Contract and Contract Mobilization

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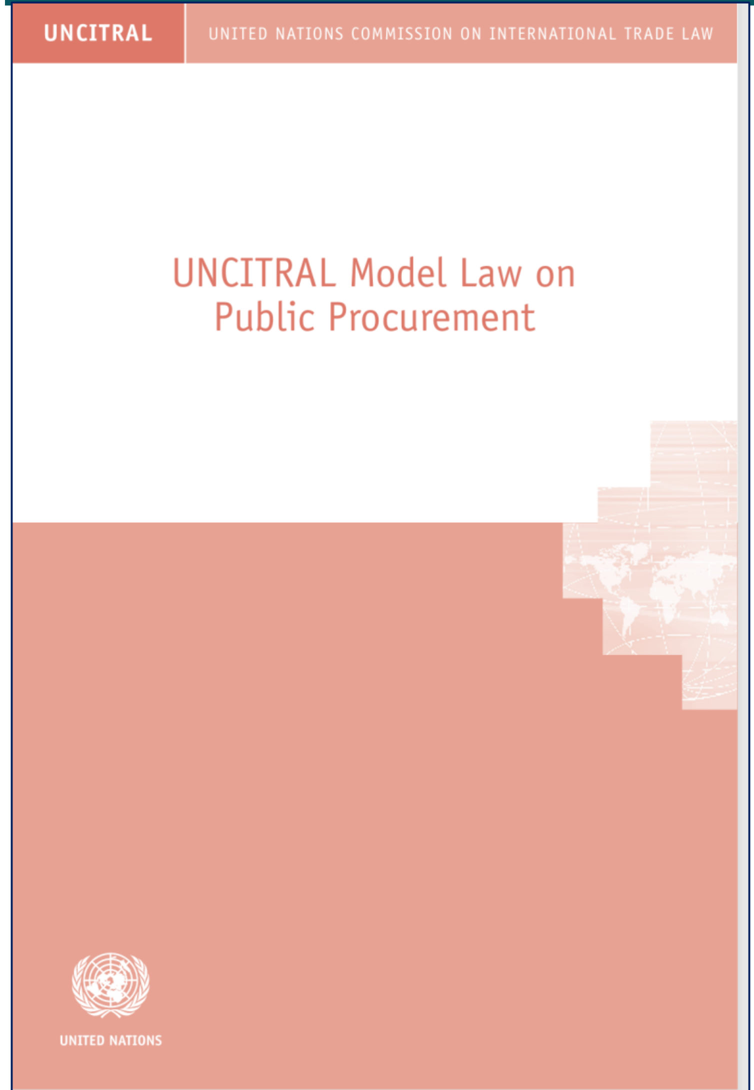
नेपालको खरिद कानुन



