addition to this, as provided under Article 3210(2) of the Civil Code the administrative authority cannot require the

[40] These refers to documents which the contracting administrative authority prepared in the form of general business terms before the conclusion of the contract and which are designed to govern the operation of the concession agreement.

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activities of the concessionaire to be approved in advance by the administrative authority itself. The administrative authority cannot also use its right to supervise to force the concessionaire perform its obligation. Since the relationship that exists between the administration and the grantee is a contractual relationship, forced performance of the obligation by the grantee can, within the conditions provided by law, only be demanded from court of law. The administrative authority cannot use its administrative power or the power to supervise the operation of the concession to force the concessionaire perform its obligations (Article 3211(2).

These limitations on the power of the contracting administrative authority to control the operation of the concession, apart from enabling the smooth running of the concession, will help to maintain the autonomy of the contract that exists between the administration and the grantee. Since the relationship between the grantee and the administration emanated from contract, the contract sprit and the rights and obligation defined at the inception of the relationship must be maintained throughout the relationship. In other words the administrative authority's power to supervise should not surpass its limits and turn the relationship into an administrative superior-subordinate relationship thereby altering the contractual nature of the relationship.

On a different note it should be borne in mind that the provisions of the contract should not be construed in such a way as to form an obstacle to the power of the administrative authority to control and supervise. The interpretation of the provisions of the concession agreement should be made in such a way as to enable the exercise of control by the administration effective. As pointed out above the administrative authority has the right to supervise how the concessionaire is managing the provision of the public service. On top of this and independently from the contract and as part of its regulatory power, the administrative authority may issue directives regulating public order. The provisions of the contract should not be interpreted in a manner that will impair such

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measures of the administrative authority. It is this point that is emphasized in Article 3211 of the Civil Code.

4.1.3.2.Variation of tariffs

Even though a contract for the concession of public service is concluded between an administrative authority and a private enterprise called the grantee or concessionaire, the object of the contract is the supply of public service to the public. As pointed out above the grantee may be entitled under the contract to supply the service by collecting fees from users of the service to recoup the capital it invested to run the public service. As will be seen below, the tariffs to be collected by the grantee from the users is to be fixed by the concession agreement. As time progresses situations may arise that necessitate making adjustment on the tariffs fixed in the contract. There may be increase on the price of the goods that the grantee uses as input to make the service available. In such cases it is essential that adjustment be made on the originally agreed tariffs of the service.

When such situations arise the first thing to look at is the concession agreement if it has anything to say about variation of tariffs. As indicated under Article 3212 of the Civil Code it is possible to stipulate in the concession agreement the possibility of revising the tariffs when economic events justifying such modification arise. Such tariff variation clause in the agreement may provide for automatic adjustment proportionate to the increase in the price of inputs to be made on the tariff of the service. If there is such stipulation in the concession agreement, whenever there is increase on the price of inputs of the service a new tariff will be fixed by automatic adjustment proportionate to such increase on the price of inputs. This means no new negotiation between the concessionaire and the administrative authority is required or taking the matter to the court is not necessary. If there is disagreement on the actual application of the variation formula, the matter will be referred to court and the court will fix new tariff by applying

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the price variation clause of the concession agreement (Art. 3213 Civ. C.). On the other hand, sometimes the concession agreement may simply provide for revision to be made when economic events affect the price of inputs of the service without actually providing the variation formula. In such cases the grantee and the administrative body have to negotiate and make amendment to that part of the agreement that regulates tariff and prices of the service. Failing such agreement the matter has to be taken to court and the judge will fix an equitable tariff to be collected by the grantee from the public that use the service (Art. 3214 Civ. C.).

Thus whenever situations that necessitate the revision of tariffs of the service occur, the grantee can invoke the clauses of the concession agreement that deal with tariff adjustment. Unless there is a clause in the contract limiting such privilege, from the day the grantee assumed the running of the service it can invoke tariff adjustment clauses of the concession agreement whenever there arise economic events that justify adjusting the existing tariff of the service. The grantee cannot however invoke the tariff variation clauses for economic events that occurred after the expiry of the normal time laid down for the performance of its obligations unless it is due to an authorized extension of time (Art. 3215 Civ. C.).

Finally, it should be noted that the fact that there is no clause inserted in the concession agreement concerning variation of tariffs and prices of the concession does not mean that the grantee has no right to seek adjustment on the tariff to be collected from users when there is increase on the price of inputs of the service. In the first place the grantee can propose to the administrative authority for adjustments to be made on tariffs and prices of the service it provides to the public. Obviously, in the same way they made the concession agreement they can modify it, including the provisions of the agreement concerning tariffs. If they are unable to reach agreement on the revision of the tariff, depending on the specific factor that increased the price of inputs of the service, the grantee can invoke either the doctrines of *imprévision* or *fait du prunce* to seek judicial

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adjustment of tariffs. The grantee has this alternative remedy when the provisions of the concession agreement do not help him to adjust tariffs of the service despite increase on the price of inputs of the service.

4.1.3.3.Unilateral Variation of the Concession Agreement by the Administrative Authority

As pointed out earlier the main purpose of a concession agreement is to make essential public service available to the public in cooperation with a private company. Since concession agreements concern the general interest of the public they are different from contracts in which the parties seek to maximize their profit. It is essential that the provision of the public service is made in line with the purpose of the concession agreement. And ensuring that this happen is the responsibility of the administrative body established to undertake the organization and provision of the public service the actual provision of which it has transferred to a private enterprise by a concession agreement. As explained above the contracting administrative authority has the right to supervise and control the provision of the public service by the grantee. In order to make the administrative authority's responsibility to ensure the supply of public service more effective, in addition to the right to supervise the activities of the concessionaire, the administrative authority has the prerogative to unilaterally modify the terms of the concession agreement. Article 3216, which adapts the general administrative contracts law stipulation of Article 3179 to contracts for the concession of public service, empowers the contracting administrative authority to make modification on the terms of the concession agreement with a view to ensure that the public service is run properly. According to this provision, the contracting administrative authority can, during the currency of the concession agreement, impose on the grantee all the obligations which it thinks appropriate for the proper operation or improvement of the service granted. The administrative authority can modify the way the service is

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organized as specified in the concession agreement or in the specification. Since the administrative authority is made to possess such right to unilaterally modify the terms of the concession to protect the interest of the public, any stipulation whereby the administration waives this right have no legal effect.

It should be noted however that there are limitations on the power of the administrative authority to make unilateral modifications on the terms of the concession agreement. While there are terms of the agreement which the administrative authority cannot unilaterally modify, limitations are also imposed on the permissible type of modifications. In the first place, as indicated in Article 3217, only the clauses of the concession agreement concerning the service and its operation may be modified by the administrative authority. In particular the administrative authority can demand the grantee to increase or decrease the supply of the service or to extend the operation of the service for extra duration than that indicated in the contract.

As pointed out above the right of the administrative authority to modify the terms of the concession is not without limitation. The law provides limitations regarding the extent of the modifications that can be made by the administrative authority. The administrative authority cannot impose such modifications in the organizations of the service as would actually modify the nature or object of the contract. The administrative authority cannot also order the grantee to provide a service different to that which has been granted or to manage a new service or a service which surpasses the capacity of the grantee. Unless the grantee has suddenly interrupted the provision of the service the administrative authority cannot bring the management of the concession under state control by way of modification of the concession agreement (Article 3218 Civ. C.). In general, since the basis of the relationship between the grantee and the administrative authority is the contract, the autonomy of the contract should survive the power of the administrative authority to unilaterally modify the concession agreement.

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Over and above this, there are certain clauses of the concession agreement which the administrative authority is not allowed to modify. As stipulated in Article 3219(1) of the Civil Code the administrative authority cannot modify the provisions of the concession which determine the financial benefits of the grantee. In particular the administrative authority may not act to prejudice if there is any privilege of the grantee to exclusively supply the service by attempting to supply the service by its own or letting others to involve in the provision of the service.

This being the rule, however, the administrative authority can unilaterally modify the tariffs to be charged by the grantee from users of the service. In such cases compensation must be paid to the grantee to make good the damage that such modification cause to him. This exceptional rule is animated by the need to make public services affordable to the common people and is normally related to cases of services which are subsidized by the state. Under some economic circumstances the price of the service provided by the grantee may not be affordable for the common people and as a resulted may be prevented from using the service. In such cases the administrative authority which is in charge of making sure that the service is being properly provided to the public has to take measures that will ensure that the service is made affordable to the public without at the same time afflicting economic loss on the grantee. This compromise is achieved by allowing the administrative authority to decrease the tariffs of the service and pay compensation to the grantee for the loss he may sustain as a result of such unilateral measure by the administrative authority.

An important point worth raising in connection with the power of the administrative authority to unilaterally modify the concession agreement is the right of the grantee to claim compensation. When the administrative authority by using its prerogative to unilaterally modify the concession agreement orders the grantee to alter the way the service is being delivered or increase or decrease the amount of the service being provided or extend the period for which the service is to be provided, obviously the

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grantee will incur costs. In such cases the administrative authority has the obligation to compensate the grantee to the extent of the loss that the latter sustains (Art. 3220 Civ. C.). As stipulated under Article 3220(2), the compensation payable to the grantee is to be equal to the increase of the obligations imposed upon him by the administrative authority. This provision seems to limit the payment of compensation to the grantee only in cases where the loss is as a result of the increase of the obligations of the grantee as a result of the variation orders of the contracting administrative authority. The grantee may also sustain loss not just because of increase of his obligation but also from an order to decrease the amount of service he has to supply. As a result of an order to decrease the amount of service he has to supply goods and supplies that are in stock may be rendered useless. This obviously results in economic loss to the grantee and there is no reason not to pay compensation to the grantee. Article 3220(2) has to be read in light of Article 3181(1) and compensation equal to the loss sustained by the grantee has to be paid.

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4.1.3.4. Relation of the Grantee with Users

As noted above even if the concession agreement is concluded between an administrative authority and a private firm, referred as the grantee or concessionaire, the purpose of the agreement is to ensure that a given public service is properly provided to the public. Even if at the time of the conclusion of the grant agreement the administrative authority bargains with the grantee as if it is for its own benefit, strictly speaking the negotiation by the administrative authority is for the benefit of the public. As a contract for the concession of public service is an important exception to the principle of privity of contract enunciated in Article 1731 of the Civil Code.

By taking cognizance of the fact that the agreement concluded between the administrative authority and the grantee is ultimately for the benefit of the public that

uses the service to be provided by the grantee, the law maker has laid down rules (Arts. 3221 – 3226) that govern the relationship between the grantee and users.

Of course the relation of the grantee and users is primarily governed by clause incorporated in the concession agreement concerning such relationship. In this regard Article 3223 stipulates that the grantee may not by an individual agreement with users derogate the general rules of the service provided in the concession agreement. The provisions of the concession are as well binding as between the grantee and the users and it cannot be derogated by agreement as between the users and the grantee. This prohibition is purposely done to avoid manipulation of the service by the grantee and maintain the spirit of the concession agreement which is designed to ensure the accessibility of the public service at affordable price.

The relationship between the grantee and users of the service is characterized by the provision of service by the grantee and the payment of the price by the users for the service they utilized. The price to be paid by the users is normally fixed by the concession agreement. The concession agreement may provide a fixed price in which case the concessionaire has to charge only that fixed amount. In other cases the concession agreement may stipulate only the maximum tariff by leaving the determination of the exact tariff to be charged to be determined by the grantee. In Such case the tariff will be that which is fixed by the grantee (Art. 3221 Civ. C.).

The other aspect of the relationship of the grantee and the users is that the grantee has to treat users equally (Art. 3242 Civ. C). Neither the administrative authority nor the grantee may adopt measures that discriminate between users. In particular different categories of tariffs may not be fixed in respect of different category of users. Of course when the condition of use of the public service is different in respect of some category of users different category of tariff may be justified. For instance fixing different tariff for those who use the service for commercial purpose and for those who use it for household consumption may be justifiable.

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It is important to note that this prohibition of discrimination among users is applicable not only to users of service provided under a concession agreement, but also to industrial and commercial public services which are run in accordance with the rules of private law (Art. 3224(3) Civ. C.). Thus industrial and commercial undertakings which run services which are in the nature of public service have to treat their customers equally. They cannot invoke the fact that they are governed by the rules of private law (which imply freedom of choice with whom to contract) to discriminatorily treat users of their services. This rule is intended to ensure the accessibility of essential service to the public despite the fact that they are run by private commercial undertakings.

In the course of the operation of the concession by the grantee irregularities may occur in the relationship between the grantee and users. There may be defects in the quality, quantity or distribution of the service provided by the grantee. The grantee may have collected undue payment from users or there may be payments that are due to the grantee and which are omitted by oversight. Such irregularities have to be rectified either by mutual agreement or through court of law. Claims either by the grantee or users arising from such irregularities have to be claimed within one year from the day when the irregularity occurred (Art. 3225 Civ. C.). In connection with this it must be noted that the contracting administrative authority cannot claim compensation from the grantee by reason of the loss caused by the grantee to users of the service by non-observance of provisions of the concession agreement (Art. 3226 Civ. C.). For any irregularities that may occur in the course of operation of the service and which result in economic loss for users it is only the users themselves that may claim compensation by litigating by their own. The administrative authority cannot claim for itself or represent users and claim on their behalf.

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4.1.4. Duration and Termination of the Concession

Like any other contract, a contract for the concession of public service is to last only for a determined period of time. Normally the duration of the concession is to be determined by the agreement of the grantee and the administrative authority. In the same way that they have the capacity to create the concession agreement, they can also freely fix the duration of the concession agreement. Of course it is stipulated in Article 3227(2) of the Civil Code that the maximum duration of the concession agreement may not exceed sixty years.

Where however the duration of the concession is not fixed in the concession agreement, it is deemed that the concession is made for a period of seven years (Art. 3227(3).

It should however be noted that the concession agreement may not necessarily terminate upon the expiry of the duration fixed by the law or agreement of the parties. Depending on the situation an agreement may be made to extend it for extra duration. In fact the rule is that unless an express declaration to terminate the concession is made by one of the contracting parties two years in advance of the date the concession expires, tacit renewal of the concession is presumed (Art. 3228 Civ. C.). In addition to this, even if the agreed period of the concession expires, the administrative authority can, by its decision as part of its prerogative to unilaterally modify the concession, extend the duration of the concession and order the grantee to continue supplying the service (Art. 3217(2) Civ. C.).

As pointed out above a contract for the concession of public service is not to last forever. For one or another ground recognized by the law it comes to an end. When we closely look at the law applicable to such contract we find the following ground of termination. These are in addition to the grounds of termination of contract recognized under the general contract law rules.

1. Expiry of the concession period

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2. Redemption of the concession by the administrative authority
3. Loss of right of the grantee

As explained above a contract for the concession of public service is always made for a determined period. That period is to be determined by the parties by keeping the legal maximum of sixty years or failing such stipulation by the parties the law deems the concession is as made for a period of seven years. Thus, at the completion of the period fixed by the parties or the law the concession will terminate. Of course for the termination of the concession to take effect at completion of the concession period, one of the contracting parties, either the grantee or the concessionaire has to inform the other party, two years in advance of the expiry of the period of the concession, its intention to terminate the concession at the completion of the concession period. In the absence of such prior notice, the contract is deemed tacitly renewed for another period (Art. 3228 Civ. C.).

