



This project is funded by the European Union

## Contract Conditions and ensuring compliance

### Session 4.3 and 4.4

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# Outline

- Fundamentals of contracting-the need for contracts
- Integrating environmental and social functions in contracts
- Elements of a Contract
- Conditions of a contract- entry points for GPP/SPP
- Contract compliance management

# What is a Contract?

- It is a legally binding agreement between two or more parties whereby one or more of them undertakes to do some act in return for the other parties themselves promising to do some act.
- It can be made in writing, verbally or created by conduct. However Government Procurement Contracts **are** required to be in writing at all times

# Components of a contract,

1. **Legal Capacity** : The parties to the contract must have the legal capacity to enter into a contract. Legal capacity means that the parties are of legal age and are competent. It also means that the party is a legal entity (example: an Institution is a legal entity, a department within an Institution is not). Individuals signing the contract must have the authority to bind the legal entity to the agreement.
2. **Offer & Acceptance** : There must be a genuine intent to enter into the agreement from all parties. Allegations of coercion or intimidation can be grounds to render the contract void.
3. **Consideration** : To be legally enforceable something of value must be given by one party in return for the promise of action, or omission of action by the other party. Most commonly the consideration takes the form of money, but it could be something else of value (example: goods or services).
4. **Legal Purpose** : The purpose of the contract must be for legal endeavours (example: contracts for a supply of illegal drugs would not be enforceable at law).
5. **Conditions** : The contract must specify the terms that will govern the agreement.

# Fundamentals of Contracting

## The Need for Contracts

- To establish the rights and obligations of the procuring entities and supplying organisations.
- The contract is your opportunity to establish what performance you require from your contractor and cement your requirements into a legally binding contractual relationship.
- It is not just a legal document but also has to be practical, effective and workable.
- It identifies the contractor and client obligations, but also the foundation for a productive relationship built on trust

# Fundamentals of Contracting

All contracts mostly include arrangements governing:

- Health & Safety,
- Equality and Diversity,
- Environmental considerations
- Economic regeneration
- Community engagement
- Sub contractors
- Hazardous Materials
- Sustainability & the environment



# Fundamentals of Contracting

All contracts should include:

- a clear definition of what is to be provided (Clear focus on functionality)
- an agreed level of service or performance standard ( ability to meet environmental/social functions)
- a means to measure performance against an agreed standard
- pricing mechanisms
- clarity about ownership and IPR
- invoicing arrangements
- agreed break options
- details about premises or locations

# **Elements of Contract - General**

The Contract Documents shall contain among other things :

- **Purpose of the contract**
- **Conditions of the Contract**
- **Set of precise & clear Technical Specs including drawings.**
- **Set of priced BoQ listing the supply or works items & their unit rates or prices.**

# Conditions of Contract

1. General Conditions of Contract (GCC)
2. Special Conditions of Contract (SCC)

The text of the general conditions of contract cannot be amended in any way. If the Procuring Agency wishes to supplement or modify any of the GCC it must refer to the GCC Clause number and enter the modification in the SCC.

## Purpose

- The purpose of the GCC is to provide a tested and proven framework of conditions of contract that are suitable for use in development projects and in public procurement.
- They provide an effective and detailed checklist for public procurement agencies to use when undertaking procurement in accordance with the applicable procurement legislation

# Special Condition of Contracts

## **Purpose**

To allow the Procuring Agency to supplement or modify any of the clauses in the GCC to meet the particular requirements of the goods, works or services for which it is contracting.

The appropriate GCC Clause No. is included in the SCC and the revised condition(s) included.

**GPP requirements could be stipulated related to how a service or construction contract is to be performed and that this include social and environmental considerations. However, the conditions must be accepted by the tenderer to be valid during a possible contract period.**

# Terms and Conditions of Contract

1. Expressed terms - Specifically written into the contract
2. Implied terms - By legislation or custom and practice (Green Building Design Guidelines, SDG 2015, GNH policy, Economic Development Policy, NEPA, Food Safety Act, Labour Act etc.)
3. Conditions regarded as 'Root of the contract'
  - Reject the goods/services
  - Repudiate the contract
  - Claim for damages
4. Warranty regarded as Collateral term
  - Claim for damages
  - Cannot repudiate the contract

# Importance of Conditions of Contract

Why are terms and conditions so important ?