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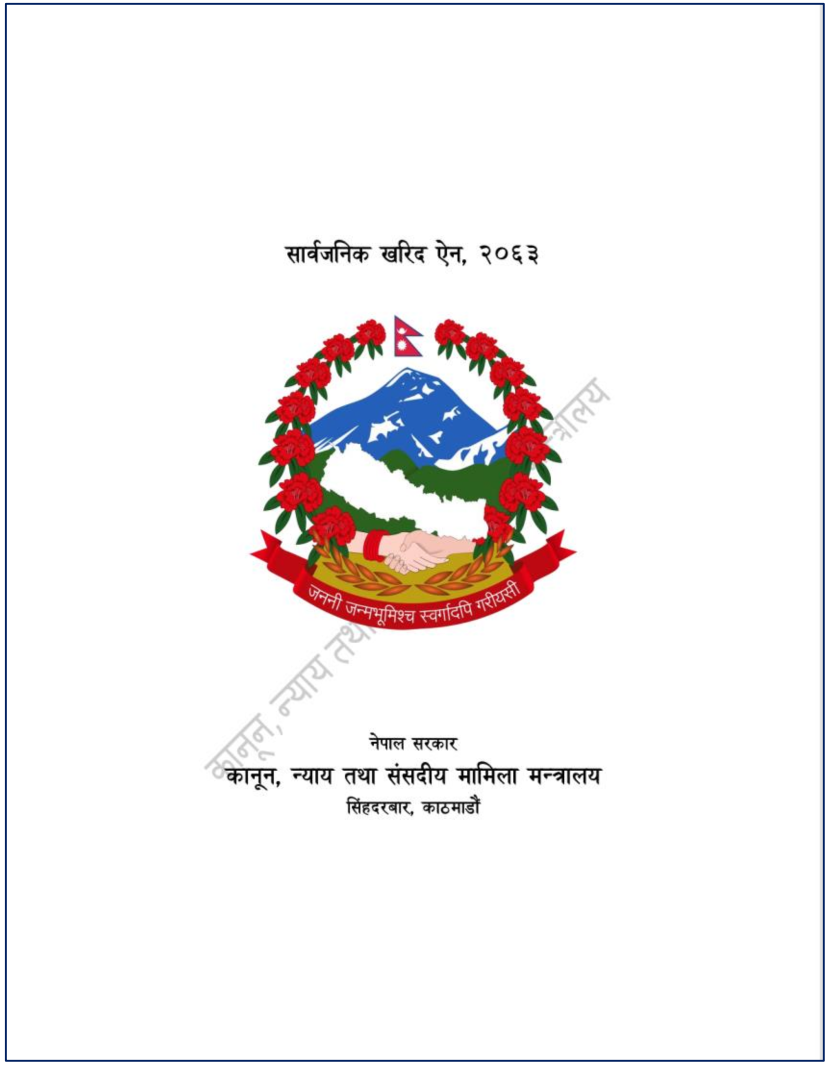
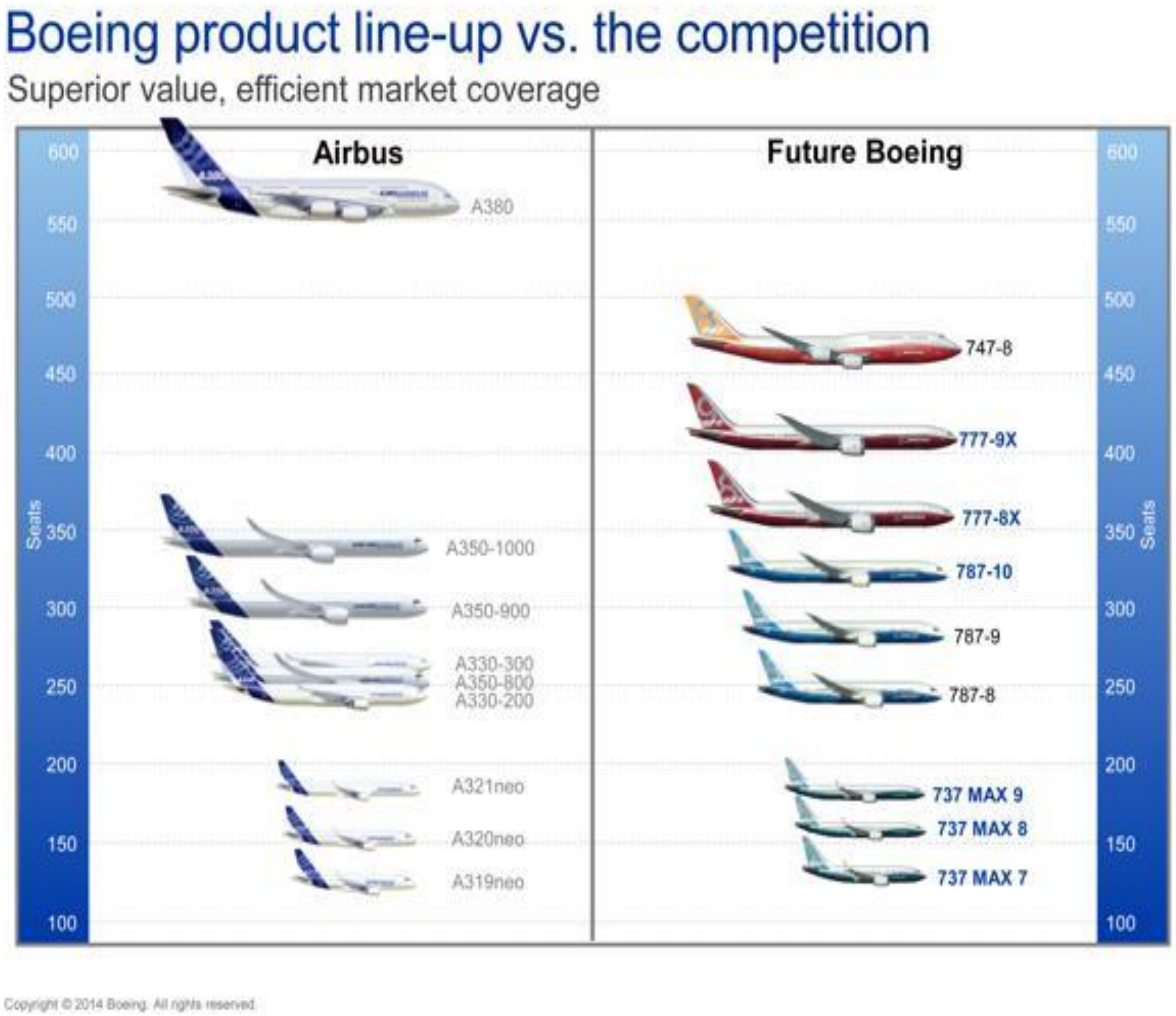


Procurement Simple?
Or Difficult?