Redemption of concession refers to the act whereby the contracting administrative authority puts an end to the concession before the expiry of its time even if the grantee has committed no fault (Art. 3236(1) Civ. C.). In the course of time the service provided by the grantee may loss its public service character or entirely restructuring the service may be necessary. In such cases the administrative authority may put an end to the concession to either abolish the service or reorganize it. This power of the administrative authority is the specific application to contract of concession of public service of the power of the administrative authority stipulated in Art. 3180. The concession may not, however, be terminated for the purpose of transferring it to another grantee unless the first grantee has committed grave fault in the running of the public service (Art. 3236(3) Civ. C.).

If the grantee sustains loss as a result of the measure of redemption by the administrative authority, he has the right to claim compensation under Article 3237(2)

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of the Civil Code. The compensation to be fixed to the grantee shall have regard not only to actual loss but also to the profit which he could reasonably expect and which he is deprived by the redemption.

Loss of right of grantee refers to the measure of termination of the concession agreement for fault committed by the grantee in the performance of its obligation (Art. 3238 Civ. C.). Two points should be noted in connection with measures to terminate the concession due to the fault of the grantee. In the first place the measure of termination can only be taken for grave faults committed by the grantee. What amounts to grave fault is not defined by the law but it seems to refer to faults that affect the substance of the contract. Where however the fault committed by the grantee is not grave in nature the measure of termination of the concession may not be taken. In such cases only a measure of sequestration may be taken (Art. 3241 Civ. C.). Sequestration refers to the measure of temporary suspension of the grantee of its right to manage the concession and putting the management of the concession under state control.

Second, in principle the measure of termination may only be made by court unless the contract gives the administrative authority the power to unilaterally terminate the contract (Ar. 3238(2) Civ. C.).

The effect of the termination of the concession contract on any of the grounds mentioned above is also regulated by the law. The termination of the concession for any reason in principle entails the winding up of the concession and the settlement of accounts between the administrative authority and the grantee (Art. 3229(1) Civ. C.). This is to be done in accordance with rules contained in the concession agreement and the provisions of the law. Articles 3230 – 3235 are intended to regulate the winding up process of the concession in case of termination. Special rules relating to the winding up of the concession in case of termination of the concession due to the fault of the grantee are also provided in Articles 3239 and 3240.

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4.2. Contract of Public Works

4.2.1. Meaning

One of the common types of administrative contracts concerning which special rules are provided for in the Civil Code is 'contract of public works.' As indicated in Art. 3244(1) a 'contract of public work' is a contract whereby one party, referred to as the contractor, enters into an agreement with an administrative authority in order to undertake a construction work in return for some kind of payment by the administrative authority. When we say construction it involves a variety of activities such as building, installation, repairing, excavation, tunneling, etc. The undertaking of the contractor having contract with the administrative authority may be any of these sorts of activities. In connection with the functions for which they are established the government and its administrative authorities undertake various types of constructions. Buildings for school, health facilities, public libraries, power generation plants and irrigation, road, railway and airport constructions are among the many types construction works which administrative authorities undertake by expending billions of Birr.

In order to say a give contract is a contract of public work the private party to the contract must be directly engaged in the execution of the construction work. If the contracting party's duty is limited to supplying the materials necessary for the construction work and do not directly take part in the execution of the work, then the contract is not a contract of public works but a contract of supplies. It is this same point that is emphasized in Article 3244(2) of the Civil Code.

A contract of public work is not a simple bilateral contractual relationship between the administrative authority and the contractor. It involves a chain of contractual relationships and its execution requires, depending on the project size, huge capital investment, work and time. Unlike contract of loan or contract for supplies, a contract of public works, staring from the preparatory works (such as feasibility study, soil test,

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design preparation, identification and settlement of claims arising out of rights that may be affected by the intended construction) all the way through contract document preparation, tendering process and conclusion of the contract with the successful bidder requires substantial amount of money, time and human resource. After conclusion of the contract its execution involves different parties and, depending on the project size and type of the work, requires manpower and material in the right amount.

It is by recognizing this complicated nature of contract of public works that the lawmaker has provided special rules governing contract of public works (Arts 3244 – 3296). Of course these are not the only rules that apply to contracts of public work. In addition to these, the general administrative contract law provisions (Arts. 3134 – 3206); Proc. no. 649/2009 and the accompanying directive; private construction law rules as contained in Articles 3019 – 3040, 2610 – 2631 of the Civil Code; Ethiopian Building Proclamation no. 624/2009 and general contract law rules (Arts. 1675 – 2026) are applicable to contracts of public work.

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4.2.2. Formation of Contract of Public Work

Like any other contract the conclusion of contract of public works must comply with the validity requirements provided by law. Of course the requirements for the formation of contract of public work are the same as those discussed in connection with the formation of administrative contracts in general. Needless to say, the formation of contract of public works must fulfill requirements as to consent, capacity, object of contract and form prescribed by law.

Furthermore, like other government contract the award of contract of public works must comply with the procedures for the allocation of government contracts. As discussed in the chapter on the formation of administrative contracts in general, there are various procedures available for the allocation of government contracts among

interested contractors. These include open bidding, restricted tendering, two-stage bidding, request for proposal, price quotation, and direct procurement. A contract of public work can be concluded by applying any of these contracting methods in so far as the intended contract of public work fulfills the conditions for the application of the particular type of contracting method. From among these contracting methods it is only Request for Proposal method that cannot be used for contract of public works. Request for Proposal method is to be used only for procurement of consultancy services and as such it is not suitable for the allocation of government construction contracts. Otherwise depending on the particular situation one or the other of these contracting methods can be applied as appropriate for allocating government construction contracts. Applying the appropriate contracting method is not discretionary; it is rather a must for the contract to be valid. Finally it should be noted that although Articles 3246 – 3249 provide rules concerning the award of contract of public works, these are no longer applicable as they are impliedly rendered inapplicable by Proclamation no. 649/2009.

The other issue that must be considered in connection with the formation of contract of public works is the choice of the contract type suitable to the particular construction project. There are various contract types/models that are used in the construction industry in general. The most common types include: measurement contract, turnkey contract, and cost-plus fee contract. These are by no means the only types of contracts and there are many more variants of these. The choice of one or the other of these contract types has effect on the allocation of risk as between the contractor and the client, cost and quality of the work and time needed for completion of the work. The contract type also in most cases determines how the price payable to the contractor is to be fixed. These contract types will be described briefly.

A. **Lump-Sum Contract-** It is a contract whereby the contractor undertakes to accomplish the construction for a fixed sum of money as quoted in its tender document. Use of this type of contract implies that design is complete and final.

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This kind of contract can be used for the construction of a part or the whole of the work or for a package deal in which the contractor is responsible for both detailed design and construction. For this type of contractual arrangement it is essential that the work be capable of precise pre-estimation, since the contractor, after carefully analyzing the specification and drawings, must be able to ascertain all the various construction processes and expenditures required. Although the contract is awarded on the basis of a single lump-sum price, usually payment of a portion of this sum is made to the contractor on completion of each of a number of different stages of the construction work.

B. Measurement contract- Also known by the names admeasurement contract, re-measurement contract, unit price contract or the traditional method. 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 contracting and it is commonly used in developing countries including our country.

This is a contract type whereby the cost of the whole work is to be determined by a detailed measurement of the various parts of the work and the valuation thereof by reference to a schedule of prices attached to the contract. As the work is in progress or after completion, the whole of the work is re-measured, and payment made for the work actually done.

This type of contract takes two forms: Bill of Quantities and Schedule of Rates contracts. The essential difference between these types of admeasurmnet contracts is that in the Bill of Quantities contract the total contract cost is the tender sum which is given in respect of a fixed measure of work as set out in the Bills of Quantities, whereas in the Schedule of Rates contract the total contract cost can be calculated only upon completion of the contract and measurement of the quantity of the work done and valuation against the schedule of rates for each unit of work.

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C. **Cost Reimbursable Contract/Cost-plus fee contract**- This type of contract is used when the requirements of the project owner/client are vague or when it is desirable for design to proceed concurrently with construction. Such contracts are also used when the project owner wants to be directly involved in the management of the contract or to reduce the financial risk to the contractor. In this type of contract the contractor is reimbursed for all costs incurred during the execution of the contract, plus an agreed fee to cover overheads and profits. The fee may be determined by way of a percentage of the agreed actual cost or a fixed amount. While it may result in inflated cost since the contractor has no incentive to act economically, this type of contract is generally thought to result in good quality work.

D. **Turnkey/package deal contract-** As opposed to **Build Only** type contracts wherein the contractor assumes only the duty to construct based on a preset design, in turnkey type of contract both detailed design and construction are undertaken by one organization although part of the design or construction may be subcontracted to specialists. In this type of contract the contractor carries most of the normal design and construction risks. In a pure turnkey construction contract the contractor has the duty not just simply to exercise reasonable skill and care but a duty to produce a work that is fit for the intended purpose.

   Payment is generally on a lump-sum basis, although this is often broken down into elements or phases of work and payment is made in stages. The absence of a third party as designer streamlines communications and avoids disputed responsibilities.

These are the most common contract types that are used in the construction industry. An examination of the General Conditions of Contract for Works used by the Federal Government of Ethiopia reveals that lump-sum contract with an activity schedule and

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admeasurmnet contract with bill of quantities are the contract types that are used for construction works financed by the Federal Government.[41]

Once a decision is made on the appropriate type of contract and the winning contractor is identified by applying the right procurement procedure, a contractual relationship will be established between the administrative authority and the contractor. Of course the contract document is not a single simple document on which the parties put their signature. The contract document is made up of different documents that define rights and obligations of the parties. The contract document for public works consists of the following documents:

1. The signed agreement/contract form
2. Letter of acceptance of tender
3. Contractor's bid
4. Special conditions of contracts
5. General conditions of contract
6. Specifications
7. Drawings/designs
8. Bill of quantities or activity schedule

These are the documents that constitute the contract of public works. When there is inconsistency between any of these documents they will be given priority in this same order.

If the project is financed from external source obtained by way of loan or grant, the agreement for the loan or grant may sometimes form part of the contract document. When other countries or international financial institutions such as the World Bank, Africa Development Bank, European Investment Bank extend financial assistance in the form of either loan or grant for projects owned by the Ethiopian government they

[41] See Clause 37 of the General Conditions of Contract for Works (Wks-SBD-ICB).

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usually do so under an agreement the respective institutions conclude with the Ethiopian government. The loan or grant agreement usually specifies the conditions under which expenditure of the money obtained under the agreement will be made. To some extent it touches upon aspects of the contractual relationship between the administrative authority and the contractor such as inspection of the work, dispute settlement, etc. What happens with most international financial lending institutions is that they have their own standard conditions of contract which they prescribe to be part of the contract document for works financed by them. Some other institution may have no their own standard conditions of contract in which case they will prescribe the **FIDIC form**[42] to be used. For instance the World Bank has mandated the use of FIDIC form to cover works financed by it.

Thus, when the project is to be financed from external sources, the agreement document for the funding and other documents that are referred therein will from part of the contract document and may have the effect of replacing all or some of the provisions of the general and special conditions of contract mentioned in the above list.

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4.2.3. Parties Involved in the Execution of a Construction Contract

As pointed out earlier a contract of public work is not a simple contractual relationship. In most cases it concerns huge project, its execution is complex and involves the

[42] FIDIC stands as an abbreviation for Fédération Internationale des Ingénieurs Conceils (International Federation of Consulting Engineers). FIDIC form, sometimes also known as the Red Book, refers to standard contract clauses or model forms of contract intended to outline the main rights and obligations of the contractor and the client (project owner) in a standard form to be used permanently by parties who enter into construction contracts. The FIDIC forms or conditions are inspired by the English Institute for Civil Engineers (ICE) form, which in turn, was based on English law concepts and construction industry practice in the United Kingdom. Although the FIDIC form is based on UK domestic contract law, it is the most widely used international standard form for civil engineering projects. See Hani Sarie-Eldin, "Operation of FIDIC Civil Engineering Conditions in Egypt and Other Arab Middle Eastern Counties", *International Lawyer*, Vol. 28, 1994, pp. 951- 953.
The FIDIC form can be used in the public as well as the private sector. In some countries government bodies prescribe it as the applicable standard contract form for the contract of public works they conclude. In our country since the Public Procurement and Property Administration Agency has, albeit substantially a copy of the FIDIC form, issued standard conditions of contract for works, unless an external funding body requires so the application of the FIDIC form as it is to government construction works is excluded.

participation of different parties. The main parties that take part in the formation and execution of the contract include: the administrative authority as owner of the project, the consultant, project manager, and sub-contractors.

According to construction industry practice the party who seeks a construction work to be done for him is known alternatively by the names 'client', 'employer', 'project owner' and in connection with contract of public works it normally is an administrative authority. Its main role in the contract is employing the contractor, paying the agreed price, and discharging other obligations under the contract which enable the contractor to properly discharge its obligations under the contract. Finally it takes delivery of the work and put it to the use it is intended for.

The contractor, also sometimes referred to as the main contractor to distinguish it from sub-contractors that may be involved, is the party that undertakes the obligation to construct the work and deliver to the administrative authority.

The consultant, also identified by the terms 'consulting engineer', 'the engineer', and in case of building construction 'architect', enters into a separate contract with the administrative authority - consultancy contract. The consultant is not a party to the contract between the administrative authority and the contractor. It rather has a separate contract- consultancy contract- with the administrative authority under which it assumes the responsibility to prepare the design of the work based on description of requirements or conceptual design provided by the administrative authority and supervises the proper construction of the work by the contractor as per the design and specifications. It undertakes the supervision of the work on behalf of the client administrative authority, serves as the first instance dispute settlement body whenever dispute arises between the contractor and the administrative body, issues certificate of payment for the contractor, issues certificate of completion of the work and certificate of defects liability for the contractor.

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The project manager may be a separate entity having separate contract with the administrative authority or it may be a team of the contract administration department of the contracting administrative authority. Its responsibility is to look after, on behalf of the administrative authority, the day-to-day administration of the contract and act as a communication channel between the administrative authority and the consultant.

4.2.4. Performance of Contract of Public Work

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Once a contract of public work is established in the manner described above, it will be binding on the contractor and the project owner administrative authority. The contract creates rights and obligations for the parties and because it is a contract there arise the duty of the parties to perform their respective obligations in good faith. In this regard Article 3172 provides the governing principle. According to this provision the contracting parties shall perform their obligations diligently in the manner provided in the contract in a correct manner, deemed to be satisfactory according to the rules of art (technology) prevailing at the time and in the kind of activity concerned.

The rules governing performance of contract of public works are those that are discussed on the topic of performance of administrative contracts in general. In this section attempt will be made to highlight the rules that are peculiar to performance of contract of public works.

4.2.4.1.Right of the Administrative Authority to Supervise and Direct the Work.

As stipulated in Article 3250 of the Civil Code the contracting administrative authority has the right to supervise and direct the execution of the work by the contractor. According to this article the administrative authority has two main rights: supervising and giving direction regarding the execution of the work.

One of the prominent features of contract of public works is the right of the administrative authority to supervise the activities of the contractor in the course of the

performance of the contract. As indicated in Article 3250(1) and reiterated in Article 3251 the contracting administrative authority has the right to supervise the performance of the contractor. Article 3251(1) hints that the administrative authority will exercise the supervision through its representatives. Since supervision and inspection of a construction work requires skill and expertise the administrative authority has to be assisted by professionals. Some professional must be placed instead of the administrative authority officials and carry out the supervision professionally. And normally this supervision work is done by the consultant/consulting engineer which the administrative authority enters into contract with for this purpose. When the project size is small and the work is not complex the supervision task may be carried out by a team of experts in the contract administration department of the administrative authority.

