AN INTRODUCTION TO THE GENERAL PRINCIPLES AND NATURE OF CONSTRUCTION CONTRACTS

A PAPER PRESENTED AT 2-DAY ZONAL WORKSHOP ON ESSENTIALS OF BUILDING AND ENGINEERING CONTRACT DOCUMENTATION AND ADMINISTRATION ORGANISED BY THE NIGERIAN INSTITUTE OF QUANTITY SURVEYORS (NIQS) ON 22ND – 23RD MARCH, 2017

AT

NEWTON HOTEL, PLOT H2, ALONG IMO SPECIALIST HOSPITAL, OFF PORT-HARCOURT ROAD, NEW OWERRI, OWERRI, IMO STATE.

BY

MR. IFEANYI ANAGO *FNIQS*

SUITE 211 HIS GLORY PLAZA,

3 OSE CLOSE, OFF ADETOKUNBO ADEMOLA CRESCENT,

(BESIDE AMIGO SUPERMARKET), WUSE 2, ABUJA

ifeanyianago2000@yahoo.com.au

MR. EMOH FRANCIS. C. *MNIQS*

DEPARTMENT OF QUANTITY SURVEYING,

FEDERAL POLYTECHNIC, OKO

ANAMBRA STATE

emolisticentity@gmail.com

LEARNING OUTCOMES: TO UNDERSTAND

- OVERVIEW OF LAW OF CONTRACT/COMMERICIAL LAW
  - Essentials of a Valid Contract
  - Nigerian Legal Systems
  - Legal Aspects of Contracts
- NATURE OF CONSTRUCTION CONTRACTS

Standard/Bespoke Forms

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ABSTRACT

No matter what you're building, constructing a solid contract represents one of the first steps toward the success of your project. As a result, this paper highlights the concept of Construction law applications in the Nigerian construction industry with much emphasis on contract documentation and administration. In line with the main focus of the theme of the workshop, it explains the drivers and formulation of building and engineering contract while highlighting the components and challenges poised by standard forms of contract been used in the execution of building and engineering projects in Nigeria and proffer solutions to mitigate the problems confronting stakeholders in adopting appropriate contract strategy during project delivery. However, It must noted that the focal point of this workshop programme is to share knowledge, rub minds and harmonize existing current practices with a view to bridging the gaps between current practice based professionals and upcoming quantity surveyors.

WHAT IS CONTRACT?

- Basically, a simple contract is made where parties have reached agreement, or where they are deemed to have reached agreement, and the law recognizes rights and obligations arising from the agreement.
- The English dictionary describes contract as “the agreement of two or more persons, upon a sufficient consideration or cause, to do, or to abstain from doing, some act; an agreement in which a party undertakes to do, or nit to do, a particular thing; a formal bargain; a compact; an interchange of legal rights. Furthermore, a formal writing which contains the agreement of parties, with the terms and conditions, and which serves as a proof of the obligation”.
- In a commercial sense or manner, according to a business dictionary, Contract is “a voluntary, deliberate, and legally binding agreement between two or more competent parties (which) are usually written but may be spoken or implied, and generally have to do with employment, sale or lease, or tenancy”.
- The legal dictionary also defines Contract as “an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration.

CLASSES OF CONTRACT

- SIMPLE CONRACT; Almost all contracts are simple contracts and the period of Limitation is six (6) years
- SPECIALTY CONTRACT, i.e. contracts made under seal and the period of Limitation is six (12) years
- In speciality contracts, the terms are usually embodied in a document which is then signed, sealed and delivered by the parties.
- This is the most solemn formality of contract-making known to English law.
- The period of limitation is the period of time in which an action for breach of contract may be brought i.e. in case of specialty contracts the Limitation Act 1939 provides that an action upon a specialty contract cannot be brought after the expiration of twelve years from the date on which the cause of action accrued, i.e. the date of the breach of contract (Major, 1978).

