



JIMMA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

EXAMINING THE LIABILITY OF CONSULTANTS IN CONSTRUCTION  
CONTRACT IN ETHIOPIA:

THE ETHIOPIAN CONSTRUCTION LAW EXCESSES AND GAPS

BY:

FEYERA JALETA REGASA

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**BY**

FEYERA JALETA REGASA

**MAIN ADVISOR :**

MR. SINTAYEHU DEMEKE (ASS. PROF. IN LAWS; DEAN, COLLEGE OF  
LAW & GOVERNANCE)

**CO-ADVISOR :**

MR. YOSEF ALEMU (ASS. PROF. IN LAWS)

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**APPROVED BY BOARD OF EXAMINERS:**

PRINCIPAL ADVISOR (NAME & SIGN.) -----

CO-ADVISOR ADVISOR (NAME & SIGN.) -----

EXTERNAL EXAMINER (NAME & SIGN.) -----

JIMMA, ETHIOIPA

JUNE, 2017

## **Declaration**

I hereby declare that this submission is my own work towards the LL.M in Commercial And Investment Laws and that, to the best of my knowledge, it contains no material previously published by another person nor material which has been accepted for the award of any other degree of the University, except where due acknowledgment has been made in the text.

Name;FeyeraJaletaRegasa

Signature: -----

Date: -----



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## **Abstract**

The modern era has brought with it a never-before-seen demand for high quality and high quantity civil infrastructures and industrial facilities. To attain this objective, the involvements of construction consultants are highly indispensable starting from the pre-construction stage to the provision of certificate of accomplishment of the project. Accordingly, the purpose of this thesis is to examine the liabilities of construction consultants (professionals) who through discharge of their obligations as agents of clients (employers) in construction contract have assumed contractual and tortious liabilities in the Ethiopian Construction laws.

In construction contract adequate liability allocation pertaining to consultants is almost neglected. Beyond the fact that the agreed contract terms allocate the rights and obligations in a contract, the contract and actions of parties are governed by the prevailing law. This governing law is expected to provide adequate statutory and legal controls to regulate specific liability terms in contracts, in addition to offering ample guidance in interpretation of these terms. The thesis aims to investigate the concept of liabilities, its limitation and provisions in the legal framework of Ethiopia; with the intention of examining adequacy and proficiency of the Ethiopian construction laws.

The research will mainly be doctrinal in its nature in which different documented facts on the construction consultants' liability in construction contracts will be explored, legal regimes and policies will be analyzed.

Accordingly, the study reveals certain lacuna in the Ethiopian construction laws and in order to overcome these issues, a new approach to achieve equilibrium in liability or risk allocation in construction contracts particularly consultants is recommended. The research findings advocate need for statutory intervention and reforms to be made to guide the new approach of construction contract condition formation which best maintains shared liability through developing a comprehensive or integrate construction contractand accordingly determine the extent, amount

and conditions of construction consultants' liability. The thesis further tried to draw lessons from other countries experience, pertaining to joint and several liabilities among firm owners.

Key words: Construction contract, consultants Liability, shared liability, integrate contract.

## **Acronyms and Abbreviations**

FIDIC= International Federation of Consulting Engineers

AIA= American Institute of Architectures

EFCA= European Federation of Engineering Consultancy Associations

BOT= Build Operate and Turn Over

E.C = Ethiopian Calendar

EEC= Ethiopian Economic Commission

Plc. = Private Limited Company

MoWUD= Ministry of Works and Urban Development

MoUDC =Ministry of Urban Development and Construction

MoFED = Ministry of Finance and Economic Development

FPPA = Federal Procurement and Property Administration Authority

PE= Procuring Entity

ERA = Ethiopian Roads Authority

GCC= General Conditions of Contract

SCC= Special Conditions of Contract

FDRE = Ethiopian Federal Democratic Republic Ethiopia

BOQ= Bill of Quantity

GDP= Gross Domestic Product

EU= European Union

Fana BC= Fana Broad Casting Corporate

# CHAPTER ONE

## 1. INTRODUCTION

### 1.1 Background of the study

Consultant is defined as an individual or organization that provides feasibility study design, supervision and contract administration services on construction.<sup>1</sup> In other words consultants are professionals either natural person or juridical person registered and issued with certificate as a design or construction consultant by relevant organ.<sup>2</sup> They are professional agents of the owner/employer that provides a feasibility study design, provide technical consultancy, supervise the construction work, and administer the whole construction contract on behalf of the employer.<sup>3</sup>

The design or engineering work associated with a construction project is critical to the overall success of completed structure.

Accordingly, to overlook, or to fail to dedicate serious attention and take care of it which is necessary to successfully accomplish the project, is to expose the project to significant losses that may result in project failure, or distractions to the project. Compatible with Ethiopia's economic growth exhibited in recent years, demand for residential, Office, Industrial, and civil infrastructures in quality and quantity has tremendously increased.

To meet the intended high quality and quantity demands in construction project in Ethiopia, it is critical to develop the capacity of consultants and provide compatible legal framework which sufficiently regulates the rights and corresponding liabilities of actors in construction contracts including consultants. For instance, a design professional is required to keep apprised of building restrictions, codes and regulations, and must prepare plans and specifications in accordance with those various regulations.<sup>4</sup>

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1. *Construction Industry registration proclamation of 2013 (draft), Art.2*

2MoUDC, Directives for the Registration of Construction Professionals and consultants (Amended) 22 of 2013, Art.2(4)

3Ramaswamy, UNDERSTANDING CONSTRUCTION CONTRACTS; available at [www.PDHSite.com](http://www.PDHSite.com), at 5.

4 Joel B. Castro, Understanding design Build contract, at 3 , Volume 58

Ethiopian legal regimes governing the construction industry at the moment lack organization and found scattered in different statutes. The major construction laws of the country among others are mainly found in the 1960 s Civil Code,<sup>5</sup> the Building proclamations <sup>6</sup>and regulations,<sup>7</sup> other directives issued by competent organs predominantly by Ministry of Urban Development and Construction Ministry,<sup>8</sup> and the construction industry policies of the country issued at different times. In all of these legislations the country enacted to regulate the construction industry, one could hardly find a provision which sufficiently dealswith the grounds and extent of liability of consultants.

Another aspect of design in the Ethiopian construction laws which casts doubt over its capacity to achieve in setting objective standards for what professional construction defects are and who bears respective liabilities concerning consultants in the construction contract. Because today in an increasing number of projects, it is understood that construction projects usually have in force several simultaneous contractual arrangements: between the client and consultant, between the client/consultant, and general contractor and sub-contractors, and suppliers.

These contracts can establish a complicated structure of responsibility for damages arising out of construction operations.<sup>9</sup>On the other hand, under contemporary construction practices; it is often inefficient for the design professional or firm that provides an overall project design to retain responsibility for all critical aspects of project design.<sup>10</sup> In this case it is very difficult to successfully accomplish certain construction project without collaboration of consultants in the field. In the core of collaboration of construction consultants/architectures, an important question that must seek answer in the construction industry and for lawyers, insurers, and sureties is that who is going to bear liability for the design defects in this circumstances, and more importantly what principles, processes and authority should establish the rules for allocating, insuring and otherwise managing design liability is not yet determined in contemporary construction laws in

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5 Proclamation Civil Code of 1960, arts. 320-340.

6 The Ethiopian Building Proclamation 624 of 2009

7 The Ethiopian Building Regulation 243 of 2011

8MoUDaC, Directive for the Registration of construction Professionals (Amendment) Directive 22 of 2013

9AbebeDinku, Insurance requirements and practices in Ethiopia's Construction sector at 26, Journal

10 Supra note 2 at 564

efficient manner.<sup>11</sup> In this particular legal issue the author of this article, is arguing that there must be a trend towards adapting the shared design.

When one refers the Ethiopian construction Laws regarding determining the extent and limitation of architect's or designer's liability in Construction contract, it is hardly possible to grasp sufficient and effective legal remedy in case of occurrence of design defects or errors. To justify this connotation is of essential to look at the Ethiopian Building Proclamation, which states that concerning the professional liabilities the relevant provisions of the Civil Code shall apply.<sup>12</sup> First do the relevant tort (extra-contractual) provisions part of the civil code preferable to apply taking the commercial risks involved in the construction industry? Second taking the unique nature of construction contract in which high uncertainty and risks involved,<sup>13</sup> and necessitates the involvements of different construction professionals, does the existing practice of traditional construction contract in Ethiopia<sup>14</sup> allocate, insure and manage the consultants liability? Towards this end the author is arguing that there must be other mechanisms to be devised in the Ethiopian construction laws which addresses the legal issue of shared-design liability among all participants of certain project on one hand, in case integrate construction contract; and also there must be unlimited liability among the consultant firm owners on the other. And furthermore, the legal regimes should be designed towards shared liability commencing from the consultant firms establishment to their work accomplishment in construction contract.

## **I. Research Problem and Questions**

The role of the consultant on a construction project is often not fully understood by the other parties involved on the project, including the consultant's client, the owner, and the administrative agencies entitled to enter into construction contract on behalf of the government. Unsurprisingly, defects are one of the major causes of dispute and construction litigation.

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<sup>11</sup> Ibid at 564, Volume 58

<sup>12</sup> See Ethiopian Building Proclamation 624 of 2009, art. 28(1)

<sup>13</sup> Tecele Hagos and Mahelet Shewangizaw, Construction law, Teaching Material (Un published), 2009 at 1,

<sup>14</sup> Hans-Joachim Backer and Behailu Demeke Demissie, Public Private Partnership in Road Projects in Ethiopia, Technische Universität Berlin, shows that the Ethiopian Roads Authority uses the Traditional ways of procurements- Design – Bid-Build at 26, 2006.

Dealing with construction failures requires various degrees of familiarity with law, building technology and practice. Modern construction industry is one of the indigenous sectors of the country, and having a lion's share in the economic growth and job creation, but there is a discussion in the construction industry business community, academician, and other government agencies about lack of comprehensive construction regulations particularly pertaining to determining liability and the guarantees the construction consultants (Architects, designers or other engineering consultants) bears in the construction contract.

On the other hand, in both practice and model construction contracts in Ethiopia, there is no contractual relationship between the consultants (architect, designer and other engineering consultants) in specific project, and/or the contractor and consultants or the issue is not addressed yet. In this case it is hardly possible to work cooperatively towards achieving successful construction project accomplishment in terms of quality, time, cost, and effectively discharging their respective contractual obligations. At this time it is very critical for the construction industry in Ethiopia to search another way or mechanisms by which these parties can legally be bound to enter into contractual obligation to have shared (joint) liabilities.

Furthermore, in case of failure of the construction project intended to be constructed, or existence of defect performance in construction project, or the existence of the non-performance of the construction contract due to reasons related to the services of the consultants, for instance related to the architect or design of the project, the Ethiopian construction law never devised a legal mechanism in case the architect or designer is going to be liable for the whole project pertaining to the service provided. Due to this reason the construction industry itself and other stake holders such as government institutions including higher educations, investors, and individuals are left without sufficient legal remedy. The rules in the civil code, and elsewhere, of the country on formation of construction contract, determining the liability and governance of construction consultant firms have also been discussed for being incomplete from time to time.

The central research question this work raises therefore is, 'has Ethiopia adopted sufficient laws (regulations) which define the liability of consultants in construction contracts?' This being the central question, the work further tries to address the following specific questions:



1. Does the existing Ethiopian construction legal frameworkset, extent of liability of construction consultants in construction contract? If not, how should the construction laws be reframed for the betterment of construction industry itself, and to protect the interests of clients or contractors from construction consultants acts of defects/mismanagement by extending their responsibility in Ethiopian construction laws, and construction contracts in particular?
2. How do the Ethiopian construction laws and contracts regulate the extent of liability of consultants (designers); should the stated liability extend to the total estimated price or value of the whole project, or otherwise only limited to the price of the consultancy service?
3. How does the Ethiopian construction laws sufficiently regulate construction consultants' performance duty, and the extent of provision of performance guarantee bond or surety in construction contracts in case of failure of the construction project, nonperformance or existence of any defects in performances of consultants (architects/designers)
4. What are the lessons that can be drawn from the international experience and scholarly recommendations in this respect?

## **II. Research Objectives and Significance**

The objective of this thesis is to study and analyze the liability of construction consultants in the Ethiopian construction contracts (particularly Ethiopian Construction Laws) in light of the general Ethiopian construction industry policies and principles of efficient shared-liability in construction contract, with special emphasis up on the equitability of liabilities of consultants {architects, designers and other consultants}. The study will draw upon the various policy documents and construction laws of Ethiopia to articulate Ethiopia's construction industry policy and in particular to establish shared and efficient liability of consultants as a fundamental goal of Ethiopian construction policy. The study will investigate the practical challenges and problems the Ethiopian construction contract system faces and highlight the problems that arise from design problems in the Ethiopian construction industry; regarding the effective and efficient determination of liabilities of construction consultants. The Liabilities of construction consultants in the Ethiopian construction laws structure has been accepted from the very beginning of modern construction contract unchallenged, and this study will direct attention to

the way the construction laws regarding ascertaining equitable shared liability of construction consultants is structured and will force rethinking about how construction laws concerning determining liabilities of construction consultants should be structured in Ethiopia.

Thus, it accordingly aimed at achieving three equally important objectives. First, it aims at contributing to knowledge about the construction industry, policy and regulation of the country pertaining to construction consultant's liability in construction contract. Second, to examine the Ethiopian legal framework regarding the grounds and extents of liability of construction consultants (registered professionals) under Ethiopian Construction Laws, and identify the excesses and gaps concerning registered professionals (consultants). Third, in light of the research background, problems and questions indicated above, the research aimed at indicating the need, areas and nature of further action by the country in order to further develop its legal framework to adequately manage the liability of consultants in construction contract.

The research is, accordingly, useful to both the pursuit of knowledge and the identification of the reform measures for Ethiopia.

### **III. The Scope of the Study**

The country's huge infrastructure expansion and urban centers' remarkable building construction activities provided an opportunity for taking up the issue for further analysis. However, lack of sufficient information on the industry may not allow an in-depth analysis of the issue to the required level. In addition, lack of time series historical data on the industry also put limitations in the examination of extent of construction consultants' liability in construction contract. With these limitations, the thesis however, will attempt, to the extent possible, to depict the trends and provide a comprehensive examination of the construction industry regarding the extent and determination of the liability of consultants including designers in construction contracts. In addition to this, the researcher will exert all possible efforts to address the issue of surety to be furnished by construction consultants with respect to construction contract, and will address the problems exhibited regarding legal gaps in Ethiopian Construction laws with respect to defect performance of consultants in construction contracts.

#### **IV. Research methodology**

Unlike the wealth of literature on construction management consultancy service, or construction contracts systems in general outside of Ethiopia, not much is written in connection to liability of construction consultants in the Ethiopian context based on Ethiopian laws.

The research will mainly be doctrinal in its nature in which different documented facts on the construction consultants' liability in construction contracts will be explored, legal regimes and policies will be analyzed. Experience of other legal systems will also be investigated with the aim of drawing important lesson relevant to Ethiopia. In addition to doctrinal legal research the researcher also aims to use interviews to gather information from relevant construction contract participants (Clients, Contractors and Consultants or experts in the field).

#### **V. Limitations of the Study**

The country's huge infrastructure expansion and urban centers' remarkable building construction activities provided an opportunity for taking up the issue for further analysis. However, lack of sufficient information on the industry may not allow an in-depth analysis of the issue to the required level.

Lack of adequate research on the Ethiopian construction industries: Lack of adequate research in construction laws has become sort of a truism in Ethiopia. While many aspects of Ethiopian legal system suffer from the lack of adequate research, the situation is even more pronounced in construction industry in general and consultant's legal liability in particular. Furthermore, lack of time series historical data on the industry had also limitations for examining for what and extent of construction consultants' liability in construction contract.

With these limitations, the thesis however, will attempt, to the extent possible, to depict the trends and provide a comprehensive examination of the construction industry regarding the extent and determination of the liability of consultants (designers) in construction contracts. And also, the researcher will exert all possible efforts to address the issue of surety to be furnished by construction consultants with respect to construction contract, and will address the problems to

make use of as remedy in case of defect performance with respect to Consultants in construction contracts.

## **VI. Synopsis of the Chapters**

All the chapters are structured in a way that they will address both the international experience and the Ethiopian situation. The second chapter focuses on the general theories and principles of liability of consultants in construction contract. It discusses the concepts of construction contract; the legal regimes governing construction contract both in international and domestic contracts, roles and responsibilities of consultants, and theories of construction consultants' liabilities in a construction contract, and Guarantees in the construction contract.

The third chapter focuses on the Ethiopian Construction Consultants Liability: towards effective regulation of the construction consultants. It discusses the history, current state, risk allocations, and need for development of proper legal regimes and measures that need to be taken by the country in designing their structure and regulation in light of both the international experience and the domestic situation. The fourth chapter focuses on the summary of the study and conclusions, and indicates the measures that need to be taken by the country.