The main responsibility of the consulting engineer or any one entrusted with the responsibility to supervise the work is checking whether the work is being done in accordance with the design and specification of materials. For this purpose the representatives can at any time visit the site of the construction and require the contractor to produce information necessary for their control (Art. 3251(1) Civ. C.). They can inspect the works done, may take measurements, and take sample of the materials used as input and test in a laboratory to check whether it conforms to the specifications in the contract. The contractor has the duty to cooperate for these measures.

The right of the administrative authority, acting through its representatives, to supervise the work is not limited only to inspecting the wok done. The supervision extends also to checking things that have effect on the quality of the work. In this regard the administrative authority has the right to check the quality and propriety of the construction machineries and the key personnel used in the construction. As indicated in Article 3173 of the Civil Code, unless there is contrary agreement the contractor has the liberty to choose the materials and recruit the personnel necessary for the

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construction work. Even if the contractor has this liberty the administrative authority will not be prevented from controlling the quality of the materials and the personnel to be used by the contractor. According to article 3255 the administrative authority has the power to control the means to be employed both as regards personnel and the material and may require that employees be changed or dismissed.

The administrative authority can also supervise whether the contractor is observing the regulations provided in order to ensure good order and security in the construction sites (Art.3251(2) Civ. C.). The contracting administrative authority may prescribe rules that are intended to ensure safety and security in the work site. These regulations may concern protection of the environment, safety and order, protection of historical and archeological sites, protection of residents from injury or displacement as a result of the construction. The contractor has the obligation to observe such regulations and the administrative authority has the right to follow up that the regulations are being observed.

The other right that is given to the administrative authority with a view to help it ensure the proper performance of the construction contract it concluded is the right to give directions/work orders regarding the performance of the work by the contractor. Of course unless it is not accompanied by the power to give directions or prescribe the manner of performance of the contract, the right to supervise and inspect the work alone is of little importance to ensure the proper execution of the work to the satisfaction of the contracting administrative authority. Control over the execution of the work will be effective when it is accompanied by right to direct and prescribe the manner of performance of the contract. Realizing this Article 3250(2) of the Civil Code provides that the administrative authority can prescribe to the contractor the manner of performance of the construction work. Reiterating this, Article 3252 further provides that the administrative authority can direct by means of requisition orders the progress of the works and prescribe to the contractor the manner of performance of such works.

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And the contractor has the obligation to comply with the designs as may be provided to him from time to time by the administrative authority.

The power of the administrative authority to direct the performance of the work is not limited only to prescribing new ways of the performance of the work. In the course of the direction and supervision of the work the administrative authority may also require the demolition and reconstruction of any defective works at the expense of the contractor (Art. 3256 Civ. C.).

The contractor has the obligation to execute orders given to him regarding the performance of the work by the administrative authority. As stipulated in Article 3257(1) the contractor is obliged to comply with orders that are given to him in writing. Of course there are two exceptional cases whereby the contractor will be bound by orders given orally. And that is when either the orders given verbally pertain to works indicated in the specifications without causing any change thereto or the contractor has expressly agreed to be bound by orders given verbally.

Thus the contractor has in principle the obligation to carryout written and, in the exceptional case mentioned above, verbal orders given to him by the administrative authority regarding the performance of the work. If he wants to challenge the orders by lodging an administrative or court appeal he has to in the first place refuse to accept or the acceptance must be with reservation (Art. 3258 Civ. C.).

To sum up, we have seen above that the contracting administrative authority has the right, through its representatives, to supervise and direct the overall progress of the work. It should be noted that the extent of the right of the administrative authority to supervise and direct the work is such that it substantially distinguishes the law of contract of public works from private construction law. According to the rules of private construction law once the client provided the contractor with a specification of its requirements and design of the work he has no prerogative to supervise each and every activity of the contractor and how and when the work is done. Of course as per

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Article 3028 of the Civil Code the client has the right to cause the quality of the materials used and the work to be examined by experts. Else, it is up to the contractor to determine the manner of performance of the work. More importantly, as can be seen from Article 3033(1) of the Civil Code, the client in case of private construction contracts cannot demand alterations to be made on the originally agreed plan. The client's main right is seeing a work completed according to the specification and that can be put to the use it is intended for within the time specified in the agreement.

The law of contract of public works is different from in this regard. As explained above the contracting administrative authority has, through its representative, the right to closely supervise the work, determine the materials, machineries and the personnel to be used for the work and direct the overall performance of the work by issuing requisition orders to the contractor. And it is important to note that as indicated in Article 3260 of the Civil Code the fact that the contractor is performing the work under close supervision and direction of the administrative authority will not relieve him of liability for defective works unless the defective work is the result of carrying out requisition orders which he is bound to comply with.

The other issue worth considering in connection with the right of the administrative authority to supervise and direct the overall progress of the work is the right of the contractor to claim compensation. Obviously the supervision and direction measures by the administrative authority may cause inconvenience and economic loss to the contractor. The measures may delay its work, cause him to incur extra cost or reduce the profit he expects. Such cases raise the issue of whether compensation will be due to the contractor. As can be seen from the stipulations of Articles 3259 and 3256 of the Civil Code, the answer to this question is both yes and no. The contractor will not be entitled to compensation if the measure taken pertains to correction of defective works or it is a normal exercise of power of control of the administrative authority within limits prescribed in the contract. On the other hand if the contractor sustains loss as a

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result of the fault of the administrative authority in the course of supervision and direction of the work the contractor will be entitled to compensation to the extent of the damage caused to him. As per Article 3259(3) the contractor will be entitled to compensation even if no fault is committed by the administrative authority where the measures of control have increased the cost of performance of the contract. As part of the supervision and direction of the progress of the work, the administrative authority may order the postponement of the construction of some part of the work or modifications to be made on works already completed. Such measures may make performance of the contract by the contractor more onerous than he foresaw at the time of the making of the contract. In such cases the contractor will be entitled to compensation for the expenses and damages he sustained.

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4.2.4.2. Time of Performance of Contract of Public Works

As discussed in the preceding Chapter in connection with performance of administrative contracts in general, Article 3174(1) provides that parties to an administrative contract have to perform their obligations within the time specified in the contract. Of course this rule will be applicable only when the parties have specified in their contract the time for the performance of obligations. If no time is specified in the contract, the parties have to perform their obligations within reasonable time having regard to the nature of the obligation and the circumstance of the case. As stipulated under Article 3175 the administrative authority has no prerogative to fix the time for the performance of the contract unless such power is given to it under the contract.

In case of contract of public works the rule is slightly different. If the contract of public work specifies the time within which the contract is to be performed the contractor has to perform the work within that prescribed time. If the contract does not fix the time of performance or it is indicated only in a general way by using phrases such as "within a

short time“ or “as soon as possible” or “within a reasonable time”, the administrative authority can fix the exact time for the performance of the contract (Art.3253 Civ. C.). The administrative authority can fix the general period for the performance of the entire work and the time for the performance of each part or phase of the work.

If the contract does not fix the time of performance and the administrative authority fails to provide a time table for the performance of the work, the contractor will have to perform his obligation within a reasonable time. This is the last way out to determine the time for the performance of contract of public works.

The other issue that must be discussed in connection with time of performance of contract of public works is the starting period or time of commencement of performance. The question is as of when is the contractor supposed to commence performance of the work? Article 3254 addresses this issue. As per Article 3254(1) the contractor has in principle to commence performance from the date of the conclusion of the contract. The provision uses the phrase “… date of notification of contract”, it must be taken to mean the date of conclusion of the contract.

Sometimes commencement of performance by the contractor may be conditional upon a decision or material act on the part of the contracting administrative authority. In the contract it may be provided that the contractor will commence performance when the administrative authority gives the go ahead or the administrative authority may have to deliver the site by clearing from claims or make advance payments. In such cases the contractor will have to commence performance from the date of the completion of the required acts by the administrative authority (Art. 3254(2) Civ. C.).

4.2.4.3. Payment of Price

Like in any other contract, payment of price is one aspect of the performance of contract of public works. Paying an agreed amount as price is the main obligation that the administrative authority assumes towards the contractor.

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As construction work itself is complex and its performance involves in most cases complicated process, it has also the effect of making payment of the price a complicated process. Recognizing this fact the law has provided detailed rules (Arts. 3261 – 3273) regulating the payment of price and settlement of account between the contractor and the administrative authority. The law provides for various alternative methods on how the price payable to the contractor is to be determined and paid out. These provisions address how the price payable is to be determined, and when and how payment is to be made.

A look into the provisions of the law dealing with the determination of the amount payable as price tells that the determination of the amount payable as price is dependent upon the type of contract, i.e., whether it is lump-sum, admeasurment or cost –reimbursement type.

Article 3261 is referring to lump-sum types of contract. According to this provision the price payable to the contractor may be fixed by way of lump-sum. In such type of contracts the contractor assumes the obligation to undertake the construction of the work for a fixed and non-adjustable price. The contractor is bound to execute the work in accordance with the specifications or drawings and having no right to additional payment if he should find it necessary to do extra, uncontemplated work in order to carry out the contract. In such contracts the amount due to the contractor is only that which is indicated in the contract as lump-sum/fixed price.

Article 3262 is referring to admeasurment contract with schedule of rates where the contract is restricted to prescribing only the rates/prices payable for each part or unit of work without specifying the extent of the work to be done. This type of contract is adopted when it is not possible to know the exact quantity of the work to be done. In this type of contract the total amount of price payable to the contractor is determined by measuring the work done at the end of the work and valuing it against the unit rates/price indicated in the contract.

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Article 3263 is referring to admeasurement contract with bill of quantities where the contract specifies the quantities of the work to be done and the series of price for each part of the work. In this type of contracts the bills provide the measure of work for which the agreed price is to be paid. If the actual quantities of work done in performance of the contract exceed the estimated quantities in the bills, the contractor is entitled to additional payment in accordance with the rates in the bills.

The cost reimbursement type of contract is provided under Article 3264 [43]of the Civil Code. In this type of contract the professional fee (profit) of the contractor and the cost of performance of the work are set separately. The fee payable to the contractor is set at a fixed amount, subject to no increase or decrease. The cost estimate for the performance of the contract is not however binding. The administrative authority (client) agrees to cover or reimburse the contractor all allowable expenses incurred by the contractor in the course of the performance of the contract. In order to provide an incentive to the contractor to be economical, such contacts usually establish an estimate of total cost and a ceiling that the contractor may not exceed unless at the contractor's own risk and cost. Thus under this type of contract, the amount payable to the contractor will include the fixed fee and the reimbursements for all the allowable expenses incurred by the contractor for the performance of the contract.

Article 3265 is about contract by order where the contract restricts to setting a provisional price corresponding to essential services required to be performed in the contract. This kind of arrangement will be made when circumstances do not allow an assessment of the extent of the work at the time of the conclusion of the contract. In such cases a provisional price will be indicated for essential services or technical phases of the work such as, in connection with hydropower project, arch-dam construction, tunneling, electromechanical installation, etc. Such contracts must include a clause

[43] See the Amharic version of this provision. The English version seems defective.

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regarding how the final price is to be determined or failing such stipulation in the contract as per Article 3265(3) the administrative authority will determine the final price due to the contractor.

That is how the price payable to the contractor under a contract of public works is to be determined. The other issue that is worth considering in connection with price payment is the mode of payment. As per Article 24 of Council of Ministers Financial Regulations no. 17/1997 payment, whenever it is due, shall be made by means of cash, cheque, letter of credit, bank transfer or payment order.

The other issue is time of payment of price. Price will be paid at the time indicated in the contract. There are different possibilities of fixing the time for payment of price. The contract may indicate that the whole sum be paid at the time of final acceptance of the work. In that case the contractor will be entitled to the sum only after final acceptance of the work by the administrative authority is effected. Alternatively, the contract may provide for price to be paid in installments following the successive completion of the works at various phases. In such cases the contractor will be entitled to the installments at a recognized interval or on completion of a distinct part of the work. In order to claim the installment the contractor must prepare a provisional calculation of the works performed and expenses incurred by him in order to serve as a basis for the payment of the installment after verification by the consulting engineer (Art. 3270(1) Civ. C.). The installment to be paid is only in respect of works already completed and the amount shall be equal to the value of the materials or machineries supplied or expenses incurred for works already completed (Art. 3270(3) Civ. C.). Where there is no reference point indicated in the contract for the payment of installments, it shall be made ever three months (Art.3270 (2) Civ. C.).

Article 3269 provides that the contractor can as of right demand the payment of installments once he deposited in the construction yards machineries or workshop

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materials or supplies owned by him and to be used for the construction work or upon paying wages for labour employed exclusively for the performance of the contract.

Sometimes the payment of the total final price or installments may be dependent upon an ascertainment or measurement of the works done by the administrative authority or its representatives. In such cases the required measure of ascertainment shall be made within the time specified in the contract for such acts of ascertainment. If there is lapse of fifteen days after the expiry of such period the contractor will automatically be entitled to interest on payments that are due to him, where the delay, of course, is attributable to the fault of the administrative authority (Art. 3268 Civ. C.). This provision is intended to guard the contractor from carelessness on the part of the contracting administrative authority.

The issue of advance payment is regulated under Article 3271. According to this provision the contractor can ask for advance payment from the contracting administrative authority in respect of the performance of the contract. The advance payment will be made only after the contractor deposited security or naming a guarantor to guarantee reimbursement of the money paid in advance in the event that the contractor fails to perform the contract despite the payment of advances. What happens in practice is that the contractor who wants to receive advance payments has to produce advance payment security in the form of an unconditional bank guarantee. The sums advanced to the contractor will be deducted from the sums finally due to him by way of installment or final settlement.

An important and final step in the payment of price is final calculations or final settlement of accounts between the contractor and the administrative authority. This is an act to determine the final and conclusive price payable by the administrative authority to the contractor (Art. 3272(2) Civ. C.). This final calculation of price may take place after or before completion of the work, when determined period has passed after commencement of performance, or a specified part of the work has been performed. It

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is a joint act of the administrative authority and the contractor. The final calculation will have legal effect only if it is accepted by the contractor (Art. 3272(2) Civ. C.). This is to say that the administrative authority cannot unilaterally determine the final price.

It should be noted that the issue of final calculations is relevant only for contracts other than lump-sum type contract. In lump-sum type of contract since a non-reviewable lump-sum price is fixed in advance, the need for final determination of price will not arise. Determination of final price or final settlement of account is relevant for cost reimbursement contracts or admeasurment type contracts that involve readjustment of price.

4.2.5. Variation/Revision of Contract of Public Works

As mentioned in the discussion on administrative contracts in general, revision/variation of the terms of the contract is one aspect of the performance of administrative contracts. Contract of public works are no exceptions to this phenomenon. For that matter the need for revision of the terms of the contract frequently arises in connection with contract of public works since their performance is complex and takes long time.

Once performance commenced following the conclusion of the contract and as time passes circumstances may change necessitating the revision of some aspects of the contract. The requirements of the administrative authority may change as to the form and manner of execution of the work. In such cases there arises the need to revise the contract. The preferred solution in such cases is to revise the contract by mutual agreement. So long as the motive for the revision of the contract is lawful and it complies with the formality requirements for the formation of the contract itself, revision by agreement is an option that can be freely employed by the parties. Revision by agreement is a corollary of freedom of contract and it is one way by which the

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contract of public works can be modified. In addition to this contract of public works can be revised by the contracting administrative authority unilaterally or by the court.