ESSENTIALS ELEMENTS OF A VALID CONTRACT

- OFFER AND ACCEPTANCE OF THE OFFER (EFFECTIVELY AGREEMENT).
- INTENTION TO CREATE A LEGALLY BINDING AGREEMENT OR RELATIONS
- A PRICE PAID (NOT NECESSARILY MONEY) AND TECHNICALLY REFERRED TO AS CONSIDERATION
- THERE MUST BE GENUINENESS, PROPER UNDERSTANDING AND CONSENT OF WHAT IS INVOLVED BY THE PARTIES TO THE TERMS OF THE CONTRACT
- THE PARTIES MUST HAVE THE LEGAL CAPACITY TO ENTER INTO THE CONTRACT AT THEIR OWN FREE WILL.
- THE CONTRACT MUST NOT BE CONTRARY TO PUBLIC POLICY

NOTE

- **Any duress,**
- **Any false statements,**
- **Any undue influence or**
- **Any unconscionable dealings**

could make a contract illegal and void”.

OFFER AND ACCEPTANCE

- A contract is formed when an offer by one party is accepted by the other party.
- ***Thus an offer is an undertaking by an offeror to the offeree to be contractually bound in the event of a proper acceptance being made by the offeree***.
- An offer must be distinguished from mere willingness to deal or negotiate.
- The offer must, therefore, be clear, complete and final.
- Thus, an invitation to treat is not an offer. ***An invitation to treat is a first step in negotiations, which may, or may not, be a prelude to a firm offer by one of the parties***.
- Where an offeree makes a counteroffer, the original offer is deemed to have been rejected and cannot be subsequently accepted.
- An offer need not be made to a specific person. It may be made to a person, a class of people, or to the whole world (See Carlill v. Carbolic Smoke Ball Co. (1892).
- An offer may be communicated in any manner whatsoever, provided the parties are in communication i.e. made in writing, orally, by inference from the conduct of the parties and the circumstance of the case; or by any combinations of the above modes.
- An offer may be partly expressed and partly implied.
- Acceptance occurs when the party accepting the offer agrees to the offer by way of a statement or an act.
- Acceptance must be unequivocal and communicated to the offeror

INTENTION TO CREATE LEGAL RELATIONS

- The intention of the parties is gathered from the express terms of contract.
- Also, where necessary, the conduct of the parties is taken into account, for much can be inferred from conduct.
- Hence, a contract does not exist simply because there is an agreement between people.
- The parties to the agreement must intend to enter into a legally binding agreement.
- This will rarely be stated explicitly but will usually be able to be inferred from the circumstances in which the agreement was made.

CONSIDERATION

- Consideration is the price paid for the promise of the other party.
- The price must be something of value, although it need not be money.
- Consideration may be some right, interest or benefit going to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party.
- So long as consideration exists, the court will not question its adequacy, provided that it is of some value
- Consideration must not be illegal or impossible to perform.
- There is an exception to the rule: documents under seal (deeds) do not require consideration for there to be a binding contract

RULES GOVERNING CONSIDERATION:

- Consideration must be real (or sufficient**) but not necessarily adequate**
- Consideration must move from the promisee but not necessarily to the promisor
- Consideration must not be past
- Consideration must not be illegal
- Consideration must not be vague
- Consideration must be possible of performance
- Rules (a) to (c) above are fundamental to the nature of consideration while rules (e) to (f) may be regarded as auxiliary.

LEGAL AND CONTRACTUAL CAPACITY

- Summarily, where parties have made a binding contract, they have created rights and obligations between themselves.
- The contractual rights and obligations are correlative.
- However, in order to benefit from a contractual right, or to incur a contractual obligation, a contracting party must have the appropriate capacity.
- Rights and obligations can exist only where there is capacity to support them.
- Incapacity may, therefore, affect the apparent rights and obligations created by a contract.

- In law, persons may be natural or artificial.
- Natural persons are human beings;
- Artificial persons are corporations.
- Contractual capacity (or the lack of it) is an incident of personality.
- It is not possible for contractual capacity to attaché to animals or inanimate objects.

