

CONSTRUCTION LAW

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Chapter Two

FORMATION OF CONSTRUCTION CONTRACT

Introductory Questions

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- Is there a difference between formation of construction contracts and general contracts?
- What special condition/requirement is attached to the formation of construction contract in addition to the general contracts law rules?
- Is there a difference between formation of civil/private and public/government construction contracts? If any , what is it?

Introduction

- In relation to its formation, construction contract can be treated in **two different domains**:

1. **Civil/Private** Construction Contract &
2. **Government/public** Construction Contract

- The division is simply based on the employer or owner who seeks the building project to be completed.
- The **former** refers to when a **private individual** or company employer enters into a contract with a contractor.
- The latter refers to the **government department**, as an employer wants to have the construction carried out on behalf of the

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- Whosoever the parties are, **the contract** in both civil and government construction cases engenders a separate set of rights and obligations.
- Based on the difference on the parties so involved in it, the formation requirement and procedures of civil and government construction contracts are also different.

2.1. Formation of Civil Construction Contracts

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- Civil Construction Contract is a construction contract between or **among private individuals or private companies**.
- Therefore, its formation requirements are different from that of public/gov't construction contract.
- In addition to the specific requirements need to be fulfilled by the employer and the contractor, the general contracts rule may also apply to the formation of civil cc.

Requirements in Establishing Civil Construction Contract

- Both the **Client/employer** and the Contractor need to fulfill certain preconditions before starting a negotiation for the contract itself.

For instance **the client** is required to:

- ✓ **Conduct soil test of the site**
- ✓ **have the site surveyed**
- ✓ **make sure that the building he is intending to build will in no way infringe up on others right and**
- ✓ **Have to secure a build permit.**

The **contractor** on his side need to have a **license** that will enable him to realize the project intended by the employer/client....**Grades** in licensing!

Common Formation Requirements in Civil CC

- Without affecting the validity of the above mentioned requirements, for a civil construction contract to be valid both parties also need to fulfill the following:

1. **Capacity:** The parties to the contract must be **competent, and legally capable** of playing their intended part....**why?**

This is because **the law cannot enforce** the agreement on someone who does not have the legal capacity to enter into an agreement.

✓ **Incapacity** of the parties **could be due to age (Minority), Mental problem(JI) & or legal interdictions.**

1. Capacity Contd.

If one or both of the parties in construction contract are juridical/legal persons, there are certain additional requirements in relation to their capacity. These are:

1. Legal personality:

Established by law (Gov't Agency) or a Memorandum of Association and thus, registered (BO)

2. Contractual Capacity:

The organ needs to be capable of contracting on such matters.

For instance: **MoSHE** cannot sign a road construction contract only because it has a legal personality.... **ERA**

2. Object

- Object of a construction contract need to be lawful, possible, moral and clearly defined among others.
- **Object of the contract** must **be lawful** and **definite** in respect of requirements and duties of each party.
 - ✓ For example a contract **violating municipal regulation** is not binding and is void in courts.
 - ✓ Also **uncertainty** in respect of the what is wanted may result in the contract being not enforceable by law.

- Object of a construction contract need to be clearly stated **because** construction contract is expected to include **too much details** which need a clear statement.
- Given the **complex nature** of the contract it self, parties failure to define object of their contracts would even make their situation worse.
- **Therefore**, in order to avoid a subjective interpretation at a latter date, **parties need to be alert regarding statement of their object.**

3. Free consent of parties to the contract

- ✓ **Consent** refers to parties agreement on each and every terms (the subject matter) of the contract.
- Consent is said to be **free when it is not caused by force, or undue influence or fraud or misrepresentation.**
- **Especially in construction contract since the contractor is a professional and the client is not, in most cases, there is a high chance for the client to be defrauded by the contractor.**

4. Form

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- Can you imagine a construction without design?
- Can we have a construction contract without a number of documents describing the details of the project?

Construction contract (especially **public CC**) must be in a written form most importantly for the **purpose** of:

- ✓ Accuracy in the work
- ✓ Recalling the content and
- ✓ Because value it involves is huge
- ✓ Offices may change...
- ✓ Reducing Corruption...transparency...by recording the content of the contract

2.2. Formation of Government/Public CC

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- Saving the requirements of **capacity, consent, object and form**, in a government /public construction contracts there is another additional requirement.
- Forming Gov't CC **is not left to the whim of the individual power holders** at the various hierarchies of the government structure.
- What officials of the Government do with the public expenditure should be **transparent**, and those wielding the power should be **accountable** to the general public for each and every activity that they do and have it done on behalf of the public.

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- Thus, on one  hand, **to promote transparency** in the process of government contract formation and, on the other hand, **to make officials** involved in public procurement processes be **accountable**, governments come up with **procurement rules**.
- Currently we have The Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009.
- Thus, it is a party **who win the bid** that **will be a party to CC with government**.