## CHAPTER TWO

# GENERAL THEORIES AND PRINCIPLES OF LIABILITY OF CONSULTANTS IN CONSTRUCTION CONTRACT: REVIEW OF THE LITERATURE.

### 2.1 Concepts of Construction Industry, And Construction Contracts: Overview

Basically construction consultancy service is an indispensable part of both construction industry and construction contract. Accordingly, construction is the act of building by combining or arranging parts or elements, the thing so built.<sup>15</sup> Furthermore construction industry is defined as a sector of the economy that transforms various resources into constructed physical economic and social infrastructure necessary for socio-economic development, and hence it embraces the process by which the said physical infrastructure are planned, designed, procured, constructed or produced, altered, repaired, maintained, and demolished.<sup>16</sup> The constructed infrastructures may include buildings, transportation facilities such as roads, air ports, railways, Sea ports, pipe lines, industrial parks and so on.

Whereas, construction contract is defined as, a contract setting forth the specifications of a building project's construction, and this type of contract is usually secured by performance and payment bonds to protect both the owner and subcontractors.<sup>17</sup> Many scholars stated that construction contract has a unique nature which may differentiate it from other commercial contracts.

For instance TeceleHagos and MaheletShewangzaw in their work titled, Construction Law Teaching Material prepared under the sponsorship of Ethiopian Justice and Legal System Research Institute, stated that the construction project is governed by complicated contracts

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<sup>15</sup> Black's law dictionary seventh ed. at 308.

<sup>16</sup>The Ethiopian Federal Government, Ministry of Urban Development and Construction industry policy (First Draft) July of 2012, at 1.

<sup>17</sup> Supra note 13 at 320.

involving complex relationships in several tiers.<sup>18</sup> According to the general conditions of the contract for construction, a construction contract represents:

*“The entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The contract may be amended or modified only by modification. The contract documents shall not be construed to create a contractual relationship of any kind (1) between the architect and contractor, (2) between the owner and sub-contractor or (3) between any persons or entities other than the owner and contractor. The architect shall, however, be entitled to performance and enforcement of obligations under the contract intended to facilitate performance of the architect's duties”.*<sup>19</sup>.

Similarly, AbebeDinku (Engineer) further delineated this concept by stating that it is understood that construction projects usually have in force several simultaneous contractual arrangements: between the client and consultant, between the client/consultant and general contractor and between the general contractor and his several sub-contractors and suppliers.<sup>20</sup> Contracting for construction services is an inherently risky venture for the owner, design agent and contractor.<sup>21</sup>

As construction history reveals that construction contract is a risky business for all parties to the construction contract, more importantly for client, construction professionals (consultants) and the contractors. Hence, in the contemporary construction contract to adequately address the problems related to risk allocation on the one hand, and determine the extent of liability of each party in that contract on the other, and in effect foster the construction industry forward, there should be another modern construction contract model to be devised which best make the parties to work in collaborative manner.

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<sup>18</sup>TecléHagos and Mehelethewangizaw, Construction Law, teaching material(unpublished) at2, 2009

<sup>19</sup>Ibid at 9 -10

<sup>20</sup>AbebeDinku, insurance requirements and Practice of Ethiopia’s Construction sector , Journal of EAEA Vol.17, at 26, 2000

<sup>21</sup> Joseph C.Lavinge, Construction contract claims and methods of avoiding contract litigation through dispute resolution alternatives, at 10, 1993

Regarding the emergence of new contract model, authors from UK and China argued that *the most urgent problem with the construction industry was the “necessity of thinking and acting as a whole”*. *Attitudes and procedures needed to change but such change was “of no avail until those engaged in the industry themselves think and act together” the changes proposed included steps to agree a joint form for building and civil engineering conditions of contract and unifications of subcontract terms and conditions*”.<sup>22</sup>

Furthermore, if someone looks the Ethiopian Construction Contract standard forms, he/she can simply identify the existence of the same problem raised above which is lack of reframing in a way to enable the parties involved to work in cooperative manner by developing a joint and unified form of construction contract for building and civil engineering conditions (designers).<sup>23</sup>

## **2.2. Types of construction contract**

The conditions of the construction contracts are formed has direct consequence up on the end result of that contract. Because it can hardly be said that all conditions of construction contract have the same effect up on the outcome of that specific Construction contract depending up on its pecuniary characteristics.

Though FIDIC has limited capacity to be applicable in Ethiopian Construction contract which depends up on the free will of the contracting parties to choose it for specific reason in international Construction contract, it is widely used and frequently referred as a model construction contract in international and certain domestic Construction contracts; it is worth to mention here.

Accordingly, FIDIC in its recent 5<sup>th</sup> edition the conditions of contract for construction works in 1999 published four model conditions of construction contracts, namely<sup>24</sup>,

**A. Conditions of Contract for Construction:** Conditions of Contract, also known as the "Red Book", identifies the basic principles of procurement and Construction Contract. In this

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22 Wayne Lord, ‘ et al’, A modern contract developments in the UK and China, at 8-9, 2010.

23 MoWUD, Standard conditions of contract for construction of civil works projects, 1994.

24 Dr. Jur. Tunay KÖKSAL, FIDIC conditions of contract as model for international construction contract, Inter.l Journal social science and humanities, vol. 1 no.8, 2011 at 141.

Conditions of Contract, the Project of the Work is prepared by the Employer or made it prepared, execution of the construction work by the Contractor is provided for.

**B. Conditions of Contract for Plant and Design-Build:** This Conditions of Contract, also known as "Yellow Book", has been prepared for use design and construction or installation to be made by the Contractor in the construction and engineering work.

**C. Conditions of Contract for Engineering Purchase Construction (EPC) / Turnkey:** The Conditions of Contract, also known as "Silver Book" is recommended for works to be performed turnkey projects such as power plants, factories or water treatment plant

**D. Short Form of Contract:** The Conditions of Contract, also known as "Green Book", provides for a different regulation rather than previous conditions. According to this different regulation, FIDIC, for any building or engineering work of which the Contract price is less than U.S. \$ 500,000 and is provided for to be completed in 6 months, through accepting that the supervision service can be provided by the Contracting Authority, hasn't required to employ a consultant engineer for the supervision of construction work.

From the above FIDIC model conditions of construction contracts, the client may choose which condition of contract among the four conditions of contracts can best suit for the intended construction project.

However, none of the FIDIC four model conditions of construction contract mentioned here in above addressed in adequate manner for the question how to determine the shared- liability of construction professionals (consultants) involved in construction project, and hardly suggested- possible paramount options for the clients and /or contractors which warrants to maintain shared liability in existence of any defects or errors happened in due course of the construction as a result of the service provided by consultants- such as architecture or designer or any relevant engineering consultants.

Basically there are multiple types or forms of contracts in commercial transactions both at international and domestic level based on the kind of the object the parties to the contract intended to abide by, as far as the object of the contract does not contradict the laws or morals, and possible to perform.



In Ethiopian construction laws, there are different types of construction contract forms and used in the construction sector more or less similar to the FIDIC forms of construction conditions contract. For instance, the most widely applicable Construction contract forms as stated by GetaneheGezahagn are follows:<sup>25</sup>

- I. Re-Measurement form of Contract:** In this form of contract, the contractor is paid based on the amount of work executed, as compared to the prices detailed in the (BOQ). This is the most widely used form of contract in Ethiopia for both local and international contracts.
- II. Build-operate and turn over form of Contract:** This is a form of contract where the contractor builds, operates and turn over (BOT) the project to the Employer for a fee.
- III. Turnkey Projects:** This form of contract, also called EPC-contract (Engineer, Procure, Construct-Contracts) is a form of contract where the contractor is responsible for the design and building of the project. Such forms of contract are particularly suitable for electro-mechanical contracts.
- IV. Lump Sum form of Contract:** In this form of contract, the contractor agrees to do the job for a fixed sum. In this case the contractor is responsible for the preparation of all details.

Theoretically speaking, the power to choose one form among construction contract those listed above which in his/her belief can best fit for the intended project to be built is left for the client. On the other hand truly speaking, most clients/employers have no sufficient know how about the technicalities of construction contracts and the effects it entails at the end. Hence, clients must be supported by lawyers. In this case in the due course of providing legal service, lawyers are expected to identify the pros and cons of each form of the construction contracts by taking into consideration different factors such as whether adequately allocating risks among the parties to construction contract, or sufficiently determining liabilities in case of occurrence of construction defects. Regarding determining liability of construction consultants which is the theme of this study, the author of this thesis will address in the forthcoming sections.

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<sup>25</sup>GetaneheGezahagn, *Assessment of Conditions of Contract Problems in Ethiopian Construction Industry AAU, 2011 at 36*

## 2.3. Governing Laws in Construction Contract in Ethiopia

### Introduction

In general construction of certain projects was as old as human beings. Despite its very old history of construction projects, the first positive law enacted to regulate the construction of certain projects dated back to the era of Hammurabi at 2000 B.C King of Babylon.<sup>26</sup> All commercial transaction is rooted in the contract.

Both International and Domestic Construction contracts address the most common problems and allocate most standard risks accordingly. However, no perfect contract exists because of the uniqueness and unforeseeable nature of this field.<sup>27</sup> While governing laws contains the mandatory clauses as a rule, they have the capacity to set certain legal requirements to fairly allocate liabilities that usually took place in the construction sector.

### A. National Laws

The Ethiopian construction contract laws which are parts of the Civil Code,<sup>28</sup> like other laws, are transplanted; from Civil Law legal system based mainly the French Civil code.<sup>29</sup>

Different writers place Ethiopian construction laws in different categories or domains. According to, Teclé Hagos, the construction industry in Ethiopia is regulated by various legislative enactments which mainly come under two different domains; namely, civil construction laws, and government construction laws.<sup>30</sup> The former laws are applied where a private individual or company usually referred to as 'employer' (otherwise known as 'owner' or 'client') enters into a construction contract with a contractor. And the latter involves a government department which intends to have construction works carried out on behalf of the government for public interest. Thus, depending on whether the construction contract involves a private civil/business-to-

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26 Assessment of Conditions of Contract Problems in Ethiopian Construction Industry AAU, 2011 at 36

27 See Lukas Klee, International Construction Contract Laws, at 24 (2015).

28 Ethiopian Building Policy 2003 at 2 (amharic)

29 See Muradu Abdo, Ethiopian legal history

30 Teclé Hagos, Adjudication and arbitration of Governments Construction contract, Mizan Law Review, Vol.3. No.1 at 1, 2009

business engagement or a government- to-business, separate set of rights and obligations apply in the construction industry.<sup>31</sup>

### **i. Government Construction Laws or Government- to Business Domain Laws**

It is hardly possible to find a comprehensive construction laws in Ethiopia. Rather it is found in scattered manner either by forming parts of other laws like in the Civil Code or found independently as in proclamations, regulations, directives or orders.

Regarding this aspect as stated in the Ethiopian construction contract standard' the contract shall in all respects be construed and operate as Ethiopian contract and in conformity with the Ethiopian Laws.<sup>32</sup> Hence, it can be rightly mentioned that the governing laws in Government construction contract in Ethiopia are, the Civil Code<sup>33</sup>, Building Proclamation,<sup>34</sup> Construction Procurement and Property Administration Proclamation,<sup>35</sup> Construction Firms Registration Draft Proclamation<sup>36</sup>, Construction Machineries Registration Proclamation,<sup>37</sup> Building Regulation,<sup>38</sup> Construction management regulation,<sup>39</sup> Federal Government Procurement and Property Administration Proclamations,<sup>40</sup> Construction directives issued by MoWUD<sup>41</sup>, and laws issued by regional states established under art. 49 of FDRE Constitution,<sup>42</sup> and construction laws model issued by FDRE government for regional states<sup>43</sup>. However, there is an exception to this rule where the Federal government public procurement and property administration Proclamations

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31 Ibid

32 Getanehegezahagn at 34 (Civil Codes art.2610-2631, 2632-38, 3019-3040 ) ; see MuraduAbdo, Ethiopian Legal History {legal transplantation legal history }

33 Proclamation (Civil Code of Ethiopia) 160 of 1960, Arts, 320-340.

34 Building proclamation 624 of 2009, See the standard conditions of contract for construction of civil work,- MoWUD at clause 5 (2)

35 Federal Procurement, Proclamation 629 of 2009

36 Construction Firms Registration Proclamation (Draft) of 2013

37 Construction Machineries registration Proclamation 177 of 1999

38 Building Regulation 243 of 2011

39 Construction Design and Control Authority, Construction Management regulation, 1983 { See Tecele and Shewngizaw, Ethiopian Construction law Teaching material- unpublished }

40 Federal Government Procurement and Property Administration Proclamation 649 of 2009.

41 MoFED, Registration of construction designers and consultants, No. 22/2013.

42 FDRE Constitution, NegaritGazetta, proclamation 1 of 1991, Art. 49.

43 Construction regulation model, by Construction Minister as a model for regional states.

does not apply to contracts a public body entered with another public body for the provision of goods, works, consultancy services or other services at cost; and all other civil construction contract procurements.<sup>44</sup>

## **ii. Civil Construction Laws**

These laws apply when private individuals or corporations usually named as client/owner entered into Construction contract with the contractor.<sup>45</sup>

In this perspective it is the clients/owners free will to enter into the construction contract to make obligations between the contracting parties. In doing so, the parties are expected to observe the mandatory rules those which parties shall not deviate from it.

## **B. International Laws**

In addition to national laws, there are internationally accepted construction law principles particularly the FIDIC (International Federations of Consulting Engineers) and applicable in Ethiopian Construction industry either by incorporating those principles in to the existing Ethiopian government construction laws or through making reference to the FIDIC construction contract model. The applicability of international construction law principles came to picture while at least one of the contracting parties is a foreign element or choice of law or principle of law was made in the construction contract. Governing (applicable) law is agreed upon by the parties as a general rule. In the absence of a legally binding global treaty concerning construction investments, a widely respected model treaty could be adopted as a ‘soft law’ instrument-(FIDIC Conditions of construction contract).<sup>46</sup>

Therefore, to be applicable the internationally accepted construction law principles including the FIDIC, the parties to the contract must incorporate in to their agreement or make a reference to it when a controversy arise and interpretation necessitates.

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<sup>44</sup> See proclamation 649 of 2009 art. 3(1) and 2(b); Federal Public Procurement manual at 19, 2011.

<sup>45</sup> See Supra note 30, at 1.

<sup>46</sup> See Surya P Subedi, International Investment Law Reconciling Policy and Principle, pp. 198; see Lukas klee, international construction contract at pp. 24; see lukasklee, international construction contract law-{ICC forms of contract} pp. 313.

## **2.4. Consultants in Construction contracts**

### **I. Definition of Consultants in Construction Contracts**

Different literatures reveal that consultants are explained by enumerating the roles they play within the construction project. For instance, TeceleHagos and MaheleteShewangizaw<sup>47</sup> have defined consultants by enumerating the roles consultants have in certain project. Accordingly, the architect is the person who is employed by the employer so as to design the project and oversee that the construction is being undertaken as per the contract. Similarly, the quantity surveyor is a person who calculates the quantity of labor and materials that are required to erect the building and compiles this information in a document known as a bill of quantities, which is used by tenderers as a basis for estimating the cost of the project and formulating their tenders. In this case consultants may play a dual role both as an agent of the client/owner and as a party to the consultant contract concluded between the client and the consultant.

On the other hand consultants may be defined legally by emphasizing up on the legal requirements and professional qualifications. Accordingly the Ethiopian building proclamation has defined consultants as a person who is issued with a certificate as a design or professional or a juridical person which is issued with a certificate as a design or construction consultant by the relevant body by satisfying the legal requirements.<sup>48</sup> In this statutory definition one could understand that to be named as a consultant there must be two minimal requirements are met.<sup>49</sup> First a person or juridical person who wants to engage in consultancy service must fulfill certain legal requirements such as having a certificate of professional competency from the relevant organ, minimum capital requirement, minimum required personnel and office facilities. Secondly an individual or a juridical person shall be registered and issued with the certificate of consultancy in either field of consultancy service from the relevant body. Therefore, according to

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<sup>47</sup> See TeceleHagos and maheleteShewangizaw, Construction Law, teaching Material- sponsored by the Ethiopian Legal Research Institute, at 43-46. (2009); Lukas Klee, International Construction Contract Law, at 3 (2015)

<sup>48</sup> See the Ethiopian Building Proclamation No 624/2009 art. 2(4); Directive for Registration of Consultants No.22/2013 art. 2(4)

<sup>49</sup> See the relevant provisions of the directive no 22/2013.

these statutory definitions consultant is an individual or legal personality registered with the Ministry after having satisfied the various requirements.

## **II. Background and Current State of Construction consultants Liability Regulation**

### **A. The international history in brief**

Construction has existed since humans have constructed dwellings. The first written law, the Code of Hammurabi (created around 1792 B.C), include construction law and building standards.<sup>50</sup> In this code of Hammurabi it stated that if a builder built a house that collapses and kills the owner, the builder shall be put to death. As technology advancement and investment continues to grow from time to time, construction industry management becomes more complex and as a result necessitates the growth of a body of special law- construction law to regulate this peculiar industry.

The history of construction law reveals that the construction industry does not have clearly defined borders and its characteristics range from simple to complex. The diverse nature of the construction industry reflects the complexity of contemporary society as a whole, leading then to necessary specialization of particular activities in construction. A construction project is further comprised of complex processes, services and supplies reaching beyond the scope of this industry alone.<sup>51</sup> For example, insurance, financing, bonds and guarantees, purchase of plant and equipment, operations and maintenance of work processes. Furthermore, nowadays construction industry become the main cross-border investment and comprises huge capital expenditure.

