

SESSION 1

CONTRACT PRINCIPLES Goods & Works



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LEARNING OBJECTIVES

By the end of the session, participants will be able to:

- Introduction
- Define a Contract
- Explain the Essential Elements of a Valid Contract
- Describe the Formation of a Contract
- Explain Types of Goods & Works Contract
- Identify the circumstances under which each type of contract may be applied.
- Discuss the Factors Affecting the Choice of a Contract Type
- Explain the General Principles for Contracts



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Introduction

- The Public Procurement Act, 2003, Act 663
- The Public Procurement Act, 2003, Act 663 – Revised (Ghana Law Records – Issue 1 - IV)
- The Public Procurement Amendment Act, 2016, Act 914



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Parts of Act 663 as Amended

- Part 1: Establishment of the Authority
- Part 2: Procurement Structures
- Part 3: Procurement Rules
- Part 4: Methods of Procurement
- Part 5: Tendering Procedures
- Part 6: Methods and Procedures to Engage the services of a consultant
- Part 7: Complaints and Administrative Review
- Part 8: Disposal of Stores, Vehicles, Plants and Equipment's
- Part 9: Miscellaneous Provisions



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Parts of Act 663 as Amended

- **FIRST SCHEDULE:** Categories of Entity Tender Committees
- **SECOND SCHEDULE:** Thresholds for Ministries, Departments and Agencies
- **THIRD SCHEDULE:** Thresholds for Regional Coordinating Councils and Metropolitan, Municipal and District Assemblies
- **FOURTH SCHEDULE:** Composition of Tender Review Committees
- **FIFTH SCHEDULE:** Thresholds for Procurement Methods; and
- **SIXTH SCHEDULE:** Standard Tender Documents and Standard Requests for Proposals



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ABRAHAM ABLORH MENSAH (MCIPS) – TRAINING TO
IMPACT

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Introduction

- Contract Award is essential to Public Procurement.
- It is the starting point for contract execution and administration.



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Contract Definition

The Oxford English Dictionary defines a Contract as:

- An agreement between two or more parties whereby each party promises to do or not to do something,
- A transaction involving two or more individuals, whereby each has reciprocal rights to demand performance of what is promised, and
- A form of agreement enforceable at law.



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Contract Definition – Cont'd

- Another Def. **“An agreement, enforceable by law, between two or more competent parties (legal entities) to perform or not to perform a specific act or acts for a consideration.”**
- A “Contract” is generally regarded as a form of agreement, specifically one which is enforceable at law.
- Act 663(as amended), Section.98

“procurement contract” means a contract between the Procurement Entity and a Supplier , Contractor or Consultant resulting from procurement proceedings.



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Essential Elements of a Contract

- **Capacity to contract** - parties must have legal right to enter into the contract with respect to age, competency and corporate authority.
- **Certainty** - parties must have same mind (*consensus ad idem*) about the offer and acceptance with definite and agreed terms
- **Consideration** - parties must each give something of legal value to the other or a third party in return for benefit
- **Legality of purpose/object** - object must not be one of which the law disapproves, the law will not enforce an illegal contract or when it is against public policy.
- **Possibility of performance** - a contract must be possible to perform.



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Formation of a Contract

- **“Offer and acceptance”** is the basis upon which a contract is formed.
- An offer may not always be the first move in the formation of a contract in some jurisdictions.
- A contract is formed when there is an offer and acceptance backed by consideration.
- Acceptance of the offer must be positive, unconditional, unequivocal and unambiguous



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Formation of Contract –Public Procurement

- Needs Analysis
- Availability of funds
- Approval mechanisms
- Selection of a Prospective Supplier / Contractor
- Execution of Activity
- Meeting the needs of the organisation



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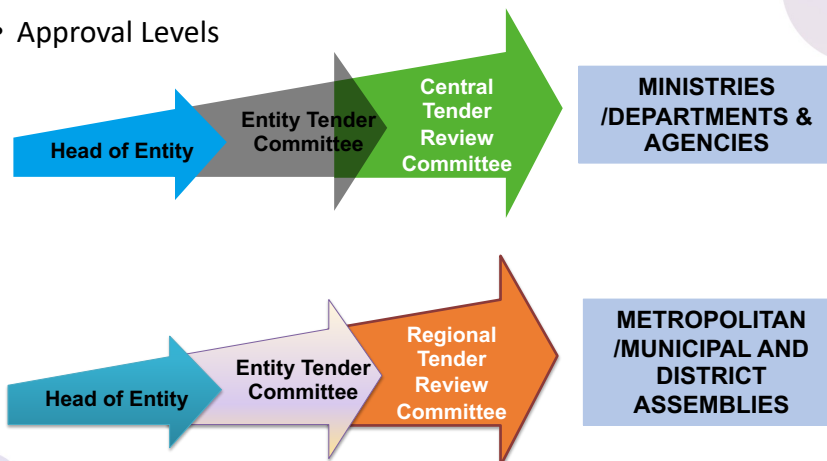
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Part II: Procurement Structures