A. Unilateral Variation by the Administrative Authority

Under the law of contract of public works the right to unilaterally modify the contract is a power given only to the contracting administrative authority and it normally arises from the principle enshrined under Article 3179 of the Civil Code dealing with administrative contracts in general. This right which is provided under Article 3179 of the Civil Code is reproduced for contract of public works in Articles 3283 and 3284 of the Civil Code. According to Article 3283 of the Civil Code the administrative authority can unilaterally impose upon the contractor changes in the original conditions of the contract as indicated in the specification. The unilateral modification may affect only the execution of the work and it may not affect financial/price elements of the contract.

As can be understood from the reading of Article 3284 of the Civil Code, the contracting administrative authority can also order the contractor to perform works which were not mentioned in the contract.[44] This right of the administrative authority is limited by conditions. According to sub-articles 2 and 3 of Article 3284, not only that the administrative authority has to pay for the extra works done by the contractor, its right to demand extra work is limited to what is reasonable under the circumstance. The administrative authority cannot demand the contractor to do a work which is totally different from that mentioned in the contract or require the contractor to perform the work under conditions entirely different from those mentioned in the contract. The increase or decrease of the obligations of the contractor by the unilateral measure of the administrative authority should not be beyond what can reasonably be expected by the contractor at the time of the conclusion of the contractor. The reading of Article 3285(1)

[44] This right of the administrative authority is indicated in Article 3266(1) of the Civil Code. We can say that the stipulation under Article 3284(1) is an unnecessary repetition.

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indirectly tells us that the increase or decrease in the obligation of the contractor is said to be excessive or disproportionate when the decrease or increase required by the administrative authority involves a variation of more than one-sixth of the cost motioned in the contract.

Corresponding to this right of the administrative authority to unilaterally vary the contract are remedies of the contractor who is affected by the unilateral measure of variation. The measure of variation may be excessive or, even if it is reasonable, it may have the effect of increasing the cost of the contractor or decreasing the profits the contractor expects from the contract. The contractor has corresponding remedies for any of these negative effects that the unilateral measure of variation may put upon him. These remedies are provided in Article 3285 of the Civil Code which adapts Articles 3181 & 3182 of the general administrative contract law provisions to contract of public works.

Thus, where the measure of variation of variation is excessive having the effect of varying more than one-sixth of the total cost of the contract, the contractor can declare the termination of the contract and may claim for any loss he sustained as a result of such measures. Where the extent of the measure of the variation on the contract is within limits provided by the law under Article 3284(2) & (3) of the Civil Code, but it has the effect of causing economic damage to the contractor, the contractor has the right to claim compensation to the extent of the damage he sustained. Under Article 3285(2) the compensation will cover actual cost incurred and loss of expected profits. The amount of compensation for deprivation of profit may be reduced where the variation is necessitated due to extraneous circumstances and not due to the fault of the contracting administrative authority.

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B. Judicial Variation of Contract of Public Works

As explained in the discussion on administrative contracts in general judicial variation of administrative contracts is possible only under the doctrines of *imprévision* and *fait du prunce*. In so long as a contract of public work qualifies as an administrative contract, it is also governed by these doctrines and whenever circumstances arise that give rise to the application of these doctrines, the contract will be revised by court of law. The part of the law dealing with contract of public works mentions under Article 3286 only the doctrine of *imprévision* as a ground for judicial variation of contract of public works. This does not mean that the doctrine of *fait du prunce* is irrelevant for contract of public works. It only means that the law maker wanted to incorporate some more specific rules regarding the application of the doctrine of *imprévision* to contract of public works.

Thus, where in the course of the performance of the contract, the contractor encounters a material difficulty of an absolutely abnormal nature unforeseen at the time of the conclusion of the contract, he may require that the contract be revised (Art. 3286(1) Civ. C.). When the existence of the unforeseen event presenting material difficulty to the performance of the contract by the contractor is ascertained, the contracting administrative authority has two options: either cancelling the contract or compensating the contractor. If the administrative authority chooses the second option, its responsibility is to cover only half of the exceptional loss that the contractor sustained as a result of the unforeseen event.

Related to the issue of unforeseen event Article 3287 provides that where the unforeseen event compels the contractor to perform a supplementary work (such as building connecting bridge to the site damaged by flood or land slide, constructing canal or ditch, etc.) not mentioned in the contract, in principle the contractor may proceed to do such work only after obtaining work order or approval from the administrative authority to do the work. Where, however, the work is absolutely essential for the

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performance of the contract and it is urgent in nature, the contractor can undertake the work without the need to wait for approval by the administrative authority.

Getting the approval of the administrative authority to do the supplementary works is essential for the contractor if he wants to be compensated for the work done. Where the work is urgent and essential for the performance of the contract, the contractor can do the work even without prior approval of the administrative authority; in that case he will be compensated according to the rules of unauthorized agency (See Art. 3287(3) Civ. C.).

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4.2.6. Non-Performance of Contract of Public Works and Its Effects

Under normal circumstances it is expected that the contractor will dully complete and deliver the work within the time set for the performance of the contract. Sometimes things may turn out contrary to this assumption. There are circumstances where the contractor prolong performance of the work or totally fail to perform part or the whole of the contract.

When this happens in case of private contracts the party affected by the non-performance of the contract may, depending on the particular circumstance, demand specific performance of the contract or require the cancellation of the contract and ask the payment of compensation for the economic loss he sustained as a result of the non-performance of the contract. In case of contract of public works the rule is somewhat different. Since administrative contracts embody public interest, the intention of the law maker is always to ensure the smooth execution of contracts and to avoid to the extent possible any interruption or delay in the performance of contracts. Thus the law does not prescribe as a main remedy the cancellation of the contract whenever the contractor fails to perform the contract. Specifically, in connection with contract of public works Article 3288(1) stipulates that when the contractor fails to perform his obligation the contract shall be put under state control. Put otherwise, when the contractor fails to

perform his obligations as per the terms of the contract, the administrative authority will take control of the execution of the work to ensure performance of the contract by using its own staff or by temporarily employing the service of another contractor.

In general there are three conditions that must be observed in order to put the performance of the contract under the control or management of the administrative authority:

- There must be failure of the contractor to perform the work;
- Before putting the contract under state control the administrative authority must give to the contractor at least 10 days default notice; and,
- When the non-performance pertains only to part of the work, as in the case where the contractor is undertaking construction at different sites, the placing under state control may affect only that part of the work which is affected by the non-performance.

The effect of putting under state control is that the contractor will be temporarily deprived of the management and operation of the contract (Art. 3289(1) Civ. C.). The management and operation of the contract will for the moment be taken care of by a person to be appointed for this purpose by the administrative authority.

It should be noted that the measure of placing under state control is only a temporary solution to the non-performance of the contract by the contractor. The performance of the contract cannot continue under the control of the administrative authority. In such cases the administrative authority has two options as a final solution to the situation. These are either reinstating the contractor to perform the work where it is shown by the contractor that he has the necessary means to resume performance and carryout the work to completion. Or, alternatively, when it is not possible for the contractor to resume performance, the administrative authority can allocate the performance of the

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contract to another contractor by auction or negotiation (See Arts. 3290 & 3291(1) Civ. C.).

Obviously, when the contractor fails to perform and the performance of the contract is put under state control, the management of the contract by the administrative authority and the process of re-allocation of the contract when reinstatement of the contractor is not possible, all have cost implications. These costs are to be borne by the contractor in default (Arts.3289 (2) & 3291(2) Civ. C.).

The other remedy available for the administrative authority is claiming the payment of liquidated damages if the contractor has delayed the completion of the work beyond the intended completion date. When we see the general conditions of contract used by the Ethiopian government, inserting a liquidated damages clause is an established practice.[45] The liquidated damages clause provides for certain percentage of the contract price (usually 0.1%) to be due to the administrative authority for each day of delay on the part of the contractor in completing the work. The liquidated damage to be due according to this formula should not exceed 10% of the contract price, in other words the amount of the performance bond or contract security. When the amount due as a liquidated damage equals 10% of the contract price termination of the contract will be declared by the administrative authority.[46]

Finally, mention should be made of the role of courts in connection with the measure of putting the contract under state control and related measures. In connection with this Article 3292[47] stipulates that the court cannot cancel the measure of coercion (putting under state control) or cancellation of the contract applied by the administrative authority against the contractor. The role of the court is limited only to awarding

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[45] See for example Clause 49 of the General Conditions of Contract for Works, International Competitive Bid (ICB) issued by the Public Procurement and Property Administration Agency, 2006.
[46] See Id., clause 59.2.g.
[47] See the Amharic version of this article. The English version seems to have a defective formulation.

damages to the contractor when it ascertains that the measure of putting under state control or cancellation is not applied properly.

4.2.7. Assignment, Sub-Contracting and Giving Contract in Security

In the preceding chapter dealing with performance of administrative contracts in general it has been indicated that the contractor can delegate the performance of part or the whole of the contract to a third party with the prior approval of the contracting administrative authority. While the transfer to a third party of the performance of the whole of the contract is referred to as assignment, the delegation of a third party to perform only part of the construction work is known as sub-contracting. Whereas assignment of the performance of the contract, in principle, relieves the original contractor from his obligation under the contract, in case of sub-contracting the original contractor remains liable for performance by the sub-contractor.

These rules concerning assignment and sub-contracting are also applicable to contract of public works. In fact the need for assignment or sub-contracting frequently arises in connection with construction contracts because of the vast and complex nature of the works such contracts involve. Recognizing this fact the special rules governing contract of public works incorporate some rules regulating the conditions and effects of assignment and sub-contracting of contract of public works. These rules are in addition to the rules governing assignment and sub-contracting of administrative contracts in general as contained in Articles 3201 – 3206 of the Civil Code.

If the performance of a contract of public work is assigned to a third party by observing the conditions provided by law, it is the assignee, not the original contractor, which is entitled to receive the price for the performance of the contract from the administrative authority (Art. 3294 Civ. C.).[48]

[48] There is a discrepancy between the Amharic and English version of this Article. In light of the effect of assignment of totally substituting the assignee for the original contractor the English version seems correct. If, as per Article 3205 of the Civ. C., the original contractor is substituted by the assignee and relieved of liability for

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In the same way, under Article 3295, the sub-contractor who is approved by the administrative authority has the right to claim payment of price for the work done by him directly from the administrative authority. This right of the sub-contractor is, however, subject to conditions and restrictions. In the first place, for the sub-contractor to be able to claim payment directly from the administrative authority, the main contractor has agreed and the nature and the value of the works to be performed by the sub-contractor has been specifically indicated in the sub-contracting agreement. Second, the list of works done by the sub-contractor shall be accepted by the main contractor. Third, direct payment to the sub-contractor may not be made where the main contractor has given the contract in security.

In relation to this it should also be noted that, as stipulated in Article 3296, the sub-contractor may in no case receive advance payments. He can claim payments only for works done. The rationale for this prohibition seems to be the fact that unlike the main contractor, the sub-contractor has no contract security deposited with the administrative authority.

The other issue that is specifically addressed in the section dealing with the assignment and sub-contracting of contract of public works is the possibility of giving the contract in security. As provided under Article 3293 of the Civil Code contract of public works may be given in security by the main contractor or by sub-contractors approved by the administrative authorities. In other words this means that the contractor can give as a security the right (payment of price) which he is entitled to claim after completing the work to enter into loan or credit agreement with financial institutions.

Finally it should be pointed out that the rules governing the assignment, sub-contracting and giving of contract in security are designed to facilitate the smooth

non-performance afterwards, there is no reason to assume that the original contractor will be entitled to claim payment of the price. Even in case of sub-contracting which has no effect of releasing the original contractor from liability for non-performance by the sub-contractor, the sub-contractor has the right to claim payment directly from the administrative authority.

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execution of contract of public works by enabling the contractor to get access to financial and other resource.

4.2.8. Delivery/Acceptance of Work

The main obligation of the contractor under a contract of public works is delivering a dully completed work. Deliver/acceptance of a dully completed work is an event that both the contractor and the client administrative authority eagerly long for. Since a contract of public work is in most cases huge and complex deliver/acceptance of the work is not an easy and a one-off act. It takes place at different stages: provisional acceptance and final acceptance. As we shall see below these involve different act and produce different effects.

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A. Provisional Acceptance

As per Article 3274(1) provisional acceptance is the joint ascertainment of the works made immediately after the completion of the work. Thus according to this provision a provisional acceptance is said to be made when the contracting administrative with the help of the consulting engineer and the contractor give a statement ascertaining the practical completion of the work. As the practice stands now, however, the event that marks provisional acceptance is the issuance by the consulting engineer to the contractor of a Certificate of Completion of the Work[49] – a document certifying the completion of the works that are supposed to be done under the contract.

As per sub-article 2 of Article 3274, provisional acceptance results also from the effective taking of possession of the works done by the administrative authority. Thus, even if a joint ascertainment of the completion of the work or issuance of a certificate of completion of the work is not made, provisional acceptance is deemed to have taken place when the administrative authority effectively takes possession of the works done.

[49] See Clause 55 of the General Conditions of Contract for Works, International Competitive Bid (ICB) issued by the Public Procurement and Property Administration Agency, 2006.

But, for such effective takeover of the possession of the work to qualify as provisional acceptance, takeover of the possession of the work must be made with reservation, i.e., at the time of entering into possession the administrative authority must declare that the takeover is only for the purpose of checking or verifying the works; that it is not meant to be final acceptance.

The occurrence of provisional acceptance in any of the forms described above produces different legal effects for the contracting parties. First, as per Article 3275(2), provisional acceptance implies a tacit acceptance of the modifications which the contractor has made on the project. In the course of performance of the work, for technical reasons or by oversight, the contractor may have made modifications on the plans or drawings of the work provided to him by the administrative authority. Once provisional acceptance is made it is deemed that these modifications are accepted by the administrative authority.

Second, as can be understood from *a contrario* reading of Article 3275(1), provisional acceptance exonerates the contractor from liability for apparent/patent defects, i.e., defects in the work which were apparent at the time of provisional acceptance. The contractor, however, remains liable for latent defects, i.e., defects which are not visible at the time of provisional acceptance but surface sometime after provisional acceptance is made.

Third, as can be seen from a close reading of Article 3276(1), provisional acceptance has the effect of transferring risk for loss or deterioration of the work to the administrative authority. From the commencement of the work until provisional acceptance of the work is made, the contractor bears the risk for damage or deterioration of the work as a result of any fortuitous event. From the moment of provisional acceptance of the work this risk will be transferred to the administrative authority.

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Fourth, as per Article 3275(3), provisional acceptance marks the beginning of the period of warranty, alias known as defects liability period, at the expiry of which final acceptance will take place.

According to Article 3277, the period of warranty or defects liability period that commences immediately after provisional acceptance is the period during which the administrative authority through the consulting engineer checks or verify the proper performance of the works before final acceptance. Its duration is not fixed by the law. It is expected to be determined by the contract and usually, in practice, it is fixed at twelve months from the date of provisional acceptance.

During the defects liability period the responsibility of the contractor is to repair defective works whenever he receives work order from the administrative authority acting through the consulting engineer (Art. 3278 Civ. C.). During the defects liability period the consulting engineer checks the work done for proper performance and whenever he finds defects he can order the contractor to correct the defects at his own expenses and the contractor has to carry out such orders.