- As a general rule, all natural persons have full contractual capacity but there are exceptions in the case of
- infants or minors,
- drunken persons,
- insane persons (people who have a mental impairment),
- bankrupts,
- prisoners and
- Enemy aliens.

THE CONTRACTUAL CAPACITY OF CORPORATIONS DEPENDS ON THE MANNER IN WHICH IT WAS CREATED I.E EITHER CHARTERED, STATUTORY OR REGISTERED CORPORATIONS.

- In Nigeria, the age of capacity for the purpose of any rule of law is eighteen years
- A person will be deemed to attain the age of eighteen at the commencement of the eighteenth anniversary of his birth.
- A person below the age of capacity may be referred to as an infant or as a minor.
- Accordingly a contract entered into by an infant will fall into one of the four following classes;
  - Contracts rendered void by statute.
  - Contracts voidable by the infant.
  - Contract binding on the infant.
  - Contracts enforceable by the infant but not against him.

- Suffice to say that contracts binding on the infant are of the following kinds:
- Contracts for necessaries: an infant is liable to pay for necessaries that have been supplied to him. At common law, the concept of “necessaries” includes goods and services necessary to the infant and his dependants according to his position in life.
- Contracts of education, training or beneficial service: an infant is bound by a contract under which he obtains education, or training for a trade or profession, or beneficial experience in a trade or profession. He is bound to pay a reasonable price for training where a price is agreed.

CONSENT

- Entering into a contract must involve the elements of free will and proper understanding of what each of the parties is doing.
- In other words, the consent of each of the parties to a contract must be genuine.
- Only where the essential element of proper consent has been given is there a contract that is binding upon the parties.
- The ultimate consequences of establishing that no proper consent was given to enter the contract are matters dealt with when considering remedies for breach of contract.
- Proper consent may be affected by any of the following matters:
  - mistake;
  - false statements;
  - **duress**; and
  - **undue influence** or unconscionability

ILLEGAL AND VOID CONTRACTS

- The law will not enforce all contracts. There are some categories of contract to be wary of.
- Where a contract is illegal, this may affect its enforceability.
- Contracts that are illegal by statute will be regulated as to enforceability by the statute;
- thus the statute will need to be read and interpreted.
- Contracts absolutely prohibited by statute will be void, whether the parties know of the illegality or not.
- However, where one party performs an otherwise legal contract in a manner that breaches legislation, the other party, if having no knowledge of the facts giving rise to the illegality, can still enforce the contract or recover damages for breach of it.
- They may also recover money or other property transferred under the contract.
- Contracts made void by statute are treated differently; while they remain valid contracts, the courts will not enforce them.
- Again, the precise extent of the enforceability of, or the recovery of any money paid under, a void contract will depend on the particular statute.

- Certain types of contracts are illegal at common law, because they are contrary to the public good. These include contracts:
- to commit a crime, a tort or a fraud;
- that are sexually immoral;
- that prejudice public safety, including good relations with other states or countries;
- that prejudice the administration of justice; that tend to promote corruption in public life; and
- to defraud the revenue.

- Illegally formed contracts are generally void and unenforceable by either party at common law. Therefore, property or money transferred cannot be recovered.
- Where legally formed contracts are performed in an illegal manner (i.e. the illegal conduct was not an intended or required part of the contract but merely incidental to the way it happened to be performed) then the contract is not void, but:
- no remedies are available to the guilty party; and
- the innocent party retains all rights and remedies (provided they did not know the contract was to be performed illegally).

- Certain types of contracts are void at common law, being contrary to the public good. These include contracts:
- to oust the jurisdictions of the courts;
- prejudicial to the status of marriage;
- in restraint of trade (unless the restraint is reasonable both between the parties and in the public interest).
- The courts here will look at the relative bargaining power of the parties.
- Restraint imposed between equals is viewed with more favour than, for instance, a contract between an employer and employee in unequal bargaining positions.

- The general rule is that the contract is void only so far as it is contrary to the public good; it is not void entirely. That is, the offending part can be removed provided that the rest of the contract continues to make sense. However, contracts illegal at common law are not “severable”; that is, the “illegal” parts of the contract cannot be removed or severed from the “legal” parts.
- Money paid or property transferred under a contract that is void at common law may be recoverable because the effect of the contract being void is that there is no contract, so that the parties should be put back to their original position.