- Approval Levels



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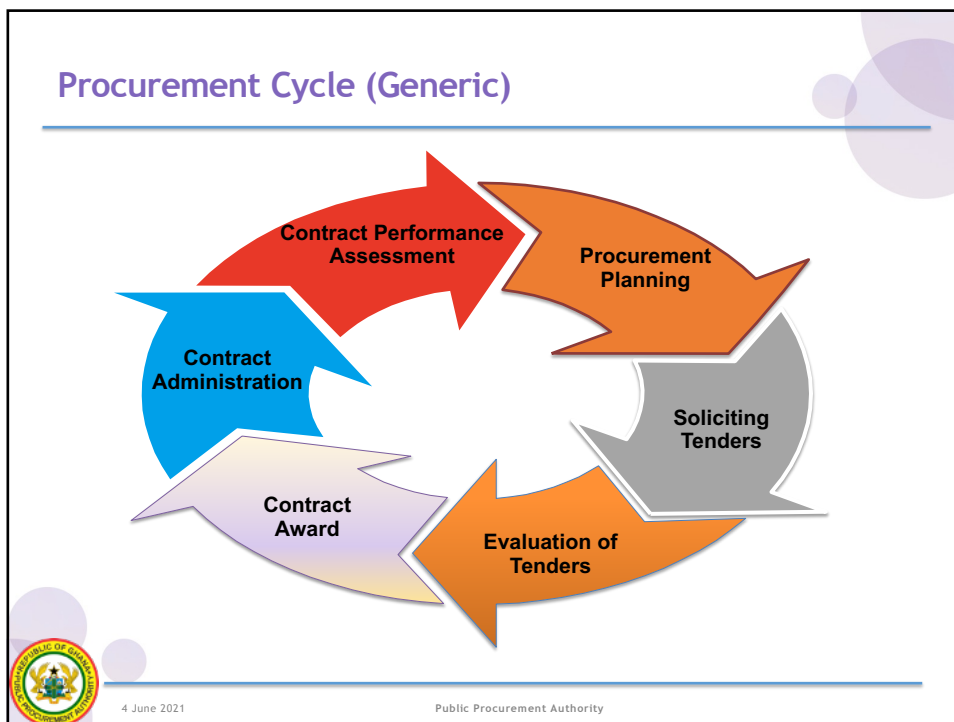
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Approval Thresholds
SECOND SCHEDULE
 (Sections 18, 20, 20A, 20B and 20C)

Approving	Category F1			Category F2			Category F3		
	Regional Coordinating Council			Metropolitan Assemblies			Municipal and District Assemblies		
	Goods	Works	Services	Goods	Works	Services	Goods	Works	Services
Central Tender Review Committee	Above 750,000	Above 1,000,000	Above 750,000	Above 550,000	Above 750,000	Above 550,000	Above 400,000	Above 550,000	Above 400,000
Entity Tender Committee	Above 100,000 to 750,000	Above 150,000 to 1,000,000	Above 100,000 to 750,000	Above 75,000 to 550,000	Above 125,000 to 750,000	Above 75,000 to 550,000	Above 50,000 to 400,000	Above 90,000 to 550,000	Above 50,000 to 400,000
Entity Head	Up to 100,000	Up to 150,000	Up to 100,000	Up to 75,000	Up to 125,000	Up to 75,000	Up to 50,000	Up to 90,000	Up to 50,000

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Procurement Cycle (Generic)

Planning

- Identification of need-goods, works, consultancy services and technical services
- Specification of the requirements (functional, performance, technical) and /or developing terms of reference for assignments.
- Determining the packaging of the requirements
- Estimating costs of packages and determination of sources of funding-

Soliciting

- Pre-qualification of potential suppliers, contractors, technical service providers / Advertising
- Preparing Tender Documents (Solicitation Documents, including Request for Proposals)
- Issuing Tender Documents
- Receiving Tenders
- Opening Tenders



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Procurement Cycle (Generic)

Evaluation of Tender

- Preliminary Examination (Verification, Eligibility, Tender Security, Completeness of Tender, Substantial Responsiveness)
 - Commercial Responsiveness/Technical Responsiveness
- Detailed Evaluation
 - Correction of errors/ Clarification/ Financial

Contract Award

- Notification of Award/Letter of Acceptance
- Return of Tender Securities
- Finalization of terms and conditions of contract
 - ✓ Negotiation of terms and conditions of contract (if applicable).
 - ✓ Provision of Performance Securities
 - ✓ Provision of Insurance
 - ✓ Finalizing the Work Programme/Work Plan
- Contract signing