- Clear record
- Reduce risk
- Control
- Audit trail
- Reduce misunderstanding
- Clear remedies in event of breach
- Performance measures
- Deals with non-performance
- Ensure VFM

# Contract Compliance Management

Contract compliance management is a vital part of the procurement cycle and can be defined as:

The management of the interface between the client and the contractor to ensure that the relationship and contract performance are optimised to deliver best value

## **Or as**

A number of related activities that together form a structured and **planned system** which enables the proactive management of all aspects of contractual relationships and their desired outcomes

Or put simply as - the pursuit of contractual performance

# Contract Compliance Management

## Deliver and Optimise

Effective contract management will help you to ensure that all your contracts continue to deliver and optimise.

- Value for money
- continuous improvement
- performance compliance by continual measurement
- fulfilment of ongoing demand

## Assign Adequate Resources

- Contract management forms the interface between demand (you, the customer) and supply (the contractor)
- Good contract management takes time and effort and adequate resources must be assigned with relationship management arrangements in place

# Contract Compliance Management

## Using the Right People

Well managed contracts have people dedicated to the task that possess the level of knowledge and skills (business, contractual and technical) that are appropriate to the task and can understand both sides of the arrangement. Their responsibilities are clearly defined including:

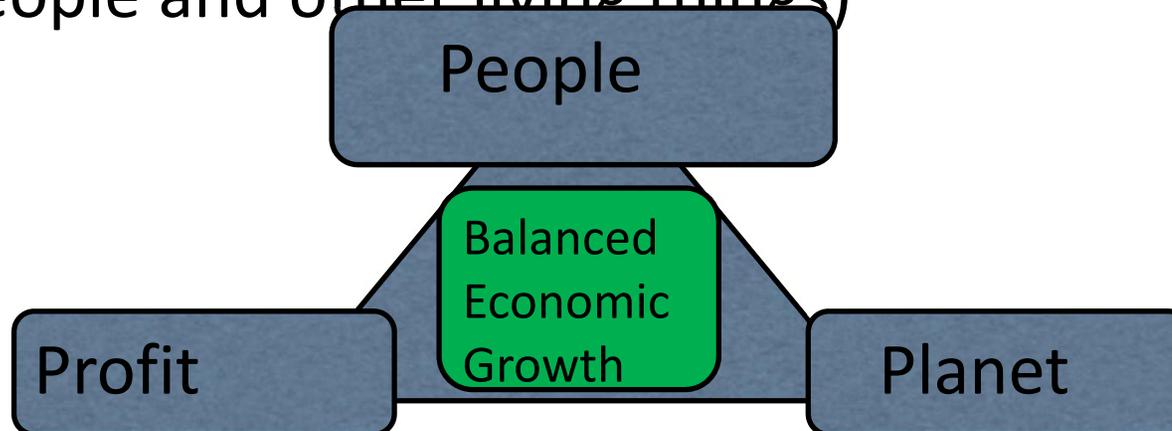
- Financial
- Technical
- Risk management
- Performance
- Relationship management
- ???

# Sustainable development??

‘Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’

# Dimensions of sustainability

- **Profit** (economic performance), **People** (social sustainability) and **Planet** (environmental sustainability)
  - **Economics**, **Environment** and **Equity** (social justice)
  - **Resources** (the wise use and management of economic and natural resources) and **Respect** (for people and other living things)



# Sustainable development

- Sustainable development requires the use of a long-term horizon for decision making.
- Sustainable development recognises the interdependence of economic, environmental, and social wellbeing.
- Sustainable development depends on decision-making that is inclusive, participatory, and transparent.
- Sustainable development promotes equity between generations and among different groups in society.
- Sustainable development is anticipatory: it promotes efforts to prevent problems and minimise risks as the first course of action.

# What are the key sustainability concerns

- **Minimise environmental pollution**, damage and degradation from industrial activity
- **Manage waste products** (often referred to as the 3Rs: reduction, re-use, recycling)
- **Reduce greenhouse gas** (GHG) emissions, or reduce the ‘carbon footprint’ of organisational activity
- Minimise the use of **non-renewable** materials and resources
- Design or adapt production processes to be environmentally ‘clean’, resource-efficient and safe for workers
- Minimise **negative impacts on communities** and social amenities from business activity
- Ensure the **ethical** and responsible treatment of labour, supply chains and communities
- Build and manage **sustainable production capacity**
- **Using local, small and diverse suppliers where possible**