These days, the construction industry is witnessing globalization. Integrated processes, newly emerging supranational formations, government programs supporting investment, the expansion and development of means of communication, social networks, increased mobility of goods, capital and labor, have all had a major impact on the construction industry.<sup>52</sup>

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<sup>50</sup> Understanding construction law, by the Association of Corporate Counsel 1025 Connecticut Avenue, NW, Suite 200 Washington, DC 20036 Tel 202.293.4103 Fax 202.293.4701 www.acc.coms, at 5: August 2008

<sup>51</sup> Lukas Klee, International Construction Contract Law, at 1:2015.

<sup>52</sup> *Ibid* at 11-12

## **I. FIDIC Regulation of the Liability of Consultants in Construction contract**

FIDIC is founded in 1913 in Lausanne, Switzerland, by two professional associations (International Federation of Consulting Engineers and International Federation of Housing and Public Works) jointly preparing the FIDIC Suite of Contracts, have published the first edition in 1957.<sup>53</sup> And it is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its member associations and to disseminate information and resources of interest to its members.<sup>54</sup> Today, FIDIC membership covers 97 countries of the world's national associations of consultant Engineers.<sup>55</sup> FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.<sup>56</sup>

The design responsibility of Consultants under the FIDIC could be said neglected, because under the FIDIC most part of the design responsibility is transferred either to the contractor or to employer/client.<sup>57</sup> For instance in case of design-build type of construction contract, the ultimate design liability bearer is the contractor; and in case of traditional construction contract type, design –bid-build, a major portion of design responsibility is borne by the employer. Furthermore, recent developments under the FIDIC conditions of contract concerning the allocation of design liability resembles that the contractor is fully responsible for all design defects in especial construction contracts.<sup>58</sup>

Basically, among the main actors of the construction industry, engineers or consultants play irreversible role. As a result, there should be equivalent risk allocation to be maintained in the construction contract pertaining to liability of consultants. To make clear more the researcher

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<sup>53</sup>Dr. jur.tunayköksal, fidic conditions of contract as a model for an international construction contract, *International Journal of Humanities and Social Science* Vol. 1 No. 8; July 2011 at 140.

<sup>54</sup>DarkoSpasevski, Ph.D, The Role Of The Engineer In The FIDIC Conditions Of Contract; *slustinianus Primus Law , Review* Vol. 6:1 , at 2.

<sup>55</sup> Ibid at 2, see Dr. Jur. Supra note 31 at 140.

<sup>56</sup>Dr,Darko S. Ibid at 2-3

<sup>57</sup> Klee, supra note 29, at 301-302; see FIDIC sub-clause 4.1, 7.1, and 8.3.

<sup>58</sup>Reg Thomas, *Construction contract claims* 2nd ed. at 47. Under the recent FIDIC standards of contract, especially under both the Yellow and Orange Books contemplate design by the contractor.

beliefs worth to look that what was stated by the International construction law expert Dr. Lukas Klee and stated in the following paragraph:

*The engineer (consultant- emphasis added) may be responsible (and liable) for negligent design and supervision, negligent under-certification, negligent statements and instructions lack of cooperation, lack of prevention of damage, and so on. The engineer is also responsible against third parties. The potential liability and the form and extent of liability depend on the governing law.*<sup>59</sup>

Therefore, from this discussion one could understand that FIDIC standardized conditions of construction contract and principles are not laws, rather soft principles which may not have a force of law. Because as discussed above members of FIDIC are not states, rather consulting engineers associations, inter alia states have a discretionary power to be abide by FIDIC standard conditions of contract or not. In this case states couldn't expect the FIDIC to enact governing laws for them; as far as they are professionals who involves by themselves in the construction sector, it could be fair for those professionals to act to the best interest of themselves while to formulate standard conditions of construction contract. In other words, the potential liability, the form and extent of liability of consultants remain on the governing laws enacted by states.

## **II. European Federation of Engineering Consultancy Associations (EFCA)**

The main objective of the European Union is mainly to integrate the internal markets. However, the trans-national provision of consulting services encounters several barriers, among which the difference between member states' legislation on liability and the insurance markets locally.<sup>60</sup>

Accordingly, some member states of the EFCA do have a regulation that impose the obligation on the consulting engineers to jointly and severally liable with other parties involved with him in

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<sup>59</sup> Klee *Supra* note 29, at 9-10.

<sup>60</sup>Comparative study about consulting engineers' liability and insurance requirements across Europe, (<http://fidic.org/>) of 2014, pp. 5-6



a given construction project, or consulting engineers are not allowed to limit their liability towards their client for serious hidden defects among the owners of the consulting firms.<sup>61</sup>

### **III. American Institute of Architectures (AIA) Regulation of Liability of Consultants**

Based on the information obtained at the book written by Luks Klee and titled ‘international construction contract laws’<sup>62</sup> the American Institute of Architects (AIA) has been the leading professional membership association for licensed architects, emerging professionals and allied partners in the USA since 1857. AIA sets the industry standard in contract documentation with more than 100 of its forms and contracts used in the design and construction industry. These forms and contracts define the relationships and terms involved in design and construction projects. Unlike the FIDIC conditions of standard construction contract which is mainly prepared by the Associations of National Engineers, the AIA is prepared by the joint construction participants and stake holders such as employers, contractors, attorneys, architects, engineers and others, the documents have been finely tuned during their 120-year history.<sup>63</sup> AIA forms are grouped in to families depending up on the basis of delivery method, size and participants involved. Although AIA documents have been criticized for being builder-friendly, failing to protect the owner, who is usually the in-house attorney’s client,<sup>64</sup> the most important point worth to mention here of its current relevance for Countries like Ethiopia who has no comprehensive construction laws, and the researcher of this thesis believed that has importance to draw lesson for Ethiopia among the features of AIA are as follows:

1. AIA is prepared in cooperation with employers, contractors, attorneys, architects, engineers and others, which entitles it the nature of comprehensive nature of contract and as a result may facilitates the impartiality nature of risk allocation;
2. AIA incorporated the integrated Project Delivery (IPD) method which is a collaborative project delivery approach that uses the talents and insights of all project participants across

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61Ibid {in countries such as France, Spain or Belgium, consulting engineers are not allowed to **limit their liability** towards the client for serious hidden defects}

62 Lukas Klee, International construction Contract law, at 316.

63 Ibid

64Womble Carlyle Sandridge& Rice, PLLC, Understanding Construction Contracts, at 5 (2008). For more information refer at [www.acc.com](http://www.acc.com)

all phases of design and construction; and a single agreement that the parties can use to design and construct a project using integrated project delivery.<sup>65</sup>

The construction of certain project is a highly, risky and complex investment. Because it necessitates the involvement of at least three (3C's) participants in most cases which made it difficult to allocate liability happened. Therefore, it is extremely important to develop an impartial and comprehensive construction contract which is integrating the contract to a single contract inter alia fairly allocate liability among all participants. In other words, it avoids unnecessary risk transfer usually took place by construction consultants.

## **B. The Background of Regulation of the Liability of Consultants in Ethiopia**

Ethiopia has no comprehensive construction law yet. Rather one can find the construction laws in scattered manner,<sup>66</sup> one or the other in the Civil Code, proclamations, regulations, directives and policies. Furthermore, when one looks the development of Ethiopian Construction legal framework, it is hardly possible to trace back the period it began to flourish; because of lack of chronologically documented data on this particular field. However, in the 20<sup>th</sup> century, Ethiopia began the codification of Civil Code which incorporates the provisions particularly dealing with construction of buildings.<sup>67</sup> Though it has its own limitations which will be raised in the forthcoming sections, the Commercial Code provisions particularly dealing with Building Contracts are the foundation or mile-stone for the emergence of the specialized area of law-Construction Laws in Ethiopia. It can be said that almost all of these laws remains silent to address the potential liability, and the form and extent of liability of construction consultants in Ethiopia. Because the building proclamation no.624/2009 art. 28 (1) which states that 'Without prejudice to his criminal liability, any registered professional, contractor or subcontractor shall be liable for any damage he causes to his employer in accordance with the provisions of the Civil Code due to his defective design or construction work.' From the wording of this provision one

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<sup>65</sup> Ibid at 317

<sup>66</sup>The proclamation 160 of 1960 (Civ. Code) art.(3020-3040), Building proclamation 624/2009, procurement and property Administration proclamation 649/2009, building Regulation 243/2013, directive 22 of 2011 enacted by MoUDC

<sup>67</sup>Mulugeta M. Ayalew, Ethiopian Contract law, at 197-198.; See Civil Code arts. 3020- 3040.

could understand that the liability of consultants or registered professionals shall be determined according to the relevant provisions of the civil code.

This begs an essential question which seeks answer that does the civil code have provided relevant provisions for this special contract liability; and hence being one among the themes of this thesis will be discussed in detail in the forthcoming chapter (3) of this thesis.

## **I. Objective of Examining their Liability**

To attain the predetermined goals in the construction sector: high quality, safety, environmental conducive building, and even nowadays needs to take into consideration terrorist attacks. Beside this, in Ethiopia the construction sector is an engine for all development programs of the country. This can be understood from the Construction industry policy of Ethiopia, which states among others that in growth and transformation plan huge development programs designed, energy Supply, Irrigation dams, Canals, residence and trade centers buildings, Health institutions (Hospitals, health centers and others), construction of manufacturing industries, Education Institutions (Universities, primary and secondary Schools), and construction of infrastructures such as asphalt roads, rail ways, rural roads, and construction of urban and rural clean water supply projects, can be realized only through the construction sector.<sup>68</sup> To make this policy effective the regulatory frameworks enacted shall resemble this policy as their core objectives.

For example, when one looks at the preambles of the Building Proclamation,<sup>69</sup> - *It has been found necessary to determine the minimum national standard for the construction or modification of buildings or alteration of their use in order to ensure public health and safety;*

And also the amendment directive of the Ministry of Urban Development and Construction<sup>70</sup> which states- ‘Whereas, it is essential to safeguard the interest of the public at large and that of the government by regulating the participation of the persons and other legal entities engaged in the field of consultancy by setting certain rules and standards to be observed for purposes of safety, quality works and efficiency;’

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68. FDRE Ministry of Urban Development, Housing and Construction, Construction Industry Development Policy (Draft), at 7: July 2013.

69. Ethiopian Building Proclamation No. 624/2009,

70. Amendment directive 22 of 2013.

On the other hand, as mentioned in the previous sections of this thesis, a builder or homeowner may sue a design professional based upon two principal theories, namely:<sup>71</sup>

- (1) The design professional failed to carry out the terms of the contract, and/or
- (2) The design professional was negligent.

In the Ethiopian construction industry, the main problem which undermines the sector itself, and other investments, in case lack of quality, safety, fairness and efficient, mainly arise from the acts or omissions of construction designers. Because construction designers (designer, architecture, construction management engineering, quantity surveyor and etc.) acts on behalf of the owner/client in case providing advisory service to the owner/client, and play project management and control role technically, can play essential role for the success of the project or otherwise.

## **II. Roles and responsibilities of Consultants in Construction Contract**

The role of the consultant in a construction project is not fully understood by the other parties involved on the project, including the consultant's client (the owner).<sup>72</sup> Here are also instances where the consultant itself is not fully aware of its duties and obligations to the owner and others; there by exposing itself to potential liability claims.<sup>73</sup> Consequently, the role of consultants in the construction contract is usually oversimplified. Basically construction consultants are of different categories; of which architectures, designers, and other engineering consultants such as electrical, geotechnical, mechanical and so on.<sup>74</sup>

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71. Jon Kusler, Professional Liability for Construction in Flood Hazard Areas Esq.518-872-1804; Prepared for the Association of State Floodplain Managers with Funding Support from the Association of State Floodplain Managers Foundation at 8.

72. See [www.cwilson.com](http://www.cwilson.com) under the title of the role of the consultant in construction at 1.

73. See Ibid, at 1

74. See Ibid at 4-10; see supra note 34, art. 19.

Construction consultants are indispensable parties to the construction contract, because consultants play an essential role starting from the pre-design phase of an intended construction project till its accomplishments.<sup>75</sup>

Accordingly,

- During the pre-design phase consultants are involved in assisting the owner with the task of project budgeting and management, site selection, space relationship, and environmental studies.
- At the design stage, the consultant determines the feasibility of the project from an artistic, technical, logistical and financial standpoint. Furthermore at this design phase the consultant moves to design approval and design development.
- The consultant is responsible for the specifications, plans and drawings related to a project. If the drawings or specifications do not indicate unusual features or hazards on a site, for example, the consultant may be held liable for the increased cost construction incurred by the contractor when it encounter these items.
- During bidding and negotiations, the consultant represents the owner and acts as the owner's agent in the preparation, issuance and supervision of tender documents. The consultant owes a duty of care to protect owners, even if there is no contract between them.
- During the construction contract administration, the consultant owes a duty to the owner to ensure that the contractor abides with the terms of its construction contract and that it follows the plans and specifications in constructing the project. The main tool to triumph the construction contract is being adhered to be through on site field reviews.
- When dispute arises between the contractor and the owner which they are unable to resolve, the first stage in the dispute resolution process set out for the parties is to involve is the consultant.

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75. See Ibid at 4-10; and see Journal of Business and Management (IOSR-JBM) e-ISSN: 2278-487X, p-ISSN: 2319-7668. Volume 14, Issue 1 (Sep. - Oct. 2013), PP 30-34 {www.iosrjournals.org Law and contract- Sri Lanka – at 55- 56}

Generally, as clearly stated in the construction consultant manual in the Office of Operations Construction Division of the New York State Department of Transportation, construction consultants perform work in one or more of the following areas:<sup>76</sup>

- Resident Engineering
- Contract Administration
- Construction Inspection/Management
- Construction Support

In Ethiopia, it is hardly possible to find literature on comprehensive roles of construction consultants in legislations as well as in literature.<sup>77</sup> However; this does not mean that the role of construction consultants in Ethiopia is unknown. Because one can find the roles of construction consultants in Ethiopia in scattered ways, such as in construction policy documents, Construction consultancy service contract models<sup>78</sup> and from practice.<sup>79</sup> Furthermore, practically in Ethiopia the construction consultants play similar roles in a construction contract of a given project as we have discussed above.

## **2.5. Liabilities of Consultants in Construction Contracts**

### **2.5.1 Definition of Liability in General**

Liability is a very broad term. It can be defined as a “responsibility which is a state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either expressed or implied or in consequence of torts committed.<sup>80</sup>

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<sup>76</sup> See JOSEPH H. BOARDMAN and GEORGE E. PATAKI-Commissioner and Governor respectively- Murk Part 1D construction Consultant Manual, the Office of Operations Construction Division of the New York State Department of Transportation at 1.

<sup>77</sup> See Report on the Ethiopian economy Volume VI 2006/07, the current state of the construction industry by Ethiopian Economic Association EEA at 233.

<sup>78</sup> See Ethiopian Roads Authority- standard bidding Document for the Procurement of Consultancy Service developed by Federal public procurement and Property Administration Agency, Addis Ababa July, 2011.

<sup>79</sup> Interview conducted with AtoAddisuMammo, Mettu University Legal Service Head,

<sup>80</sup>FemenaMohamad, Limitation of Liabilities– Analyzing a balanced approach to Limiting Liabilities in Construction Contract, Dissertation submitted in partial fulfillment of the requirements for the degree of MSc Construction Law and Dispute Resolution, at 7: May 2014

Liability as stated in Osborne Concise Law Dictionary is ‘an amount owed; or subject to legal obligation; or the obligation itself, he who commits a wrong or break on a contract or trust is said to be liable or responsible for it’.<sup>81</sup> Ayodeji S. Ojo, noted that in law, a person may owe a duty to another person by his own free will in a Contract or by the operation of the law-tort; and the failure to perform or negligently perform these duties or responsibilities constitute a breach, therefore he or she will be answerable or accountable to the other party who may have suffered as a result of his/her wrongful act.<sup>82</sup>

## **2.5.2. Theories of Liability of Consultants in Construction Contract**

### **I. Introduction**

In every contractual or extra-contractual relationship in a construction project, it is common to see the involvements of three parties usually called C3 (contractor, client and consultants). In this case to establish liability in relation to each party based on laws and contracts in a specific construction contract minimizes unnecessary risk transfer. Unsurprisingly, defects are one of the major causes of dispute and construction litigation.<sup>83</sup> Dealing with construction failures requires various degrees of familiarity with law, building technology and practice.<sup>84</sup>

Dealing with the threat of litigation has become a major distraction for design professionals.<sup>85</sup> Consequently, design professionals must appreciate the boundaries of professional liability; boundaries that if taken into account while performing services might have avoided the claims, or at least might have minimized their effect.

