Unit One: Introduction

1.1. Evolution of the Concept of Administrative Contract (A.k)

- The concept of the law of A.K is basically related with a change in the philosophy of the role and function of the state in society.
- Adam Smith's 18th century modern economic theory of *laissez fair vs command form of gov't*
- Smith: role of the state is only to ensure peace and order in society; any interference by government in competitive economic activities is not only unnecessary but also injurious.
- However, Smith's conception of the role of the state was not realistic.
- Among others, transactions under the *autonomy of will and free market led to* human misery, spread of poverty and concentration of wealth in the hands of the few.
- These provoked wide spread social unrest.
- 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.

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- 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.

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- In order to discharge these ever-increasing responsibilities, the state in the first place uses its coercive or 'police' power: 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 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.

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1.2. Is there a need of a unique law of Administrative Contract?

- There are debates over the issue and the answer varies depending on the legal system of a country.

Under the Civil Law legal system,

- Schoolars like Léon Blum had urged the recognition of separate concept of A.Ks 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.
- today we find administrative contracts recognized as separate and distinct concept from private contracts.
- There is 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.
- particularly in France, administrative contract is unquestionably subordinate, by law or nature of k, to the administrative powers of the contracting government agency.
- Rights and obligation of the parties arise not only from the contract but also from administrative law and administrative decisions

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- It seems a combination of contract and administrative discretion(as it empowers the adm. agency to take unilateral actions) governs A.Ks .
- 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.
- Duguit , though he had civil law perspective, argues 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 not, then it is not a contract. 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.

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Common Law Legal System :

- Theoretically, there is only one juridical concept of contract, it does not recognize any conceptually different rights or obligations, from an ordinary private contract.
- In principle, no legal ground for the courts to give a different treatment for contracts by the administration. No laws entitle an administrative body to unilaterally terminate or vary a contract to which it is a party.
- Dicey, a prominent British scholar, also argues: 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. He argues that the essential elements of contract are always the same and the identity of the parties or of the object of the contract does not make the contract any different from private law contracts.
- There is no need to give recognition to a separate concept of administrative contract law.
- So, in the common law countries we do not find a separate concept of administrative contract law

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- There are , however, differential treatments of contracts by the government in countries that follow the Common Law legal system.
- There are, for example, are special treatments applicable only to contracts by the government, usually at times of crisis or when the gov’t is committed to a national defense program

These include:

- Government clauses which give the contracting administrative body the prerogative to unilaterally vary or terminate the terms of the contract.
- insertion of standard conditions and terms in contracts o be concluded by the government is required by law. t
- the principle of renegotiation(in the US for example): 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. Usually, insertion of such principle allows the adm. Agency to eliminate or claim repayment of excessive profit, if any.
- Insertion of a clause, in cases of disputes, declaring decisions rendered by the head of the contracting government agency on appeal is final and conclusive on the parties thereto. In a country where courts are reluctant to accept the finality of arbitral award, rendering heads of gov’t agencies to give final decisions seems a clear special treatment of adm.k.

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Basic distinctions

- Unlike the case in Common law legal system, separate legal regime is recognized under the civil law legal system
- 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.
- While the prerogatives are always available in the civil law legal system, the availability of such power in the common law legal system depends on the nature of contract.
- The other difference between the Common Law and the Civil law legal systems as regards administrative contracts relates to the protection accorded to contractors. In the Civil Law legal system, an act of the administration should not impose any loss or damage on the contractor over and above the public as a whole
- Unlike the common law legal system, administrative disputes, under the civil law legal system, are submitted to administrative tribunals. The tribunal is expected to balance the interest of contracting parties by checking the arbitrariness, or otherwise, of unilateral action by the admi. Agency

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Reasons to have laws of A.k?

1. The distinctive nature of adm.k from other forms of k ??
2. Assimilating the contract to private contract and subjecting it to the ordinary contract law rules designed to apply for contractual relationships where there is equal representation of interests will jeopardize the tax payers' interest.
3. 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.
4. It is also necessary to ensure that administrative contracts are performed only in the public interest.
5. the need to ensure the continued operation of public services.
6. 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.

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- 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.
- 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 which are indicated by law.

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1.3. Administrative vs civil contracts

Similarities

- Governed by the principle of good faith.
- Applicability of the principle of freedom of contract. The contract is presumed made by the consent of the parties
- Presumed as contract for consideration

Differences

- Differences spring from the basic object of administrative contracts: satisfying the public interest and the resultant special prerogative power of the administrative agent. This in turn led to differences source of the rights and obligations of the parties to the contract.

Rights and obligations of the parties to administrative contract arises from

1. contract: name of the parties, works to be done, the price to be paid, etc.
2. general public law: more works, or supplies to be provided than were agreed upon.
3. regulatory powers of the administration:

- 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 A.k.