Introduction to contract, करार सम्झौता

A contract is an agreement between two or more parties whereby each party promises to do, or not to do, something; a transaction involving two or more individuals, whereby each has reciprocal rights to demand the performance of what is promised. (Friedman, Jack P., Dictionary of Business Terms Page 123)

An advertisement or request for bids for the sale of a particular property or the erection or construction of a particular structure is merely an **invitation for offers** that cannot be accepted by any particular bid. A submitted bid is, however, **an offer**, which upon acceptance by the offeree becomes **a valid contract**.

Essential Elements of a Contract

Agreement सम्झौता:

The primary element that creates a contract between parties is an agreement, which is an offer and acceptance, that forms consideration for the parties concerned.

Free Consent स्वतन्त्र सहमति:

Consent of the parties is another important aspect of a contract, which means the parties entering into the, must agree upon the same thing in the same sense. The t is said to be free when it is not influenced by coercion, undue influence, fraud, misrepresentation or mistake.

Competency सक्षमता:

Competency refers to the capacity of the parties to enter into the contract, i.e. he/she has reached the age of maturity, he/she must be of sound mind, and he/she is not disqualified from contracting, as per the law like the alien enemy, foreign sovereigns, etc.

Consideration प्रतिफल:

It implies the price agreed to be paid for the promisor’s obligation by the promisee. It must be adequate and lawful.

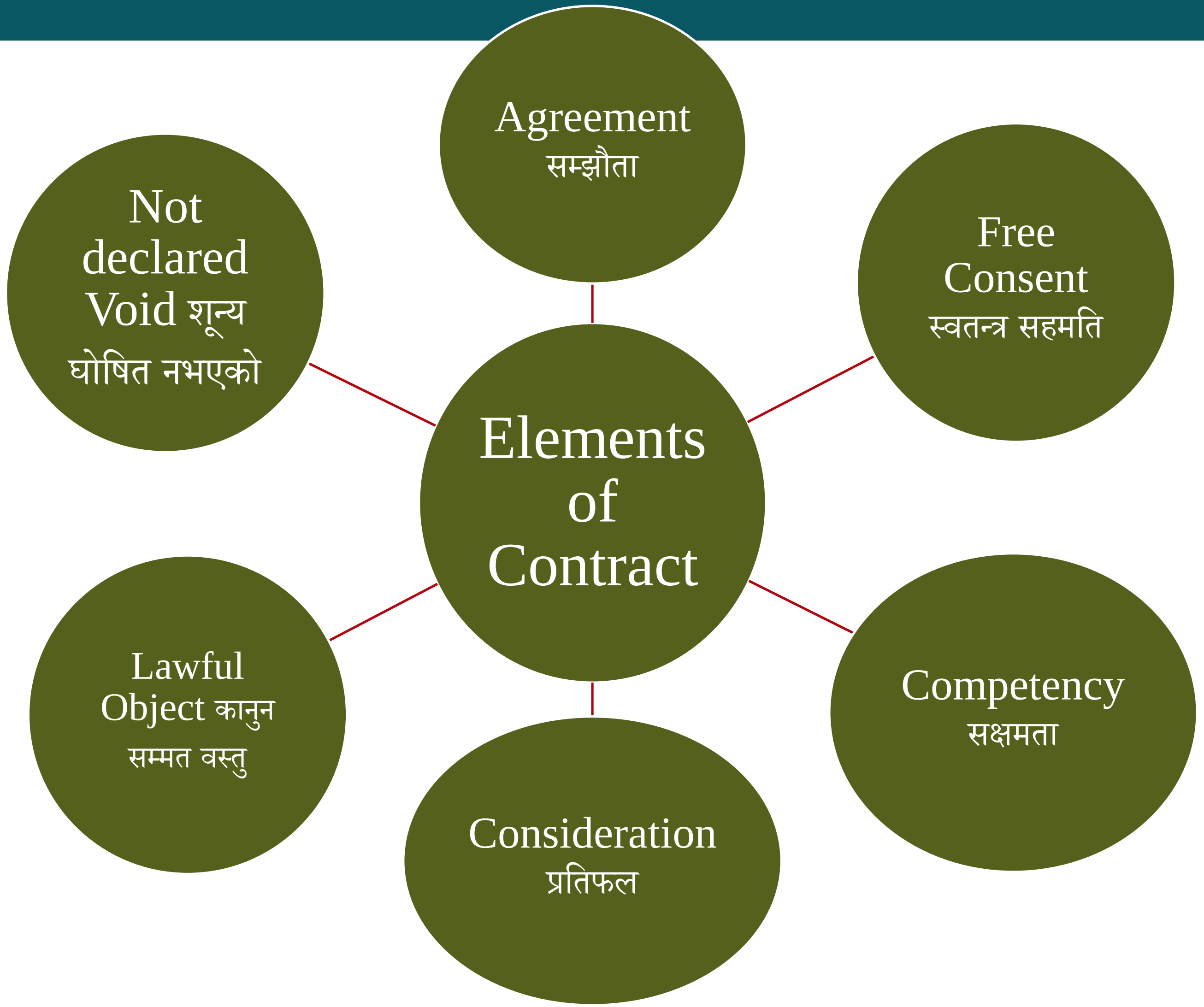
Lawful object कानुन/विधि सम्मत वस्तु:

The object for which the contract is created must be lawful, or else it is declared void.

Not expressly declared as void (शून्य घोषित नगरिएको):

The law should not expressly declare the contract as void, such as a contract in restraint of marriage, trade, or legal proceedings.

Essential Elements of a Contract



Process of a Contract

Offer or Proposal प्रस्ताव

Acceptance स्वीकार

Agreement सम्झौता

Legal Enforceability कानुनी रूपमा कार्यान्वयन

Contract करार

Process of a Contract

"It's a pretty standard contract - just sign here below, ' ... and hung by the neck until dead.'"

Process of a contract

- Offer and Acceptance: Offer of one party accepted by another - 'we agree to build a House in NRs 20.5 Crores'
- Acceptance: Before expiry
- Exchange of a promise: for a promise or act
- Adequacy of consideration: The contracting party needs to explore
- Valid and Binding
- Agreement: Latin Term “Consensus ad idem” – a meeting of minds or all parties involved in a contract have a shared understanding and agreement on the contract's essential terms and conditions

Contract Agreement
सार्वजनिक खरिद ऐन, २०६३ को व्यवस्था

- **"खरिद सम्झौता"** भन्नाले सार्वजनिक निकाय र आपूर्तिकर्ता वा निर्माण व्यवसायी वा परामर्शदाता वा सेवाप्रदायक बीच भएको खरिदसम्बन्धी सम्झौता *(दफा:२)*
- **फुटकर खरिद बाहेक** अन्य खरिद गर्दा खरिद सम्झौता गर्नु पर्ने (दफा:५२)
- **खरिद सम्झौतामा संशोधन (दफा:५३)** : कामको आधारभूत प्रकृति वा क्षेत्र परिवर्तन नहुने गरी दुवै पक्षको लिखित सहमतिबाट खरिद सम्झौतामा अन्यथा व्यवस्था भएकोमा बाहेक खरिद सम्झौतामा संशोधन गर्न सकिनेछ ।

  तर भेरियशन आदेश जारी गर्दा वा दफा ५५ बमोजिम मूल्य समायोजन (Price Adjustment) गर्दा खरिद सम्झौतामा संशोधन गर्नु पर्ने छैन

Other important elements of the Contract

- There must be **at least two parties** to constitute a contract, entering one who proposes, and another accepts the same.
- The parties entering into the contract **must intend to create a legal obligation for one another**.
- It must be in **writing**.
- There must be certainty of meaning, the terms of the parties must be clear to the parties, i.e. the party should not interpret anything wrong, and there **must be a consensus ad idem**.
- There should be **a possibility of performing the contract**.

Types of Contract

- Types of Contract
  - On the Basis of
    - Validity
      - Valid
      - Void
      - Voidable
      - Illegal
      - Unenforceable
    - Formation
      - Express
      - Implied
      - Quasi अधुरा
      - E-Contract
    - Performance
      - Executed
      - Executory
      - Partly executed and Partly Executory
      - Unilateral
      - Bilateral

Types of Contract

Valid contract वैध करार

- If the contract entered into by the parties and satisfies all the elements of a valid contract as per the act, it is said to be a valid contract.

Void contract शून्य करार

- A contract that ceases to be enforceable by law becomes void when it ceases to be enforceable. Thus a void contract is one that cannot be enforced by a court of law.
- **Example**: Mr A agrees to write a book with a publisher. After few days, A dies in an accident. Here the contract becomes void due to the impossibility of performance of the contract.