Besides construction professionals, lawyers who advise clients concerning building design and construction contracts, endeavor to develop legal theory in construction contract to persuade

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<sup>81</sup>. Ayodeji S. Ojo, Defect Liability Period: Employer’s Right and Contractor’s Liabilities Examined Ministry of National Development, Mahe, Seychelles, at 471:

<sup>82</sup>. Ibid at 471

<sup>83</sup>. See Fenwick Elliott [www.fenwickelliott.co.uk](http://www.fenwickelliott.co.uk) Jeremy Glover, Liability for Defects in Construction Contracts - who pays and how much? at 1

<sup>84</sup> Ibid at 1

<sup>85</sup>. Voluntary Education Program for Design Professionals, Legal liability against design professionals at 1. (pdf. )

<sup>85</sup>. Carl, J. Circo (here in after named Circo), Contract Theory and Contract Practice: Allocating Design Responsibility in the Construction Industry Florida Law Review, Volume 58, at 562.

courts of law or arbitration tribunal. Regarding legal theory in construction contract a scholar in the field named Carl J. Circo:

*Lawyers litigating contract cases also invoke and confront theory to develop a case, to attempt to persuade a court, to transform the application of the law to particular facts, or to account for the jurisprudence of a specific judge or court. But of what interest is legal theory to construction lawyers in their everyday practice?*<sup>86</sup>

Regarding legal theories of liabilities of construction professionals in construction contract, different scholars put in more than three categories. For instance in USA there are at least three basic common legal theories found in claims against construction designers that the claimant must establish and proof.<sup>87</sup>

These are:-

- Breach of contract- A breach of contract occurs when a party fails to perform according to the contract and does not have a legal excuse for doing so. In this case compensatory damages are awarded for the economic harm caused by the other party's breach.
- Negligence- Negligence is broadly defined as “the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.” In this regard with design professionals, negligence claims against design professionals require expert proof of the applicable standard of care and the breach of that standard.
- Breach of warranty- A warranty can best be described as an agreement that accompanies a sale of goods or procurement of services, by which the seller [or provider] undertakes to vouch for the condition or quality of the goods sold or the services provided. Even though a warranty is a part of a contract, it is an independent promise apart from the contractual obligations, and its breach gives rise to a separate action for damages.

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87. See Supra note 51 at 1-29.



## 2.6 Sources and Concepts of Liability of Construction Consultants in General

Basically there is no single definition of legal liability that is satisfactory for all circumstances. When we come to our purposive definition, Professional liability consists of those obligations those are or will be legally enforceable, and that arise out of the performance of, or failure to perform, professional services by the design professional.

Thus, the widely used dictionary in laws, Black's law dictionary puts in the following form:

Liability - the quality or state of being legally obligated or accountable; legal responsibility to another or to the society enforceable by civil remedy or criminal punishment. In similar fashion the Ethiopian Building proclamation has stipulated a single article which states the construction professionals (consultants) are liable both in civil and criminal pertaining to the professional duty they have accomplished. Regarding those liabilities particularly, civil liabilities the proclamation preferred to cross- refer to the relevant provisions of the 1960 Civil Code.

The striking balance here is that, does the Ethiopian Civil Code relevant provisions sufficiently addressed the governing laws pertaining to the liabilities of construction consultants, attracts a hot discussion. Therefore in the forthcoming sections, saving other criminal liabilities, the researcher of this thesis discussed the common civil liabilities contractual and extra-contractual (tort liabilities) in forthcoming sections.

Generally, from the discussions took place and as a result arrived at a conclusion by the following three scholarsnamelyCirco, though his primary aim is to analysis the contractual commercial risk responses in favor of tort approach,<sup>88</sup> and OJO *et al*, under their article titled, “the contractual and tortious liabilities in employer-consultant agency relationship in construction contracts in Nigeria”<sup>89</sup> pertaining to basic legal theories of liabilities of consultants, whatever the case may be, one can understand that the basic legal theories of liabilities of construction consultants remains under either of contractual or extra-contractual(tort) claims.

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88. See Supra note 39 at 564-566

89. OJo'et al', The Contractual and Tortious Liabilities in Employer-Consultant Agency Relationship in Construction Contracts in Nigeria, Journal of Law, Policy and Globalization [www.iiste.org](http://www.iiste.org) ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol 8, 2012 pp. 43,

Based on the above analysis it is possible to divide the liability of construction consultants into two, contractual and extra-contractual (tort) liabilities which will be discussed in detail here in under.

## **I. Theories of Contractual Liabilities of Consultants in construction contract**

A contract is a binding agreement between two or more persons, and in common law, depicts a *consensus ad idem* i.e agreement of minds.<sup>90</sup> In this case the party to an agreement is believed to negotiate and determine intensively regarding the objects and contents of their agreement which shall be approved by providing their respective consent to be abided by the obligations or duties imposed on either of the parties to that contract. In every formation of a contract parties to a contract shall adhere to the law of contract which sets a mandatory rule to guide the relationship of parties in that contract, a breach of which attracts remedies including damages, injunctions, quantum merit etc.

For instance, in Nigeria and as related to construction contract, expressly stated and elucidated the contractual obligations or duties including outlines of the scope of service, remuneration payable and payment method, time of performance, duty of skill, care and diligence.<sup>91</sup>

## **II. The Theory of Tort Liability of Consultants in construction contract in General.**

*Tort is a French word meaning “a wrong”. In English, the word has a purely technical legal meaning – a legal wrong with a lawful remedy. Applied into law therefore, Tort has been defined as a branch of law that deals with civil wrong, Where a breach of the civil duty arises without contract between parties, it results to tortious liability and redress able primarily by an action*

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90. Ibid at 42

91. Ibid, p 4.

*for un liquidated damages or other civil remedies. Such civil wrong may include negligence, vicarious liability, injurious falsehood, interference with contract, trespass, loss etc.*<sup>92</sup>

In Ethiopia Tort is concerned with liability that may arise when there is no contract between the parties. When we read articles 2055 cum 2028 of the Civil Code which reads that a person commits an offence where, having intention to enter into contract and having induced others to incur expenses with the view to concluding a contract with him, he arbitrarily altered his intention; and who so ever causes damage to another by an offense shall make it good.<sup>93</sup> In this case construction consultant firms may be liable for the acts of their employees, vehicles, and so on. But the tort liability could not be a remedy for the acts of a defective design or other consultant acts, though failed to be addressed in the contractual agreements.

The most important issue seek answer at this junction is that which of the two legal theories, tort and contractual liability, in construction contract particularly regarding consultants can best fit the contemporary needs toward innovative contract and risk allocation.

Having these two theories of Liability regarding parties to a construction project, the main distinction between them, in case tort and contract is that, tortious duties are created by the operation of law independently of the consent of the parties, and contractual duties arise from the consent of the parties. In this case the author is arguing that having, the complex and high risk nature of the consultancy service in construction contract, and having the practical problem the construction sector is facing in Ethiopia, there must be a need to devise another mechanism of contract which best fit and foster the sector for further towards the intended scale, through developing the legal framework which necessitates to integrate a construction contract form or shared-design form of contract. This is being the main theme of this thesis will be discussed in the forthcoming chapter.

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92. See Supra note 56, see supra note 89 {Journal of Law, Policy and Globalization, Nigeria}, at 42-43

93. See Supra note 59 at 72-75

## **2.7 Sources and Concepts of Liability of Construction Consultants in Ethiopia**

### **I. Sources and concepts of Contractual Liability of consultants in construction Contacts in Ethiopia**

On the other hand, the Ethiopian law of contracts is principally based on the principle of freedom of contract, according to which parties are entitled to contractually assume any kind of obligations formed in any kind of manner.<sup>94</sup>In the Ethiopian contract law parties to have a legal remedy there must be a contract agreed by both parties. This means in the absence of contract there shall be no contractual liability on either side of the parties to the contract.<sup>95</sup>

Basically the Ethiopian Civil Code particularly parts dealing with contract has defined contracts as an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature.<sup>96</sup>And also a contract is one of the primary activities that having legal remedies up on the contracting parties; and furthermore backed by laws.<sup>97</sup>After legally binding contracts are formed, it is usual to expect performance or non-performance of the obligations stipulated in that contract. In this case the Code<sup>98</sup> has stipulated the liability clauses for the parties to a contract to determine it as the part and parcel of the obligations one owe to the other party to the contract. As clearly stated by Prof. Rene David the Ethiopian Civil Code recognizes the validity of liability clause; but clauses limiting or excluding liability are of great concern.<sup>99</sup>According to Rene David, in extreme cases, they destroy the very essence of the obligation and contract; a person who incurs liability is not legally obligated.

The other essential question seeks answer pertaining to liability clauses in a given contract particularly in the complex contacts like construction contracts is that for instance in a given construction project there are multiple independent, but indispensable contracts. Accordingly, the

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94. Mulugeta M. Ayalew, *Ethiopian Contract Law*, University of Surrey at 71, 2010

95. *Ibid* at 73 paragraph-133, see civil code provisions dealing with liability in case of contract.1789-1802

96. See Rene David, *Commentary On Contracts in Ethiopia*, Haile Sellassie University, AA at 7-8 : 1973.

97. See TilahunTeshome (ass. Prof.), *Basic principles of Ethiopian Contract Law*, 5th ed. 2007, AAU, at 68; 2007.

98. Proclamation 160 of 1960 art. 1886-1895: here in after called the Civil code.

99. *SEE Supra note Rene David, Commentary On Contracts in Ethiopia, Haile Sellassie University, AA at 102 : 1973*

prime-contract (the contract concluded between the contractor and client/owner), one or more construction consultancy services (Architecture, designer, Quantity surveyor, project management) contracts mainly concluded between the owner/client and the consultancy firms. Regarding this particular issue what makes more difficult is that for one thing both contracts are equally important for the successful accomplishment of the intended project, because when a fault or an error happens on one side of the parties to a given project (contractor or consultant), it for sure affects the work of the other, and the project itself; since from its very nature construction of a project necessarily needs consultancy service and constructing the project as well.

To begin with, let us start from these abstractions to the extraordinarily practical environment of the contemporary construction industry. To make clear the issue raised here, the researcher opt worthy to use hypothetical case; in this regard: If a client named A (*public body*) planned building of a project estimated price worth *Birr 200,000,000.00 (two hundred Million)* and accordingly concluded a main contract with AB Plc. (contractor) ; assume all legal procedures are carefully observed. And also the client A (public body) concluded a consultancy service contract pertaining to the stated project with AC S. Co. (Consultant) with the estimated price worth *Birr 20,000,000.00 (twenty million)* assume all the required procedurals are carefully passed through . So, from this hypothetical example the critical point ought to be addressed would be is that, is the consultant would be going to be liable for the whole project (*Birr 200,000,000.00 (two hundred Million)*) or for consultancy service estimated price *Birr 20,000,000.00 (twenty million)*?

To elaborate this question more, it is better to look at the Ethiopian Building Proclamation<sup>100</sup> which states that regarding the civil liability of professional consultants, the relevant provisions of the Civil Code shall apply. Furthermore, if one refers the Civil Code specially a part dealing with contractual liability takes him/her to general contracts. But, on the other hand there is another argument which claims that the general contract provisions shall not apply regarding cases pertaining to the contract of building immovable properties. To substantiate this

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100. see *Building proclamation 624 of 2009 art. 28*

argument it is better to look at the Decision of the Federal Supreme Court Cassation Bench File No. 47526.<sup>101</sup> Accordingly, the stated Bench decision says that ‘to regulate the contract of building of an immovable, Art. 3019 (1) of the Civil Code states that special provisions of the Code Art. 3019 – 3040 shall apply. Therefore, according to the decision of this Bench, the general contract provisions shall have no application.

However, as mentioned here in above the contractual liability provisions are parts of the general contract provisions of the Civil Code. Though the Building Proclamation stipulates the application of relevant provisions of the Civil Code, the special parts dealing with construction contracts say nothing about the contractual liability of parties to a given construction contract specifically construction consultants.

However, it does not suffice to mean that in Ethiopia; in the absence of contract there could be no any legal remedy to deal with the relationship of parties to any business transaction. This concept leads us to the next legal theory of liability of consultants in construction project which is tort liability.

## **II. The Theory of Extra-contractual Liability of Consultants in construction contract in Ethiopia.**

Basically, Extra-contractual liability not arises from the agreement of the parties to a given contract. In this case the one who is going to bear legal liability cannot raise the defenses like it is not what I have committed myself for such obligation through my free will and consent. Rather, the obligation of tort (extra-contractual liability) emanates from the operation of the law.

<sup>102</sup>

According to Prof. Tilahun, tort liability in Ethiopia emanates from mainly four ways.<sup>103</sup> And the researcher believing that these classifications are relevant and hence preferred to mention in the following manner precisely:-

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*101. See cassation application between the appellant Zarfo Plc. And Respondent National Design Consultant*

102. see supra note TilahunTeshome at 6: 2009, here after called Professor Tilahun, at 6.

103. See ibid at 6-10.

- a. Obligations emanates directly by the operation of the law; such as the obligation to pay taxes and duties to the government based on the tax laws, the obligation to assist financially or other means of social and livelihood for the legal dependents for instance persons related through consanguinity parents-children, marriage relatives , brother – sister .
- b. Obligations emanates from the acts of the debtor; in this case the debtor by his acts whether by commissions or omissions, and intentionally or negligently inflicts injury up on another person , other things remain constant shall be liable ,
- c. Obligations emanates from being liable for the acts of other persons; in this case even if the one who bears tort liability has no connections with the wrong or harm done up on another party, may bear civil liability called vicarious liability. For example when minors caused harm to another third party parents shall bear legal obligations; likes wise employers for their employees (workers), principals for acts of agents, and so on.
- d. Unlawful enrichments- in this case even if there is no contractual arrangements between the one who uses third parties property without the latter’s consent shall bear legal liability.

When one looks at the sources of extra-contractual liability in the Ethiopian civil code and stipulated above, with respect to the extra-contractual liability of construction consultants, notwithstanding the commercial risks which can be more remedied in contractual liabilities,<sup>104</sup>.the consulting firms may bear legal tort liability for the acts or omissions of the property they have such as vehicles, buildings, employees. <sup>105</sup>

In Ethiopia Tort is concerned with liability that may arise when there is no contract between the parties. When we read articles 2055 cum 2028 of the Civil Code which reads that a person commits an offence where, having intention to enter into contract and having induced others to incur expenses with the view to concluding a contract with him, he arbitrarily altered his intention; and who so ever causes damage to another by an offense shall make it good.<sup>106</sup>

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104. See Carl J. Circo, Contract theory and Contract Practice: Allocating Design Responsibility in the Construction industry. \* Florida Law Review no ,58 at 567 at 2006

105 . see the relevant provisions of the Ethiopian extra-contractual liability provisions

106. See Supra note 59 at 72-75

Therefore, having these two theories of Liability regarding parties to a construction project mainly consultants, the main distinction between them, in case tort and contract is that, tortious duties are created by the operation of law independently of the consent of the parties, and contractual duties arise from the consent of the parties.

To sum up the most important issue seek answer at this junction is that which of the two legal theories, tort and contractual liability, in construction contract particularly regarding consultants can best fit the contemporary needs toward innovative contract and risk proper risk allocation.

In Ethiopia regarding the contractual risk allocation and shared- liability of consultants in construction contract is not yet addressed in special contract part of the Civil Code dealing construction contract.

In this case the author is arguing that having, the complex and high risk nature of the consultancy service in construction contract, and having the practical problem the construction sector has been facing in Ethiopia, there must be a need to devise another mechanism of contract which best fit and foster the sector for further towards the intended scale, through developing the legal framework which necessitates to integrate a construction contract form or shared-design form of contract. This is being the main theme of this thesis will be discussed in the forthcoming chapter (3).

## **2.8 Guarantees Vis-a- Vis Liabilities in construction consultancy Contracts**

### **I. Guarantees in construction consultancy Contracts general**

A construction industry by its nature is characterized as highly complex business activities, which necessitates the involvements of different parties at different stages of the project with multi machineries and personnel. Furthermore, one of the unique features of the construction industry is its being a hazardous/highly risky investment. As a result, it is very keen to secure risk allocations among the construction industry participants, mainly through providing insurance or surety ship guarantee scheme.

In different literatures the terms surety and guarantee are used interchangeably by different authors. Parties to certain contract may use terms which best designates the type of security they



preferred might be related to the respective contract. Though contracting parties and different scholars usually use the two terms interchangeably at one hand, there are certain basic differences. Regarding this distinction the researcher is opted to refer to the Black's law dictionary definition provided for both terms. Usually the words surety and guarantor are often used indiscriminately as synonymous terms, but while a surety and a guarantor have this in common, that they are both bound for another person, there are points of difference between them which should be carefully noted.

*A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. Usually the surety will not be discharged, either by the mere indulgence of the creditor to the principal, no matter how much he may be injured thereby. A Surety in its broadest sense is the one who is liable for the accessorial obligations. It is a direct and not conditioned up on the principal debtor's fault. On the other hand the contract of guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. Unlike surety ship, guaranty and endorsement which are conditional, secondary obligations.<sup>107</sup>*

From this definition one could understand that though surety and guarantee sometimes used as a synonymous words, however both notions have their own unique characteristics. Therefore, as to the researcher the notion of the security scheme has no substantial significant whether it be surety ship or guarantee rather its object. Because it the matter of each country's internal rule to designates the scheme. For instance, in the US, large construction projects are frequently secured by means of a surety ship in the form of a 'surety bond'. These securities are issued by companies specializing in this field. Owing to the traditional restrictions on bank guarantees, a *stand-by letter of credit* is preferred in the US and functions the same way as a bank guarantee payable on first demand.<sup>108</sup> Hence, under this section we will deal in detail the surety bond in construction industry with respect to commercial risk allocation in construction industry in general and particularly in Ethiopia.