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- By far the greatest right of the administration which arises in connection with public contracts is that the administration has the sole power of determining when a contract is properly serving the public purpose it is intended for.
- The 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, 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.
- Failure on the part of the contractor to comply with these added directions from the administrative body is considered as breach of the contract.

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- Differences arising from the need to protect the contractor in an administrative contract.
- Effect of change of circumstances that upset the balance of the contract and make the obligation of the contractor onerous.
- In private contract law, the debtor has to perform the terms of the contract- Article 1764 of CC. unless justified as of Article 1766 and 1767.
- 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; the contractor has right to receive compensation where (known as doctrine of *imprévision in Frenech)*:
- 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,
- the contract has to be performed strictly according to its terms,

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- The other difference between administrative contracts and private contracts relates to the doctrine of *fait du prince (Acts of State)*. 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, by either the same branch as that 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.
- Procedure of formation of the contract. Unlike the case in adm. K, parties in civil contract have 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. In fact, 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, 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. Why?

1.4. Ethiopian Administrative Contract Law

What is an administrative contract?

- a contract to which one of the contracting parties is an administrative agency.

What is Administrative agencies ?

are non-for-profit pure public bodies within the state structure and financed by annual government budget.

- Not all government bodies are necessarily administrative agencies.

* Public enterprises, the judiciary, the legislature and organs vested with administrative and regulatory functions, having quasi-legislative and quasi-judicial power.

- Not all contracts by administrative agencies are necessarily administrative contracts.
- In principle , k by the gov't are considered as civil contracts and be subject to the general and special private contract law rules(3131(1))
- 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. Art. 3131(2) of CC

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When do we say that a contract by the government is an administrative contract?

* Article 3132 lists four alternative criteria

1. Intention of the Parties to the Contract

- 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.
- Must be derived from express declaration in the contract and should not be implied by interpretation from the terms of the contract.
- 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.
- 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).
- Provisions of C.C are also of such a nature that their application presupposes the existence of an administrative body as a contracting party

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2. Designation by Law as 'Administrative Contract'

- If 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.
- Without the need to look at additional requirements.
- *Expressly*- 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 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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3. 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- requires the permanent participation of the party contracting with the administrative authority in the execution of the contract, the contractor should be under utmost obligation to continue to supply the public service without interruption.

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- The term 'public service' is a key term in Article 3132(b). So, what is 'public service'?
- Article 3207 (1) :- *"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."*
- The fact that it is carried out by the government or its agencies acting for the public is not a necessary precondition
- the service carried out by the government should be an essential public service,
- the service must be one which is not supplied by the private sector or 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.
- Any discrepancy between the Amharic and English versions of Article 3132(b) ? Which one is correct?

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***4. Clauses Exorbitantes* - clause** which unbalances the contract in favor of the administration, justified by the existence of **provisions** made in the general interest and prohibited in private k,

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.
- Eg. of exorbitant clause: 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, annul 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.
- What matters is the purpose, not the content

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- *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.
- 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.

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- 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
- 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.
- 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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1.5. Origin and Historical Development

- Its emergence is associated with evolution of modern form of gov't. It is when the gov't use contract to provide basic utilities and services other than ensuring internal peace and order, guarding the national territory and territorial expansion.
- It becomes familiar mainly after the end of Italian occupation, following the expansion of government responsibilities and establishment of different administrative agencies.
- comprehensive modern law that governs administrative contracts with the promulgation of the 1960 Civil Code.
- Is it appropriated to incorporate Administrative contract law in to the Civil Code?
- Is it not Public? Is an anomaly? Read the note by Professor René David.
- *"The term 'administrative contract' is not used in all legal systems and not treated under the civil code.*

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- *Legal 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.*
- *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.*

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1.6. Source and Structure of the Ethiopian A.K

- 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.
- They are devoted to the formation (Arts. 3134 – 3171) and the effects (Arts. 3172- 3206) of administrative contracts.
- Special provisions (Arts 3207-3306) are incorporated for three different but common types of administrative contracts.

These are:-

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

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Why? Is it b/c the rules of general k are not applicable to Ad.k?

- 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.
- On matters 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.

Which laws are applicable? (Article 3131(1) & (2)

- The rules contained XIX of the Civil Code are not the only provisions that are applicable to administrative contracts.
- Ethiopian Federal Government Procurement and Property Administration Proclamation no. No. 649/2009
- Directives
- Rules of General Contract(Arts. 1675 – 2026)
- Special private contract law(Arts. 2179 – 3130)
- Provisions of Commercial Code
- Provisions of Maritime Code

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- Why so? Because:
  - administrative contracts are contracts in the ordinary sense of the term
  - 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.
  - Administrative contract law provisions have supplementary role.
- But, note that provisions of Ad.K 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.