TERMS OF A CONTRACT

- The terms of a contract are its contents, and these determine the extent to which the parties are in agreement.
- Accordingly, the terms of the contract define the rights and obligations arising from the contract.
- Contractual terms may be expressed or implied;
- Express terms are express statements made by the parties and by which they intended to be bound.
- Implied terms are those which have been implied by the law either:
- ✓ According to the provisions of a statute or
- ✓ To give effect to the presumed intentions of the parties.

TYPES OF CONTRACTS:

- **Bilateral Contracts:** In a bilateral contract both of the parties involved promise to carry out certain things.
- **Unilateral Contracts:** A Unilateral contract is a contract in which one of the parties (offeror) demands performance from the other party (offeree), instead of a promise. Since the offeree makes no promise, he cannot be sued for abandoning or failing to carry out his act; only the offeror is bound by the law and, therefore, this is a single-sided contract.
- **Express Contracts:** Express contract is a contract in which the terms of the contract are stated clearly, either orally or in writing.
- **Implied Contracts:** Can either be implied in fact or implied in law;
- ✓ **Implied in fact**: A contract in which an agreement is seemingly intended among the parties involved, but not particularly verbally or in writing.
- ✓ **Implied-In-Law Contract:** This is also known as a Quasi-Contract. It isn’t actually a contract; rather, it is a way for the

TYPES OF CONTRACTS CONTD:

- **Void Contracts:** A void contract is an agreement to do illegal things or that lacks legal elements.
- **Voidable Contracts:** A contract is voidable if one of the parties has the option to abort the contract; usually in the cases of misrepresentation.
- **Simple Contracts:** A simple contract is any written or oral agreement which is not required to be witnessed, signed or sealed.
- **Formal Contracts:** This is the complete opposite of a simple contract as this need to be written, signed, witnessed and sealed by the participating parties.

NATURE AND ENFORCEMENT OF CONTRACT LAW

- A Contract Law refers to enforceable law(s) that guide the execution of a contract.
- The law recognises basic elements of a contract as earlier
- Where a party neglects or refuses to honour a contractual obligation, there is a ***breach of contract***.
- A breach by one party causes a right of action to accrue to the other party. The usual remedy for the breach of contract is ***damages***, i.e. the award of a sum of money to put the aggrieved party in the position he would have enjoyed had the contract not been broken. Of course, the contract breaker following the award of the court pays the sum.
- As Anago (2017) puts it “possible remedies for breach of contract include general damages, consequential damages, reliance damages, and specific performance”

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- Specific performance or more technically referred to as the ***equitable remedy of specific performance*** is in special circumstances where by the court may order the contract-breaker to carry out his contractual promises specifically.
- But it is worthy to note that Specific performance is never awarded where damages will suffice.

- Most commonly, some form of monetary compensation is sought for a breach of contract. In some cases, the contract may have stipulated the maximum amount of money recoverable in the event of breach as in the case of liquidated and/or ascertained damages in a construction project

SCOPE, NATURE AND FORMULATION OF CONSTRUCTION CONTRACT

WHAT THEN IS THE MEANING OF CONSTRUCTION CONTRACT?

- Looking specifically at construction, the best definition of a contract, was provided in *Modern Engineering (Bristol) ltd v Gilbert-Ash Northern [1974]* AC 689. Lord Diplock defined a building contract as:
- *"**An entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as making variation orders, the expenditure of provisional sums and prime cost sums and extension of time for the carrying out of the work under the contract"*.**

- Simply put, a Construction Contract is a contract involving works of building and engineering construction.
- They can be found in diverse economic and activity sectors such as the
  - Building and Construction,
  - Agriculture,
  - Oil and Gas,
  - Aviation,
  - Water Resources, etc.
- There is construction contract in practically all sectors of the Nigerian economy.
- This explains why construction is a leading economic sector.