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<sup>107</sup>. Black's law dictionary 7<sup>th</sup> edition at 1455.

<sup>108</sup>. See Lukas klee, International Construction Contract, at 382.

When an owner, contractor, and construction consultant considers the risk of a defaulting contractor or consultant unacceptable, it usually will attempt to minimize this risk through the use of construction bonding. Construction bonding is defined as a method of redistributing the risks associated with construction projects; and these bonds generally consist of a three party, or tripartite, agreement between a surety, a principal, and an entity that will benefit from the issuance of the bond.<sup>109</sup> In other words, a surety bond is a three-party contract. One party, the surety, promises, in accordance with the terms of a bond, to answer for the default of another party, the principal. The third party, the obligee, is protected by the bond. Typically, the principal and surety will promise to perform or pay the obligee up to a stated amount of money for damages if the principal fails to perform its contract obligations. A fourth party, the surety bond producer or “bonding agent,” is not actually a party to the bond, but is a resource to the other parties and may have a facilitating role in a claims situation.

While surety and other lines of insurance are analogous in many respects, they are underwritten on different premises and perform in markedly different ways.<sup>110</sup> Understanding the similarities as well as the differences is highly essential for procurement and use of bonds. Basically the issue of indemnity, whether in the form of insurance or surety is the same. Indemnity, in layman’s terms, is to make whole, or return a person or party to the position they held before the loss.<sup>111</sup> Unlike surety ship in which a tripartite risk transfers occurs, insurance is a two-party risk transfer mechanism whereby one party pays to have another party it from certain well-defined risks.<sup>112</sup> Insurance may be defined as a social device providing financial compensation for the effects of misfortune, the payments being made from the accumulated contributions of all parties participating in the scheme.<sup>113</sup> In purely theoretical terms, insurance is a pool created by a large number of people exposed to a common risk; and each member of the pool contributes to it and

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109. See Robert Jenkins, Q.C. and Andrew Wallace, P.Eng. Construction Bonds: What Every Contractor and Owner Should Know, Construction Law, accessible [www.jml.ca](http://www.jml.ca) at 1, Jenkins Marzban Logan LLP Lawyers.

110. The Associated General Contractors of America and National Association of Surety Bond Producers, The Basic Bond Book: 2011, 2nd ed.

111. See Ibid

112. See ibid

113. See AbebeDinku, Insurance Requirements and Practices of Ethiopia’s Construction Sector, at 26, Journal of EAEA ,Vol.17:2000

any members who suffer loss as a result of the risk assumed may be compensated for that loss by the pool.<sup>114</sup>

In modern times, construction projects have become increasingly complex and fascinating. One source of complexity arises from the large number of parties involved, funding for the projects of industry and the largest energy security requires well-managed, profitable construction companies.<sup>115</sup> The realization of a construction project is mostly calculated by the timely response to the specifications around the specified budget completion. Conversely, that in the implementation of any engineering project there is always an element of risk: that is, the construction is a high risk business, the level of risk when considered much higher than in other types of economic activities.<sup>116</sup>

In fact in construction projects usually have in force several simultaneous contractual arrangements such as between the client and consultant, between the client/consultant and general contractor and between the general contractor and his several sub-contractors and suppliers. These contracts can establish a complicated structure of responsibility for damages arising out of construction operations. Presently, Ethiopia has relatively extensive plans of infrastructure development and the infrastructure development of the country is growing faster.<sup>117</sup> The construction of new regional and international air-fields, roads, high raised buildings and factory buildings are among the construction investments to be cited. The quality and standards of design and construction of these investments play a significant role in the success of these investments.

When the quality of design and construction works is considered the risk that is involved in construction works come into picture. In the developed world, it is almost impossible nowadays to go for construction business without sufficient cover of insurance.<sup>118</sup>

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<sup>114</sup>. See supra note 179 above.

<sup>115</sup>. AfuaAgyefuaBaiden, *Relevance of Procurement Securities in the Procurement of Works in the Ghanaian Construction Industry: A Case Study of the Road Sector*, Kwame Nkrumah University of science and technology, Kumasi, Ghana, at 12: Nov. 2015.

<sup>116</sup>. Ibid at 12-13

<sup>117</sup>. National Planning Commission May, 2016 Addis Ababa Federal Democratic Republic of Ethiopia , *Growth and Transformation Plan II (GTP II) (2015/16-2019/20) Volume I: Main Text* National Planning Commission May, 2016 Addis Ababa, at 28-32; 34-41; see supra note 180 above.

<sup>118</sup>. See supra note 180 at 26.

## II. Guarantees in construction consultancy Contracts in Ethiopia

However in Ethiopia, studies clearly indicated that the role of insurance principles in Ethiopian construction industry, even in consulting firms, is little understood.<sup>119</sup> Furthermore, it can be understood that among the requirements of the Ministry of Urban Development and Construction for licensing neither contractors nor consultants do not include insurance as a criteria for registration.<sup>120</sup>

Basically contracts are made in order to reduce the damage of risk. Besides risks in construction industry could be allocated mainly through insurance/surety bond. In Ethiopian construction industry security bonds are not found in a comprehensive ways. Rather found in scattered ways in different public procurement and building laws. Basically there are different types of bonds which are adopted in a construction activity;<sup>121</sup> however in the construction consultancy service procurement and contract performance activities securities (emphasis added) are the following.<sup>122</sup>

- i. Bid Bond / Bid Security and
- ii. Performance Bond,

Having these brief discussions for this particular subtitle, we will deal the existing problems with possible suggestions in detail in the following chapter 3 of regulatory frameworks.

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119 See Ibid at 33.

120 Ibid at 31

121 Abebe Dinku, Insurance Requirements and Practices of Ethiopia's Construction Sector, at 26: 200: Journal of EAEA, Vol.17:2000 at 14; accordingly in every construction activity, the main securities are: 1. Bid Bond / Bid Security. 2. Performance Bond 3. Advance Payment Guarantee / Bank Guarantee, 4. Retention Money Guarantee.

122. The Ethiopian Federal Government procurement and property administration Proclamation 649 of 2009 arts.40 and 47.

## **CHAPTER THREE**

# **ETHIOPIAN CONSTRUCTION CONSULTANTS LIABILITY: TOWARDS EFFECTIVE REGULATION OF LIABILITIES.**

### **3.1 Establishments, Procurements and Sources of Liability**

#### **Introduction**

In every construction project consultants play an essential role starting from its inception as an idea in the client's/owner's mind to the completion of the whole project. Though construction consultants' act is an indispensable party in the construction industry, other parties to the construction contract and even including the consultants themselves, do not fully understand such indispensable role of consultants in a proper way. To make the problem worse, in Ethiopia, it is hardly possible to find laws governing construction consultants in particular, except draft regulation pertaining to registration and ascertaining professional competency.<sup>123</sup> In this chapter the researcher aimed to discuss natures and regulations pertaining to the Ethiopian Construction Consultants and will try to find out the existing gaps, and will draw lessons from other countries experiences.

#### **3.1.1 Principal Establishments, Capital Requirements and its Implications on Consultants Liability in Construction in Ethiopia**

Most construction projects involve the participation of owners, designers and contractors. Once the decision is made to have a project built, it is necessary to obtain the designer service.<sup>124</sup> According to Jimmie, the design, clearly adhering to the owner's stated project objectives, will

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<sup>123</sup> see CONSTRUCTION INDUSTRY REGISTRATION PROCLAMATION DRAFT 2013, Directives for registration of construction professionals and consultants no.22, 2013

<sup>124</sup> See Jimmie Hinz, Construction contracts, Indian Edition, 2013 at 17 here in after called JIMMIE.

serve as the guidance document for the constructor who will build the project.<sup>125</sup> Equally important point to raise here is that in specific construction project, there may be a possibility of more than one consultant's involvements such as Architecture, Designer, Project Administration Engineer, Quantity surveyor, and special consultants depending up on the complexities of the project. In this case there may be difficulties to decide who will be liable for which wrong or error, and how to allocate liabilities among all consultants participating in a project. Hence it needs further specialization in treating this type of business other than the ordinary business activity.

### **3.1.2. Principal Establishments of Construction Consultancy Organizations and its Implications on Liability**

#### **3.1.2.1. International Experience**

According to Jammie, there are essentially three forms of business organizations, and also found in construction industry: proprietorships, partnerships and corporations.<sup>126</sup>

In all these categories of business formation, whether the business forms are organized into three or five, the common character worth to mention here is that the existence of either limited or unlimited liability pertaining to the business owners/shareholders. Among the formation of business organization stated here above, a limited partner and corporations have a limited liability: the liability shall not transfer to the business owners'/shareholders' personal properties.

<sup>127</sup>Though it is up to the owners to choose the type of business forms to establish, there are two competitive views regarding the formation of construction business organizations, particularly consultants, pertaining to the existence of limited or unlimited liability among the partners of the consultant firm on one hand, and consultant firm with other parties to the construction contract on the other.

Regarding the first view to determine the limitation of liability among owners of the construction consultant firm, for instance EU member countries such as France, Spain and

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<sup>125</sup>Ibid, p17.

<sup>126</sup>Ibid at 72

<sup>127</sup>See COM. Code arts. 210, 510,

Belgium, consulting Engineers are not allowed to limit their liability towards the client for serious hidden defects.<sup>128</sup> Furthermore in other countries, partners are only severally and jointly liable to the client when working in a total consultancy group or joint venture.

Secondly, in many countries in a European Union, a consulting Engineer can be jointly and severally liable with other parties involved with in the project. And also, in Turkey, the consultant is severally liable together with the contractor for the inspection of construction works performed under the public procurement contract.<sup>129</sup> As a matter of principle, there is no prohibition in EU member states for consulting Engineers to exercise their professional activities in a form of limited corporations. In addition to this, the construction business organizations which involve in International Construction contract can be established in either of the two: Representative Office or Foreign Subsidiary Office.<sup>130</sup>

### **3.1.2.2. In Ethiopia**

The Ethiopian Commercial Law slightly puts the type of business organization in different forms than that of Jammie, in which business organizations are formed. Accordingly, Art. 212 (1) of the Commercial Code put the numbers of business organizations into five forms; namely:<sup>131</sup>

- Partnerships
- Joint Ventures,
- Corporations (company),

In construction industry, in Ethiopia, consultancy businesses can be established through one of the five forms of business organizations enumerated in the Commercial Code. This can be

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128 See IBID at 6.

129 See Comparative study about consulting engineers' liability and insurance requirements across Europe, 2014 at 5-6.

130 Lukas Klee, International Construction Contract Law, at 19: 2015.

131. Proclamation 166 of 1960 (Comm. code) Art. 210.

inferred from the regulations enacted to regulate the construction industry sector.<sup>132</sup> Most often, consulting firms take the form of PLC than other forms of business organization and it is obvious that as a matter of principle partners have limited liability in PLCs as per Ethiopian law and this applies only as regards the partners not with other actors in a construction contract.

The critical issue worth to mention here regarding formation of Consultancy business in the construction sector is that whether it be domestic or international is that whether limited liability formation is preferable or not. From its very nature, construction contracts are different from other commercial agreements because of high degree of uncertainty, which may result from high degree of project complexity.<sup>133</sup> Furthermore, in Ethiopia, the construction industry is one of among highly corruption or rent seeking vulnerable sectors.<sup>134</sup> Hence, based on the above discussions and other countries' experience such as France, Spain, Belgium, and other international construction Contracts practical experience, the researcher is arguing that it is worth and advisable for Ethiopia pertaining to the establishment of the construction consultancy business should be established in a form that could not limit the liability of the business owners or in other words the shareholders should not limit their personal liability only to the extent of the share they have within the firm. In addition Ethiopia should frame the construction laws in line with this end - {introducing mandatory clauses which prohibits consulting firms to limit their liability in order to hide the owners from hidden defective performance }

### **3.1.3 Capital Requirements and its Implications on Liabilities**

In starting a business, the first decision that must be made by those considering incorporation of a business is the type of firm that will be suitable, taking into account the allocation of liabilities

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132 Directive for the registration of design professionals and consultants 22 of 2013 Arts. 4 and 5.; see Proclamation for registration of construction consultants of 2013 (draft) Arts. 2 (7), (9), (10); (10) ; according to these regulations consultants could be established in the form of either individual persons or organizations. Then when we read this provision with Art.210 of the Civil Code which provides six types of business organizations {limited partnership, general partnership, ordinary partnership, joint venture, private limited company and share company, }; one could understand that consultancy business service in Ethiopia can be established in one of these business forms.

133 See supra note Lukas Klee, International Construction Contract Law, at 4: 2015.

134 see FANA BC.Report January 1, 2016; Janelle Plummer, World Bank Report, Diagnosing corruption in Ethiopia, Perceptions, Realities, and the Way Forward for Key Sectors at 237-284 : 2012, Ethiopian Reporter, 17 Dec, 2016.



of the owners of incorporations separate from the entity, and the amount of capital required to incorporate it.

Regarding capital requirements different states set minimum capital requirements for a business entity to be established. For instance, the European community second directive has set the minimum capital for a registered company in the European Community at 25,000ecu.<sup>135</sup> It is nowadays prevalent to see that there are scholars who argue that minimum capital requirements should not be set by regulations; to support their argument these scholars raise that investors should be at liberty to enter into the business then regulation shall be applicable then after.

The researcher of this thesis argue that minimum initial capitals are very crucial for the establishments of certain business organization particularly businesses involved in the highly risky area like construction industries. Because there are highly concerns of the surety, creditors, and principals (emphasis added) that the firm may have insufficient funds to satisfy a possible indebtedness.<sup>136</sup>

The Ethiopian law of traders and business organizations puts no minimum capital requirements for business organizations established in the form of partnerships in which general partnerships, limited partnerships, ordinary partnership and joint ventures are included. However, pertaining to private limited company and share companies the stated law sets minimum capitals: 15,000.00 (fifteen thousand Eth. Dollars) and 50,000.00 (fifty thousand Eth. dollars) respectively.<sup>137</sup> As the economy of the country grows, it is obvious that this minimum capital requirement established by the commercial code several decades back must be amended. For instance, it is worth to mention that in the financial corporations respective initial capital requirement is very much higher than what was stated in the Commercial Code. To establish Micro finance the minimum capital required is birr 2,000,000.00 (two millions) is required as an initial capital.<sup>138</sup>

As far as the minimum capital required for establishing certain business organizations in Ethiopia is not specifically amended as opposed to that of the financial sector, the applicable law for this particular area of regulation is those enacted in the Commercial code. Because of the

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<sup>135</sup>See Janet Dine, *Company Law* fourth Ed. at 12: 2001.

<sup>136</sup>Supra note Jimmie Hinze, *Construction Contracts* at 84: 2013

<sup>137</sup> See Ethiopian Com. Code 1960, art. 512 & 306 respectively

<sup>138</sup>National Bank of Ethiopia Directives No. MFI/ 25 /2013

nature of construction contracts which are characterized by high uncertainty and risk, particular attention has to be offered as regards stipulating the minimum capital requirement to protect the clients in construction contracts and the general public and the construction industry.

Unlike, the Ethiopian building proclamation and regulation,<sup>139</sup> the amended directive for the registration of construction consultants, has stipulated capital requirements as eligibility criteria for registration of different categories of Construction professionals and consultants ranging from Birr **5,000.00 up to 800,000.00**.<sup>140</sup> According to this directive when a person or persons wanted to invest in a construction consultancy business, the minimum capital stipulated in the directive shall be fulfilled. However, when one see in light with the Commercial Code of Ethiopia which puts minimum capital requirements only regarding Private limited and Share Company as mentioned here in above, it is evident that there is a deviation. At this junction the essential legal issue seeks answer is that both of these laws are not on the same hierarchy of laws; in case the former is a directive while the latter is a proclamation (proclamation no. 166/1960), but both laws overlap on the area of determining minimum capital requirements for establishing new construction consultancy business organization. From the principles of legal interpretations point of view, as far as both laws have no equal status (not on same hierarchy), the proclamation prevails over the directive. On the other hand, the stated directive is the special and latest law than the commercial code proclamation (1960). Though the directive is special and latest law, it is impossible to say that the special and latest law in case the directive prevails over the proclamation<sup>141</sup>, because the laws have no same (equal) status. As a result, the issue remained unanswered yet; and hence need special attention to reframe the Building, and Consultancy service proclamations towards resolving the issue at hand.

Therefore, the researcher is arguing that the Ethiopian Law makers and construction policy developers should have to take into consideration and accordingly amend and accommodate, the existing minimum capital requirements enacted by the Ministry of Urban Development and Construction directive level, to an equal and special law, building proclamation

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139 See Building procl.624/2009, Building Regu. 243/2013

140 Ministry of Urban Devt.and Construction, Directives for the Registration of Construction Professionals and consultants (Amended) (Directive No 22) Annexes 1 -11: 2013.