Hierarchy of applicability →

- The special administrative contract law rules → general administrative contract law rules → relevant special private contract law rules → general contract law rules.
- Proclamation No.649/2009 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).

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Scope of 649/2009

- applied on all contracts by the government – be it Ad.k or not. Read Articles 3(1), 2(6), (8) and (5) of Proclamation no. 649/2009.
- 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.
- Why is this so?
- 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.
- Provisions, in the civil code, that deviate from the freedom of contract principle, should be applicable in limited case, only when deviation from freedom of contract principle is is justified.
- Do regional states have the power to enact their own laws of Ad.K?

Unit Two: Formation of Administrative Contract

2.1. Essential Requirements for the Formation of A.k

See Article 1678 of the Civil Code

- Requirements 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 are applicable. See Articles 1678, 1676(1) and 3131(1) and (2)

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A. Capacity of Contracting Parties

Who are the parties in Ad.K?

- On the one side: the government or its administrative agencies and
- On the other side: as contractor, a business organization, individual persons (physical persons)
- 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.
- Proclamation no. 649/2009 Article 28(1) lays down additional requirements: 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.

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- 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. It may also considered as ultra virus, See Art.401 of CC
- 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.
- Scope of Procl. No. 649/2009 Article 28(3)- applicable equally for all contractors and shall be set forth in the bid document or other documents for solicitation of offers.
- 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.

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- 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. 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.
- Capacity of the administrative body
- It acquires personality either either from law or authorization from higher authority.
- If establishment proclamation are silent?
- Capacity seems presumed, unless an express restrictions/additional requirements is stipulated in the establishment proclamation
- According to Art. 3140(2), 3143(1) of the Civ. C. the authorization, which cannot be implied, is a necessary condition to be filled.
- 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.

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- The conclusion, by an administrative authority, of a contract without having the power to do so or without observing the procedures and formalities that are required by law will make the contract void. See 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.
- The fact that an administrative authority does not have the necessary fund to finance the contract will affect the validity of the contract. See Article 32(2) of Proclamation no.648/2009 and Article 401 of the Civil Code. Compare it with Article 3142 of CC

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B. 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.

What is an offer? Acceptance?

- Is there an exception to Ad.K?
- The identity of the party that makes the offer and the identity of the party that accepts the offer are predefined by the law. Use the competitive bidding system.
- 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.
- In principle, the offerer is the contractor and the acceptance is to be made by the contracting administrative authority.
- It is only in case of counter offer or in a contract without competitive bidding procedure that administrative authority is the offer maker and the contractor acceptor.

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Is the adm. body has freedom to engage in k?

- Yes, unless there is requirement of the authorization by other party(Article 3134(2)).
- Effect of silence? does not amount to acceptance
- See art. (Article 3134(1) and (2)), 1682 of the Civil Code.
- This rule is not without exception, however. Compare it with Article 1683, 1684, 1685, and 1686

Any exception?

- If an express stipulation stating " silence amounts to acceptance" is inserted
- If approval by a higher authority is required and no timely response is given by adm authority, party contracting with the administrative authority can release himself from the contract by giving notice to the contracting administrative authority.3144.3145

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C. Requirement of Form

- The general rule? see Articles 1719 – 1730 of the Civil Code.
- Requirement of form is not just only for the purpose of proof of the contract (*ad probatum*), but it is also a validity requirement (*ad validitum*).
- 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.

Who will sign?

- 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).

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- 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.
- How about by electronic means (like telephone, e-mail, etc.)?
- Article 26(2) of Proclamation no. 649/2009 states possibilities if authorized by the Minister of Finance and Economic Development .
- Effects of non-observance? The contract null and void.
- See also Article 1720(1) , 401(1) of the Civil Code

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D. Requirements as to the Object

- object : obligations of the parties to a contract. See Articles 1711-1716 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.
- 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.
- Compare Article 1717 of the Civil Code with Articles 3170 and 3171 of the Civil Code ? Is motive a requirement?
- As provided in Article 3171(1) an administrative contract will be void where
- It should not be 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.

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- Article 3171(2) 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.
- Requirement of cause. 3170 Has to 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.
- 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.

