

#### Project delivery processes

1. Project conception – development of project idea
2. Project inception – the start of implementing the idea
3. Project implementation – appreciation of processes including feasibility studies, tendering, contract execution, other project activities;
4. Testing and Commissioning – General commissioning procedures, reference to specific subjects, personnel involved, standards to conform, contractual issues, responsibilities, handover procedures, general commissioning procedures

#### Project procurement aspects:

Public projects are based on clear principles, procedures mainly based on existing laws

For private clients these may be based on best practices

#### Financing of projects:

1. Self-financing, financing from lending institutions
2. Private financing
3. Financing by public funds
4. Grant and credit financing facilities

A project is a temporary endeavor undertaken to accomplish a unique purpose

#### Attributes of projects

1. Unique purpose
2. Temporary
3. Require resources, often from various areas
4. Should have a primary sponsor and/or customer
5. Involve uncertainty

#### The Triple Constraint

1. Scope goals
2. Time goals
3. Cost goals

**Project management** is the application of knowledge, skills, tools, and techniques to project activities in order to meet or exceed stakeholder needs and expectations from a project

#### Engineering Project Management Procedures

1. Conception
2. Preliminary design
3. Design or definition
4. Tendering – selecting a contractor who would deliver the intended product
5. Implementation – actual delivery of the intended product
6. Commissioning – checking whether the product meets performance requirements
7. Use and maintenance for the product

#### Key actors in the project processes

1. Client: A person who defines what is required and generally pays for it
2. Consultant: A professional who translates the Clients requirements into product delivery information design and drawings, tender documents;
3. Contractor: A person who translates the delivery information into the actual product

A **project delivery method** is a system used by an agency or owner for organizing and financing design, construction, operations, and maintenance services for a structure or facility by entering into legal agreements with one or more entities or parties

Project delivery processes:

- Project conception
- Project inception
- Project delivery
- Project implementation
- Processes include feasibility studies
- Tendering
- Contract execution
- Other project activities

#### ALTERNATIVE STRATEGIES FOR PROJECT DELIVERY

Two essentials:

1. A sound contractual relationship between the owner and each of consultants and contractors
2. Cooperation and trust between the people from different organizations and professions involved

Key Services

Before an engineering facility is realized two essential functions have to be performed

- Design
- Installation Erection Construction

PROCUREMENT PROCEDURES options include

1. All work in-house
2. Design in-house and erection by a contractor
3. Initial design brief in-house, design by a consultant and erection by main contractors who will use subcontractors as necessary
4. All design and management by a project manager, using several trade contractors whom work directly for the owner
5. Raising the finance, design, erection and operation by a single contractor, who employs consultants and subcontractors as necessary

The choice will depend partly on:

1. the Owners policy
2. facilities which the Owner has available in-house
3. the size and type of the project

All work in-house

- The Owner does the feasibility study
- This is followed by preliminary designs and estimates
- Owner then uses own expertise to prepare detailed design
- He uses in-house staff to construct/erect the facility
- Use the erected facility for own purposes

Disadvantages:

- Lack of accountability
- Poor quality and budgetary control

Design in-house and erection by a contractor

- The Owner does the feasibility study
- This is followed by preliminary designs and estimates done by the owner
- Owner then uses own expertise to prepare detailed design
- he uses an established contractor to carry out the construction/erection
- Owner supervises work performed by the contractor
- Contractor hands over constructed facility when construction is completed to the satisfaction of the owner.

Disadvantage:

- Lack of accountability for design
- Lack of quality control mechanism for design

Initial design brief in-house, design by a consultant and erection by main contractor (traditional method)

- The Owner prepares the project brief (or can be assisted by a consultant)
- This is followed by preliminary designs and estimates done by a Consultant
- Owner then uses the prepare detailed design to select a contractor to construct
- Consultant supervises work performed by the contractor
- Contractor hands over constructed facility when construction is completed to the satisfaction of the Consultant

Main disadvantage – may be time consuming

#### Method 4: Design and Build

- Under this method of contracting, the owner awards a single contract to the design-builder to design and construct the public work. Thus, the design-builder undertakes responsibility for both the design and construction of the project.
- The Owner prepares the project brief (or can be assisted by a consultant);
- Client prepares preliminary estimate based on prelim. designs; (or appoints a Consultant to prepared prelim. Designs);
- Client supervises the erection to ensure that performance requirements are met; (or may appoint a Consultant to do so);
- Final project accepted on the basis of performance tests by Consultant or Client;

Main advantages:

- Selection flexibility
- Team Concept
- Single point of accountability for design and construction
- Enables fast-track delivery (construction begins before design is complete), saving time.
- Facilitates alternative financing methods
- Eliminates Owner concern with cost overruns

Disadvantages:

- No check and balance between architect and builder.
- Owner must select a team rather than the best architect and best builder.
- Difficult to control quality because design/build team must
- Only meet minimum criteria standards.