141 see rules legal interpretations

### 3.2. Procurements of Construction Consultancy Service in Ethiopia.

Procurement is a generic term embracing all those activities undertaken by a client seeking to bring about the construction or renovation of a building. Various referred to as a method, path or system, procurement is initiated by devising a project strategy, which entails weighing up the benefits, risks and financial constraints which attend the project and which eventually will be reflected in the choice of contractual arrangements. In every project the concerns of the client will focus on time, cost, and performance or quality, in relation both to design and to construction of the building.<sup>142</sup>

Similarly, Procurement means obtaining goods, works, consultancy or other services through purchasing, hiring or obtaining by any other contractual means;<sup>143</sup> And furthermore, Consultancy Service mean a service of an intellectual and advisory nature provided by consultants using their professional skills to study, design and organize specific projects, advice clients, conduct training and transfer knowledge;<sup>144</sup>

Basically, for both government and civil work construction contracts, it is very important to procure the consultancy service carefully in construction contract. Because in all construction projects, engineering consultants play an agency role in construction contracts, on behalf of the client or owner.<sup>145</sup> Equally important, to say a lawful agreement is reached, when and where, the requirements of free and fair consent has been secured from all of the contracting parties, legal capacity, legality of the objects of the contract, not contrary to law or moral, and certain formality fulfilled when the law so requires it.<sup>146</sup> The government and civil construction project contract can be made between different government organs (corporates) or private individuals. The law governing these different types of construction contracts like differs. In the forthcoming sub-sections we will deal about the procurements of both government and civil (private) construction consultancy services.

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142 See the deciding on the appropriate JCT (joint Contract Tribunal) contract practice in Uk, 2011 at 2. Accessible from the web address [www.jctcontracts.com](http://www.jctcontracts.com)

143 See Public procurement procl. 649/2009 art. 2(5)

144 See Ibid art. 2(4)

145 See Jimmie Hinze, Construction contracts, infra note at 61:

146 See prof. TilahunTeshome, Basic Principles of Ethiopian Contract Law at 3: 2007.

### 3.2.1 Government Construction Consultancy Service Procurements

The main reason for liability of Ethiopian construction industry to claim is the procurement system practiced in the country.

Though all contracts have a binding nature, and have a force of law between or among the contracting parties, and stipulates the rights and obligations of each party to the contract, the government construction contracts shall pass through all mandatory rules and procedures. In public works projects the bidding procedure, procurement process, is strictly outlined.

In construction contract the government enters in to, including construction consultancy service contract (emphasis added), it is a must that it shall pass through bidding process.<sup>147</sup> This exhibits the basic constitutional principle, which states that “the conduct of the affairs of government shall be transparent. The public official or an elected representative is accountable for any failure in official duties.”<sup>148</sup>

Regarding the Government procurements method in Ethiopia, there are frequent clear deviations from what the law says. This assertion can be justified from the facts of Humbo-Arbaminch road upgrading project case. Regarding this particular project, Construction Sector Transparency Initiative Ethiopia in its report narrated the facts of the case as follows

According to this report, though feasibility study and EIA of the project could not be found, the technical evaluation report indicates that the detailed engineering design and detailed tender document preparation was made by Associated Engineering Consultants (AEC) PLC. On implementation phase, construction supervision and contract administration during construction stage is carried out by the same consultant, AEC. The main contract works of the project construction is being carried out by a local construction company known as DMC Construction PLC.<sup>149</sup>

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147BisoBekele, Construction Contract, Oromia Justice Professionals Training and legal Research institute, at 22 : 2008

148See art. 12 (1 and 2) of FDRE constitution, proclamation no. 1/1995

149Construction Sector transparency initiative Ethiopia (CoST-ETHIOPIA) Final Report 2010

## **Key Findings of the Report**

Therefore, clear cut conclusions on the fact that whether concerns to be expressed in the feasibility study regarding the project, are addressed before proceeding implementation of the project could not be disclosed.

The tender document for works contract has been prepared by AEC and the consultant was made agreement with PE to prepare tender document for periodic maintenance of road. The tender for works contract was advertised for upgrading the project. There is no clear information disclosed for the change of the work from its original plan. The PE was expected to prepare proper tender document as per the actual work of the project and it will be in contrary with the Ethiopian Government law for Procurement of Works PPA (public procuring Authority), January, 2006'.<sup>150</sup>The PPA law for procurement of works under User Guide, on section 'Preparation and Issue of Bidding Document', states that the PE is responsible for the preparation of studying document before bid.

Fluctuation of program of the PE (procuring entity) from the original intended plan has caused to make additional agreement for supervision works. The supervision consultant has originally entered in to a contract for periodic maintenance works. However, the PE has changed his plan for upgrading the road project. Consequently, change of the procuring entity's interest has resulted to a supplementary agreement of ETB **4,886,966.40**.<sup>151</sup>

From the above mentioned Humbo-Arbaminch upgrading project, one could understand that in the specific given government construction project, the Associated Engineering Consultants (AEC) PLC has competed and won the consultancy bid which was dependent up on the feasibility study of the periodic maintenance of the stated road, but later on the Procuring entity has changed his interest to upgrading of the road, which completely necessitates new feasibility study which directly has effect on the overall cost, time, capacity of the consultant, construction materials to be used, and service fees of the consultancy service, which is directly contrary to government procurement proclamation and other related directives and working manuals as mentioned here in above.

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<sup>150</sup> See Public procurement Manual arts. 2.8.1 and 2.8.3 (if a previous bid is rejected or reversed by any means another new bid shall be invited): 2011

<sup>151</sup> See supra note 89 at 5-6.

On the other hand, the Ethiopian procurement laws particularly laws enacted after Ethiopia adopted Free market Economy, post 1991 and the introduction of the 1995 FDRE constitution, stipulates that federal Government procurement laws shall not apply when the procurement of goods, services, consultancy services are made between public bodies.<sup>152</sup> In turn public body is defined under definitional parts of the same regulations mentioned here in above, which states that public body means any public body, which is partly or wholly <sup>153</sup>financed by the Federal Government budget, higher education institutions and public institutions of like nature. From this definition, it is not far from the truth that, the procurement regulations enacted shall not apply on government enterprises, development Business Organizations that may involve in this business types including the construction consultancy service.

But as history reveals, it is hardly possible to warrant that the public bodies are free from any construction design defects, errors, or negligence. Furthermore, even if the concerned public body is a part of government organ/body, the one who executes the procurement process is a human being which necessitates a binding guide lines or regulations. Therefore, if the procurement regulations are not applicable pertaining to the case at hand, then the procurement of the trade deal between two public bodies remain unresolved. And also the basic foundational principles of procurement regulations- transparency, efficiency, fairness and impartiality are hardly achieved in this respective.<sup>154</sup>

### **3.2.2 Private (Civil Works) Owned Projects**

Privately funded construction projects accounts a huge amount of share in a country. For instance in USA, privately funded projects account for an average of 68 percent of total construction volume.<sup>155</sup> Though there is absence of a conclusive survey in the sector, it is evident that there are huge amount of private funded construction projects, such as residential buildings, buildings used for businesses, industries,(from small scale to complex and huge industries), and other construction facilities.

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152 See government proc. Proclamation 649 of 2009 art.3(2-b), public procurement manual art.1.3 at 19: 2011.

153 See the FDRE Amendment criminal code art 404

154 See Preambles of Proclamation 649 of 2009; see proclamation 1 of 1995 art.12 (FDRE constitution.)

155 see Supra note Jammie above at 8

In private construction works, the procurement process, particularly consultancy service, is often varied from public works projects. No laws govern the process by which private construction contracts are made.<sup>156</sup> Likewise in Ethiopia, there is no law which governs the procurements and methods to be followed in private construction projects. Although there is no rule which administer the private construction contract forms,<sup>157</sup> It is however obvious that the contract cannot deviate from the mandatory provisions of the laws of the land.

Though private construction projects are funded by private individuals or corporations, but does it necessarily mean that every activity involved in this sector does not affect the economic and other social interests of the people, but yet the construction regulations have not yet addressed them. . But what can be said pertaining to the success of construction industry is the cumulative effect of both public (government) and private (civil) construction projects and therefore equal attention must be offered regarding the procurement procedure.

On the other hand, as stated here in above when one carefully looks the preambles of the Ethiopian building and procurement proclamations, regulation, directives and working manuals, their primary objectives are to protect the quality of the construction projects, to protect the safety, health, and the environment on the one hand, and to promote transparency, fairness and the like in the construction industries on the other hand.<sup>158</sup> Hence, the researcher argues that though matters of private contracts are left for private persons to decide as a matter of principle, the construction contracts which are more complex, risky and need highly trained expertise, and taking the essentiality of the construction industry as being an engine for other investments, economic developments, and high employment enrollment, the issue of construction consultancy service procurement shouldn't be left for the sole private matter. Therefore, Ethiopian law makers and policy developers should reconsider to enact mandatory which governs the private construction projects including construction consultants in Ethiopia.

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156 see Ibid Jimmie at 119

157 See supra note BisoBekela, at 31 (Afan Oromo)

158 *The preambles and objective parts of the stated laws {proclamation 624 of 2009, regulation 243 of 2013, proclamation draft of 2013 }.*

### 3.3 Areas and Devices of Regulation of Liability of Consultants

#### 3.3.1 Market Entry Requirements

The Ethiopian Commercial Code recognizes business organization to be formed at least by two persons. So, one person business organization does not exist. Article 210 of the Commercial Code defines a business organization as “any association arising out of a partnership agreement.” A partnership agreement, pursuant to Article 211 of the Code, is “a contract where by two or more persons who intend to join together and to cooperate undertake to bring together contribution for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out there or ,if any.”<sup>159</sup> However, the other countries’ jurisdictions experience justify that the existence of the one man company, such as US and other countries. In Ethiopia though there is no one man company, but recently there is a pressure from the scholars to introduce the one man company by putting essential justifications, namely<sup>160</sup> :

- It is not logical to force an investor to look for another person usually a straw man to form a company;
- It gives investors the opportunity to separate property allocated for business and their personal property; and
- In modern business, capital is more important than the individual.

The construction consulting firms whether it is an individual or organizations are one of among businesses or trades recognized in the Ethiopian legal system.<sup>161</sup> Likewise on the global arena,

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<sup>159</sup>AlemayehuFentaw and KefeneGurmu, Law of Traders and Business Organizations Teaching Material Prepared under the Sponsorship of the Justice and Legal System Research Institute 2009 Proclamation No. 166/1960,- Ethiopian Commercial code art. 210 at 44.

<sup>160</sup> Scholar recommendations, Prepared by A Team of Fourteen National Experts, for the amendment of the Commercial Code, Pro. 166/1960, Position of the Business Community on the Revision of the Commercial Code of Ethiopia Produced by Addis Ababa Chamber of Commerce and Sectorial Associations, at 17:2008.

<sup>161</sup>Proclamation No.166/1960 Art.5 (5, 8) of Commercial Code, **The Construction Industry Registration Proclamation (Draft) art. 2(7) of : 2013**



the consulting engineering industry, which comprises independent private consulting firms supplying services on a fee-for-service basis, is a major industry worldwide.<sup>162</sup>

In Ethiopia to engage in a business or commercial activity, a person or firm shall be registered in a commercial registry. In other words no person shall engage in any commercial activity which requires business license without being registered in the commercial register administered by the Ministry of trade and industry.<sup>163</sup> Like all other commercial activities, engineering services including engineering consultancy services are commercial activities which are inevitably subject to mandatory registration at the Ministry of Trade and Industry before entry in to the market.<sup>164</sup> As stated in the previous parts of this thesis, the minimum capital required to establish a business organization concerning companies is clearly stipulated, and while pertaining to partnerships the Ethiopian company law sets no minimum capital requirement.<sup>165</sup>

On the other hand, one can find that the minimum capital requirements for the registration of construction consultants are stipulated; depending up on the category of the consultancy services they intended to engage in, under the directive issued by the Ministry of Urban Development and Construction.<sup>166</sup> For instance, the minimum capital requirement to register Category I and V for the office of Architectural and Engineering Consultants is *Birr 800,000.00 (Eight hundred thousand) and Birr 50,000.00 (fifty thousand)* respectively.<sup>167</sup> This signifies that in Ethiopia, there is a minimum capital requirement for the establishment of Construction consultancy firms.

However, the minimum capital requirement set above is incorporated in a directive issued by the Ministry of Urban Development and Construction.<sup>168</sup> Contrary to this the Ethiopian Commercial Code sets the minimum capital requirement for share company as of 50,000.00 (fifty thousand)

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<sup>162</sup> UNESCO Report Engineering: Issues Challenges and Opportunities for Development Produced in conjunction with: World Federation of Engineering Organizations (WFEO), International Council of Academies of Engineering and Technological Sciences (CAETS) and International Federation of Consulting Engineers (FIDIC); Published in 2010 by the United Nations Educational, Scientific and Cultural Organization 7, place de Fontenoy, 75352 Paris 07 SP, France at 140.

<sup>163</sup> See proclamation no 686/2010, art. 6(1),2(16) and 5(1) of Commercial Registration and business Licensing Proclamation.

<sup>164</sup> See Ibid art. 2(13), 4 and 30(1), which clearly states under its scope of application Engineering services (including construction consultants) are under the scope application of this proclamation,

<sup>165</sup> See discussions under Chapter 3, sub-topic 3

<sup>166</sup> Registration of Design professionals and consultants Directive No.22/2013, see Annexes 1- 12.

<sup>167</sup> See Ibid annex 5.

<sup>168</sup> Ibid

and private limited company Birr 15,000.00 (fifteen thousand), no minimum capital requirement is set for partnerships in the same code.<sup>169</sup> At this stake there may be certain questions seek answer:

According to the wording of the directive, does the directive allow share companies and private Limited Companies to establish a consultancy company below the capital requirement set in the Commercial Code? If there is a contradiction between the provisions the Commercial code and the directive which provision shall prevail?

Firstly, when we deal with the first issue, it is better to cross refer the two laws, namely the Ethiopian Commercial Code's relevant provisions, and amendment directives for the registration of construction professionals and consultants. Basically, the power to issue business license for commercial businesses in Ethiopia is entrusted to the Ministry of Trade and Industry. On the other hand to engage in a construction consultancy a firm must be registered and authenticated for professional competency at the Ministry of Urban Development and Construction. Therefore, a construction consultancy firm expected to fulfill the mandatory pre-requisites among others such as obtaining a business license from ministry of Trade and Industry, and registering and obtaining a professional competency from Ministry of Urban Development and Construction. In this case to make registration and issued with a certificate of competency at MoUDC an engineering consultant shall fulfill the minimum capital requirement among others. This minimum capital required as per the directive may or may not coincide with the capital set in the Commercial Code as discussed above in this thesis. Moreover, it is worth to state that as far as the two Ministries work in collaboration in which the Ministry of Trade and Industry issue a business license after the engineering consultants submit certificate of professional competence.<sup>170</sup> From this perspective it is practical and possible to conclude that the capital requirements needed to establish an engineering consultancy firm is what is stated in the directive in lieu of the Commercial Code. But, in the hierarchy of laws both laws are on the same status. This leads to the second question and discussed in the following paragraph.

Secondly as far as the directive is considered pertaining to the minimum capital requirements set for the establishment of engineering consultancy firm, yes the directive is in contradiction with

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<sup>169</sup> See discussion in the previous chapter (3:3)

<sup>170</sup> Supra note 127 Art. 30(3) and 2(36).

the Commercial Code provisions, in case the directive allows a consultancy firm minimum capital required for establishment ranging from Birr 5,000.00 up to Birr 800,000.00.<sup>171</sup> For the researcher, amendment of the minimum capital required to establish engineering consultants firm which is different from other business organizations, has no problem and even in addition based on the nature of the business the construction consultancy firms engaged in which is characterized existence high risky ,depending up on detail study may needs even higher minimum capital requirement. But, to amend a given law, it presupposes the law which is going to be amended, and the amendment shall be on the same hierarchy of laws. Because if the laws with different hierarchy contradict each other, it further necessitates the choice of laws between them to decide which law prevails over the other and applicable when both laws deals the same issue. Therefore, when two laws governing the same legal issue contradicts each other, the principle of legal interpretation becomes material. As discussed above since both laws, the commercial code and Consultants registration amendment directive are not in the same hierarchy, it may create confusion.

Furthermore, according to the amendment directive the consultancy firms are classified according to size, expertise and financial capability by the Ministry of Urban Development and Construction (MoUDC). The capital requirement has a direct relationship with risk allocation. Because the construction consultancy firm established with better capital has a high probability of solvency and hence, can easily access to adequate guarantees from relevant financial industries. These construction professional services sector consists of architects, civil engineers, electrical engineers, sanitary engineers, and mechanical engineers, quantity surveyors and surveyors who provided the design expertise.<sup>172</sup> As repetitively stated the Construction industry is a highly risky business.

Therefore, based on discussions and analysis done above the researcher of this thesis argue that to establish adequate construction consultancy firms' liability, their financial capital should be properly regulated. Consequently, there should be a proclamation enacted particularly having equal status with the commercial code which basically address the capital requirements of

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<sup>171</sup> See supra note 130.

<sup>172</sup> See Ibid part II

construction consultants in a comprehensive manner based on the nature and risks of businesses they may engage in.