- A Construction Contract is therefore work/project of the above nature to be executed by a Contractor for a given employer. There are generally only 2 parties to a Construction Contract, namely, the Employer and the Contractor

NATURE AND CHARACTERISTICS OF THE CONSTRUCTION INDUSTRY

- Formulation of Construction Contract poises some great challenges due the nature and characteristics of the Construction Industry
- The physical nature of its product
- The product is normally manufactured on the client's premises, i.e. the construction site
- Many of its projects are one-off designs in the absence of a prototype model
- The traditional arrangement separates design from manufacture
- It produces investment rather than consumer goods
- It is subject to wide swings of activity than most other industries
- Its activities are affected by the vagaries of the weather
- Its process include a complex mixture of different materials, skills and trades
- Typically, throughout the world, it includes a small number of relatively large construction firms and a very large number of small firms
- The smaller firms tend to concentrate on repair and maintenance.

CONSTRUCTION CONTRACT

- Involves too many technicalities because of the complex nature of the construction industry and process.
- multiparty contract in nature
- Requires specific jurisdictions in enforcement and interpretation
- Plethora of standard forms and regulating documents such as JCT, NEC, FIDIC, PPA, SBD , etc hence so the knowledge of these different standard of forms of contract and documents is imperative

CONTRACT FORMULATION

- Contract formulation is the process of identifying the object of execution in a contract. It also entails creating, stating and agreeing on the standards, conditions, technicalities, understandings, specifications and possible laws and policies to guide the execution of a contract.

ESSENTIAL ELEMENTS OF CONSTRUCTION CONTRACT

- In formulating construction contracts, it worthy to note that the following five essential elements of a construction contract can result in major vulnerabilities (weaknesses) if overlooked:
- **Full Name, Address, and Signatures of Both Parties**
- **Scope of Work**
- **Project Cost and Payment Terms**
- **Schedule of Work**
- **Authority**

Full Name, Address, and Signatures of Both Parties

- 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

Scope of Work

- Although this is an element that is often included in most construction contracts, many individuals tend to overlook the necessity for details. This area of the contract 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

Project Cost and Payment Terms

- This is an area of a construction contract that should be clearly and simply stated. 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 BOQ and Conditions of contract

Schedule of Work

- Establish a clear notice to proceed date, 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 the result of bad weather. Make sure to account for lead times from your suppliers, and if there are change orders, be sure to document any additional time they will require. Also in BOQs

Authority

- With so many moving parts, it can 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 before project initiation. This simple element of the construction contract can save a lot of headache and confusion during the project. Stated in conditions of contract.

NIGERIAN LEGAL SYSTEM

- NATURE OF OUR JURISDICTIONS
- COURT SYSTEMS
- SOURCES OF OUR LAW etc.

STANDARD FORMS/ BESPOKE FORMS

- SFBCN 90 – Standard Form of Building Contract Nigerian Edition 90
- FMWH FORM – Federal Ministry of Works & Housing Form
- ICE FORM/ MINISTRY OF WORK FORM (Institution of Civil Engineers Form)
- FIDIC – International Federation of Consulting Engineers form
- NEC- Engineering and Construction contract
- JCT- Joint Contract Tribunals etc

KEY COMPONENTS OF CONTRACT DOCUMENTS

1. INTRODCUTION

- THIS SECTION OF THE PAPER SERVES AS AN INTRODUCTION TO THE SHAPE AND STRUCTURE OF A CONSTRUCTION CONTRACT, WITH PARTICULAR ATTENTION PAID TO THOSE FEATURES THAT COMMONLY GIVE RISE TO DISPUTES.
- THE FOCUS IS ON THE KEY PLAYERS AND KEY PROVISIONS THAT CONSTRUCTION CONTRACTS USUALLY CONTAIN.
- IT ALSO CONSIDERS THE ROLE OF ANCILLIARY DOCUMENTS WHICH ARE OFTEN AN IMPORTANT PART OF THE BACKGROUND FACTS OR MOTIVATION FOR A DISPUTE.