Design and Manage by a project manager

- The Owner prepares the project brief (or can be assisted by a consultant)
- Appoints a Project Manager to carry out the design (or obtains design services from other firms);
- Then appoints various contractors to perform different aspects of the project
- He remain responsible for the project design and construction/installation/erection

Main Disadvantage:

- If the PM is not good the project can fail very easily.
- Costs may increase beyond budget

Advantage: Speed

Raising the finance, design, and construction operation by a single contractor

- Client may prepare a project brief and invite contractors
- Contractor performs detailed feasibility study
- Contractor raises funds for the project
- Appoints consultant to perform detailed design
- Implements construction to completion
- Starts operating the constructed facility – say a bridge which s/he then charges for crossing
- Operates the facility until the return on investment is obtained

Advantage: Client does not use his/her own funds for the project;

Disadvantage: Client has little control unless by means of legislation or special agreement

The methods discouraged by governments

- All in-house
- Design in house and erection by contractor

### **Procurement of Consultant Services and Proposal Evaluation (Within the PPA 2004 Framework)**

Methods that can be used for selecting a consultant based on:

1. Technical quality
2. Combined technical quality and price consideration;
3. Compatible technical quality and least cost
4. Fixed budget
5. Consultant's qualifications

#### **Proposal Evaluation**

Proposals are considered to be under evaluation from the time of the official opening until the Client has appointed the Consultant and has notified other Consultants accordingly or until the validity period of proposals expires, whichever is the earlier

#### **Duties of the Evaluation Committee**

1. To establish and agree on the detailed evaluation criteria
2. To study, analyse, evaluate and rank all technical proposals
3. To prepare and submit the number of copies of the Evaluation Report required by the accounting officer or chief executive officer or the approving authority

#### **Evaluation of technical proposals**

##### **Committee checks for**

- Admissibility of proposals
- Compliance with instructions to consultants

All technical proposals are marked on a **merit point system** or **scores system** specified in the request for proposal

To avoid collusion, each member of the evaluation committee should independently evaluate the technical proposal(s) by applying agreed evaluation sub criteria based on the evaluation criteria of the letter of invitation/request for proposals

- After individual evaluations, committee members shall average the evaluation results and reach a consensus on the ranking between committee members

#### **Evaluation Criteria (Qualifications and experience)**

- experience in similar projects
- experience in similar areas and conditions
- capacity of consultants to carry out the assignment
- specialization
- references from clients, banks,
- organization and management
- quality assurance programmes
- legal disputes, if any

#### **Proposed methodology and works plan**

- Understanding of the objectives of the assignment
- Responsiveness to the Terms of Reference
- Innovativeness
- Quality and clarity
- Efficiency in resource utilization
- Technology
- Flexibility and adaptability
- Timeliness of outputs
- Reliability and sustainability
- Efficiency in transfer of skills

#### **Quality of proposed staff**

- General qualifications
- Age
- Education level
- Experience in similar assignments
- Publications on relevant subjects
- Specialization
- Language capability
- Professional experience and status
- Training experience
- Career attainment

#### Other major criteria

- Transfer of knowledge
- The extent of participation by nationals among key staff in the performance of the assignment
- Knowledge of country (Tanzania)

#### Grading of the technical proposals

- After evaluation of the technical proposals, the evaluation committee shall grade and rank the technical proposals in accordance with the scores obtained
- In the selection procedure based solely on technical quality, the firm which has submitted the best technically acceptable proposal shall be the first to be invited for negotiation.
- The envelope containing the financial proposal shall be opened in the firm's presence and its contents examined.
- If no agreement is reached, then the consultant whose technical proposal is ranked the second best shall be invited for negotiation.