### **3.4 Risk Diversification Requirements:**

#### **3.4.1 Prudential Liability Allocation: Legality**

Before we deal with risk diversification, it is essential to define what risk mean. Accordingly, a blacks' Law Dictionary defined risk as the chance of injury, damage or loss, danger or hazard, and hence liability for injury, damage, or loss if it occurs.<sup>173</sup> Risk in relation to construction is defined as "a consideration in the process of a construction Project whose variation results in uncertainty in the final cost, duration and quality of the project".<sup>174</sup> Furthermore, liability is defined in Osborne Concise Law Dictionary as 'an amount owed; or subject to legal obligation; or the obligation itself, he who commits a wrong or break on a contract or trust is said to be liable or responsible for it'.<sup>175</sup> Liability is created when the law recognizes two elements 'the existence of an enforceable legal duty to be performed by one party for the benefit of another' and the failure to perform the duty in accordance with applicable legal standards.<sup>176</sup> Hence, the main element in liability is the existence of duty and responsibility. The duty and responsibility of the various parties in a construction project may arise from contract or law of tort or both.<sup>177</sup> It is also very much associated with the interrelationship between them and the scope and nature of services they provided in the project.

Basically the responsibilities of consultants on a construction project are set out in a standard form of agreement between the consultant and the client/owner. A design professional can limit liability to a client largely through the contract between the design professional and the client. The primary relationship between the design professional and his or her client is one of contract. Yet, ambiguities are common in contract language and a contract will often not protect against a

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<sup>173</sup> Bryan A. Garner, Blacks' Law Dictionary seventh edition, 1999 at 1328.

<sup>174</sup> Addis Mesfin, Construction contract Risk management practices in Ethiopian Building Construction projects, at 24-25: 2004.

<sup>175</sup> Asmah Alia BintiMohamadBohari, Quantity surveyor's Liability During Pre tender stage, University Technology Malaysia, at 40 : 2009.

<sup>176</sup> Ibid at 40-41

<sup>177</sup> Ibid at 41

negligence suit or third party liability.<sup>178</sup> The primary test for determining whether the design professional has adequately performed his or her design duties for the client is conformance with terms of the contract.<sup>179</sup> In this all most all cases the consultant who is a professional always prefers to limit his/her liability towards both the client/owner and third parties. Before evaluating the risk allocation in standard forms of agreement entered between the consultant and the owner/client, it is worth to pay crucial attention to the fact that behind the construction contract there is a public policy issues which must be attained as end goal. This can be exhibited for instance from the preambles of the Ethiopian construction laws,<sup>180</sup> among others mainly to protect the safety of the public.

Typically when we see the formation of the standard forms of construction agreement/contracts, both at global and domestic level, they are developed by consultants for the consultants; and are pro-consultants. For instance, the conditions of contract prepared by the International Federation of Consulting Engineers, (FIDIC) are nowadays the most widely used sample forms of contracts for construction projects.<sup>181</sup> In addition, Based on the information at <http://www.aia.org>, the American Institute of Architects (AIA) has been the leading professional membership association for licensed architects, emerging professionals and allied partners in the USA since 1857. AIA sets the industry standard in contract documentation with more than 100 of its forms and contracts used in the design and construction industry.<sup>182</sup>

The FIDIC and other standard construction contracts including the AIA have influenced domestic construction contracts through incorporating National Consulting engineers associations as membership including Ethiopia, and promoting the through the same. This assertion is supported by one writer based on the information at [www.cwilson.com](http://www.cwilson.com), in the writer's view the Canadian Standard Constructions (Canadian Constructions Documents Committee standard form contract between the owner and the contractor, 2008 edition and the

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<sup>178</sup> Professional Liability For Construction in Flood Hazard Areas, Prepared for the Association of State Floodplain Managers With Funding Support From The Association of State Floodplain Managers Foundation at 9: Revised 24/09/07

<sup>179</sup> See Supra note 140 at 43.

<sup>180</sup> See - Building proclamation 624/2009, building regulation 243/2013, Construction professional registration proclamation (draft) 2013, condominium proclamations and regulations, directive for registration of consultants 22/2011.

<sup>181</sup> Lukas Klee, International Construction Contract, at 315.

<sup>182</sup> Ibid at , at 316.

Association of Consulting Engineers of Canada Document 31) are pro-consultants.<sup>183</sup> During construction, the role of a consultant is either to design, administer, or provision of any consultancy service concerning the contract as described in the “Contract Documents”. However, the Contract Documents do not reference the agreement between the owner and consultant which outlines the professional services to be provided to the project. For example, both standard form contracts contain terms that protect the consultant by limiting the consultant’s liability exposure both in terms of time and quantum.<sup>184</sup> As noted above, the impact of the services provided by the consultant can be significant.

Likewise in Ethiopia when one carefully looks at the Ethiopian standard Conditions for construction of civil works (MoWUD),<sup>185</sup> it is hardly possible to find provisions referring the construction consultancy service agreement reached between the owner and the consultant. Furthermore the standard bidding document for the procurements of consultancy services prepared by FPPA (Federal public procuring agency) version1- July 2011 in Ethiopia denotes the pro-consultants. Because the construction consultancy service standard document clearly limits the liability of the consultants to the price of the consultancy service. In addition to this the data collected from the government institutions who are clients for the consultants through interview told that due to lack of relevant provisions in the Ethiopian Construction laws pertaining to determining the liability of engineering consultants equivalent to the estimated price of the construction project, the government institutions are facing irremediable damages due to errors in engineering consultants’ performances.<sup>186</sup> Furthermore, what makes more difficult for lawyers who advocates for the Government Institutions is that since the contract between the client and the consultant is already prepared and sent for their institution from, the Federal government public procuring Agency, as a result they couldn’t incorporate clauses into the contract which best protects the interest of the client.<sup>187</sup>

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<sup>183</sup> See [www.cwilson.com](http://www.cwilson.com)(Clark Wilson LLP, BC’s Law Firm for Business), The Role Of The Consultant In Construction, pp. 4.

<sup>184</sup> See *Ibid* .

<sup>185</sup> See Ministry of Works and Urban Development, the standard conditions of contract for Construction of civil works in Ethiopia, 1994.

<sup>186</sup> Interviews conducted with 1. AtoTakeleLulena (M.Sc.) , Federal government Building Construction Administration Bureau- project and contract administration directorate director. 2. AtoAddisuMammo, legal Service head at Mettu University.

<sup>187</sup>Interview conducted with lawyers from Jimma University Legal Service Division.

Though Construction Industry is an engine for other investments to growth rapidly and has a vital share in GDP of the country Ethiopia,<sup>188</sup> by its nature construction contracts are different from other commercial agreements because of a high degree of uncertainty.

However, in the analysis of legal responsibilities for construction failures, attention should be directed to the contract documents, which should establish, among other things, the law of the state to be applied, the scope of the work to be performed, and the standard of care with which the work was to be performed. Regarding the construction failures the Ethiopian building proclamation denotes as a dangerous building that is structurally unsafe or constitutes special fire hazard or health risk.<sup>189</sup> Furthermore the same proclamation explains that among other things any building or components thereof shall be according to acceptable building codes to ensure safety, comfort and unconstrained services.<sup>190</sup> In this case when it is evident that the building is unsafe or dangerous for human life, for instance because of design errors, the Ethiopian building proclamation enacted among other measures demolishing of the building.<sup>191</sup> To justify more with example the researcher choose to use the hypothetical case stated in the previous part (2.3.2.3 A) of this thesis, accordingly, If a client named *A (public body)* planned building of a project estimated price worth *Birr 200,000,000.00 (two hundred Million)* and accordingly concluded a main contract with *AB Plc. (contractor)*; assume all legal procedures are carefully observed. And also the client *A (public body)* concluded a consultancy service contract pertaining to the stated project with *AC S. Co. (Consultant)* with the estimated price worth *Birr 20,000,000.00 (twenty million)* assume all the required procedurals are carefully passed through . Unfortunately after the construction of the project exceeds more than 60%, the building is proved unsafe or inadequate due to fundamental design error. As it is evident from the hypothetical case the client *A (public body)* confronted economic loss (damage) which might exceeding *Birr 20,000,000.00 (twenty million)* which is the maximum amount of the consultancy service agreement.

Practically when one carefully looks at the Ethiopian Construction consultancy service standard contracts produced by FPPA, GCC 47.2 b, states that the amount of aggregate liability of the

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188See Ministry of Urban Development and Construction, Construction Industry Policy (Draft) at 1:2012.

189See building proclamation art. 2(10)

190See Ibid art. 30

191See Supra note – BisoBekele, Oromia Justice Organ professionals Training and legal Research Institute, Construction Contract, at 36: 2008 E.C.

consultant shall be equal to the contract ceiling,<sup>192</sup> which is in our hypothetical case birr 20,000,000.00 (twenty million). Therefore, when we see the contractual remedy drafted by FPPA, regarding the liability of consulting engineers, it couldn't serve adequate remedy for the clients/owners of a building or a construction project. Furthermore, it does not suffice to protect the construction/building objectives enshrined in construction industry policy, the preambles of construction laws of the country and constitutional protection accorded including the right to claim adequate, fair and unconditional compensation in lieu of his property being damaged.<sup>193</sup>

On the other hand as discussed in the previous Chapter of this thesis particularly Chapter- 2 (2.3.2.3 A), it could be said that the Ethiopian building law by itself didn't address sufficiently the liabilities of consulting engineers. Because the building proclamation<sup>194</sup> stated concerning determination of the liability of construction professionals (consultants) cross referred the provisions of the Civil Code. However, one couldn't find provisions dealing with the liability of construction consultants in the especial parts of the code,<sup>195</sup> dealing construction contract(work). Therefore, one can rightfully state that the legal issue of determining the liability of construction consultants remains unresolved yet.

Unlike the Ethiopian Civil Code provisions, other civil law legal system follower countries incorporated the liabilities for consulting engineers in their Civil Codes or private laws such as Australia, Belgium, Denmark, France, Germany, and Turkey. And also one can find the

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192 Ethiopian Roads Authority, Standard Bidding Document for Procurement of Consultancy Services for the Road construction, Gambela-Abobo-Gogo-Dima; Contract I: Gambela-Abobo and Fiseha Genet-Kele-Soyama-Segen-Gebelbano; Lot I: Fiseha Genet-Kele-Soyama-Km 90 (2 Projects), August, 2016.

193 See the preambles of the building or construction laws which states that to determine the minimum national standard for the construction or modification of buildings or alteration of their use in order to ensure public health and safety; large public sector spending and private investment on construction works are required to be carried out by responsible and qualified professionals and organizations that ensure effective and economic utilization of resources with quality and timely delivery; and it is desirable to enforce professional ethics and discipline, to prevent impropriety that could harm the healthy development of the sector; { Proclamation 624/2009, 1/ 1995 FDRE constitution, art. 40(1,2 and 7), and draft proclamation of 2013 construction professionals registration proclamation.

194. See supra note art. 28 (1)

195. See Civil Code, arts. 3023-3040.



liabilities of consulting engineers in Common law legal system or case laws followers like England, and Ireland.<sup>196</sup>

The country, therefore, needs to make or enact regulations on the construction Consultants liability regimes. First, distinction needs to be made between the contractual and tort liability requirements in the construction contract agreement and enforcement laws.

Secondly, the minimum liability requirements in line with the main contract of the construction consultants need to be fixed in the law and the maximum ceiling of liability requirements need to be left to decision of the parties in their agreement.

### **3.4.2 Integrate Construction Contract**

Most construction projects involve the participation of owners, designers and contractors. Depending on the nature and size of the project, the contractual arrangements between these parties may change. In some cases one party may play two roles or even all these roles. These different roles should be clearly understood and carefully evaluated to determine the contractual relationship that should lead to the most effective delivery of the project. According to Professor Jimmie Hinze, there are essentially five different types of contracting procedures in the construction industry, namely General Contract (Traditional) Method, Separate Contract (Owner as general contractor) Method, Self-Performance(Owner as manager only, no formal contract) Method, Design Build method, and Professional Construction Management Method.<sup>197</sup> Since the objective of this section is not to examine the types of construction contract, rather determining the effective allocation of construction consultants' liability in construction contract, the readers are advised to refer chapter 2 of this thesis to remind the types and concepts underneath the construction contract methods.

Therefore, this section is aimed to examine among the types of construction contracts stated here in above, best suits for justifiable allocation of the liability of construction consultants. In other words, that avoids or even at least minimizes unnecessary risk transfer in construction contract.

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<sup>196</sup> the European Federation of Engineering Consultancy Associations (EFCA) , Comparative study about consulting engineers' liability and insurance requirements across Europe, at 32-46: 2014

<sup>197</sup> See Jimmie Hinze, Construction Contracts, Indian edition at 17-26: 2013.

However, the researcher is not arguing in case that for all design errors or failures, the designer or consultant must bear liability irrespective of existence of fault or professional negligence on the side of the engineering consult. Rather the researcher is arguing that to strike the balance between defining the liability of construction consultants, and protecting the construction industry itself for public interest at large.

Regarding this assertion, Reg Thomas also stated that the core idea behind determining the liability of designers {consultants - emphasis added} in the following paragraph.<sup>198</sup>

*It is usually the case that where a contractor designs the works, his liability for design is 'fit for purpose'. This means that the design must work and contractor will be liable for any failure in design. In contrast, where the design is done by the employer's designer and the contractor builds in accordance with the employer's design, and then the employer's designer's liability for design is 'that of a professional man'. That is to say, provided that the employer's designer exercised reasonable skill and care (of the standard expected of a competent professional man); using all relevant and universally known codes and standards; then he will not normally be liable if the design fails. This Option limits the normal liability for design by the contractor to the same as 'that of a professional man'. This may be of significance, particularly if it is impossible to insure for design defects if the liability is 'fitness for purpose'.*

In this case what seeks answer beyond determining the liability of designer either in design-bid – build contract in which the designer is usually an employer’s designer who made the design based independent contract with the client/owner or a bid-build contract in which the contractor agreed both to design and construct the construction project with the owner/client, is that based on the nature of the construction contract unique feature, which necessities the involvement of different parties in which their work concerning the construction contract is interdepend in case affects the fate of the construction project.

Typically, under the traditional design-bid-build system, the owner warrants the correctness of the plans and specifications to the construction contractor in the US, for instance applied in

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<sup>198</sup>Reg Thomas, Construction Contract Claims, at 50-51: 2001; Palgrave.

California by *Souza & McCue Constr. Co. v. Superior Court*.<sup>199</sup> In this case a design professional does not warrant the sufficiency of the plans and specifications furnished to the owner, unless there is an express warranty agreement that the design professional assumes responsibility for the accuracy of the plans. Accordingly, a contractor who has followed, specifications or directions provided by the owner, or one acting on behalf of the owner, traditionally cannot be held liable for alleged construction defects or insufficiencies attributable to the plans.<sup>200</sup>

In contrast, design-builders assume the responsibilities of a design professional (architect/engineer) and furnish all services – designing, engineering, constructing – necessary to deliver a completed project for an agreed price. A design-builder assumes total responsibility from design through completion -- until “handing over the key” to the turnkey project to the client.<sup>201</sup>

Both systems presume that a single professional or firm working under a contract with the owner maintains ultimate design responsibility for substantially the entire project.<sup>202</sup> While the industry has noted the unique challenges that delegated and specialty designs present, industry responses to date fail to recognize that these practices raise new issues about the basis for imposing design liability.<sup>203</sup> According to Circo; this failure results in part from inadequate attention to the controlling theories of liability. And he argues that at the very least, legal theory must furnish the context to facilitate practical adjustments in contract practices, mainly shared-design. This new approach to allocating design liability must recognize that shared-design responsibility creates interdependence among those who design and build project components, a relationship that requires a more comprehensive contract solution.<sup>204</sup>

In Ethiopia due to design failure in the construction industry, the country, and investors are incurring huge amount of costs. For instance, foreign investors operating at Bole Lemi Industrial park costs millions of dollars in a year due to construction defects such as inaccurate slope utilized in the construction of the drainage lines, Leakages of water pipelines across the park

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<sup>199</sup> See Joel B. Castro, *Evolving Liability for Design-Build Contracts*, pp.2.

<sup>200</sup> *Ibid* at 2

<sup>201</sup> *Ibid* at 2-3

<sup>202</sup> Carl J. Circo, *contract theory and practice, allocating design responsibility in the construction industry*, Florida law review, Vol. 58, at 565

<sup>203</sup> *Ibid* at 565

<sup>204</sup> *Ibid* at 566-567

have been costing the companies in the form of extra water bills. For instance Ayka losing 13 million dollars a year in Ethiopia, as a result of errors during the construction of the industrial park mainly inaccurate slope utilized in the construction of the drainage lines is now causing flood on facilities, and hinders water to flow which result in lack of water supply; in lieu the firms are forced to transport water from other distant places by using trucks which made them to pay high amount of money.<sup>205</sup> In addition as data collected from the intensive interviews<sup>206</sup> and secondary data reviewed such as Standard conditions of contract for the construction of civil work projects<sup>207</sup> and Standard Biding Document for the Procurements of Consultancy Services<sup>208</sup> exhibits that Ethiopia is practically using mainly the Design- Bid- Build type of construction contract. Based on the above discussions and Ethiopian standard bidding document for the procurement of construction consultancy service reveals that the Ethiopian construction contract standard, one could rightly sate that the Ethiopian construction contract standard didn't recognize a shared-design responsibility among who design and build the project.