Voidable contract शून्य योग्य करार

- an agreement that is enforceable by law at the option of one or more parties but not at the option of the other or others is a voidable contract.
- This means where one of the parties to the agreement is in a position or is legally entitled or authorized to avoid performing his part, then the agreement is treated and becomes voidable.
- Such a right might arise from the fact that the contract may have been brought about by one of the parties by **coercion**, **undue influence**, **fraud** , or **misrepresentation** , and hence the other party has a right to treat it as a voidable contract.

Types of Contract

Illegal contract गैर कानुनी

- Illegal contract are those that are forbidden by law. All illegal contracts are hence void also. Because of the illegality of their nature, they cannot be enforced by any court of law.
- In fact, even associated contracts cannot be enforced. Contracts which are opposed to public policy or immoral are illegal. Similarly, contracts to commit a crime like supari contracts are illegal contracts.

Unenforceable contract कार्यान्वयन गर्न नसकिने करार

- A type of contract which satisfies all the requirements of the contract but has technical defects is called an unenforceable contract.
- A contract is said to have a technical defect when it does not fulfil the legal formalities required by some other act. When such legal formalities are compiled are complied with, later on, the act becomes enforceable.

Types of Contract

Express Contracts वचन

- A contract made by word spoken or written.
- if a proposal or acceptance of any promise is made in words the promise is said to be d.
- **Example:** A says to B ‘will you purchase my bike for Rs.20,000?” B says to A “Yes”.

Implied Contract निहित

- A contract inferred by
  - The conduct of person
  - The circumstances of the case.
- By implies contract means implied by law (i.e.) the law <u>implied a contract</u> through parties never intended.

Example: A stops a taxi by waving his hand and takes his seat. There is an implied contract that A will pay the prescribed fare.

Types of Contract

Quasi-contract अधुरो

- In such a type of contract, the rights and obligations arise not by an agreement but by **operation of law**.
- **Example:** If Mr A leaves his goods at Mr B's shop by mistake, then it is for Mr. B to return the goods or to compensate for the price.
- **Example**: Ordered and paid by A, delivered to B and consumed, B must pay A

E-contract

- An e-contract is a contract made through the digital mode.
- **Example:** Via Internet

Executed contract कार्यान्वित

- **In an executed contract both the parties have performed their promises under a contract.**
- **Example:** A contracts to buy a car from B by paying cash, and B instantly delivers his car.

Executory contract कार्यान्वयन हुने

- In a Executory contract both the parties are yet to perform their promises.
- **Example:** A sells his car to B for Rs. 2 lakh. If A is still to deliver the car and B is yet to pay the price, it is an executory contract.

Types of Contract

Partly Executed and partly executory contract

- In a partly executed and partly executory contract, one party has already performed his promised and the other party has yet to execute his promise.
- **Example:** Anuj promises to pay Rs. 1000 to anyone who finds his lost cell phone. B finds and returns it to Anuj. From the time B found the cellphone, the contract came into existence. Now Anuj has to perform his promise, i.e. the payment of Rs. 1,000.

Unilateral Contract एकांकी करार

- A unilateral contract is also known as a **one-sided contract**. It is a type of contract where only one party has to perform his promise.

Bilateral contract

- A Bilateral contract is one where the obligation or promise is outstanding on the part of both the parties. It is also known as a **two-sided contract**.
- **Example**: Aj promises to sell his car to Bj for Rs. 1 lakh and agrees to deliver the car on the receipt of the payment by the end of the week. The contract is bilateral as both the parties have exchanged a promise to be performed within a stipulated time.

Types of Contracts

- Lump-sum fixed price
- Unit price
- Fixed price with escalation (price adjustment)
- Guaranteed maximum price (target price: gain share and pain share)
- Cost plus incentive fee (time/cost goals)
- Cost plus fixed fee
- Cost plus a percentage of cost

Contract Documents and their Priority

The documents forming the Contract shall be interpreted in the following order of priority:

(a) Contract Agreement,
(b) Letter of Acceptance,
(c) Contractor’s Bid,
(d) Special Conditions of Contract,
(e) General Conditions of Contract,
(f) Specifications,
(g) Drawings,
(h) Bill of Quantities (or Schedules of Prices for lump sum contracts), and
(i) Any other document listed in the SCC as forming part of the Contract.