## THE LAW OF CONTRACT

Four ingredients of a contract

1. An **offer**
2. An **acceptance** of that offer
3. **Consideration**
4. An intention to **create legal relations**

An offer and acceptance is the genesis of an agreement

Agreement is main underlying ingredient of a contract

For agreement to exist there must be **consensus ad idem** or a **meeting of the minds**

Not all agreements are contracts

Agreement must be enforceable at law

In **standard form contracts**, e.g. guarantees and bank documents terms are fixed by one party so the other either takes it or leaves it

An **offer** is the expression of a willingness to enter into a contract on certain terms

No contract until terms of offer are accepted

The person making the offer is the **offeror** and the person receiving it the **offeree**

A **proposal** does not produce an obligation and person bound by the proposal may retract his consent at any time before it is accepted

An offer can be made:

1. In writing
2. Orally
3. By conduct
4. By a combination of any of the above

An offer can be made:

- To one person
- To a group of persons
- To the world at large

An offer is not an **invitation to treat**

An invitation to treat is a **request for offers** not an offer

An invitation to treat therefore *precedes* an offer

An invitation to treat is distinguished from an offer by:

1. The **intention** of the person making it
2. The words used
3. The actions carried out
4. The surrounding circumstances

Common examples of invitations to treat include:

- Displays of goods with price tags in shops
- Auction sales
- Invitation for tenders
- Request for Proposal

An offer cannot be accepted:

1. After it is revoked
2. After it is rejected
3. After the expiration of the period for which it is made
4. Without complying with all the conditions it is made subject to
5. Unless both parties have legal capacity

A **personal offer** is one that depends on the particular attributes and skills of the offeror

Personal offer lapses when offeror dies

**Estate offer** can still be accepted

Offer made by a drunk or insane person (no **legal capacity**) is invalid

An **acceptance** is a final, unqualified and unconditional assent to all the terms of an offer

An acceptance that doesn't correspond **exactly** with terms of an offer is a **counter-offer**

A counter-offer:

- Destroys the old offer
- Becomes a new offer

Information asked by offeree, doesn't destroy the offer it is a mere inquiry, which should have been answered and not treated as a rejection of the offer

The court will have to look at what the offeree says/does to decide what it means

An acceptance must correspond **exactly** with the offer

A conditioned offer cannot be an accepted

As an acceptance involves accepting an offer, there can be no acceptance if the offeree is ignorant of the offer

An acceptance must be communicated to the offeror unless:

- The offeror **waives** this requirement
- The offeror's **conduct** prevents him from denying that he received the acceptance

Offeror waives communication if offer is made to the **world at large** hence **performance of the terms** of the offer constitutes the acceptance

Method of acceptance/communication doesn't matter unless clearly indicated by offeror

Silence cannot constitute an acceptance because it must be **unequivocal**

Silence is usually **ambiguous**

As a rule, an **offeror** cannot stipulate that silence will amount to consent

**Consideration** is something of value given for a promise in order to make it enforceable as a contract (otherwise made by deed)

Without consideration/ deed is not binding

It is detriment to the promisee or some benefit to the promisor

Enforceability of agreements depends if the consideration is

**informal gratuitous promises** (presents) or those promises which are intended to be legally binding

A distinction is drawn between:

1. **Social and domestic arrangements** courts presume that the parties do not intend legal consequences to follow
2. **Business and commercial arrangements** presume that parties intend legal consequences to follow from their agreement

Contract not be in writing unless indicated by statute

Contents of Contract

1. Express and Implied Terms
2. Exclusion or Limitation Clauses

Express and Implied Terms

Obligations of the parties are defined by the terms of the contract  
**Express terms** are terms which the parties have expressly agreed upon

**Implied terms**

- Because of the intention of the parties
- By operation of law
- By custom or usage

Exclusion or Limitation Clauses

**Exclusion clause** is term of the contract which attempts to exclude liability

**Limitation clause** is term of the contract which attempts to limit liability

**Vitiating factors** are those factors which nullify the contract or allow the innocent party to set the contract aside

Vitiating factors include:

- Mistake
- Misrepresentation
- Duress and Undue Influence
- Unconscionability
- Illegality
- Incapacity

Intention to Create Legal Relations

Vitiating factors have the effect of rendering a contract void or voidable

A contract which is **void** has no legal effect and occurs because of

1. illegality
2. incapacity
3. some instances of mistake

A contract which is **voidable** is capable of being set aside and occurs because of

1. misrepresentation
2. some instances of mistake
3. nondisclosure
4. duress and undue influence

Discharge of Contract entails the termination of contractual obligations and may take place by:

1. performance of the contract
2. express agreement
3. breach of contract
4. frustration of contract

**Performance of Contract** occurs if obligations under the contract are carried out, the contract is discharged

Performance by both parties discharges the contract completely

Performance by one party discharges him alone

Express Agreement

1. **Bilateral discharge** each party releases the other from his existing obligations
2. **Unilateral discharge** one party purchases a release from his obligations when the other party has already performed his side of the bargain and this purchase is effected by fresh agreement for which new consideration is given