Procurement/**Bittaa**/ጥዥ/: What is it?

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- **Procurement** mean obtaining goods, **works**, consultancy or other services through purchasing, hiring or obtaining by any other contractual means.(Art2(5) Proc.**649/09**.
- In UK's, *Government Procurement Act* (S2A) "**procurement**" is defined as "the **process** of acquiring goods, services, works or property by purchase, lease, rental or exchange". **Any d/ce??**
- **Works** mean all work associated with the construction, reconstruction, up grading, demolition, repair or renovation of a building road, or structure, as well as services incidental to works, if the value of those services does not exceed that of the works themselves.

What are the Methods of **Procurement**?

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- According to the proclamation (Art. 33) we have the following methods of bidding/procurement:
- a) Open Bidding;
- b) Request for Proposals;
- c) **Two stage Tendering;**
- d) Restricted Tendering;
- e) Request for Quotation;
- f) Direct Procurement.

- All procurement that  involves the Federal Government at all levels should **comply** with the prescribed methods of procurement.
- **However**, the Ministry of Finance and Economic Development in consultation with the pertinent body, **decides to procure goods, services and works other than those procedures** given under it **for national security or national defense interests**.
- **Is it feasible? Wouldn't it amounts to compromising quality?**

Why Procurement?

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Procurement is **believed to ensure or helps in bringing:**

- Transparency...no secret dealings
- Fairness...everyone will get equal chance
- Non-discrimination...
- Market competitiveness
- The best value for money
- Efficiency

Method of Procurement (Art. 33)

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- **1. Open Tendering**
 - ✓ Open tendering is the **preferred (default) procedure** of procurement (33/2).
 - ✓ Under open tendering, the procuring entity must **prepare an invitation** to tender as well as tender documents.
 - ✓ The invitation to tender must be brought to the attention of those who may wish to submit tenders by advertisement in newspapers that have wide circulation within the country.

- **RT is available if:**
 1. The **costs of open tendering would be disproportionate** to the value of the contract
 2. There are **only a limited number of suppliers**
- **It is similar to 'open tendering' except that the invitation to tender is given only to selected persons.**

3. Direct Procurement

- Direct procurement is available if there is **only one supplier** or if there is an **urgent** need.

4. Request for Proposals

Request for Proposals is a choice **to procure** services that are advisory or are of a **predominantly intellectual** nature...
Consultancy Services

- RQ is available **to procure goods that are readily available** and for which there is an established market.
- The successful quotation is the one with the lowest price that meets the requirements in the request for quotations.

6. Two stage Tendering

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- It is similar to RP because the technical and financial proposals are submitted separately, but one before the other, rather than simultaneously.
- Its key feature is that the submission of proposals takes place in two stages.
- Moreover, bidders can assist in defining the technical requirement and the scope of work.
- It is used for the procurement of goods, services and construction works.

- In formulating their construction contract detail, parties need to include the following **essential parts** which if overlooked will affect performance of the contract. These are:
 - ❖ **Full Name, Address, and Signatures of Both Parties**
 - ❖ **Scope of Work**
 - ❖ **Project Cost and Payment Terms**
 - ❖ **Schedule of Work**
 - ❖ **Authority**

1. Full Name, Address, and Signatures of Parties

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- Though this may sound obvious, this commonly overlooked element of construction contracts is required to make the contract legally binding.
- Without the proper information or appropriate signatures on all required documents, it will be difficult **to get the contract to hold up in court.**
- This is usually contained in the Articles of Contract Agreement.

2. Scope of Work

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- Although this is an element that is often included in most construction contracts, many individuals tend to overlook the necessity for details.
- This is an area of the contract that **should, in great detail, explain the services to be provided, including a description of materials, quality, grade, schedule of work, and other specifications pertinent to the construction of the project.**
- This is usually seen in Drawings and Specifications.

3. Project Cost and Payment Terms

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- There should be no confusion as to the cost of services included and cost of services beyond the scope of the project.
- The **schedule of payments**,
- the **amount** that is due, and
- the **terms and conditions of payment** should also be clearly outlined in this section of the contract.
- These are contained in the conditions of contract

The CC shall establish:

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- **A construction start date, and**
- **Date of completion, and be sure to differentiate between calendar days and work days.**
- It is also wise to include in the contract that **you are not responsible for delays caused by the employer in obtaining the required permits, easements, and approvals, or for delays as a result of bad weather.**
- If there would be change orders, be sure to document any additional time that they will require.



With so many complications involved, it may become difficult to establish **who has authority to make decisions during a construction project.**

This is why it is important **to make clear who has the authority** to make legally binding decisions.

- This simple element of the construction contract can save a lot of headache and confusion during the project.

Authority is to be stated in **conditions of contract** part.

- For instance who can make variation orders , time extensions , price adjustments and etc? has to be included in the contract.

THANK YOU