Procurement Contract

खरिद सम्झौताका शर्तहरु (दफा:५२)

- खरिद सम्झौताका पक्षहरुको नाम र ठेगाना, फोन, फ्याक्स नम्बर र सम्झौता कार्यान्वयनका लागि सम्पर्क राख्ने व्यक्ति,
- खरिद सम्झौताको कार्य क्षेत्र,
- खरिद सम्झौतामा रहेका लिखतहरुको विवरण र प्राथमिकताको क्रम,
- कार्य सम्पादन तालिका,
- आपूर्ति समय, कार्य सम्पादन गर्नु पर्ने समय वा म्याद थप गर्न सकिने नसकिने व्यवस्था,
- खरिद सम्झौताको रकम वा सो निर्धारण गर्ने तरिका,
- मालसामान, निर्माण कार्य वा सेवा स्वीकार हुने शर्तहरु,
- पेश्की भुक्तानी, विदेशी मुद्राको भुक्तानी लगायत भुक्तानीका शर्त र तरिका,
- काबु बाहिरको परिस्थिति (फोर्श मेजर),
- मूल्य समायोजन गर्न सकिने भए सोको व्यवस्था,
- खरिद सम्झौता सशोधन र भेरिएसन आदेश जारी गर्न सकिने भए सोको व्यवस्था,
- विमा आवश्यक भएमा सो सम्बन्धी व्यवस्था

Procurement Contract

खरिद सम्झौताका शर्तहरु (दफा:५२)

- आवश्यक पर्ने जमानत,
- निर्धारित अवधिमा कार्य सम्पादन हुन नसके वापतको पूर्व निर्धारित क्षतिपूर्ति (लिक्विडेटेड ड्यामेजेज),
- निर्धारित अवधि भन्दा अगाडि नै कार्य सम्पादन भएमा दिने बोनस सम्बन्धी व्यवस्था,
- खरिद सम्झौता रद्द गर्न सक्ने व्यवस्था,
- सब कन्ट्र्याक्ट गर्न सकिने वा नसकिने व्यवस्था,
- विवाद समाधानको संयन्त्र,
- लागू हुने कानून, र
- तोकिए बमोजिमका अन्य कुराहरु ।

Importance of contract management

सम्झौता कार्यान्वयनको प्रभावकारीता

- खरिद सम्झौताले नियोक्ता (Employer) र ठेकेदार (Contractor) को *काम तथा दायित्व* स्थापना हुने
- तोकिएको काम र दायित्वको पालना नहुँदा *दुवै पक्षलाई जोखिम* हुन सक्ने
- जोखिमको अवस्था *खरिद सम्झौताको उल्लंघनको कारक* हुने
- सम्झौता उल्लंघनबाट *करारको अन्त्य वा । र क्षतिपूर्ति गर्नु पर्ने अवस्थाहरु सिर्जना हुने*
- क्षतिपूर्तिको लागि *दावीको प्रावधानहरु अवलम्बन* गर्नु पर्ने
- उल्लंघनको सघनता अनुसार *करारको अन्त्य गर्न सकिने*
- करारको अन्त्य हुने अवस्थामा प्राप्त हुने *उपचारहरुको निर्धारण*

Objectives of Contract Management

- Ensuring compliance with legal and regulatory requirements
- Managing risks associated with contracts
- Optimizing costs and improving efficiency
- Enhancing communications and relationships with contracting parties
- Monitoring and evaluating contract performance

Good contract management

Increase Efficiency

- Prepare, from the onset, a contract management plan and mobilize the relevant resources for it.
- Support ongoing monitoring of a contractor's performance.
- Operate a robust contract administration system and maintain a reliable record management system.

Reduce Risk

- Anticipate what could go wrong, e.g., payment delays, right of access to site.
- Put in place mitigation measures to address any identified risks.
- Manage the closure of the project, ensuring that no pending issues or obligations remain unaddressed.

Deliver Value for Money

- Contractor meets the requirements of the project.
- Projects are completed on time or earlier.
- Applicable legislation is complied with.

Contract Management Process (Client Perspective)

Precontract Award

- Develop Risk Assessment
- Develop Contract management Strategy
- Develop Contract management Plan

Contract Administration

- Record Management
- Performance Management
- Managing Payment
- Managing Changes
- Claim and dispute Management

Contract Closure

- Contract Close-out
- Post Contract Review
- Filling Contract Records

Contract Administration: Responsibility Matrix

Activity	Client	Consultant	Contractor
Plan and Design	Give clear requirements	Design based on best information, best practice and options	May submit alternate design
Measurement	Final approval	Check and certify	Perform
Interim Bills	Pay Timely	Check and certify	Prepare and submit
Work progress	Arrange meets, work solutions	Monitor and advice	Keep up as per schedule, promptly report problems
Payment	Pay promptly	Certify promptly	Submit Bills, evidence