# Sustainable Procurement contributes towards 3 P's

<p><b>Profit:</b> adding economic value</p>	<ul style="list-style-type: none"> <li>• Securing value for money</li> <li>• Effective investment appraisal and capital purchasing</li> </ul>	<ul style="list-style-type: none"> <li>• Cost management and budgetary control</li> <li>• Added value</li> <li>• Ethical trading</li> </ul>
<p><b>Planet:</b> adding environmental value</p>	<ul style="list-style-type: none"> <li>• Input to design and specification of green products and services</li> <li>• Sourcing of green materials and resources</li> <li>• Green sourcing</li> </ul>	<ul style="list-style-type: none"> <li>• Reducing the waste of resources throughout the sourcing cycle</li> <li>• Managing logistics to minimise waste, pollution, GHG emissions and environmental impacts</li> </ul>
<p><b>People:</b> adding social value</p>	<ul style="list-style-type: none"> <li>• Encouraging diversity in the purchasing team and among suppliers</li> <li>• Monitoring supplier practices</li> </ul>	<ul style="list-style-type: none"> <li>• Input to health and safety of products and services</li> <li>• Fair and ethical trading</li> <li>• Local and small-business sourcing</li> </ul>

# The economic aspect of sustainability for Procurer

- Requires a sound **'business case'** for sustainability
- Encourage the use of more **resource-efficient** goods, services and processes
- Encourages purchasers to evaluate **cost performance** and **value over the whole life of a contract**
- Encourages purchasers to pursue the **elimination of wastes** throughout the supply chain
- Recognises the **need to drive** job creation, develop new markets and support innovation
- Recognises that **sustainable markets and supply chains** are essential for long-term growth

# Contract award in the public sector

## In relation to non-price criteria:

- Lowest price and MEAT criteria for contract award allow issues such as resource consumption and disposal costs, for example, to be taken into account.
- The best opportunity to incorporate sustainability criteria is at the **need definition, specification and pre-qualification stages/Evaluation Stage of the procurement cycle** – and through **Post-tender negotiated improvement agreements**.

# Objectives for sustainable specification

To seek cost-effective alternatives to environmentally or socially unsustainable materials

To minimise waste produced by the product

To maximise the re-use and recycling of materials

To ensure ethical and socially responsible trading and employment practices at all tiers of the supply chain

To maximise access to contracts for small, diverse, local suppliers

# Provisions for Community benefits

Training and skilling programmes

Local hiring and employment programmes

Targets for the use of local, women-owned, minority-owned and SME suppliers and subcontractors

Commitment to hiring responsible contractors

Commitment to pay living or statutory minimum wages

Guaranteed mitigations in excess of those required under local law (eg. addressing environmental impacts)

Commitments or targets for community investment

# Post-tender negotiation

To highlight the importance of sustainability issues and emphasise the need for commitment to sustainability improvements (where required)

To check suppliers' understanding of codes of practice and standards to which they have agreed to adhere (or work towards)

To influence the preferred supplier's forward sustainability agenda and improvement plans

To refine or improve the winning bid, in relation to sustainability targets

To gain supplier agreement to mitigate specific sustainability risks or impacts that may have been identified

To negotiate into the contract any sustainability commitments that could not be delivered through the tender process

# Contract Document (PRR 2009)

- 2.1 Subject to the order of precedence set forth in the Contract Agreement, all documents forming the Contract (and all parts thereof) are intended to be correlative, complementary and mutually explanatory. The Contract Agreement shall be read as a whole.
- 4.3 Entire Agreement : The Contract constitutes the entire agreement between the Purchaser and the Supplier and supersedes all communications, negotiations and agreements (whether written or oral) of the parties with respect thereto made prior to the date of Contract.

# Schedule of contract documents

1. Letter of acceptance of tender
2. Scope of contract document
3. Specification or statement of requirements
4. Technical drawings (where relevant) with reference, sheet and version number
5. General conditions of contract
6. Special conditions of contract
7. Invitation to tender, tender form and attached schedules
8. Any correspondence referred to in the letter of acceptance

## Schedule of contract documents (**SBD Works**)

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

- (1) Contract,
- (2) Letter of Acceptance,
- (3) Contractor's Bid,
- (4) Special Conditions of Contract,
- (5) General Conditions of Contract,
- (6) **Specifications,**
- (7) Drawings,
- (8) Bill of Quantities, and
- (9) *any other document listed in the SCC as forming part of the Contract*