B. Final Acceptance

The next step in the delivery/acceptance process of a construction work done under a contract of public works is final acceptance. As indicated under Article 3279 of the Civil Code final acceptance is the definitive takeover of the work by the administrative authorities after ascertaining that the contractor has performed his obligations in their entirety. As it is stated in the same article, the ascertainment that the works are done in their entirety has to be made jointly by the administrative authority and the contractor and a record or minute of the joint ascertainment shall be drawn up and kept. Practice shows that it is the issuance by the consulting engineer of Defects Liability Certificate, i.e., a certificate attesting that the contractor has corrected all defects, which marks final acceptance of the work. Article 3280 provides the possibility of effectuation of final

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acceptance of the work through declaration by court that the work is in a condition to be accepted where the administrative authority is reluctant to effect final acceptance of the work at the end of the defects liability period.

The taking place of final acceptance has its own effects. The first most important effect of final acceptance as stipulated under Article 3281(1) is it releases the contractor from the obligation to repair the works. In other words it marks the coming into an end of the obligation of the contractor to perform he assumed under the contract. At that point the contract comes to an end by performance.

Second, the contractor will be entitled to claim the payment of the balance of the price that is not paid to him. Final settlement of accounts regarding the price payable to the contractor will be made.

Third, the contractor will be entitled to reimbursement of the amount retained by the administrative authority as guarantee and of security. At the time of conclusion of the contract the contractor is required to deposit as performance bond (contract security) 10% of the total contract cost.[50] When payment is made by installment following the successive completion of the works 5% deductions is made from each installment as a security for the works done.[51] Upon final acceptance these will be released for the contractor since final acceptance epitomizes that the contractor has discharged all his obligations under the contract.

It should, however, be noted that final acceptance will not relieve the contractor from liability for defects in construction. For ten years from the date of taking possession of the work by the administrative authority, the contractor guarantees the proper execution and solidity of the work done by him.[52]

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[50] See Federal Public Procurement Directive issued by the Ministry of Finance and Economic Development, June 2010, Art. 16.25.2.
[51] Id., Art. 28.5.b.
[52] See Civil Code Arts.3282 and 3039 (1).

However, the liability of the contractor during this period is limited. In the first place the contractor is liable only for such loss or deterioration of the work due to a defect in workmanship or to the nature of the soil on which the work has been done.[53] Second, the liability applies only to latent defects, i.e., defects which were not visible at the time of final acceptance of the work.[54] Third, the contractor is liable only for major defects, i.e., defects which prevent the work from being used for the purpose it is intended for or renders such use more costly or reduce its profits.[55]

An important question worth raising at this point is, what is expected of the contractor during the period of warranty? The law does provide no clear answer. Certainly the contractor will not be required to undertake repairing the defective works since he is relieved of this obligation by the operation of Article 3281(1) of the Civil Code. The only conceivable responsibility of the contractor during this period of warranty, also known as performance warranty period, is to pay damages to the administrative authority for the loss which the latter sustains as a result of defects for which the contractor is liable. The defects may cause the administrative authority to incur costs to correct the defects and put the work to use. The defects may also reduce the life time of the work or reduce the production capacity in case where the work is a production facility. This events cause economic loss to the administrative authority and the contractor will be obliged to compensate such loss.

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[53] Id., Art. 3039(2).
[54] Id., Art. 3282(2).
[55] Id., Art. 3282(3).

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4.3. Contract of Supplies

One of the special types of administrative contract which the law maker thought deserve more specialized rules in addition to the general administrative contract law rules is contract of supplies which administrative authorities conclude with private parties for the purpose of acquiring goods which they need in order to discharge the duties they are established for. The contracts which the government and its administrative agencies conclude for the purpose of acquiring the goods which they need for their functions have their own unique features from the other contracts administrative bodies conclude, such as construction contracts or contracts for the concession of public service. Recognizing this fact the legislature has provided some special rules that are tailored to address the special features of contract of supplies. It should be noted also that the private contract law rules, particularly the law of sales (Articles 2266 – 2407 Civ. C.) are relevant to contract of supplies concluded by administrative authorities.

Basically administrative authorities have to conclude contract of supplies by following one of the appropriate procedures/contracting methods provided in Proclamation no. 649/2009. From the procurement procedures that are recognized by the Proclamation the one that may not be applicable to the conclusion of contract of supplies is Request for Proposal Procedure, since this procedure is destined to be applicable only for the conclusion of contracts having as their object the procurement of consultancy service.[56] Depending on the situation all the other procurement methods can be applicable for the conclusion of contract of supplies.

In generally, the conclusion of contract of supplies must fulfill all the requirements that are necessary for a valid administrative contract and which are discussed in connection with formation of administrative contracts in general. Once contract of supply is

[56] Proclamation no. 649/2009, Art. 53.

concluded in this manner since it is valid before the law and binding, the parties have to perform their obligations as per its terms.

In a contract of supplies the principal obligation of the supplier is to supply the good(s) as per the specifications and the right amount of quantity indicated in the contract. If increasing or decreasing the quantity of the goods to be supplied is in the interest of the administrative authority, its' right to do so unilaterally is guaranteed under Article 3179 of the Civil Code subject to the obligation to compensate the supplier, as per Article 3181, for the loss the contractor sustained as a result of such unilateral variation.

In a contract of supplies the supplier has the freedom to take the initiative and choose the manner of performance of the contract (Art. 3297(1) Civ. C.). It is up to the supplier to decide the manner of performance of the contract. In other words this is to say that the contracting administrative authority does have no right to direct and supervise the manner of performance of the contract, unlike in case of contract of public works. Since the supplier is wholesaler or retailer of agricultural or industrial products and is not involved in the making of the goods themselves it is not that important for the contracting administrative body to interfere in the performance of the contract and direct its execution. Thus the supplier may purchase the goods for the purpose of performance of the contract from whomever he likes (Art. 3297(2) Civ. C.). In other words the supplier can choose its own supplier, who may be a manufacturer or distributor.

It should be noted, however, that the freedom of the supplier to determine the manner of performance of the contract is not an unlimited one. Some aspects of the performance, such as time and place of delivery of the goods, may be limited by the contract.

As per Article 3299 the delivery and acceptance of the goods will take place in the manner and at the time specified in the contract. Where the place for the delivery of the goods is not indicated in the contract as per Article 2279 of the Civil Code delivery will

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take place at the place of business, and in the absence of such, at the normal residence of the supplier.

Acceptance of the goods by the administrative authority will take place after verification of the goods for conformity with the specification and they are free from defects (Art. 3302 Civ. C.). The date for the verification of the goods by the administrative authority or by experts employed by him should be informed to the supplier and that he should be allowed to be present at the verification venue and put forward his remarks in the process of verification. If the verification of the goods is effected at the supplier's premise the cost of verification (e.g. payment for experts, laboratory, etc.) shall be borne by the supplier himself. Where, however, the verification is effected in other place, the cost of verification shall be covered by the contracting administrative authority (see Art. 3302 Civ. C.).

If, upon verification the administrative authority finds that the goods supplied are not in conformity with the specifications indicated in the contract the administrative authority shall reject the supply (Art. 3301 Civ. C.). But, in order for the administrative authority to adopt such measure there are conditions that must be fulfilled. In the first place the administrative authority cannot take the measure of rejection for each and every deviation in performance from the specifications of the goods. As stipulated under Article 3301, the administrative authority may reject the supplies only when the defect is such as to affect the utility of the goods for which they are intended to be used by the administrative authorities. Second, the supplier must be given the opportunity to remedy the defects by giving extension of time (Art. 3300 Civ. C.). It is only when the supplier is unable or unwilling to remedy such defects within the required time that the administrative authority should take the measure of rejection of the supplies (in other words cancellation of the contract). As stated elsewhere in this text the desire of the law maker is always to ensure the smooth performance of an administrative contract since

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that helps to avoid breakdown in the running of public service or unnecessary transaction costs (such as costs resulting from re-tendering, etc.).

It should be noted that the existence of supervision, if there is any such supervision (may be arising from the terms of the contract) by the administrative authorities of the performance of the contract leading up to the delivery of the goods will not release the supplier from liability for defect in the goods (Art. 3303 Civ. C.). It will have no effect of restricting the right of the administrative authority to reject the goods which are found to be defective at the time of acceptance or to cause to be repaired a latent defect discovered during the period of warranty.[57]

Article 3304 refers to performance by reason of default. According to this article where the supplier fails to carry out an urgent delivery of goods or the contract is canceled because of non-performance, performance by reason of default may be ordered. The effect of this is that the administrative authority will be able to take the place of the defaulting supplier and purchase the supplies from another supplier. The effect of the administrative authority proceeding to purchase the goods by placing itself in the shoe of the defaulting supplier rather than by its own, it seems, is to enable the administrative body to recoup any expenses it incurred as a result of it having to enter into contract with another supplier. It is indicated under Article 3304(3) that the administrative authority has the right to claim damages from the defaulting supplier.

Even if the courts have the power to check the measure of cancellation of the contract or coercion applied by the administrative authority against the supplier they cannot cancel such measures. Except awarding damage to the supplier in case of inappropriate application of any of these measures the courts cannot give any other order (Art. 3305 Civ. C.). Although the supplier has the right to recourse to the courts under Article 3306, it can do so only after exhausting administrative remedies by making preliminary

[57] The period of warranty referred to here (under Article 3303) is the warranty known in the law of sales. As regards contract of supplies of administrative in nature there are no special stipulations in administrative contract law section regulating warranty. The rules that are applicable concerning warranty are all from the law of sales.

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claim to the administrative authority. A recourse to the courts that is not preceded by the preliminary claims to the administrative authority will not be admissible in court.

The other issue that must be mentioned in connection with contract of supplies is the issue of transfer of risk. In this regard the principle is that risk follows the good. It is the same principle that is stipulated under Article 3298(1). According to this provision it is the supplier that bears the risk of the loss of the goods as a result of force majeure until the acceptance of the goods by the administrative authority. However, as per the stipulations under Article 1758(2) if the administrative authority has been put in default to accept the goods, from the moment it is given that notice, the administrative authority bears the risk of the loss of the thing as a result of force majeure.

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Review Questions

1. What is the rationale for having specialized rules meant to be applicable for contract of concession of public service, contract of public works and contract of supplies? Is there any substantial difference between, on the one hand these three different set of rules and that of general administrative contract law rules?
2. Elaborate the similarities and differences between, on the one hand a contract for the concession of public service and on the other hand contract of lease, privatization which the government concludes.
3. What is the basis to say that contract for the concession of public service is an exception to the privity of contract rule?
4. Explain the similarities and differences between contract of public works and ordinary construction contracts?
5. What is the difference between provisional acceptance and final acceptance in relation to contract of public works?

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Chapter Five

Dispute Settlement Mechanisms

5.1. Introduction

In the preceding chapters attempt has been made to show the similarities and differences between administrative contracts and private contracts; the formation, effects, manner of performance and the effects of non-performance of administrative contracts. Special set of rules governing three main types of administrative contract, i.e., contract for the concession of public service, contract of public works and contract of supplies, have been explored in some detail.

Since administrative contracts are transactions that involve the interaction of two or three parties there is a high probability for misunderstandings to crop up and grow into dispute in the course of performance. However hard the parties may work in drafting the contract to make everything clear and avoid any potential dispute they may only succeed, may be, in substantially reducing the probability of the occurrence of disputes but not in hundred per cent eliminating the occurrence of disputes. The nature of disputes is such that they are bound to happen. Since almost all administrative contracts involve huge and complicated works there is a really good chance of occurrence of disputes. Therefore, in this Chapter attempt will be made to outline the main factors that give rise to disputes in administrative contracts and the various mechanisms for settling disputes when they arise.

When we talking about dispute settlement mechanisms, we realize that arbitration is the most commonly utilized dispute settlement mechanism other than in-court settlement of disputes. In this Chapter we will examine whether this method of dispute settlement is applicable for settlement of dispute arising from administrative contracts by analyzing the relevant principles and provisions of the law. We will also examine

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problems that hamper the utilization of arbitration for settlement of disputes arising from administrative contracts in Ethiopia.

Objectives:

After reading this chapter students will be able to:-

- Understand the nature and causes of disputes arising from administrative contracts,
- Know the various dispute settlement mechanisms for disputes arising from administrative contracts,
- Appreciate the comparative advantages of outside-of-court dispute settlement mechanisms,
- Know whether disputes arising from administrative contracts can be submitted to arbitration, and
- Appreciate factors that are hindering the effective utilization of arbitration as a means of settling disputes arising from administrative contracts.

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5.2. Nature and Causes of Disputes Arising from Administrative Contracts

As indicated above that disputes are an inevitable aspects of administrative contracts is a fact that cannot be denied. Particularly when the contract is one for concession of public services or public works since it involves work that is huge, complex, time consuming and there will be the involvement of third parties the process of performance will not be problem free. This does not, however, mean that disputes will not arise from other types of administrative contracts. Once contract is concluded and performance commences, the parties will be tested by their interpretation of the content and breadth of the conditions, rights and obligations incorporated in the contract. It is at

the performance stage that contracts will be tested as to whether they have been properly crafted to convey the true intention of the parties. Gaps, omissions, errors, contradictions, and vagueness in the terms of the contract may be discovered in the course of performance of contract. It is delay in performance and the resultant wastage of money or destruction and deterioration of materials resulting from the intervention of third parties or supervening events or due to neglect of duty on the part of the parties that give rise to disputes.

The intense, and sometimes insane, competition which prevails in some sector of public procurement, resulting in tenders being submitted at or below cost, coupled with the awarding of contracts to the firm who submitted the lowest-priced tender often without their technical, managerial and financial competency to undertake the work, tempts the contractors to exploit every opportunity whether real or imaginary and submit extensive claims with a view to raise their margin of profits to an acceptable level.

In general, disputes that arise from administrative contracts revolve around three main points which are considered to be pillars of the contract. These are;-

1. Quality of performance,
2. Price, and
3. Time

To begin with the first, it is obvious that once an administrative contract is formed it is binding and it is expected that the administrative body and the contractor will perform their respective obligations in good faith according to the terms of the contract. However, for various reasons the parties may fail to realize their obligations. One of the parties may fail to execute his side of the obligations. Even if obligations are performed there may be problems as regards type, quality or quantity. The contractor may question the appropriateness of unilateral variations of the contract and work orders given by the contracting administrative authority as part of its prerogative to direct the

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performance of the contract. It is likely that the party alleging to have been a victim any of these situations will forward claims for compensation.

Even if performance is going perfectly according to the terms of the contract, the cost of performance may increase for various reasons leading the contractor to demand revision of the price clauses of the contract. Unforeseen events or intervention of the contracting administrative body in the performance of the contract by way of unilateral variation of the terms of the contract or work order it gives to the contractor may have the effect of making the obligations of the contractor more onerous and costly leading the contractor to ask adjustment of the prices.

In addition to this, performance of the contract may be delayed by factors that may or may not be attributable to the fault of the parties. The party that is affected by the delay in performance will be seeking remedy. The party that delayed performance of the contract may forward reasons justifying his delay and demand for extension of time of performance. Since extension of time may have many implications, the party to whom extension of time is proposed may overturn the proposal, thereby breeding dispute.

To sum it up, disputes arise in connection with administrative contracts when a claim forwarded by one party is objected by the other. Sources of misunderstanding that give rise to dispute between the contracting parties cannot be eliminated from contractual relationships. May be the parties may succeed only in substantially reducing the probable occurrence of disputes by working hard and clever to make everything clear at the time of the drafting the contract.

So, since dispute have a negative impact in the performance of contracts, particularly administrative contracts that involve public interest, it is desirable that there be appropriate dispute settlement mechanism. In the following sub-section attempt will be made to outline the various mechanisms available for settling disputes arising from administrative contracts.