Contract Administration: Responsibility Matrix

Activity	Client	Consultant	Contractor
Quality Control	Commitment	Check and certify	Commit, plan, implement
Documentation	Review and approve	Document well	Study docs well, comment constructively
Tender	Final approval	Prepare carefully	Study and Fill carefully, competitively
Tender evaluation	Criteria approval , Final approval	Evaluate impartially based on accepted criteria	Exert no undue pressure
Mobilisation Advance	Pay promptly	Certify, check guarantee, recovery	Ask for, utilise properly and pay back timely

Contract Administration: Responsibility Matrix

Activity	Client	Consultant	Contractor
Claims	Respond , negotiate, settle	Study and certify on time	Raise genuine ones on time, negotiate and settle
Variations	Decide where cost is increasing	Certify the needful ones with proper justifications	Raise issue, get approval and Implement
Rate revision	Final approval	Verify critically	Ask for genuine rates
Price adjustment	Final approval	Check impartially, recommend	Ask for genuine amount only, support with docs
Claims	Respond , negotiate, settle	Study and certify on time	Raise genuine ones on time, negotiate and settle

Contract Administration: Responsibility Matrix

Activity	Client	Consultant	Contractor
Termination	Final approval	Evaluate works impartially	Help evaluation
Adjudication	Facilitation	Prepare documents	Facilitation
Arbitration	Nominate arbitrator, furnish docs, attend	Prepare documents, justifications	Nominate arbitrator and furnish documents, attend, accept
Final Account	Approve	Check and recommend	Prepare and submit on time
Defect Liability	Relieve contractor	List , check rectification and certify	Rectify defects
Certification	Relieve contractor and consultant	Certify Finally	Apply for certificate

Contractor's mobilization (with discussion on different activities)

Mobilization in construction is a critical phase that sets the foundation for a successful project. It involves the **preparation and organization required before the actual construction work begins**.

Mobilization in construction refers to the **process of preparing and organizing resources, equipment, and personnel necessary for a construction project**. This phase ensures that all elements are in place to start work efficiently and effectively. Mobilization involves activities such as setting up site offices, arranging for construction equipment, and procuring materials.

Contractor’s Mobilization

Activity	Details
Site Preparation	Clearing and preparing the construction site, including necessary demolition or site clearing.
Resource Allocation	Ensuring that equipment, materials, and personnel are available and ready for deployment.
Administrative Setup	Establishing project management systems, communication protocols, and safety measures.
Logistics Coordination	Managing the transportation and delivery of materials and equipment to the site.
Technical Management	Make ready for deployment of technical personnel, equipment, laboratories, and other logistics used for quality control and survey

Types of mobilization costs

Mobilization in Construction

Administrative Mobilization

1.1. Project Office

2.2. Administrative, Account, Technical Staffs,

3.3 Site Camps, Store, Yards, etc.

4.4. Office Logistics, equipment, etc.

5.5. Vehicles, etc.

6.6. Expenses for Banking Securities, Insurance, License, Renewal fees,

•Construction-related mobilization

1. Machinery and Plant
2. Technical Staffs
3. Equipment
4. Construction Materials
5. Skilled and unskilled Manpower
6. Operators,
7. Fuel, Lubricants
8. Maintenance

Remobilization

1. Remobilization for correction
2. Cost for remedial actions
3. Defect Liability

Administrative mobilization

Administrative mobilization costs are things that take time and money but might not be tied directly to the actual performance of work. These can include expenses like:

- Contractor licensing
- Securing required construction bonds
- Permitting
- Even back office and project planning activities such as creating the project schedule, trade sequencing, and finalizing and reviewing plans — these all require time and funds, too.

Construction related mobilization

All of the activities described above relate to the construction industry, but there are mobilization activities that more closely relate to the **actual work** that will be performed.

- Mobile office transportation and/or construction
- Access road construction
- Equipment rental & transportation
- Utility installation
- Material storage facilities
- Transportation of job site prep materials
- Fencing and security systems installation
- Transportation, fuel, equipment rental, initial materials, and tools aren’t free, and they don’t happen instantaneously. Also, some site prep activities, setting up site office trailers, etc. will take place before the first progress payment rolls in.

Mobilization Process

Initial Planning

- The mobilization process begins with thorough planning.
- This includes defining the scope of work, estimating resource needs, and creating a timeline for mobilization activities.
- Planning ensures that all aspects of mobilization are addressed and organized effectively.

Resource and Equipment Setup

- Once planning is complete, the next step involves setting up the necessary resources and equipment.
- This includes arranging for the delivery of materials, setting up construction equipment, and ensuring that personnel are ready to begin work.

