



**ADDIS COLLEGE
SCHOOL OF GRADUATE STUDIES
DEPARTMENT OF CONSTRUCTION TECHNOLOGY
& MANAGEMENT**

**Degree program: - M.Sc. in Construction Management
Course title: - Advanced Construction Procurement and Contract
Management**

Course Contents

- **Unit 1 – Introduction to construction Procurement & Contract Management**
- **Unit 2 – Procurement through public private partnerships**
- **Unit 3 – public Procurement Law (Ethiopian)**
- **Unit 4 – The practice of contracting in construction**
- **Unit 5 – Claim and Dispute Management System**

The Practice of Contracting in general and in Ethiopia (The formation and Effects of Construction Contract)

❖ CONTRACT IN ETHIOPIAN CONTEXT

Article 1675 of Ethiopian Civil Code:

“A contract is an agreement whereby two or more persons as between themselves create, vary or Extinguish obligations of a propriety nature.”

❖ IN THE LAW OF THE COUNTRIES OF CONTINENTAL EUROPE

“a contract is defined as an agreement to create, vary and Extinguish rights and obligation.”

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- ❖ The definition contains the following elements. These are:
 - ✓ That the contract is an agreement;
 - ✓ The agreement is to be made between two or more persons;
 - ✓ That the agreement is binding between such two or more persons;
 - ✓ The agreement is to create, vary & extinguish obligations;
 - ✓ The agreement is to create obligations
 - ✓ That the nature of obligations is proprietary;

Cont'd ...

❖ **construction contract**

- A construction contract is a product of an agreement between the employer & the contractor & it is enforceable at law.
- “Enforceable at law” means that if the agreement reached between the employer & the contractor breached(deviations occur from the promises) by one of the parties, the aggrieved party, either the employer or the contractor, may bring a legal action against the other to demand the enforcement of its rights with the support of law.
- The construction contract clearly fulfils all the elements given to the definition of contract. The Form of Agreement, in the construction contract, clearly presents the Agreement reached between the employer & the contractor

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- ❖ The construction contract, in principle, is only binding between the employer & the contractor. This concept is related to the doctrine of the **privity of contract**.
- ❖ **Privity of contract** means that the contract is only binding only the parties who have made it. This is true.
- ❖ The main contract is only applies between the employer & the main contractor.

Formation of contract

- ❖ A contract is an agreement between two or more parties that is intended to be legally binding.
- ❖ Art. 1675 of the ECC (Ethiopian civil Code) defines contract as: “an agreement whereby two or more persons as between themselves create, (vary, or extinguish) obligation of proprietary nature.
- ❖ It an agreement in which each party promise to other. However, all agreements are such as domestic agreements are not contract
- **Elements for the formation of contract**
- ✓ Capacity
- ✓ Consent (offer and acceptance)
- ✓ Legality and morality
- ✓ Formality required by law

Cont'd ...

1. Contractual capacity

- ❖ a party must understand the effect of their act.
- **Minors and judicially interdicted** (insane person) cannot enter into a contract.
- **Legally interdicted person** (imprisoned person) also prohibited
- **Senile** person

Discussion point

* What if a minor enters into a contract despite.

Cont'd ...

2. Consent

- ❖ The first requisite of a contract is an agreement (consisting of an offer and acceptance... negotiation)
- ❖ The offeror who makes an offer, and the offeree who accepts the offer.
- ❖ Offer can be made in writing, orally, or sign or conduct, depending on the contract.
- ❖ **Offer**
 - Offer is defined as a proposal expressing the declared willingness of the offeror to enter in to an agreement, if the offer is accepted.
 - Offer is a legal process which is a declaration of willingness or intent to be bound by specific terms set out.
 - Offer may be made:-

Cont'd ...

- Orally;
- In writing;
- By sign;
- By conduct;
- By specially stipulated manner for acceptance;
- In case of (public) construction contract, offer shall be made in writing.