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5.3. Dispute Settlement Mechanisms

Not only in contractual relationships but also in interactions in other fields of life disputes are always there. Disputes are just one feature of interactions in social, political and economic fields. Recognizing this fact, man, who has the natural ability to find solutions to its problems, has been grappling to deal with the vice of dispute. In this endeavor, since time immemorial human beings have been developing and using various mechanisms for settling disputes. In the contemporary world, too, there are formal and informal mechanisms that are used to settle disputes arising in society. In fact, one of the reasons that necessitated the establishment of modern state system is the need for an organized system of dispute settlement.

From the dispute settlement mechanisms that are used in the contemporary world, the one that is formally and widely used is the settlement of disputes through the regular courts. Courts are one branch of government and are established to settle disputes by applying national and, depending on the case, international law. This is the regular and widely used system of disputes settlement. And, normally, disputes arising from administrative contracts are also to be entertained and settled in this forum.

In addition to the regular courts which are widely and commonly used systems of dispute settlement, there are other mechanisms for settling dispute outside of court. These out-of-court disputes settlement mechanisms are generally referred to as alternative dispute resolution (ADR) mechanisms. These includes:-

1. Arbitration
2. Mediation
3. Conciliation, and,
4. Negotiation

In the following paragraphs an explanation of each of these alternative dispute resolution mechanisms will be made.

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1. Arbitration

It is a widely used dispute resolution mechanism in the commercial world in general. In this system of dispute resolution one or more persons having expertise in law and in the subject matter of the dispute render a binding decision after hearing the arguments of the parties in dispute, examining evidence and analyzing it in light of applicable legal rules. The agreement to submit the dispute to arbitration may be made in advance (e.g. at the time of conclusion of contract) by anticipating the possible occurrence of dispute or after the dispute has occurred as a means of finding a smooth way forward. The parties may appoint their own arbitrators by nominating persons whom they trust or, instead, they may forward their disputes to permanent arbitration centers. There are permanently established institutions out there to render arbitration services. In Ethiopia we can mention Ethiopian Arbitration and Conciliation Centre and Addis Ababa Chamber of Commerce Arbitration Institute. There are also internationally recognized arbitration institutions such as the American Arbitration Association in America; The International Chamber of Commerce Arbitration Institute in Paris; The Permanent Court of Arbitration at The Hague and many more in Switzerland. The disputing parties may submit their cases to any of these institutions for amicable settlement. It is up to the parties to choose whether to constitute their own arbitration forum or forward their case to any of these permanent arbitration bodies. It is also up to the parties to determine which country's substantive law is to be applied by the arbitrators.

The arbitrator(s) appointed to entertain the case will follow a less rigidly structured procedure than formal court proceedings to dispose the case speedily in a short time. They hear the argument of the parties, examine evidences, receive expert testimony, where appropriate and finally render binding decision by examining the case and evidences in light of the applicable substantive law.

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As indicated above the arbitral award is binding on the parties. The parties have no option to reject the decision of the arbitrators. Even if the parties have the right to take the decision of the arbitrators to court by appeal that is possible only on limited grounds mentioned under Article 351 of the Civil Procedure Code of Ethiopia. In other cases they have to abide by the decision of the arbitrators. If one of the parties refuses to adhere to the decision of the arbitrators, the other party can initiate enforcement proceeding in regular court to enforce the arbitral award. It is this binding nature of arbitration decisions that makes arbitration a preferred method over other dispute settlement mechanisms.

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2. Mediation

Mediation is a dispute resolution process in which a neutral body assists the disputing parties to reach a negotiated settlement of their differences. It is generally a voluntary process, which aims at amicable settlement of the parties' dispute and defining their future relationship. A third party neutral person who has no authority to make binding decision facilitates a direct discussion between the disputing parties to reach at a solution, which is desirable by both and which can successfully resolve their difference. The main discussion is to be made between the disputing parties face-to-face. They may be accompanied by their legal representatives who will help them in preparing the legal authorities factual evidences in support of their clients' positions prior to the mediation session. The mediator at times may pose questions to both sides for clarifying any ambiguous ideas or positions. The mediator may talk to the parties jointly or privately to discuss the settlement opportunities. It is believed that in every dispute, there exists a point where the parties can reach at an agreement. It is the duty of the mediator to help the parties find that point. This duty requires a lot of effort and qualification on the part of the mediator. The mediator must be patient, knowledgeable on the subject matter of

the dispute, intelligent to understand the disputing parties' motives and intentions, and good in communication.

Mediation has its own unique features, which makes it different from other dispute settlement mechanisms, such as conciliation. In mediation, unlike conciliation which will be explained below, the parties play a greater role in coming to an agreement. The role of the mediator is just to facilitate a positive environment for the disputing parties to talk about their problem and find a common ground on which they reach consensus. On the other hand the conciliator is the one who comes up with proposed solutions for the parties in dispute. In mediation the arrival at agreeable solution is left to the parties.

3. Conciliation

This is one of the mechanisms widely used to settle disputes. It is a process whereby a neutral person, called the conciliator, meets with the parties to a dispute and explores how the dispute might be settled. The third party neutral person assists the parties in the process of settling the disputes by clarifying the issues, assessing the strengths and weaknesses of each side, all with the view of helping the parties to reach at amicable agreement. The conciliator has a big role to play by identifying and clarifying the same to the disputants. The conciliator may meet the parties in dispute jointly or separately.

The conciliator has also the duty of drawing up a proposal for the parties' considerations when there seems to be a possibility of arriving at some sort of settlement. The parties will forward their comments and observations on the proposal made by the conciliator. If the parties agree on the proposal of the conciliator, then the conciliator draws up the settlement agreement or assists the parties to draw the same. Finally, the duty of the conciliator terminates when the parties sign on the settlement agreement, which makes the terms of the agreement final and binding on the parties.

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Conciliation as a dispute resolution mechanism is recognized under Ethiopian laws. Articles 3318 – 3324 of the Civil Code and Articles 274 – 276 of the Civil Procedure Code govern this particular form of out-of-court dispute settlement mechanism.

4. Negotiation; (Also known as Amicable Settlement)

Negotiation is another form of disputes settlement mechanism. It is a consensual bargaining process in which the parties attempt to reach agreement on a disputed matter. Unlike the other dispute settlement mechanisms discussed above which involve a neutral third party, negotiation does not involve any neutral third party facilitator. The parties in dispute are the only ones who are going to deal with the problem. The ideas during the discussion come only from the parties and no third party is involved. When the source of the dispute is clearly identified, it becomes possible for the parties to reach at a solution through negotiation, in a manner which satisfies both. This dispute settlement mechanism helps to maintain smooth business relationship between the parties and also protect their privacy.

To sum up, these are the various dispute settlement mechanisms that have got wide recognition in the last four or five decades as alternative (to regular courts) means of settling disputes arising in the various walks of human life. They are applicable for disputes arising not only from contract but also in any other field of human interaction.

It should be noted however that the alternative disputes resolution mechanisms described above are the major ones and by no means the only ones. There are many more types of out-of-court disputes resolution mechanisms. For example in the realm of construction contracts most general conditions of contract used in the sector stipulate disputes arising from construction contract to be submitted to the consulting engineer before resorting to other means of settling dispute.[58] If the contractor and the client

[58] See for example clauses 4, 24, & 59(3) of the General Conditions of Contract for Works, International Competitive Bid (ICB) issued by the Public Procurement and Property Administration Agency, 2006; and Clause 67.1 of FIDIC conditions of contract.

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agree with the decision of the consulting engineer then that will be the end of the matter. If any of the two are unsatisfied with the decision of the engineer then they can take the case to other dispute settlement forums. The other dispute settlement mechanism that is used for settling disputes arising from construction contracts is the Dispute Review Board (DRB) or Dispute Review Expert (DRE) – the difference between the two being the number of experts reviewing the case. These particular forms of dispute resolution are adopted by the Standard Bidding Document (SBD) prepared by the World Bank (May 2002) for procurement of works financed by the World Bank. It is also incorporated in the FIDIC standard form (1999) as additional approach to consulting engineer's decision.

The members constituting the board or the expert are appointed even before the commencement of the construction. The members actually inspect and closely follow the progress of the work. This will greatly help the experts to visit the site and also get to know the personalities involved in the contract. This situation enables the experts to quickly recommend solution before adversarial attitude take hold the disputing parties. Of course the experts have no power to pass binding decision on the disputed issue. They can only make professional recommendation.

The other dispute resolution body that is used in the construction sector is the adjudicator(s). As the construction industry practice shows the adjudicator(s) is to be appointed by the contractor and the client bound by a construction contract. And the adjudicator is there to review and decide cases brought by way of appeal from the decision of the engineer. It is the duty of the adjudicator to arrive at a decision within a short period of time (usually 28 days). The adjudicator commences his duty by examining and analyzing the positions and arguments of the parties in dispute. In the process of carrying out his duty the adjudicator has the power to ascertain the facts and the law involving the dispute. After the proper deliberation and investigation is done, the adjudicator will render a decision which is intended to settle the dispute between

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the contractor and the client. The decision of the adjudicator is final and binding only if it is not challenged by appeal to court or arbitrators. This mode of dispute settlement is recognized in a number of standard conditions of contract. For example, Clause 67 of the Standard Bidding Document for Works (SBDW) prepared by the World Bank and Clauses 24 and 25 of the General Conditions of Contract for Works for International Competitive Bidding (GCCW-ICB) used by the Ethiopian government recognize the adjudicator as a dispute settlement body.

In the preceding paragraphs attempt has been made to explore the different types of out-of-court disputes resolution mechanisms. These dispute resolution mechanisms can also be used to settle disputes arising from administrative contracts. There are a number of cases in which one or the other of these dispute resolution mechanisms have been used to settle disputes arising from administrative contracts in the past in Ethiopia. For example determination of consulting engineer was used in the contract between *M.A. Kharafi & Sons vs. FDRE Civil Aviation Authority* for the expansion project of *Bole International Air Port*; dispute review expert in the contract between *China Road and Bridge Corporation (CRBC) and the Ethiopian Roads Authority* for upgrading the *Awash- Kulibi- Dengego- Dire Dawa* and *Dengego- Harar* roads; negotiation in the contract between *China Wambo and Ethiopian Roads Authority* for the construction of *Debre Markos – Merawi* road; and arbitration in the contract between *Marples Ridgway and Partners Ltd and Imperial High Way Authority* for the construction of *Asebe Teferi- Kulbi* high way.

As mentioned above in the last few decades alternative dispute resolution mechanisms have become a preferable means of settling disputes particularly for disputes involving civil & commercial matters. These mechanisms are also becoming increasingly important for settling disputes arising from administrative contracts. At this point one may appropriately ask why is it that alternative dispute resolution mechanisms increasingly became important for settling disputes arising from administrative contract. The following paragraphs will provide answer to this question.

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The factors that made alternative dispute resolution mechanisms important means of settling disputes arising from administrative contracts are the following.

1. The Relative advantage of alternative dispute resolution mechanism as a means of dispute settlement mechanism over that of regular courts. There are a number of advantages that arise from settling disputes out of court. The first advantage is the specialized competence/expertise of the persons entertaining the case. The judges at the regular court of law are competent only at interpreting the law and may not have specialized and technical knowledge of the subject matter of the dispute. The persons to be appointed as conciliators or arbitrators are normally experts with technical knowhow of the issue involved enabling them to dispose the case amicably. Second, alternative dispute resolution mechanisms help to maintain smooth business relationship between the disputing parties after settlement of the dispute. Unlike adjudication of a case in court of law that creates a winner-loser relationship affecting smooth business relationship thereafter, alternative dispute resolution mechanisms create a win-win situation since the cases are settled in a manner that will satisfy the interest of both parties ensuring smooth relationship for the future. Third, since alternative dispute resolution mechanisms follow a less rigid procedure unlike regular courts the application of alternative dispute resolution mechanisms helps to dispose the case speedily (minimizes cost). Fourth, alternative dispute resolution mechanisms enable the parties to direct the process of dispute settlement. Which dispute settlement method to adopt, where, when, what language and which law to apply, all will be decided by the disputing parties. Fifth, unlike a regular court proceeding which is public, alternative dispute settlement mechanisms are suitable to ensure privacy and confidentiality for the parties in dispute. All these advantages make alternative dispute resolution mechanisms preferable means of

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settling dispute particularly for disputes relating to commercial and construction matters.

2. The other reason for the increased utilization of alternative dispute resolution mechanisms for settling disputes arising from administrative contracts is because they are prescribed by international financial institutions that finance projects. Many projects in our country are financed by funds obtained in the form of grant or loan from international financial institutions through agreements which the government of Ethiopia concludes with such financial institutions. When the financial institutions agree to extend the loan or grant they put forward a number of precondition. One of the conditions commonly incorporated in such agreements is the requirement to submit disputes arising from the project financed under the agreement to various forms of out of-court disputes settlement mechanisms. For instance the Standard Bidding Document for Procurement of Works (SBDW) prepared by the World Bank to govern construction works financed by the World Bank requires that disputes arising from projects the value of which is less than fifty million dollar to be decided by the consulting engineer and when the value of the contract is more than fifty million dollar disputes arising from the project to be reviewed in the first instance by Dispute Review Expert or Disputes Review Board. The same document also provides negotiation and arbitration to be used at different levels. The General Conditions for Works Contracts Financed by the European Development Fund prepared by the European Development Fund (EDF) also provides conciliation and arbitration to be used for settling disputes arising from projects financed by the European Development Fund.
3. Another reason for resorting to alternative disputes resolution mechanism is the lack of confidence in the courts. Unfortunately the justice system in Ethiopia is not efficient and reliable. For this reason companies entering into agreement with

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governmental bodies in Ethiopia do not want to submit themselves to the jurisdiction of the regular courts.

These are, then, the factors that made alternative dispute resolution mechanisms the preferred means for settling disputes arising from administrative contracts. This does not, however, mean that all are equally important as a means of settling disputes arising from administrative contracts. From the alternative dispute resolution mechanisms mentioned above, arbitration is the most widely used method of dispute resolution although it is interwoven by the controversial issue of arbitrablity of administrative contracts. The following paragraphs will explore arbitration and the issue of arbitrability of administrative contracts more closely.

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5.4. The Issue of Arbitrability of Administrative Contracts

Relatively speaking, from among the various types of alternative disputes resolution mechanisms, arbitration is the most widely applicable method for settling disputes. It is also a preferred method of settling disputes arising from administrative contracts. Arbitration as a dispute resolution mechanism has its own unique features that enabled it to be the most preferred alternative dispute resolution mechanism, the most important of which are the following.

1. Arbitration, unlike other forms of dispute resolution, results in final and binding decision. No other alternative dispute resolution mechanism arrives at an enforceable outcome. For example, mediation may resolve disputes, but its enforcement totally depends upon the willingness of the parties to the dispute. Arbitration, however, like court litigation, arrives at decision which becomes binding on the parties to the dispute. The decision is also final. Decisions of arbitral awards are more likely to be final than court judgments since arbitral awards are not subject to appeal. Arbitral awards are appealable to regular

courts only on limited grounds mentioned under Article 351 of the Civil Procedure Code.

2. Arbitral awards are internationally recognized. There are several multilateral and bilateral conventions intended to facilitate and help the recognition and enforcement of arbitral awards worldwide. For example, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is one such multilateral agreement. This convention has more than 137 countries as members, which have all accepted the terms of the convention for recognizing and enforcing foreign arbitral awards. This fact actually allows arbitral awards to enjoy a much greater international recognition than other forms of dispute resolution.