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- Specific contracting methods See Proclamation no. 649/2009
  - **Open bidding/tendering** Article 33(2) – the principle
  - Restricted tendering (Articles 49 and 50)
  - Direct Procurement (Articles 51 and 52)
  - Request for Proposal procedure (Articles 53 and 54)
  - Request for Price Quotation procedure (Articles 55 and 56)
  - Two-stage bidding (Articles 57 and 58)
- The contracting methods that are mentioned above from 2 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. What is the effect of General terms of business (Model specifications, General clauses and conditions, and Common directives) developed by the contracting ad.body?
- See Art. Of C.C, Art. 3135 & 3136 of the Civil Code, PPPAA
- The PPPAA is empowered to prepare sets of general business. So far the PPPAA has prepared separate set of business terms applicable for procurement of goods, procurement of services, procurement of works, procurement of consultancy service, procurement of pharmaceuticals and for minor (local) purchases.

Cont'd

Why Tendering?

- The essence of tendering is competition. Offer to the least possible price.
- 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.
- It gives equal chance of participation in public works financed by the tax payers' money. Reinforcing this assertion, Art. 24 of Procl.No. 649/2009- non discrimination,
- Art.25 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.

Cont'd

Exceptions :- Art. 3(2a) of Procl.649/2009

These are:-

- Contracts relating to national security and defense- for efficiency and eco of k, confidentiality, security
- Contracts financed by external source (Art.6)- b/c the provisions of loan or grant agreements which the government of Ethiopia enters into with other states or international organizations prevail over the procl.
- Contracts between government bodies for the supply of goods, execution of work, provision of consultancy or services for consideration. Art. 3(2b), Procl. No. 649/2009).

Rationals

- Effects of failure to apply appropriate procedure, Arts. 3137 – 3139, 1668,of the Civil Code
- Results in the nullity of the contract as per Article 401(1) of the Civil Code.
- What is the effect of General terms of business (Model specifications, General clauses and conditions, and Common directives) developed by the contracting ad.body?
- See Art. Of C.C, Art. 3135 & 3136 of the Civil Code, PPPAA
- The PPPAA is empowered to prepare sets of general business. So far the PPPAA has prepared separate set of business terms applicable for procurement of goods, procurement of services, procurement of works, procurement of consultancy service, procurement of pharmaceuticals and for minor (local) purchases.

Cont'd

- 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).
- Art.3137, if they 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
- Art. 1686- general terms of business obligate a party even if they were unknown to him whenever they have been prescribed by the public authority.
- Is it justified?
- René David, says that it was due to slip of the pen
- If modified after the conclusion of the k, general terms will not affect the rights and obligations of the parties – Art 3139

Cont'd

specifications. (Art. 29(3) Procl. no. 649/2009).

- National Standard
- Usually has no requirement or reference to particular trademark or name, patent, design or type, specific original producer, or service provider.
- If there is the need to resort to this way or method of preparing the specification, phrases such as "or equivalent" must be included.
- As provided in Article 3152

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.

- prepared in advance

Cont'd

A. **Open Bidding** : Article 49 – 58 of Proclamation no. 649/2009.

- In principle, administrative authorities have to employ open bidding.
- the procedures involved.

Preparation of bidding documents. Art.2(12,)37

- It must include instruction ,information bid submission forms ,number of copies to be submitted with the original bid, the general and specific conditions of contract; Specifications of requirements, period during which the bid remains in force, price adjustment, evidence to be provided by bidders to demonstrate its qualification as well as its fiscal and legal standing; the criteria and the points to each criterion for evaluation of bids and award of the contract;

Cont'd

Advertising invitation to bid- art 36

- 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. What info. Should be aired?
- The name and address , brief description of the goods, works or services , means and conditions for obtaining the bidding documents and the place from where they may be obtained; place and deadline for the submission of bids; and
- Availability, accessibility , modifications of bid document- see art.39

Cont’d

Receipt of bids 41(1),42,3153,3154,3156-57

- submit their bid in writing, signed and in sealed envelope, to the place and before the deadline The bid that interested contractors submit should consist of declaration of intention to tender. 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, bid document in which the bidder specifies his offer of the price and the terms and conditions which he is willing to be bound by, bid bond/security.
- As provided in this article, bidders have to submit together with their bid a bid bond or security. The purpose of the
- bid bond ? bid security? (in the form of casher’s certified check (CPO) from a recognized bank, letter of credit (LC) or bank guarantee.
- Are they necessary? Not in every bid. 40
-

Cont'd

Opening of bids- art 8,42,PPA, 3158 of CC

- 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
- 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.

Examination and evaluation of bids and selection of the successful bidder,44,43

- 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.
- Arithmetic errors can, however, be corrected by notifying to the
- 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
- These cases are out rightly excluded by the law maker.

Cont’d

- No criterion shall be used that has not been set forth in the bidding documents.
- The successful bid will be the bid that is found to be responsive to the technical requirements and with the lowest evaluated price-(Article 43(8))
- 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;
- 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.