**A breach of contract** is committed when a party fails or refuses to perform a contractual promise and has two forms

1. **Actual failure** by a party to perform his contractual obligations
2. An **indication of intention** not to perform his contractual obligations

An indication that a contract will be breached in the future is called **repudiation** or **anticipatory breach**

The repudiation of a contract entitles the injured party to:

1. treat the contract as discharged; and
2. sue immediately for damages

Actual breach may take the form of:

- **Fundamental breach** (i.e. breach of a major term or a serious breach of intermediate significance)
- **Breach of a minor term**

Where the right to terminate arises, the injured party has a choice to either

1. Terminate the contract
2. Affirm the contract

When the right to terminate is exercised:

- The primary obligations of the parties under the contract are discharged
- The *aggrieved party* is not expected to accept or pay for further performance tendered by the *defaulting party*
- The aggrieved party and the defaulting party are both absolved from the future performance of their obligations

If the injured party affirms the contract he treats the contract as continuing and holds the other party to the bargain

**Frustration of Contract** is the unforeseen termination of a contract as a result of an event that:

1. Either renders its performance impossible or illegal
2. Or prevents its main purpose from being achieved

Remedies under a contract can be analyzed in terms of the following three categories:

1. Damages
2. Specific Performance
3. Injunction



## Damages

1. General
2. Bases of Assessment
3. Proof of Loss and Causation
4. The Remoteness Principle
5. The Duty to Mitigate
6. Damages for Mental Distress, Anguish and Injured Feelings

### General

The aim of damages for breach of contract is to compensate the aggrieved party for the **loss** s/he has suffered

### Proof of Loss and Causation

To succeed in a claim for damages, the aggrieved party must satisfy the following requirements:

1. he must be able to prove his loss
2. the defaulting party must have caused the loss

### The Duty to Mitigate

An aggrieved party is expected to take all reasonable steps to reduce his losses consequent on a breach and isn't entitled to claim as damages losses that he could have avoided by taking such steps

### Specific Performance

An **order for specific performance** is a court order requiring a person to perform his obligations under the contract

- The remedy is a **discretionary** one if it is not available as of right
- The remedy is **available** only when an award of damages is an inadequate remedy for the aggrieved party

Where damages provide an adequate remedy for a breach of contract, specific performance will not be ordered and the aggrieved party will be confined to his remedy in damages

## Injunction

An **injunction** is an order or decree by which a party is required to do, or refrain from doing, a particular thing

1. prohibitory
2. mandatory

In a **prohibitory injunction**, the party is ordered by the court not to act in a manner inconsistent with the contractual obligation

In a **mandatory injunction**, the court orders the defaulting party to undo the effects of his breach

An injunction is a discretionary remedy

- It may be refused if the order causes hardship to the defendant
- If the remedy sought is inequitable or oppressive, the court may decline to grant it

## **THE TENDERING PROCEEDINGS AND SELECTION PROCESS**

Procurement Under Two Stage Tendering;

- Invitation for Pre-qualification Applications
- Contents of the Pre-qualification Documents
- Procedures for submission of pre-qualification application
- Evaluation of Prequalification Applications
- Preparation of Short-list (pre-qualified Applicants)
- Announcement of Pre-qualification Results

### **Methods of Selection**

1. International Competitive Tendering
2. National Competitive Tendering
3. Restricted Competitive Tendering
4. Single-Source Procurement
5. Direct Contracting for Works

International competitive Tendering

A Client invites Tenderers regardless of their nationality advertised nationally and internationally

International Competitive Tendering is appropriate where

Payment may be made in whole or in part in foreign currency

Advertising outlets - international magazines; dgmarket; undbonline; etc

National Competitive Tendering

A Client shall invite Tenderers by means of a Procurement Notice advertised only in the United Republic of Tanzania

National Competitive Tendering is appropriate where:

Payment may be made wholly in Tanzania shillings

The services can be obtained locally at prices below the international market

Restricted Tendering

A Client may restrict the issue of tender documents to a limited number of specified Tenderers when

- Such Tenderers have already been pre-qualified
- The services required are within the competence of limited number of specialized Tenderers

- There is an urgent need for the works such that there would be insufficient time to engage in national or international tendering

Single Source Procurement

Only to be used in exceptional circumstances, this may include the following

- Continuation of an existing or previous assignment
- In an emergency requiring rapid selection
- Where only one firm is qualified or has experience to undertake the assignment