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Procurement Cycle (Generic)

Contract Administration

- Appointment of the Contract Administrator and team.
- Preparation of Contract Administration Plan
- Monitoring Contract Performance & Reporting
- Managing Contract Changes/Variations
- Processing Payments,
- Resolution of Claims & Settlement of Disputes
- Termination of Contract, if any / Etc

Contract Assessment

- Assess the performance of Supplier/Contractor/Consultant/Technical Service Provider
- Review performance of Procurement Entity (PE)
 - ✓ To assess compliance, efficiency and effectiveness
 - ✓ May include procurement audits
 - ✓ Note lessons learned



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Laws Applicable to Contract

- No contract exists in a void/vacuum and one national law applicable to the formation, interpretation and application of a contract,
- Parties to international contracts are free to choose the law applicable to their relationship and may not be without exceptions,
- Laws of one country may be stringent or mandatory in character, i.e. may override any provision to the contrary in the contract between the parties,



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Laws Application to Contract – cont'd

The importance of the applicable law is to:

- ✓ regulate matters which the parties have not addressed in their contract, and
- ✓ hold the parties within limits drawn up by the stringent provisions of the law,
- ✓ interpret the contract by a judge or an arbitrator/adjudicator, and
- ✓ fill in gaps in the contract where no contractual provisions exist.



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Laws Application to Contract – cont'd

- Under the various Standard Tender Documents of the Public Procurement Act, 2003, Act 663 as amended, the Law Applicable to a Contract is that of Ghana.
- Documents forming Goods and Works Contracts are taken as mutually explanatory of one another



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Laws Application to Contract – cont'd

- For the purposes of interpretation, the composition and priority of the documents are in accordance with the following sequence:
 - ✓ Contract Agreement (if any),
 - ✓ Letter of Acceptance
 - ✓ Letter of Tender
 - ✓ General Conditions of Contract
 - ✓ Special Conditions of Contract
 - ✓ Specification (Goods)
 - ✓ Drawings, Designs (Works) and
 - ✓ Schedules and any other documents forming part of the Contract.
- In case of ambiguity or discrepancy, the Contract Administrator/Project Manager is to issue any necessary clarification or instruction.



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Types of Goods Contract



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TYPES OF GOODS CONTRACT

❑ Fixed-Price Contract

- A Fixed-Price contract is also known as a lump-sum contract.
- It is used when there is no uncertainty in the scope of assignment.
- Once the contract is signed, the seller/supplier is contractually bound to complete the task within the agreed amount of money and/or time.
- The seller/supplier bears the majority of the risk, as he must provide for the completion of the assignment as stipulated in the contract
- There are several variations of the fixed price contract.
- For commodities and goods where the scope of work is very clear and not likely to change, the fixed price contract offers a predictable cost.



TYPES OF GOODS CONTRACT

❑ Fixed-Price Contract with Price Adjustments

- The Fixed-Price Contract with Price Adjustment is used for unusually long projects that span over a year.
- The most common use of this type of contract is the inflation-adjusted price.
- In a country, where the value of its local currency can vary greatly in a few months, this affects the cost of local materials and labour.
- The volatility of certain commodities can also be accounted for in a price adjustment contract.
- For example, if the price of oil significantly affects the costs of a goods, the purchaser can accept the oil price volatility risk and include a provision in the contract that would allow the contract price adjustment based on a change in the price of oil.



TYPES OF GOODS CONTRACT

□ FRAMEWORK AGREEMENTS

- According to Section 98 of the Public Procurement Act, 663 as amended:

“Framework Agreement means a long-term agreement with suppliers, contractors and providers of non-consultancy services which sets out terms and conditions under which specific procurements (call-offs) can be made throughout the term of the agreement. Framework agreements are generally based on prices that are either pre-agreed or determined at the call-off stage through competition or a process allowing their revision without further competition”.

- **Section 34A of Act 663 as amended**, provides for the use of Framework Agreement through which the contract for common user items and requirements of recurrent nature, can be established with a successful tenderer.
- Call-off orders can then be placed under the Framework agreement.
- Framework Agreement can be used as the form of contract for procurement of office furniture, vehicles, spare parts, commodities, stationery, etc.



Principles of Goods Contract

- The terms of contract must be precise
- Standard forms of contract should be adopted wherever possible.
- Price Variation Clause to be provided only in long-term contracts, where the delivery period extends beyond eighteen (18) months.
- The contract should contain the mode and terms of payment.
- The terms of a contract should not be materially varied.
- All contracts shall contain a provision for recovery of liquidated damages for defaults on the part of the Supplier.
- A warranty clause should be incorporated into the contract
- Suitable provision for settlement of disputes should also be made part of the contract.