Site Organization

- Organizing the construction site involves setting up site offices, storage areas, and temporary facilities. Proper site organization ensures that everything is in place for efficient construction operations.

Monitoring and Adjustment

- During the mobilization phase, it’s crucial to monitor progress and make adjustments as needed.
- This includes addressing any issues that arise, coordinating with stakeholders, and ensuring that mobilization activities stay on track.

Remobilization: **Returning to the job site**

- **Remobilization: Returning to the jobsite**
- Remobilization occurs when a construction business must undertake additional mobilization activities after initial mobilization has already taken place.
- A contractor must return to the job for some reason (like poor scheduling or unanticipated delays**),** they might be undertaking additional costs to pick up where they left off.
- In situations where a return to the job site is necessary, contractors may be able to negotiate a change order (Variations) with the owner to recover some or all of the costs of mobilization.
- If a construction business must remobilize due to its own actions — such as defective work — those costs may not be recoverable

Mobilization fee

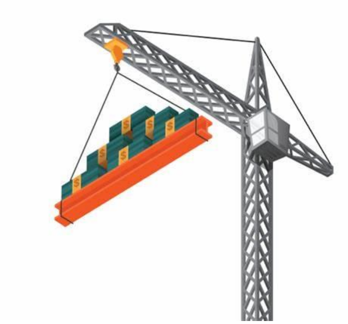
- A construction mobilization fee is typically the cost of assembling the contractor's equipment and personnel on-site.
- It is often calculated as a percentage of the total contract value, ranging from 5% to 15%.
- However, mobilization costs tend to be under 10% and even as low as 2%
- Mobilization payment is often calculated as a percentage of the total contract value, ranging from 5% to 15%, depending on the project’s complexity and the contractor’s financial requirements.
- The exact percentage is negotiated between the client and the contractor and is detailed in the contract.
- Client shares the mobilization cost of complex and complicated equipments or loaded in construction BoQ rates, which should be mentioned in the Bid Documents

Mobilization percentages

- GCC Clause 57.1 provisioned for advance payment to the Contractor as provisioned in SCC
- Advance Payments are provided in two equal installments against an unconditional bank guarantee from a Commercial Bank or Financial Institution eligible to issue a Bank Guarantee as per prevailing Law in Nepal in a form acceptable to the Employer in amounts equal to the advance payment.
- The guarantee shall remain effective until the advance payment has been repaid, but the amount of the guarantee shall be progressively reduced by the amounts repaid by the Contractor. Interest shall not be charged on the advance payment.
- **GCC Clause 57.2 restricts the Contractor to use the advance payment only to pay for Equipment, Plant, Materials, and mobilization expenses required specifically for the execution of the Contract.**

Mobilization percentages

- The Contractor shall demonstrate that advance payment has been used in this way by supplying copies of invoices or other documents to the Project Manager.
- According to GCC Clause 57.3 the advance payment shall be repaid by deducting proportionate amounts, as stated in SCC, from payments otherwise due Contractor, following the schedule of completed percentages of the Works on a payment basis.
- **No account shall be taken of the advance payment or its repayment in assessing valuations of work done, Variations, price adjustments, Compensation Events, Bonuses, or Liquidated Damages.**



Mobilization percentages

- In ADB and World Bank-funded Contracts the mobilization advance was 15-20% of the Contract amount to be paid in two equal installments
- Considering the poor performance of contractors it has reduced to 10%
- In JICA projects it is 15%
- In GoN-funded projects it was 15-20%, but now reduced to 10% in two equal installments
- For the Second installment, the contractor has to show evidence of actual mobilization; establishment of construction offices, stores, site camps, deployment of machines, Plants, manpower, etc for all projects.

Mobilization Advance

Mobilization Advance is paid to the Contractor against the **unconditional Bank guarantee**.

- An **unconditional bank guarantee** is a promise by a bank or financial institution to pay a specified amount on demand, regardless of any disputes or conditions.
- The beneficiary can demand payment without proving any default or breach of contract and the Bank must **pay immediately**
- It acts as a financial safety net, ensuring that the beneficiary can access funds quickly if needed.
- Courts are generally reluctant to interfere with unconditional guarantees

Conclusion

Proper Mobilization ensures

- Efficient Project Start
- Cost Management
- Safety and Compliance
- Enhancing Project Efficiency

Mobilization is a crucial phase in construction that ensures a smooth and efficient project start. By understanding its components and importance, construction teams can enhance their mobilization efforts, leading to successful project outcomes and improved efficiency.

Thank You