Cont'd

What if two or more bidders have same point?

- If provided in the bidding documents or the rules governing the tender procedure, successful bidder shall be selected by lot
- Absent such stipulation in the bidding documents, the administrative authority has to announce a new bid (See Article 3166 Civil Code).

What is the effect of designation of successful bidder? 3167

- shall not constitute the conclusion of the contract (Art. 3167(1) Civil Code).
- 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
- It has also the effect of releasing the other tenderers from the obligation they entered into by submitting tender

Cont’d

- 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 is deemed to be concluded when the administrative authority 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.
- Is negotiation possible after designation? 45 of PPA
- 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

Cont'd

- contract security performance bond (Art. 47 Proc. no. 649/2009).
- The purpose 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.

Restricted tendering -49

Whys

- When it is ascertained that the required object of procurement is available only with limited suppliers.
- Where a repeated advertisement of open bidding fails to attract bidders
- the procedures is the same as open tendering except:

1st, regarding the invitation to bid, the manner of communication to interested bidders is different from open bidding.

2nd, as regards the time allowed for the preparation of bids by the invited bidders

Cont'd

Request for Proposal Method-53

- 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.

Reasons

- price cannot be the sole factor in selecting the right contracting party.
- 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.
- 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.
- Basically the open bidding procedure is also applicable to request for proposal method of procurement.

Cont.

- As required under Article 54(3), the request for proposal that is to be addressed to candidates shall contain the following information:-
- The name and address of the contracting administrative authority;
- Description of the services required by way of terms of reference (ToR);
- 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;
- 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,
- Place and deadline for the submission of proposals.
- 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).

cont'd

Price Quotation Procedure (*Pro forma* procurement)-55,56

- Price quotation method is used only if:
- 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.

Two-Stage Bidding-57

- Two-stage bidding will be used:
- 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;
- 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;
- 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;
- 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.

Cont'd

- The procedure that two-stage bidding involves art. 58/ 649/2009. Thus,
- In the first stage is Request for proposal - at this stage, the administrative body shall identify the responsive bids by evaluating the proposals submitted by bidders against its requirements.
- In the second stage , 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.
- 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.

Direct Procurement

- 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.
- 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.

Cont'd

Conditions

1. When the goods, works or services is available only from one candidate;
2. For additional deliveries of goods by the original supplier
3. 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;
4. 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;
5. 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;
6. pressing emergency in which delay would create serious problems and therefore injurious to the performance of the public body;
7. necessary to meet the special needs of the administrative body;
8. 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.
9. Micro procurements- minor procurements the value of which does not exceed the amount to be stated in the procurement directives

Cont'd

International Procurement (Contracting)

- 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.

Reasons- 59

- not always possible to find the required type of goods, works or services from the domestic market.
- limitations on the part of domestic companies in capacity and technology.
- donor and lending agencies and countries may require the participation of foreign companies in works to be performed in Ethiopia.
- 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.
- 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
- 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

Cont'd

- What do you think are the effects of General terms of business (Model specifications, General clauses and conditions, and Common directives) developed by the contracting admi.body?-

- See Art. Art. 3135 & 3136,1735,1686 of the Civil Code, PPPAA

- The PPPAA is empowered to prepare sets of general business.

- So far the PPPAA has prepared separate set of business terms applicable for procurement of goods, procurement of services, procurement of works, procurement of consultancy service, procurement of pharmaceuticals and for minor (local) purchases.

* A validly formed contract has to be performed effectively.

- general contract law principles governing performance of contracts will substantially apply to performance of A.Ks..
- Art. 1731 of CC- K has to comply with mandatory provisions of the law.
- If it is validly formed, it has a binding effect on the contracting parties. It is presumed as a law b/n contracting parties
- Failure to honor the terms of the contract produces its own legal effect for the parties.
- Art. 1952(1) of the C.C provides that "...contracts shall produce effects only as between the contracting parties."

Cont’d

Interpretation of A.K

- The vice that exposes other contracts to the necessity of interpretation also affects A.Ks. This is even more so with A.K which are complex by their nature and incorporates many documents.
- There are, however, no special rules that govern the interpretation of A.Ks. The general rules of interpretation of contract (Art.s 1732-1739) apply also to interpretation of A.Ks.
- Art. 3138(2) the administrative body may incorporate special rules of interpretation in the general terms and conditions of contract which the A.Adraw.
- Since A.ks are adhesive by their nature the rule of interpretation which is provided in Art. 1738(2) is significant. “*[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*”

Cont'd

Modality and Time of Performance of A.Ks

- Since a contract is a juridical act, each contracting party has the obligation to perform as per the terms of the contract.
- In A.Ks, 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.
- Arts. 3172 of C.C – duty to perform in 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 (Art. 3172(2&3) C.C).
- Art. 3173 of CC – state the possibilities of inserting a caluse allowing the A.A to supply materials or undertake right to recruitment of the workmen