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Because of these factors arbitration is the most preferred alternative dispute resolution mechanism. It is also the most preferred method to settle disputes arising from administrative contracts. It has been used in a number of cases to resolve disputes arising from administrative contracts. For example, as mentioned earlier, it has been used in the contract between *Marples Ridgway and Partners Ltd. vs. Imperial Highway Authority* for the construction of *Assabe Teferi – Kulbi* highway; *Ethiopian Roads Authority and China Road and Bridge Corporation (CRBC)* for upgrading the *Awash – Hirna* road; *Ethiopian Roads Authority and Salini Constructori spa* for the construction of *Chida – Sodo* road; and *Ethiopian Roads Authority and SOGEA s.a* for the construction of *Mile – Assab* road.

This does not, however, mean that favorable conditions exist in Ethiopia for the effective utilization of arbitration for settling disputes arising from administrative contracts. Even if arbitration is an invaluable tool for settling disputes arising from administrative contracts, there are a number of factors hindering its effective utilization in Ethiopia, some of which are the following.

1. The first such problem is the outdated nature of the Ethiopian law governing arbitration. The Ethiopian law of Arbitration is contained in Articles 3325 – 3346 of the Civil Code and Articles 315 – 318 of the Civil Procedure Code. These laws are promulgated 50 years ago. Over the years many changes have occurred in the requirements of the commercial world and the skills and arts of arbitration. Our law is not updated to accommodate such developments and provide room for smooth application of arbitration.
2. The unavailability of arbitrators is another problem. The complications and difficulty of resolving a commercial dispute requires that the persons constituting the arbitration tribunal should have special knowledge and expertise in the area of dispute. Arbitrators should be knowledgeable persons capable of appreciating the technical and legal aspects of the dispute. There is, apparently, lack of such persons in Ethiopia. The quality as well as the quantity of arbitrators is not satisfactory.
3. The fact that the Ethiopian legal system is not arbitration friendly is another problem facing the application of arbitration in Ethiopia. Since Ethiopia is not a signatory to bilateral or multilateral agreements intended to facilitate the recognition of arbitral awards, including the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, there is no guarantee of enforcing foreign arbitral awards in Ethiopia or worldwide recognition and enforcement of arbitral awards given in Ethiopia. Because of this, Ethiopia seems an unsuitable country for relying on arbitration as a dispute resolution mechanism.
4. The other factor that create problem for the effective utilization of arbitration as a means of settling disputes arising from administrative contracts is the fact that disputes arising from administrative contracts are legally declared to be inarbitrable. Article 315(2) of the Civil Procedure Code clearly provides that

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disputes arising from administrative contracts may not be submitted to arbitration. Despite this provision frequently reference is made to arbitration for resolving disputes arising from administrative contracts. It is not unusual however for the government to resist the enforcement of such arbitration clauses by invoking Article 315(2) of the Civil Procedure Code and the courts declare based on this provision that administrative contracts are inarbitrable. This has happened in the past in a number of instances. For instance, in the contracts between *Water and Sewerage Authority and Kunden Singh Construction*; *SOGEA s.a. and the Ethiopian Roads Authority*; and *Ethio Marketing Ltd. and Ministry of Information* arbitration was referred as a means for settling disputes arising from the contract. The respective contracting government agencies however refused to submit to arbitration by invoking the above referred provision of the Civil Procedure Code and in the first case the court ruled that matters arising from administrative contracts are not arbitrable.

This repeated practice by the Ethiopian government has the effect of creating uncertainty on the possible use of arbitration for disputes arising from administrative contracts and rejecting the benefits of arbitration.

In fact this is not a problem peculiar to Ethiopia. The same problem was observed in France and Belgium until recently since they had national laws that provide prohibition on the arbitrablity of administrative contracts. However, over the years courts and arbitration tribunals have devised mechanisms for giving effect to arbitration clauses inserted in administrative contracts; the old doctrine of inarbitrablity of administrative contracts is giving way to enforcement of arbitration clauses.

For a current analysis of the issue of arbitrability of administrative in Ethiopia and the position of the courts look at the following excerpt from an article entitled "

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Adjudication and Arbitrability of Government Construction Contracts" by Tecle Hagos, *Mizan Law Review* Vol.3 no. 1, 2009. Footnotes are omitted.

5. The Arbitrability of Government Construction Disputes

Arbitration has been widely accepted and used as a means of settling construction disputes. The scope of this article does not allow us to delve into the details of arbitration procedures. One key issue that should be properly addressed and which has been a bone of contention in the Ethiopian arbitration law and practice, however, is whether administrative contract disputes can be validly submitted to arbitration.

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The issue of arbitrability is very crucial. Redfern and Hunter wrote:

> The concept of arbitrability is, in effect, a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective; it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.

Disputes or differences arising from or relating to a specific legal relationship, be it civil or commercial, can be classified into two categories: *arbitrable* and *non-arbitrable*. It is worth mentioning, *en passant*, that parties to international commercial arbitration need to know what are arbitrable:

i. Under the arbitration laws of the seat of arbitration (*Lex Loci arbitri*);

ii. Under the laws of the state to which the parties would like to refer to as governing their arbitration (*lex electionis*) other than the *lex loci arbitri*, if any, and;

iii. Under the laws of the state in which recognition and enforcement may ultimately be sought (*lex executionis*).

Insofar as the arbitrability of administrative contract disputes is concerned, scholarly writings have been divergent on the issue. In the same vein, Ethiopian courts have been addressing the question from diverse perspectives. The following cases demonstrate as to how our courts have been dealing with the problem of arbitrability (or non-arbitrability) of administrative contracts disputes.

5.1-*High Way* v *Solel Boneh Ltd*

The holding of the Court in this case was the following:

> Although by Art.3194(1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligations, a court is not thereby precluded from ordering specific performance of an agreement to submit disputes to arbitration.

As Tilahun Teshome noted:

> A suit to enforce an arbitration clause or a separate submission to arbitrate is a special proceeding and is considered as an action for the specific performance of an agreement to arbitrate.

Specific performance is defined as: "…a process whereby the creditor obtains as nearly as possible the actual subject matter of his bargain, as opposed to compensation in money for failing to obtain it". Can we then invoke specific performance to arbitrate against an administrative body? Art.3194, under the heading of compulsory performance of contracts, states thus:

1. The court may not order the administrative authorities to perform their obligation.
2. It may, however, make an order for the payment of damages unless the administrative authorities prefer to perform their obligations.

In its decision, the Supreme Imperial Court reasoned that, "… according to art. 3194(1) of the Civil Code, the Court cannot order administrative authorities to perform their obligations, but that it can order specific performance in procedural matters". The

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ramification of this ruling was far-reaching; it is believed that this decision triggered the inclusion of the "prohibitive clause" under Art.315(2) of the Civil Procedure Code.

5.2- Ethio Marketing Ltd. v Ministry of Information

The decision of the Ethiopian Supreme Court reads:

> A contract concluded pursuant to the provisions of the Civil Code is law between the two parties. The Appellant and the Respondent having, on the basis of the Civil Code, agreed to resolve the dispute between them by arbitration, the Civil Procedure Code should not prevent the enforcement of this contractual agreement.

Simply put, the Court's decision is based on the argument that procedural laws should neither limit nor extend substantive rights. We think this argument is too difficult to maintain. Suffice it to mention the words of the famous Italian procedural lawyer, Prof. Mauro Cappelletti and American Prof. Bryant Garth:

> For more than a century lawyers and scholars have tried to distinguish between "procedural law" and "substantive law", only to find that it is impossible to draw a clear line between the two. If one tries to argue that procedure becomes substance when it determines the particular "outcome" of a legal dispute, then it appears necessary to concede that almost everything is substance. On the other hand, if procedure is confined to the methods by which legal claims are initiated and proved, there is little doubt that much of the substantive law governs procedure.[52]

Perhaps, the procedural/ substantive law dichotomy must have been a perplexing issue for those of us, academicians and practitioners alike, who attempt to specialize in the area of private international law (PIL). On top of that the investment of any or some disputes exclusively to the courts' jurisdiction could not have been better positioned anywhere else in Ethiopia than the Civil Procedure Code. Traditionally speaking, procedural laws not only confer jurisdictional powers upon the courts, but also divest or deprive, if need be, the jurisdiction of any judicial proceeding from the courts or any tribunal. This is exactly what

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procedural rules do as in the case of Art.315 (2) which allocates the power to resolve disputes arising from or related to administrative contracts exclusively to the courts.

5.3-Gebre Tsadik Hagos v Tigray State Bureau of Education

The Tigray State Supreme Court's holding in *Gebre Tsadik Hagos* v *Tigray State Bureau of Education* has the following**:**

> We have concluded that article 315(2) does not permit Government organs to settle their disputes through 'gilgil' [sic] [arbitration]…and, thus, legal prohibitive clause cannot be derogated from via any working procedures, manuals or directives issued by the Government organ. [Author's translation]

Despite the obvious contractual agreement to settle disputes between the parties first through adjudication and, then, arbitration, the Tigray Supreme Court reversed the decision of the Mekelle Zonal Court that gave the deference to the arbitration agreement. The Tigray Supreme Court, thus, remanded the case to the Zonal Court so that the latter can hear the merits of the case. What was most unfortunate about this case was the fact that the parties had to litigate their case for about a year and a half to reach a similar decision as that of the Project manager whose decision the parties agreed will be binding if not referred to an adjudicator within 14 days of the notification of the decision. The Contractor failed to refer it to the adjudicator within the agreed time frame and it should have become final and binding. Instead, the Contractor instituted an action in the Zonal Court and the Zonal Court ruled that the parties should submit the dispute to arbitration as requested by the Bureau of Education. As discussed above, however, adjudication is an ADR method for settling construction disputes that is a condition precedent to arbitration. The clause conveys in no uncertain terms the message that the parties had this in mind at the time of making of the contract.

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5.4- Zemzem PLC v Illubabor Zonal Dep't of Education

This case relates to a dispute arising out of a contract concluded between Illubabor Zonal Department of Education and ZemZem PLC for the construction of an elementary school to be built within the Illubabor Zone of the Oromiya State. The Illubabor Zonal Department of Education, as an organ of the Oromiya State, is an Administrative Body whose contracts of Public Works would fall under Art.3244 *et seq*. This enables the contract of public works that was concluded between the two parties to be qualified as an Administrative contract. At this juncture, we will be confronted with basic questions: Is an arbitration clause inserted in a public works contract valid? If so, should the court give deference to it whether or not the parties invoke it?

The ADR clause (Article 24 of the contract) used in the construction contract between Zemzem PLC was cited under Section 3 above. It is cited again for the purpose of convenience:

> Disputes between the contractor and the employer, including the Consultant acting under the employer's authority, *shall be* resolved amicably by *informal negotiations*. If no amiable solution can be found after 30 days from the commencement of negotiations, either party *may require* that the dispute be referred to a *3rd party for adjudication or arbitration* in accordance with Ethiopian law. [Emphasis added].

Moreover Article 25 of the contract reads "*The contract shall be interpreted in accordance in Ethiopian law*." A fundamental question one would raise is: What was the intention of the parties by inserting the ill-drafted clause 25 in their agreement? Moreover, various issues capture our attention. Is the contract being given an international flavor and that a conflict-of-laws rule being devised? If so, why does it dissect a limb of the total contractual relationship, i.e., the interpretation, and subject it to the Ethiopian rules of interpretation? Which law would, then, govern the validity, the performance, breach of performance, consequence of nullity of the contract, capacity of the parties, etc? There is also no need of incorporating such a clause when the construction contract does not have a foreign element.

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The Federal Supreme Court's Cassation Division ruled in its holding that the term of the contract is clear and does not need interpretation. The Court also added that contractual agreements entered into by parties are laws among the parties and are binding as between the parties by virtue of art.1731 of the Civil Code. The Federal Supreme Court did not make any reference to the term 'adjudication' in its dictum; it simply stated that according to art.24 of the contract, if negotiations fail, parties should settle their disputes through arbitration or '*begelagay dagninet*'. Thus, the Federal Supreme Court reversed the decision of the Oromiya Supreme Court and ordered the Illubabor Zonal Bureau of Education to go about settling its disputes with the appellant through arbitration.

The Oromiya Supreme Court's holding was that the contractual clause only stipulates that either party can either proceed in the 'court of law' or through arbitration (*behig weiym beshimglina*). The Court, thus, concluded that their agreement does not require the parties to settle their disputes solely through arbitration. Hence the Court had failed to distinguish between 'adjudication' and 'litigation'.

The point is, however, whether the afore-mentioned dispute settlement clause is bereft of any irregularities and tamper-proof as claimed by the Federal Supreme Court. In other words, does the wording of Art.24 engender the need for interpretation? The author believes there are, at least, some simple but key issues that should have necessitated the intervention of the Federal Supreme Court's Cassation Division for the proper determination of the parties' rights and obligations under the contract:

a) Does the clause imperatively impose the duty to arbitrate on the parties?

b) Would the Illubabor Zonal Department of Education be compelled to arbitrate, article 315(2) notwithstanding?

c) Does it settle, once and for all, the hitherto controversial issue of whether administrative contract disputes are arbitrable or non-arbitrable, taking into account the fact that the decision was rendered by the Cassation Division of the Federal Supreme Court which is 'binding' on all Federal and State Courts?

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Primarily, from the wording of the second paragraph of the afore-mentioned ADR clause, one can easily understand the fact that adjudication is not used by the parties to mean litigation as they are deliberately choosing and deploying the terms as follows: *…either party may require that the dispute be referred to a 3rd Party for adjudication or arbitration…* [Emphasis added]. This is to say that the parties were cognizant of the fact that be it "adjudication" or "arbitration", it is to be referred to a 3rd party. At least, one can safely expect that the parties, assisted by construction experts, would not commit such a clumsy bungle to refer the sovereign-appointed judges as "a 3rd party".

Secondly, a careful reading will enable us to note the stark contrast in choosing and deploying the words by the parties in the first and second paragraphs of the clause. Arguably, the parties might have intended that negotiation, as a dispute settlement method, should of necessity be resorted to by carefully choosing and deploying the imperative phrase 'shall be'! In contradistinction, the parties have been selective of their terminologies when using the word "may" (in the second para.).

Hence, it could mean that the parties stipulated an optional clause whereby the parties could either continue further negotiating on the dispute or, failing that, either party has the possibility of resorting to adjudication or arbitration, without making it imperative on the parties. In other words, it may be concluded that the parties left the door open for adjudication and/ or arbitration without entirely overruling litigation. This enables the parties to make an informed choice of the most cost-effective dispute resolution scheme in the event of a dispute.

Thirdly, the parties made it abundantly clear that the submission of their disputes, be it to adjudication or arbitration, is to be made *in accordance with the Ethiopian Law*.[Emphasis supplied]. The Ethiopian Law, which the parties laid down as governing, manifestly prohibits the submission of administrative contracts disputes (construction contracts for public works for that matter) to arbitration proceedings; thereby making the submission by the parties null and void. The Federal Supreme Court, in its cassation decision, streamlined

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the foregoing assertion by holding that, "*subject to what the law prohibits or limits, parties can enter into agreements and be bound by it as per Art.1731 of the Civil Code".* [Author's translation]

The crux of the matter is whether the Federal Supreme Court was "oblivious" of the obvious "prohibitive clause" of the arbitrability of Administrative Contracts disputes under Art.315(2) of the Civil Procedure Code? Or could it be that the parties' agreement to refer to a 3rd party for arbitration was permitted by law?