However, the Ethiopian construction law which is embodied in the Civil Code states that; in the course of performance of the construction contract, the administrative authorities may require the demolition and the reconstruction of any defective work at the expense of the contractor.<sup>209</sup> At this point the law unequivocally referring the possible extent of the liability of the contractor; but it is not uncommon to see the defective work/error pertaining to design which may necessitates the demolition and reconstruction of the defective work.<sup>210</sup> From this one could understand that

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<sup>205</sup> Yahoo.com, Ethiopian Reporter (Media), YohannesAnberbir, Foreign firms operating at Bole Lemmi Industrial Park like Ayka Addis have reported their challenges to the Industrial Affairs Standing Committee of the House of People's Representatives, and the standing committee confirmed the existence of the problem and reported to the Ministry of Industry, YohannesAnberbir, 27 Jun, 2016.

<sup>206</sup> Supra note ---- Interview conducted Director,

<sup>207</sup> Ministry of Works and Urban Development, Standard conditions of contract for the construction of civil work projects, December 1994.

<sup>208</sup> Ethiopian Roads Authority, Standard Bidding Document for the procurement of Consultancy services, Addis Ababa July 2011.

<sup>209</sup> See Civil Code, 1960, art. 3256.

<sup>210</sup> See Building Proclamation 624 of 2009, art.54; Oromiaregion Building proclamation 154 of 2012 art. 5; Peng Mo, Ryan J. Orr, Jianzhong Lu, Addis Ababa Ring Road Project, A Case Study of a Chinese Construction Project in Ethiopia, SHANGHAI, CHINA, November , 2008 in case due to the incompleteness of the original design specification and work conditions on site, the Engineer issued around 200 design variations in the 6 years. Inadequate specifications and the resulting variations led to substantial schedule-growth in the completion of the project.

the possible liability of consultants in certain construction project is neglected. As far as the law is clear it does not need interpretation.

Thus, in this thesis the researcher is arguing that the Ethiopian law and policy makers should reconsider to frame laws that adequately aimed to achieve a shared-design liability in the Ethiopian Construction laws. Furthermore, the Ethiopian Urban Development and Construction Ministry, Ethiopian Roads Authority, Ethiopian Construction Project Management Institute and other construction industry stake holders should develop standard construction contract approach allocating design liability must recognize that shared-design responsibility creates interdependence among those who design and build project components, a relationship that requires a more comprehensive contract solution.

### **3.5 Liability Vis- a-Vis Insurance (Surety) Requirements**

#### **A. Bid Bond/Bid Security**

Among the Government construction contract procurement a pre-requisites is bid security. The primary purpose of bid security is to enable the successful bidder to sign the contract or to create conducive opportunity to maintain or to abide the competitive bidders into the contract.

In Ethiopia the amount of bid security a public body may require shall be in the range of 0.5% to 2% of the total estimated contract price, which the public body has to fix and indicate in the invitation to bid and the bidding document.<sup>211</sup> However, the bid security to be fixed by the public body shall not exceed Birr 50,000.00 (five hundred thousand). The same law clearly states that concerning the procurements of consultancy services in case including construction consultancy services (emphasis added) a public body may not be required bid security in principle. But, exceptionally when the public body believes that the bid security is necessary, the public body may require consultants to bid security. In this case the law is permissive, which gives a discretionary power to the public body to decide whether bid security is necessary or not. As far as the object of bid security is concerned this is to discourage irresponsible bidders on one hand. And the construction sector is characterized by one of highly corruption or rent seeking vulnerable sectors on the other hand; based on these facts the researcher is suggesting that the

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<sup>211</sup>See the FDRE Government Public procurement Directive art. 16.06. 1 &2

law need to be reframed in a way that avoids the discretionary power to the public body or at least further puts certain limitations/criteria.

Finally, a bid security will be forfeited if a bidder withdraws his bid within the validity period thereof or in the case of a successful bidder, if the bidder repudiates the contract or fails to furnish performance security, if so required.<sup>212</sup> Therefore, to substantiate the effective liability of construction consultants in construction contract at the procurement stage, the researcher is argue that the governing law at procurement state ought to be expected to unequivocally state the bid security needed for the consultancy service procurementbased on the criteria set on the bid documents similar with other procurement of goods.

#### **4 Performance Bond/Security**

The performance bond guarantees that the contractor or consultant will execute the work in accordance with the responsibilities in the contract documents. The Ethiopia procurement proclamation states that the type of procurement for which performance bond or contract security is required and the type and amount of contract shall be determined by a directive to be issued by MoFED.<sup>213</sup> In the Ethiopian public procurement proclamation the successful bidder shall provide the performance security performance in an amount equal to 10% of the estimated total price.<sup>214</sup>The same law incorporatedperformance security to protect public work agencies against the damage of contractor/consultant default, and as a result the directive enacted by the Ministry of Finance and Economic Development require a surety bond from the contractor in the amount of the 10% (ten percent) of the contract value,<sup>215</sup> which works for all possible suppliersand may include consultants. However there is still at least two essential issues to be addressed and hence worth to discuss pertaining to construction consultants. These are:

First as far as the procurement proclamation is concerned the 10% performance security shall be the price of the intended contract; in consultancy service procurement case the intended contract shall be the consultancy service contract which is independent contract from the main

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212 See Proclamation No 649/2009 art. 40 (3)

213 See Ibid art 47

214 See Ibid art. 16. 5. 02

215 See Federal Government procurement and property administration proclamation 649 of 2009 art. 47, and Federal Government Procurement directiveart. 16. 5/ 16. !5.2 (Amharic)

construction contract, in which the value of the main contract and consultancy contract most probably unequal. So does the performance security furnished in lieu of consultancy service contract fully meet the objective of the construction industry goals? As far as the construction and consultancy services are interdependent to successfully accomplish certain construction project.

Secondly, though the Federal Government procurement proclamation empowers MoFED to determine the type of procurement for which performance bond or contract security is required, type and amount of contract through directive; and furthermore the Ministry rather than determining by itself through issuing a directive, it has chosen to leave the discretionary power to each public body if additional professional indemnity insurance is required from the consultants. In addition to this, the public procurement directive does not set certain objective standards to make at least uniformity. So taking the complex nature and the contribution the construction sector has for the country's GDP, does the directive needs to be reframed?

Regarding the first question, from the wordings of the Federal Government public procurement proclamation it could be understood that the performance security required pertaining to construction consultants could be 10% of the price of the consultancy contract. Because it can be inferred from the Federal Government procurement directive issued by the Ministry of MoFED, which states that if the public body believes that professional indemnity insurance is required can order the successful bidder to furnish professional indemnity insurance. Furthermore, the existing practice reveals that the performance security required by public body is equal to 10% of the price of the total consultancy service.<sup>216</sup> On the other hand the Federal Building regulation,<sup>217</sup> states that the form and amount of the guarantee to be produced by a registered professional who has reached agreement to carry on the design of Category "B" and "C" buildings, and researcher beliefs worth to show in the following tabular form:

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216 Data collected through Interview conducted with Jimma University's legal service lawyers, AtoChalachehuMegiste, and GetachehuNegash pertaining to the practical application of performance security required from consultants – the consultants is practically required to furnish performance security which is equal to the consultancy service price.

217See the Federal Government Building regulation No 243/2011 art. 19(6), and then after named as the building regulation.

S.N	Building Category	Project cost Birr	Guarantee (% of project cost)	Maximum guarantee in Birr	Duration	Mode of the Guarantee
1	Building Category 'B' building excluding real estate	5,000,000.00	10%	500,000.00	1yr. from completion of the project	From recognized insurance before commencing the project
2	Building category 'C' and real estate	2,500,000.00	20%	500,000.00	“	“
		10,000,000.00	15%	1,500,000.00		
		20,000,000.00	10%	2,000,000.00		

This particular regulation as shown in the above table could not represent all construction projects clearly revealed two important concepts which are different from that are stipulated in the federal government procurement laws. Firstly the standard to be taken to require the designer to furnish the amount of performance security/guarantee shall be the price of the project, not the price of the consultancy service. Secondly the percentage of the performance security required shall not be the same. Rather depending on the type and price of the building it could be different percentage of the project price; for instance, 10%, 15%, or 20% of the price of the project.<sup>218</sup>

Though the building regulation takes the price and category of the building as a base to determine the performance security required from the consultants (designer) which is an essential move to maintain the objective of the building laws to protect the safety, security, and quality of the building,<sup>219</sup> it has its own limitations. Firstly, the building regulation shall apply only for construction of buildings. In other words the regulation may not apply for the construction of other infrastructures such as road, air ports, rail ways, dams, canals, and others. Secondly the

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218. See Ibid above art. 19(6)

219. See the preambles of the Building proclamation, building regulation, condominium proclamation no 370/2003 and its regulation.



building regulation overlooked on the building projects even category 'B' and 'C' when the price of the project is greater than 20,000,000.00 (twenty million).

Therefore, from the discussion above the legal frame work pertaining to performance security requirement for consultancy service in construction projects both in the procurement and building laws should be reframed in a way that sufficiently achieve the objectives of these respective laws- construction laws. Accordingly, the researcher argues that the standard ought to be taken to determine the performance security/guarantee ought to be the price of the project.

When we come to the second issue as discussed under the first issue here in above, contrary to the public procurement directive issued by MoFED which leaves the discretionary power to determine the amount of performance security of construction consultants, the later enacted law, the building regulation reveals that the performance guarantee/security could be determined by the law, not at the construction project plan made by the public body or at the commencement of the procurement of the construction consultancy service. The researcher also argues that the performance security of construction consultants should be determined by the law makers because as experience teaches us and different reports reveals that the procurement and the award of the bidding to the contractor, or the construction consultancy service among others are highly vulnerable to corruption or rent seeking acts.<sup>220</sup>

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220. See supra note above: the report of construction transparency international report, Media Fana BC, Ethio-Reporter and All Africa. Com, world reports on the Ethiopian Construction sector reports on relevant issue.

# CHAPTER FOUR

## CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusion

The questions for this research were the following:

1. 'Has Ethiopia adopted sufficient laws (regulations) which define the liability of consultants in construction contracts?
2. Does the existing Ethiopian construction legal framework set, for what and extent of liability of construction consultants in construction contract?
3. Is there need for further reform of the structure, policy and regulation of the liability of consultants;and if any what should the reform be? In other wordshow the construction laws be reframed for the betterment of construction industry's itself, and to protect the interests of clients or contractors from construction consultants acts of defects/mismanagement by extending their responsibility in Ethiopian construction laws, and construction contracts in particular?
4. What are the lessons that can be drawn from the international experience and recommendations in this respect?

The chapters have discussed the theory, policy and regulation of the construction consultant liability of the country and shown that there are needs for further reform in light of both the international experience and recommendations and the domestic situation. The second chapter has discussed these and indicated the measures that need to be taken in respect of the existing construction consultancy service providers in the country. The third chapter has discussed and examined the Ethiopian construction consultants' liability regulatory frameworks in line with provision of an adequate and effective allocation of liability in both construction laws and contracts respectively. Accordingly, the following paragraphs gather the major findings and the measures that need to be taken by the country.

Firstly, typically when we see the formation of the standard forms of construction agreement/contracts, both at global and domestic level, they are developed by consultants for the consultants; and are pro-consultants. For instance, the conditions of contract prepared by the

International Federation of Consulting Engineers, (FIDIC) are nowadays the most widely used sample forms of contracts for construction projects. In addition, based on the information at <http://www.aia.org>, the American Institute of Architects (AIA) has been the leading professional membership association for licensed architects, emerging professionals and sets the industry standard in contract documentation with more than 100 of its forms and contracts used in the design and construction industry. Furthermore, different surveys revealed that different countries including Ethiopia have been using these standard documents either by incorporating into their own national laws and standard contracts, or by making reference to this standard contract documents through construction contracts.

On the other hand, most construction projects involve the participation of owners, designers and contractors. Depending on the nature and size of the project, the contractual arrangements between these parties may change. In some cases a single consultant a party may play two roles or even all roles such as design, architecture, project administration, arbitration and other engineering services. These different roles should be clearly understood and carefully evaluated to determine the contractual relationship that should lead to the most effective delivery of the project. Furthermore, two or more construction consultants may engage in to a single construction project which may create a difficulty to identify who is liable for what defective performance and to what extent to bears liability. However, in most construction contracts made between the client and consultant overlooked the liability of consultants in line with the overall value of the construction project. The study further revealed that in Ethiopia the standard conditions of construction contract prepared by Ministry of Works and Urban Development (1994), and the standard conditions of construction contract prepared by Public procuring Authority resembles that the liability of construction consultant is neglected in relation to the actual role they play in the construction of certain projects.

Accordingly, the finding of this thesis revealed that in Ethiopiatthere should be a new construction contract which abides all parties involving in the construction of certain project to work in a collaborative way and enable them to allocate liability in equilibrium among all parties to the contract in case a comprehensive or integrate construction contract to enable the consultants jointly and severally liable towards the client.

Secondly, in this study it is proven that engaging in the construction of certain project is a highly risky investment. Equally important that in certain construction of a project the involvement of consultants starting from the pre-construction stage to certifying the accomplishment of the project is indispensable. The defective or error performance of a consultant may result in the total demolition of the building. The study revealed that different countries experience such as France, Spain, and Belgium shows that construction consultants firm owners are not allowed to limit their liability towards the client for serious hidden defects. In addition to this the study revealed that in Ethiopia, the construction consultant firm owners are free to choose which best limits their liability they owe towards the clients or contractor, and hence usually established in the form of Plc. Based on the nature of investment in construction sector which is characterized by highly risky, and other countries experience mainly France, from which our Civil Code provisions are transplanted, the study concludes that in Ethiopia there should be a mandatory provision which oblige the consulting Engineers to be established in a form which may not limit the firm owners liability towards the clients and /or contractor in certain construction project.

Thirdly, the study revealed that the capital adequacy and solvency regulations need to be improved tolerate all the ongoing capital adequacy requirements to risk types and amount.

The amended directive for the registration of construction consultants, has stipulated capital requirements as eligibility criteria for registration of different categories of Construction professionals and consultants ranging from Birr **5,000.00 up to 800,000.00**.<sup>221</sup> According to this directive when a person or persons wanted to invest in a construction consultancy business, the minimum capital stipulated in the directive shall be fulfilled. However, when one see in light with the Commercial Code of Ethiopia which puts minimum capital requirements only regarding Private limited and Share Company as mentioned here in above, it is evident that there is a deviation. As a result, the issue remained unanswered yet; and hence need special attention to reframe the Ethiopian Construction laws pertaining to construction Consultancy service firm initial Capital requirement, in to a construction/building proclamation having equal status with the commercial code of the country.

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221. Ministry of Urban Devt. and Construction Directives for the Registration of Construction Professionals and consultants (Amended) (Directive No 22), Annexes 1 -11: 2013.

Fourthly, the study also indicated that regarding liability allocation and surety/insurance requirement in construction consultancy service procurement and construction contract formation in Ethiopia needs to be improved. As far as the procurement proclamation is concerned the 10% performance security shall be the price of the intended contract; in consultancy service procurement case the intended contract ought to be the consultancy service contract which is independent contract from the main construction contract, in which the value of the main contract and consultancy contract most probably unequal. Basically, the construction and consultancy services are interdependent to successfully accomplish certain construction project.

## **4.2. Recommendation**

The thesis is believed to stimulate public interest and calls for detailed legal and standard conditions of contract reform in the area of ensuing the consultants' liability in Ethiopian construction sector which was not given adequate emphasis nation-wide. Based on the results of the study, the following recommendations are made to ensure a better appreciation for the risks associated with the construction consultants.

1. Consultant has a wide variety of roles to play during the construction process. Because the consultant plays a multifaceted part in the construction project, and is usually involved in the project from the project's inception to its completion, it is important to fully understand consultant and authority. Accordingly, the construction contract should acknowledge all practical roles the consultants may play, and the construction business nature which is characterized by high degree of uncertainty and risks involved, the Ethiopian policy developers and the construction sector regulators should develop a new approach standard condition form construction contract which ensure equilibrium risk allocation, and collaborative working environment in case comprehensive or integrate construction contract model which necessitates all parties involving in construction of a project should sign a single contract document with the client or employer which in effect substantiate joint and several liability among parties to the construction contract.
2. As usually done in the developed world, to minimize commercial risks in construction contract, in Ethiopia there should be a mandatory law which oblige the consulting Engineers to be established in a form which may not limit the firm owners liability towards the clients and /or contractor in certain construction project for hidden defective works.

3. As it is clearly observed in the discussions made above in this thesis, the performance guarantee requirement expected from consultant concerning certain construction contract is limited to the estimated price of the consultancy service contract. As far as the works of consultants are indispensable from the main contract and same risk may happen; and hence the Ethiopian law makers/ construction policy developers should enact or develop laws/policies which oblige the consultants to furnish the minimum performance guarantee bond taking into consideration the estimated price of the project.
4. Over all the finding of this thesis revealed that in construction laws and construction contracts, the roles and liabilities of consultants is neglected. Therefore, the Ethiopian construction industry policy developers and as well as law makers should play a leading role in protecting the industry sector by developing policies and laws among others which adequately address the construction consultants roles and liabilities in a comprehensive way. This may include, enacting regulations recognizing the roles and liabilities of Architecture, designer, construction supervisors, and etc.; and their respective professional code of conduct.

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