Cont'd

When it is to be performed?-See Arts. 1756.1757 &. 3174(1) ,3175 of C.C

- 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 performance of contract depends on the circumstance of the case and the nature of the obligation assumed under the contract.
- Art. 3175 of C.C- A.A cannot unilaterally 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.
- The obligation of the contractor is more onerous than his counterpart in a private contract. Compare Art.1758(3) with 3177
- Right to refuse to carry out one's obligation incase of anticipated breach of k by the other part or declared insolvent. The doctrine of *exceptio non adimpleti contractus*

Cont'd

- The only instance where the contractor can refuse or suspend performance of his obligations as a result of the non-performance by the A.A of their obligations is when such non-performance makes impossible the performance of his obligations.

Rationales:

- A.A does not have its own interest in the contract it may be careless in the performance of the contract.
- Applying the doctrine of *exceptio non adimpleti contractus* will be prejudicial to the public interest and may result in the interruption of basic services.
- Any remedy to the contractor? Compensation from the in default.
- The price payable by the A.A to the contractor under the contract has to be effected in accordance with the rules of finance (Art. 3176, C.C). The contractor can invoke set-off except for fiscal debts (Art. 3178, C.C).

Cont'd

Unilateral Variation of the Contract by the Administrative Authority

- May arise from a stipulation in the contract to this effect
- Conditions recognized by law. Exception to The principle of Freedom of k
- The same rule is recognized under Art. 3179 of the Ethiopian C.C.

Reasons

- For 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.

Counter argument?

- Affects full and free consent of the contractor
- revisions cause breach of contract by the contractor

Cont'd

Three possibilities of unilateral variation:

- 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.

Cont'd

Remedies of the contractor which also arise from the law 3181(1),3181(2)

- Indemnification
- In case of diminution of his contractual obligations,
- 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.
- Limitation on discretion of A.A - Art. 3179

- First, in every case the administration must show that the action is for the benefit of the public.
- 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.

Cont'd

- Where, however, the variation is justified by the public interest and If a justified variation substantially alters the obligation of the contractor , he may ask for the termination of the contract and claim indemnity- See. per Art. 3182(1), 3183

What if unilateral variation by A.A changed :

nature of the obligation of the contractor? or

upset the economic balance of the contract?

- Can the contractor validly terminate the K? See Arts. 3182(2) & (3) of C.C
- Where, however, the unilateral variation of the contract by the contracting A.A 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 (Art. 3181 of CC).

Cont'd

Judicial Variation of A.Ks

- There are two doctrines: the doctrine of *imprévision* (unforeseen event) and the doctrine of *fait du prince* (act of government) that permit judicial variation

Unforeseeable Events (the Doctrine of *Imprévision*)

- 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 C.C.
- performance is expected if materially possible despite the occurrences of unforeseeable events
- What is different in case of A.K? (Art. 3183(1), C.C).
- Despite the duty of the contractor to perform, if materially possible, he has right to demand from the administration an indemnity for the increased costs in carrying out his obligations.
- The rule that allows this right to the contractor is known as the doctrine of *imprévision* : Unforeseen event + extraneous to the parties + upsets the economic balance of the contract + disproportionate financial loss to the contractor ---------compensation to the contractor.

Cont'd

Rationales:-

- 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 assumes in a private contract.
- 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.
- The question then is when do we say that the economic balance of the contract is upset?
- unforeseeable event? extent of compensation? the fate of the contract if the economic balance of it is not restored? Art.s 3184-3189 of the C.C

Cont'd

Art. 3184 of the C.C- 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.
- any ordinary price variation would not be ground for invoking the doctrine of *impévision*. War or inflation may be an example.
- The event that upset the economic balance of the contract must be extraneous to the parties. If it is the fault of the administration, it might be covered by the doctrine of *fait du prince*. Art. 3185(2), C.C

(Art. 3185(1), C.C).- 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
- Sometimes even if the event has occurred at the time of the 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.

Cont'd

- 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 (Art. 3185(3), C.C).
- 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.
- Note 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(Arts. 1791(2)-1794, C.C).
- 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 (Art. 3187).

Cont'd

The Role of the Court

- make adjustment of unbalanced r/ships
- limited only to determining the existence of an unforeseeable event that resulted in disproportionate loss to the contractor and
- fixing the amount of compensation due to the contractor until the balance of the contract is restored or
- order the cancellation of 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
- 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 A.A can ask the court to ascertain the situation.
- 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 (Art. 3189(2&3), C.C).
- The contractor cannot continue the performance in such situations.