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The far-reaching consequence of the Federal Supreme Court Cassation Division's decision in the case is that the Court, advertently or inadvertently, either nullifies or contradicts itself with the much-talked-about Art.315(2) that has been evoking heated discussions as to whether disputes arising from administrative contracts are arbitrable or non-arbitrable. It may be argued that the non-arbitrability of any subject matter should be raised by the party against whom the arbitration agreement is invoked. This conveys the message that the Court, *sua motu*, will not raise the issue of non-arbitrability. Indeed, reading from the dossier on the case, there is nothing that indicates the invocation of Art.315(2) of the Civil Procedure Code by the Zonal Bureau of Education. Nevertheless, this belief is simply erroneous in that the arbitrability and non-arbitrability of any dispute is a public policy issue and must be maintained at any cost.

The critical question here is whether we can take the above ruling of the Federal Supreme Court's Cassation Division at its face value? The decision does not seem to settle the issue once and for all because of the following reasons. Firstly, each State has the legislative power not only to form and organize its own governmental structure but also to determine the responsibilities and duties of each of its organs according to its Constitution. Corollary to it, each State determines the substantive and procedural rules that each of its administrative bodies should adhere to. The conclusion, therefore, is that each State has retained the power to legislate specific enactments on 'Administrative Contracts Laws' if it chooses to continue to apply it, or even to reject altogether the Civil Contracts/Administrative Contracts dichotomy. Second, it is understood that the

determination or allocation of the jurisdiction of each of the State courts that it establishes is left to its own discretion. No doubt, therefore, that the States determine the procedural rules employed by the respective courts of each State.

Thus, States also retain the power to enact the Civil Procedure Code for their respective courts. It should, thus, be quickly added to it that the existing Civil Procedure Code of 1965 couldn't be considered to have been a Federal one so as to bind both Federal and State courts. Indeed, it is incorporated *de jure* under Article 11 of the Federal Courts Establishment Proclamation No. 25/96 to have the force of law in the Federal courts. It is, however, not clear whether it has been *de jure* incorporated similarly in each of the States or *de facto* applied. It is clear, though, that it is being applied in all the States because of the blessing that State Councils granted to the law in their respective territory.

Furthermore, States have the legislative power to invest the determination of administrative contract disputes solely in their respective courts and prohibit the submission of same to arbitration. The Civil Procedure Code of Ethiopia, having the force of law *de jure* or *de facto* in all the States, hitherto affords deference to Article 315(2); thereby maintaining the prohibitive clause. The multitude of contractual clauses qualifying government contracts as administrative contracts, especially in construction contracts for public works in the states, are vivid testimonies of continued warm treatment being accorded to administrative contracts law.

Another issue that captures our attention is whether the Federal Supreme Court's Cassation decision nullifies the hitherto prohibitive clause in the States' Civil Procedure Codes because of the fact that Cassation decisions of the Federal Supreme Court are binding upon both the federal and state courts? This would not have engendered much of a problem if the proclamation is attempting to introduce the concept of *judicial precedence* and/ or doctrine of *stare decisis* to the Ethiopian legal system for the Federal courts. It would not be that easier, though, when and if the Federal Government is trying to levy federal laws over the states for which the Federal Government does not at all have the legislative power

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to do so. It would only be appropriate, therefore, if both the States and the Federal Government work within the ambit of their legislative power without stepping on the toes of each other.

After all, can the Federal Supreme Court exercise power of cassation over clearly defined state matters? Well, it is difficult to find a ready-made answer. We may approach it from the point of view of the pervasive practical problems in most of the States. For this purpose, it worked, perhaps, well to operate on Article 87 of the FDRE Constitution. The scope of the article does not allow us dwell on the argument. It is, however, proper to mention that empowering the Federal Supreme Court's Cassation Division to revise State matters and apply them uniformly based on judicial precedence and/ or *stare decisis* is not only unacceptable but also a dangerous undertaking that can effectively but destructively be used to usurp in piecemeal on the legislative powers of the States**.** It should, thus, only be taken to mean that cassation decisions by the Federal Supreme Court will be binding on both the Federal and State Courts on cases or disputes arising from the federal laws on the basis of judicial precedence and/ or *stare decisis*. This, indeed, is an ingenious device to guarantee uniform interpretation of the federal laws to avoid differential treatment of citizens in the same case situations wherever the case is being seized. This furthers and guarantees certainty and predictability in the federal legal system; hence ensuring equality of citizens in judicial proceedings. However, the argument that the decision of the Federal Supreme Court's Cassation Division is also binding on state matters doesn't seem to be a strong argument because the Constitution maintains diversity depending on each State's policy considerations. It would, thus, be an unwelcome exercise for the Federal Supreme Court to claim to decide on the States' policy considerations.

One cannot be certain as to what has been the impact of the decision of the Federal Supreme Court's Cassation Chilot in *re Zemzem PLC v Illubabor Bureau of Education* in the Self-Governing Federal Capital City of Addis Ababa and the Federal Enclave City of Diredawa where the Federal Courts sit and apply the Federal Civil Procedure Code.

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The lesson we, arbitrators and academicians alike, draw from the decision is, however, clear. *One*: cutting the *circulus inextricablis*!: that the Federal Supreme Court through the Cassation Decision has stripped Art. 315(2) of the Civil Procedure Code of 1965 of its luster and hammered the last nail in its coffin and that henceforth any arbitral clause or submission in an administrative contract is enforceable. *Two:* the cure is worse than the disease: The Federal Supreme Court erred in holding the decision that is unequivocally against a clear policy consideration of the non-arbitrability of the administrative contracts disputes enshrined under article 315(2) of the Civil Procedure Code of Ethiopia of 1965.

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Cutting the Gordian Knots: Conclusion

From the foregoing discussion, we can see that construction contracts for public works are part of the administrative contracts legal regime in Ethiopia and that administrative contracts, with all the privileges bestowed upon them, do exist in Ethiopia. It should also be underlined that more often than not administrative bodies do qualify their contracts as an administrative contract.

It should also be borne in mind that Art.315(2) does prohibit the arbitrability of disputes arising from administrative contracts. A sacrosanct policy consideration is manifestly expressed under Art.315(2) that invests any litigation on disputes arising from administrative contracts exclusively in the sovereign -appointed judges and expressly deprives party-appointed arbitrators of same!

The concern of the sovereign might have been, *inter alia*, the fact that states are deeply concerned in defending and tipping the scales in favor of public interest issues *vis-à-vis* the private interest. In France, for example, the administrative contracts law has been endeared as ever mainly for four basic principles advancing the *services publics*: the principles of continuity, equality, adjustment (adaptability), and priority. The arbitrators may not be

sufficiently close to such national concerns and, it can be safely said, especially in international commercial arbitration, that they have a weaker allegiance to national laws; they are notoriously open to the application of international usages and rules of the trade. This is exactly what happened in the case *re High Way Authority* v *Solel Boneh Ltd*. The case was followed by the embodiment of the much-talked-about Art.315(2) in the Civil Procedure Code that was promulgated just few months after the said Court ruling.

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John Sykes has also an equally valid concern: "litigation before the court is essentially a public expression of the need of society to let justice be seen to be done" as opposed to the confidential proceedings in arbitration.

At times, the arbitrator may not be the ideal person to rely upon for some critical disputatious issues. Let us consider the following hypothetical example:

> A certain government department head found out that the construction contract recently concluded with a certain Sky-Limit General Construction (G.I) PLC to construct the 101 kms asphalt road (worth Birr 400 Million) from a city of *Delina* to another city of *Lelina* was an artificially created demand by a certain Road Engineering Section Head within the department. The department alleges that it was intended to specifically procure financial benefits to the contractor and a certain Space Consulting Engineers and Architects (G.I) PLC, which was also awarded for the engineering and architectural services of the project. The department now wishes to invalidate the contract invoking *absence of cause* or *illicit cause* pursuant, respectively, to Article 3170 or 3171 of the Civil Code. Assuming that the contract allows the submission of disputes to arbitration, the department would, it is submitted, submit its request for invalidating the contract to arbitration. Now, would the arbitrator, in his function of determining the validity of the contract, probe into the allegations that the department artificially created the demand and intentionally rigged the procurement procedures to award the multi-million-construction contract to the bidders who connived with the Section Head? Can the arbitrator determine on the existence of procurement corruption (corrupt, collusive, fraudulent, and coercive practices) so as to declare the contract null and void? Can the arbitrator probe into the public procurement irregularities,

such as bribing, bid rigging, abuse of confidentiality, bids rejection on frivolous grounds, specification-tailoring to fit a particular bidder, bid splitting, bid bundling, etc?

For the French, the concern is even more than that. The judges of the administrative courts are distinct by their recruitment and training from the civil and criminal judges in that "the administrative judge has a distinctive formation in administration and personal experience of how it works". This is why the French administrative law system has at its epicenter the *tribunaux administratifs*, the *cours administratives d'appel,* and the *Counseil d'Etat.* Unfortunately, the Ethiopian administrative law does not enjoy similar treatment as that of its progenitor. This has left, as indicated earlier on, the Ethiopian administrative contracts law as the most marginalized and stagnated area of law.

Let us now pose the query: whether the parties [and the legal system] would be better off by submitting their disputes to arbitrators who, they believe, are experts on the area, given that there are no administrative courts to deal with them? To be sure, specialist rules require specialist judges!!

International construction contractors and funding agencies are pressurizing, in its strict sense of the word, the opening up of the restriction on the arbitrability of international construction contracts. For example, France, Belgium, and Egypt have opened up international construction contracts to arbitration. So has Ethiopia partially but falteringly.

Currently, disputes arising out of public works construction contracts in Ethiopia are being arbitrated, domestically and internationally, because of any of the following three grounds:

a) The use of the funding agencies' standard bidding documents when and if they are approved by the legislature as concomitant conditions of grants and loans for projects;
b) The judges' passivity in raising, *sua motu*, the defense of non-arbitrability of disputes arising from the public works construction contracts; and,
c) The various legislative enactments (otherwise known as 'enabling clauses') entitling the administrative bodies to settle their disputes out of court.

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Yet, the 'enabling clauses' must be carefully trodden upon. Some of them are still dubious whether they allow for arbitration or not. Let us see two of them.

i) the general manager may, with the specific permission of the Board, *settle disputes out of court;*

ii) the general manager shall *settle civil disputes out of court* in accordance with the directives issues by the Board. [Emphasis supplied].

It may well be argued that, insofar as arbitration of administrative contracts disputes are concerned, a prior express 'prohibitive clause' [Art. 315(2)] entails a posterior express 'permissive clause' to go against the former. Thus, these provisions might have been intended to serve the purpose of partly freeing the general manager to engage in ADR methods (exclusive of arbitration) and reach at a compromise agreement.

This is because the administrative bodies are bound by the public procurement rules requirements that it may not be left to their own devices with a *carte blanche* to engage in compromise negotiations that involve the use of public money once the tender award is made. At times, however, post-contractual renegotiations may enhance efficiency by allowing both parties to react to unanticipated contingencies; such contingencies being particularly rampant in construction contracts. Hence we cannot rule out the possibility that the new 'Enabling Clauses' might have been devised to offer a bit of a breathing space for the managers to engage in ADR and not in arbitration.

Be that as it may, however, the administrative contracts legal regime lacks in one basic ingredient that its counterparts have greatly benefited from, i.e., the administrative courts. The basic infrastructure that, we believe, made the administrative contracts non-arbitrable is missing here. Thus, it is high time that the Federal and States legislatures realize this gap and unfalteringly take either of the following two mutually exclusive stricter measures.

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The first option is to establish an administrative court with professionals and specialists on the area as it is, for instance, in France, Germany, Italy, Belgium, and Egypt. As observed by Mauro Cappelletti and Bryant Garth, the administrative courts in France, Germany, and Italy, not only are sufficiently specialized in the subject matter but also "…truly independent and impartial bodies, endowed with the prestige of judicial courts, and maintaining fundamental standards of procedural fairness."

The second option can be to unequivocally repeal Art.315 (2) of the Civil Procedure Code. This can possibly enable the legal system, in general, and the Government Contracts legal regime, in particular, avail themselves of the expertise of the specialist arbitrators!!

These measures can indeed serve the purpose of effectively applying and achieving the 'sacrosanct public interest issues' as it should have been advanced under the Government (Administrative) Contracts legal regime. And, perhaps equally important, they can enhance certainty and predictability in the legal system.

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Review Questions

1. What are the factors that lead parties to an administrative contract to dispute?
2. What are the advantages of settling disputes arising from administrative contract by using alternative dispute resolution mechanisms rather than in court?
3. Do you think that disputes arising from administrative contracts are arbitrable? Why?
4. What are the unique features of arbitration that make it a preferred method for settling dispute?
5. Is there a favourable condition in Ethiopia for the application of arbitration as a means of settling disputes arising from administrative contracts?

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Bibliography

[This material is a work in progress; it is not meant for citation or circulation!]

A. Books

1. Hani Sarie-Eldin, "Operation of FIDIC Civil Engineering Conditions in Egypt and Other Arab Middle Eastern Counties", *International Lawyer*, Vol. 28, 1994.
2. René David, Administrative Contracts in the Ethiopian Civil Code, Journal of Ethiopian Law, Vol.4, no. 1, 1967.
3. Sue Arrowsmith *et al*, Regulating Public Procurement: National and International Perspectives, 2000.
4. J.D.B. Mitchell, ***The Contract of Public Authorities***, 1965.
5. George Langrod, Administrative Contracts: A Comparative Study, ***American Journal of Comparative Law***, Vol.4 (1955).
6. Alan W. Mewett, The Theory of Government Contracts, ***McGill Law Journal***, Vol.5, no. 4. (1958-1959).
7. Wettenhall, R, The public–private interface: Surveying the history, in ***The Challenge of Public–Private Partnerships: Learning from International Experience.*** Eds. G. Hodge and C. Greve. Cheltenham, U.K.:Edward Elgar, 2005.
8. Martin, L., and Stutte, C., Public-Private Partnership, in ***International Handbook of Public Procurement***, Ed. Khi V. Thai, CRC Press, 2009.
9. Public Works and Contracts, in ***American Jurisprudence***, Vol 64:65 2nd ed.
10. Public contracts, in ***Corpus Juris Secondum***, Vol. 72.
11. Noel Keyes, ***Governemnt contracts***, 1990.
12. L.N. Brown and J.S Sell, French Administrative law, 5th ed. 1998.
13. Alemero Sefiw, Settlement of Disputes in Constrction Contracts Between the Ethiopian Goverment and Foreign Constrsuction Companies, (Unpublished), 2006.
14. Kebede G/Mariam, The Concept of Administrative Contracts in French and Ethiopian Law, (unpublished), 1967.
15. **ሚካኤለ ጉንፋ ፣ «የኮንስትራክሽን ውል ገፅ□ም»፣ *የኢትዬጵያ ጠበቆች የህግ መጽሔት* መ□ዋ 1 ቁ□ር 1.**
16. **ጥላሁን ተሾመ፣ *የኢትዬጵያ የውል ቅግ መሰረት ሐሳቦች*፣ 2ኛ □ት·ም 1995 ዓ.ም.**

C. Laws

1. Council of Ministers Financial Regulations no. 17/1997
2. Federal Public Procurement Directive issued by the Ministry of Finance and Economic Development, June 2010
3. Federal Government of Ethiopia Financial Administration Proclamation no.648/2009.

4. Ethiopian Federal Government Procurement and Property Administration Proclamation, no. 649/2009.
5. Civil Code of Ethiopia, 1960.
6. Civil Procedure Code of Ethiopia, 1960.

[This material is a work in progress; it is not meant for citation or circulation!]