Cont'd ...

❖ **Characteristics of Offer**

- The following are characteristics of a valid offer.
- These are that the offer should be:-
 - Certain;
 - Communicated;
 - Unconditional;
 - Distinguished from invitation to treat;

❖ **Acceptance**

- An unqualified assent to the terms of the offer (An acceptance of the terms of an offer without further qualifications)
- To make a binding contract the acceptance must exactly match the offer.

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❖ Effect of Acceptance

- Acceptance: - once an offer has been accepted, a binding contract is made.
- Rejection:- if the offeree rejects the offer that is the end of it. Eg. The defendant made the highest bid for the plaintiff's goods at an auction sale, but he withdrew his bid before the fall of the auctioneer's hammer. It was held that the defendant was not bound to purchase the goods.

❖ Defect in consent (Art. 1696-1710)

- The consent of parties must be free from mistake (fundamental), fraud, duress (coercion, referential fear)

Cont'd ...

3. Legality

- the object of contract must be lawful and not contrary to public morals
- The object shall be sufficiently defined , must be possible
- In a construction contract, matters such as the scope of work, price and the time for completion shall be sufficiently defined.

4. Forms

- Generally there is freedom of form
- Contracts required by law to be made in writing
 - Contract relating to immovable
 - Contract that made for long duration (contract of guarantee, contract of insurance, security contract,
 - Contract with public administration

Cont'd ...

- When parties decide the form of contract to be in writing
- Subsidiary contract
- Construction industry generally involve complex arrangements with in many procedures.
- As a result the contractual terms will invariably all be set down in writing.
- Failure to follow formal requirement render the contract a mere draft

Effects of Elements of contract

- The non-fulfillment of the element of contracts render the contract either **void or voidable**.
- **Void** contract does not have any legal effects from the beginning (void *abinitio*).
- Non fulfillment of object and form render the contract void.
- **Voidable** contract produce effect until invalidation (unless the party whose consent was viciated or incapable invalidates)
- It is caused by defect in consent or incapacity
- Its future effects also can be cured either by party or by law

Cont'd ...

- **Reinstatement of party:** -the party who made payment receive such payment back
- “*Pacta sunt servanda*” :-the parties are bound by their agreement; becomes a law (Art. 1971 of CC).
- It creates rights and duties between parties
- If any party breaches the conditions of contract or refuse to carry on with works; the other party seeks remedy.

Effects of Contract

- ❖ Effects of contract may have two dimensions;
- The time when the contract is considered bound by the contracting parties;
and
- The fulfillment or performance of the set of promises prescribed in the contract;
 - The first dimension relates to the effectiveness of the contract, whereas the second is related to the performance of obligations of the contracting parties under the contract.

Reference Materials & focus areas

- The civil code of international & Ethiopia
- Construction Contract law from civil code perspective
- Construction contract types
- Governing contracts in general
- Governing special contracts

Exercises & Case studies

1. As a contractor, how you are going to manage if price escalation occurs with respect to the specified materials due to market force under the contract.
2. Discuss the importance of payment provisions in the construction contract from the perspective of the Contractor;
3. The Sub-contractor which has been selected & appointed by the Contractor, indeed with the approval of the Employer, has gone bankrupt. The Main Contractor has been delayed in the completion of the project. The Employer has deducted liquidated damages from the Payment due to the Contractor. The Contractor has argued that for the bankruptcy of the Sub-contractor the Main Contractor is not responsible. Why the Contractor is or is not responsible for the delay caused by the selected Sub-contractor?

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4. Compare and Identify Merits and Demerits of the different Contract Types.
5. Explain about the capacities of Physical and Artificial Persons. Under what Conditions do physical and artificial persons lack capacities to conclude contract? Discuss.
6. What are the grounds to say consent is defective? Discuss with examples.
7. What are the legal instruments used to entertain the issues between the contracting parties in construction contract or agreements?