Cont'd

To what extent the A.A has to cover losses of the contractor?

- A.Ais not obliged to cover the whole loss the contractor sustained
- A.A is not supposed to cover loss of expected profit by the contractor (Art. 3188(1).
- The contractor is entitled to claim indemnity from the A.A only for the increased costs he sustained beyond loss of expected profit.
- And the A.A is obliged to cover only a part of the loss that the contractor sustained as a result of the unforeseen event (Art. 3183(2) and Art. 3188(1), C.C).
- The contractor is made to bear half of the loss he sustained.
- Depends on the extent of efforts made by the contractor to overcome the difficulties, the general position of the contractor and all other equitable elements (Art. 3188(2), C.C).
- If there is price varation clause there is no way to apply the doctrine of *imprévision unless*
- Where there are reasons parties fail to reach agreement in accordance of the *varaion clause*, *the* contractor can claim indemnity from the administration under the doctrine of *imprévision* (See Art. 3186(a), 3186, C.C), Art. 3183(2) of the C.C.
- Variation clause--- Increase in the expenses of the contractor + increase in the price of raw material + the unforeseen difficult nature of the work
- Increase due to inflation that hit the economy invokes the doctrine of *imprévision* (Art. 3186(b), C.C).

Cont’d

Act of Government (the Doctrine of *fait du prince*) Art.s 3190-3193

- government measures+ , + effect the upsetting of the economic balance of the contract, +extra losd profits(expect) .
- 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, regulations or directives that have the effect of increasing the obligation of the contractor.
- The effect of such kind of government measures on A.Ks is governed by the doctrine of *fait du prince*.
- 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.
- the legal effects of government measures on A.Ks, depends on whether measures are general and special measures.

Cont'd

- General measures are 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 contractor has the right to claim indemnity from the contracting A.A(Art. 3190(1), C.C).
- 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 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.
- Art. 3192- is about indirect effect of measures undertaken by the contracting A.A
- 3193 (3)- contractor will not be entitled to compensation if measures are taken by other
- He can, however, claim compensation based on the doctrine of *imprévision* under Art. 3183 (Art. 3193(2), C.C).

Cont'd

* *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 specifically in his capacity as a party to an A.K.

- 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 A.K.

What if the gov't pass a legislation increasing the minimum standard of wages and the contractor sustained damages? Dotrine of *impervision*

- What if the government passed a law prohibiting the use of coal to generate electricity and the contractor sustained damages? doctrine of *fait du prince*.

Cont'd

- 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 A.A can avoid the intervention of the court by revising the contract to adapt to the new situation.
- After all, the court is not empowered to fix new terms and condition

Can parties waive their right to apply the doctrine of *fait du prince* or the doctrine of *imprévision*

- public services are supplied without interruption and public works are properly completed without delay.
- have the effect of balancing the inequality in the contractual position of the contracting parties.
- Have same position in the contractual relationship.
- attract private enterprises to cooperate in the operation of public services.
- In general, the provisions of the C.C 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.

Cont'd

Non-Performance of A.K and its Effects

When do we say that there is non-performance of k.?

- It depends on how k. is to be performed and what non-performance means.
- It has to be performed according to the terms of the k.. See arts.1745 - Art.1748
- In general, deviations from the type, quality, quantity, design, mark, time, etc., specified in the k. amount to non-performance.
- This same principle applies to performance of A.ks.
- A validly concluded k. is law as between the k.ing parties; a k. differs from ordinary agreement by virtue of its effect on the k.ing parties. So, failure by one of the k.ing parties to discharge his obligations as per the terms of the k., will give rise to rights for the other k.ing party who is willing to discharge his side of the obligations arising from the k..
- Art.1771 of the C.C which enshrines this principle and which is also applicable to A.ks, provides that the party having right to claim performance have the following alternative remedies. These are:-

- Asking forced performance of the k., or
- Cancellation of the k., and
- Asking for compensation

Cont'd

- The party affected by non-performance can ask for one or a combination of these remedies.
- The creditor can ask forced performance of the k. either by the creditor himself or by a third party and ask compensation
- Cancellation of the k. and payment of compensation for the loss he sustained from the non-performance of the k..
- Giving notice save exceptions(See Art.1775, c.c).

Forced Performance of A.ks

- act of compelling the debtor to perform the obligation he assumed under a k. and the time of performance of which has lapsed.
- 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.