2. KEY PLAYERS

- THE EMPLOYER
- THE CONTRACTOR
- THE SUBCONTRACTORS
- THE SUPPLIERS

3. KEY DOCUMENTS IN A CONSTRUCTION CONTRACT

- ARTICLES OF AGREEMENT
- CONDITIONS OF CONTRACT
- SPECIFICATIONS
- DRAWINGS
- BILL OF QUANTITIES

CONTRACT STRATEGY

A proper contract strategy for a project involves:

- Setting the project objectives and constraints
- Selecting a proper project delivery method
- Selecting a proper contract form/type
- Contract administration practices.

4. FORMS OF CONTRACTUAL STRUCTURE

- DESIGN-BID-BUILD / BUILD ONLY
- DESIGN AND BUILD / TURNKEY
- CONSTRUCTION MANAGEMENT
- MANAGEMENT CONTRACTING
- PARTNERING AND ALLIANCING

5. PRICING METHODOLOGIES

- COST PLUS
- TARGET COST
- LUMP SUM
- PROVISIONAL LUMP SUM
- GUARANTEED MAXIMUM PRICE
- UNIT PRICE/ MEASURED WORKS
- MIX AND MATCH

6. PAYMENT ARRANGEMENTS

- PROGRESS PAYMENTS
- MILESTONE PAYMENTS

7. ADMINISTRATION OF CONTRACT

- BACKGROUND
- THE INDEPENDENT ENGINEER/ARCHITECT
- THE EMPLOYER’S REPRESENTATIVE (REALITY)
- THE ROLE OF CERTIFICATES

7. ADMINISTRATION OF CONTRACT CONTD…

THE ROLE OF CERTIFICATES

- INTERIM PAYMENT CERTIFICATES
- COMPLETION OR HANDOVER CERTIFICATES
- CERTIFICATES OF NON-COMPLETION
- CERTIFICATES OF MAKING GOOD DEFECTS
- THE FINAL CERTIFICATES

8. VARIATION ORDERS

- WHY ARE VARIATION ORDERS REQUIRED
- CONTROLLING VARIATION AND THEIR COSTS
- VARIATION ORDERS AND DISPUTES

9. COMPLETION, EXTENSIONS OF TIME & LIQUIDATED DAMAGES

- ROLE OF COMPLETION
- DEFECTS LIABILITY PERIOD
- DATE(S) FOR COMPLETION
- COMPLETION CERTIFICATE(S)
- COMPLETION TESTS

9. COMPLETION, EXTENSIONS OF TIME & LIQUIDATED DAMAGES
CONTD…

- LIQUIDATED DAMAGES FOR DELAY
- EXTENSION OF TIME
- THE ROLE OF THE PROGRAMME
- CRITICAL PATH ANALYSIS
- CONCURRENT DELAYS

9. COMPLETION, EXTENSIONS OF TIME & LIQUIDATED DAMAGES
CONTD...

- WORK-AROUND MEARSURES
- ACCELERATION/ CONSTRUCTIVE ACCELERATION
- EXTENSION OF TIME CLAIMS AND DISPUTES
- LIQUIDATED DAMAGES FOR PERFORMANCE FAILURES

10. LIABILITY

- LIMITATIONS OF LIABILITY
- DELAY AND PERFORMANCE
- DEFECTS
- ENTITLEMENT TO LOSS AND EXPENSES DUE TO DELAY AND DISRUPTION
- A CONCLUSIVE FINAL CERTIFICATE

11. PROJECT SECURITY

- TYPES OF SECURITY
- ADVANCE PAYMENT BONDS
- RETENTION FUNDS
- PERFORMANCE BONDS AND GUARANTEES
- PARENT COMPANY GUARANTEES
- PAYMENT GUARANTEES
- OTHER FORMS OF SECURITY

12. PROJECT FINANCED CONSTRUCTION PROJECTS

- THE LENDERS' ENGINEER
- LENDERS' STEP-IN RIGHTS
- VARIATION ORDERS
- LIQUIDATED DAMAGES
- PROJECT SECURITY