Exercise

1. Explain your understanding of a contract.
2. Discuss the essential elements of a valid contract
3. "A valid contract can be verbal or written". Discuss



Works Contract



Works Contract

- in consideration of the payments by the Employer to the Contractor, the Contractor covenants with the Employer to provide the Works, and
- subject to the terms of the Contract, the Employer covenants to pay the Contractor in consideration of the provision of the Works
- It is highly recommended that contracts must be in writing with exceptions where enforceability need proving existence and terms of a contract.



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Nature of Works Contract

- Are generally complex and most challenging in terms of contract administration
- Are with various degrees of complexity and risks that demand various requisite expertise for administration
- May deal with large infrastructure projects e.g. highways, bridges, roads, irrigation systems, dams etc.,
- ✓ small infrastructure projects e.g. rehabilitation of buildings, roads, sewage, water or power utilities etc., and
- ✓ environmental rehabilitation projects e.g. earthworks, planting, seeding, water management etc.



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Nature of Works Contract – Cont'd

- Procurement Entity should have experience in various types of works contracts, possess the in-house technical expertise and some level of experience in forms of contracts used in STDs, particularly FIDIC Conditions,
- Technical experience and expertise in the use of these Conditions may not be available but thorough understanding of the contract documents often proves more valuable



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Types of Works Contracts by Method

Four (4) **main** types of Works procurement under the Redesigned STDs within the Public Procurement Act, 2003, Act 663 as amended, grouped according to their estimated values as follows:

- **Major works contracts –**
- **Medium works contracts –**
- **Minor works contracts**
- **Micro works contracts**



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Basic Types of Works Contracts

Three (3) **basic and broad** types of works contract:

- ✓ Lump Sum
- ✓ Unit Rate (Admeasurement/ Re-measurement)
- ✓ Cost Reimbursable plus Fee.

Basic types of works contracts broadly defined and classified by the method of payment from which other variations have been derived to suit particular circumstances, documentation required and the advantages and disadvantages



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Basic Types of Works Contracts

Lump Sum (LS)

- LS or all-inclusive price contracts normally used for small, short duration contracts, well defined, detailed works and building construction, not subject to large quantity variations or conditions of high risk; contract prices would normally be fixed; LS contracts used for culverts and small bridges, rural schools, health clinics, housing, bus shelters, etc.

Unit Rate (UR) – Admeasurement or Re-measurement

- a contract where progress is determined by measuring the quantities of works actually performed; payments are based on these measured quantities multiplied by the respective contract unit rates as quoted by the Contractor in the priced Bills of Quantities,



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Basic Types of Works Contracts

Cost Reimbursable plus Fee

- Commonly called Cost Plus (CP) and provides for the periodic reimbursement of the contractor's actual costs for measurable inputs to the works, such as labor, materials, equipment, spare parts, fuel, etc., together with a fee to cover associated overheads, management and profit,



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Factors Affecting the Choice of Contract Type

Choice of type suitable for use are critical at **planning stage of procurement** must be considered carefully

- Nature and complexity of the works
- Degree of definition of the works,
- Element Of Risk/Uncertainty,
- Status Of Design For Both Preliminary Or Final,



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Factors Affecting the Choice of Contract Type

- Technical Capacity, Design And Supervisory Resources Of The Employer,
- Financial Resources Available And/Or Budget Constraints,
- Previous Experience Of The Employer,
- Practices And Procedures Of Funding Agencies, And
- Degree Of Compliance Required With STDs



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Challenges

- **Scope of the works:** (material movement, variety of activities, technical complexity, Duration)
- **Resources:** (Labour, Financial, Material, Plant and equipment)
- **Expertise:** (Technical and supervisory, Financial, Legal, Commercial, Contractual and issues of claims/remedies)
- **Parties:** (Employer, Contractor, Subcontractors)



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Challenges

- **Stakeholders** : (Engineer and/or Project Manager and other Consultants, Statutory agencies and undertakings, Local communities and stakeholders, End-users/beneficiaries, Insurers)
- **Disputes Resolution**: Dispute Boards/Adjudicators/Arbitral Courts/Arbitration Centres, Manufacturers, Merchants, Suppliers etc.
- **Potential impact**: (Economic, Technological, Environmental, Health, Social, Safety and Security and need for Management Plans, Political)

These factors often have a direct impact on the successful implementation of works contracts in terms of quality, time, cost, sustainability and relationships



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Conclusion

:

Management of Goods / Works Contracts

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Contract Administration

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(Management of Relationships)

Contract Parties / Third Parties / Stakeholders



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Exercise

1. What is your understanding of a Contract generally? Based on this understanding, how do you perceive a Works Contract?
2. What factors will you consider in the choice of works contract exceeding GHS50,000 but not exceeding GHS500,000?



Questions and Discussion

GRATEFUL FOR YOUR CONTRIBUTIONS