Cont'd

Any exception? Compare 1776. & Art. 3194 of the C.C

- Not to let the debtor become a slave of the creditor
- special importance and
- k. can be enforced without affecting the personal liberty of the debtor.
- Contractor cannot ask for forced performance by the contracting A.A.
- An A.A enters into k. in addition to its obligation to pay the agreed price, it may also assume other obligations towards the contractor.
- The court can, however, order the payment of compensation to the contractor unless the A.A is not willing to perform its obligations - Art.3194(2), C.C
- A related point worth considering here is that the A.A 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 k. which it has unilaterally cancelled as per Art.3180 of the C.C or forced performance of its obligation to supply material or work-men which are necessary for the performance of the k. by the contractor.
- From the side of the contractor? 3195

Cont'd

B. Cancellation of A.ks

- putting an end to a k. before it is performed.
- If one of the parties to a k. failed to perform his obligations, the other party affected by the non-performance can ask the court to terminate the k. or he can declare the termination of the k. by himself where such power is given to him under the k.

Right of cancellation of k. can only be exercised where:-

- stipulated in the k. or
- by law,

- The party affected by the non-performance of the k. can also unilaterally declare the cancellation of the k.
- Substantial nature of the non-performance has to be ascertained (Art.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.

What is unique? Art.3180 of the C.C, Art.3204 (2)

- A.A is empowered, regardless of the fault of the contractor, to unilaterally terminate the k. without the need to get the permission of the court.
- Private construction law. 3035,3038

Cont'd

Damages

- the economic loss that the non-performance of the k. by one party entails for the other party who has discharged his obligation or is ready to perform his obligation.
- Its purpose is to compensate the party that sustained economic loss as a result of the non-performance of the k..
- damage = all the economic benefits which the party affected by the non-performance could have derived had the k. been performed as it is. As pointed above damage may be asked together either with cancellation or forced performance (Art.1790(1), c.c).
- Penalty clause in accordance with the provisions of Arts. 1886-1895 of the c.c
- Failing stipulation in the k. 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 (Arts. 1789-1805, Civil Code).
- AA. has no 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 Art.3200 of the c.c
- Damage determined either by the terms of the k. or by the court, but not by the administrative body.

Cont'd

Any burden of proof on the claimant ? 1790

- there is non-performance of k.,
- he has sustained economic loss (actual loss,delay or loss of expected profit). and
- there is a direct cause and effect relationship between the non-performance of the k. and the economic loss sustained. This is implicit from the reading of Art.1790(1) of the C.c
- 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, however, defenses that may validly be raised. These include:

- there is no damage, or
- the claimant is responsible for the damage.
- admit non-performance but not liable to pay compensation under the circumstance.
- force majeure as defined under Art.1791(2) of the c.c

See also Art.1793, 1794, 3199 of the C.C

- Art.3199 of the C.C provides two additions to the list of circumstances which are not considered as force majeure: delay or default of the suppliers of the contractor cannot be raised as force majeure releasing the contractor from liability for non-performance

Cont'd

- **Assignment and Sub-K.ing of A.ks- 3201,3202**
- Assignment is an act whereby the contractor substitutes a third party for himself for the total performance of the k.. Art.3201(1) of the C.C
- sub-k.ing 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 k..- Art.3201(2)

Q. **would not it negate the purpose of the procedures for the allocation of A.ks by tender?**

- Efficiency, Effectiveness, uncertainly vs public interest
- Needs approval by the k.ing A.A or by higher authority competent to approve the conclusion of that specific type of A.k.
- What if not approved or authorized? It does not necessarily lose its validity. See 3203-3204 of the C..C.
- It is rather considered as k.ual fault on the part of the contractor justifying the cancellation of the main k. (Art.3204(2), Civil Code).
- What is the effect of assignment? See 3205-3206 Compare it with
- varies depending on whether the approval relates to assignment or subk.ing.

Cont'd

Termination of A.ks

A.ks may terminate by:-

- Decision of the parties,
- By operation of law, and
- Decision of court of law

There are two independent grounds that enable the k.ing A.A to unilaterally declare the termination of the k..

- the fault of the contractor and

- the requirement of public interest.

Protection of the contractor ?- Art.3180 ,3181(1)

- A.A has to show that the continuation of the performance of the k. is no longer necessary for the public interest.
- A.A has to compensate the loss, including loss of expected profit, which the contractor sustained as a result of the termination of the k.
- If terminated on guise of public interest, the contractor is entitled to compensation
- If terminated due to the fault of the contractor, the AA is entitled to compensation which is determined by the court.
- Please note that the measure of unilateral termination of the k. by the A.A 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*.

Cont’d

- (Art.3181(1), Civil Code).

How about unilateral termination by the contractor?

- In pple, the special A.k law rules do not allow the contractor to unilaterally terminate the k..
- Exceptions See Arts. 1787, 1788, and 1789
- If the k. so stipulates or
- those conditions that are mentioned in general k. are fulfilled