# General contract structure

<i>The agreement</i>	Names and signatures of the parties to the contract
<i>Definitions</i>	Definition of names and terms
<i>General terms</i>	<ul style="list-style-type: none"><li>• <i>General agreements</i> clause</li><li>• <i>Changes, alterations and variations</i> clause</li><li>• <i>Notice</i> clause</li></ul>
<i>Commercial provisions</i>	Rights and obligations of the supplier and of the purchaser <ul style="list-style-type: none"><li>• <i>Passing of title or ownership</i></li><li>• <i>Time of performance</i></li><li>• <i>Inspection or testing</i></li><li>• <i>Delivery and packing</i></li><li>• <i>Assignment</i></li><li>• <i>Liability</i> for damage or loss in transit (and associated insurance costs)</li><li>• <i>Rejection</i>: eg a clause stating the right of the buyer to reject goods for various reasons</li><li>• <i>Payment</i> terms</li></ul>

# General contract structure (*cont.*)

## *Secondary commercial provisions*

- *Confidentiality and intellectual property* protection (where relevant)
- *Indemnity*: eg the supplier guarantees to make good any losses suffered by the buyer
- *Guarantee* clause: eg the supplier guarantees to make good any defects
- *Termination*
- *Arbitration*

## *Standard clauses*

These may include:

- *Waiver*: failure to enforce a 'right' at a given time will not prevent the exercise of that right later
- *Force majeure*: exclusion of liability if a 'major force' outside the control of the parties (eg an act of God, war, flood etc) prevents or delays the performance of the contract
- *Law and jurisdiction*: which nation's laws govern the contract

#### **iv. Form of Contract and Contract Conditions ( Clause 5.2.2.10)**

A sample of the agreement that will be entered into between the parties shall form a part of the bid documents. Conditions setting out the rights and obligations of the parties and the terms and conditions under which the contract will be executed shall form an integral part of the contract. Most of these conditions shall be standard or general conditions, **but there can be a number of special or particular conditions that may be peculiar to the particular contract.**

# Fundamental conditions of the contract

## In addition to Scope, Quantity and Quality (6.3.4)

- **Identification**
- **Specifications**
- **Standards**
- **Responsibilities of the parties**
- Provisions relating to a **guarantee**
- Provisions relating to the costs of **insurance and transportation**
- Provisions relating to **compensation**
- **Lawful requirements relating to the use of local labour and materials**
- Provisions relating to **performance securities**

# SBD Works

10.2 - The Contractor shall pay rates of wages and observe conditions of labour which are not lower than the general level of wages and conditions in Bhutan. The Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's personnel. The Contractor shall comply with all relevant labour laws applicable to the Contractor's personnel, including their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights. The Contractor is required, to the extent practicable and reasonable, to employ national staff and labour with appropriate qualifications and experience.

# SBD Works

- 10.3 - The Contractor shall not engage **child labour and** shall conform to the labour laws/acts, rules and regulations of Bhutan in the execution of Contract work. A child who has not attained the age of 18 years shall not be employed in any work as a labourer. During the continuance of the Contract the Contractor and his Subcontractors shall abide at all times with the labour laws/acts, rules and regulations, including child labour, related enactment and rules made there under

# SBD Works

The Contractor shall assume full responsibility and comply with all applicable safety regulations for the adequacy and safety of site operations and methods of construction and he shall adopt measures to prevent injuries to persons or damage to properties or utilities. He shall hold the Employer harmless from any liability for loss or damage resulting from his failures to take the necessary precautions. He shall avoid undue interference with private business, public travel, or with the work of other contractors. He shall take steps to protect the environment and to minimize noise, pollution or other undesirable effects resulting from his method of operation

## SBD Goods (Evaluation Criteria (ITB 39.3 (e)))

Cost of major replacement components, mandatory spare parts, and service. *(insert one of the following)*

- (i) *The list of items and quantities of major assemblies, components and selected spare parts likely to be required during the initial period of operation specified in BDS Sub-Clause ITB 21.3 is in the List of Goods. An adjustment equal to the total cost of these items, at the unit prices quoted in each Bid, shall be added to the Bid Price, for evaluation purposes only. OR*
- (ii) *The Purchaser will draw up a list of high-usage and high-value items of components and spare parts, along with estimated quantities of usage in the initial period of operation specified in BDS Sub-Clause ITB 21.3. The total cost of these items and quantities will be computed from spare parts unit prices submitted by the Bidder and added to the Bid Price, for evaluation purposes only.*

## SBD Goods (**Evaluation Criteria (ITB 39.3 (e))**)

(e) **Projected operating and maintenance costs.**

Operating and maintenance costs. An adjustment to take into account the operating and maintenance costs of the Goods will be added to the Bid Price, for evaluation purposes only, if specified in BDS Sub-Clause ITB 39.3 (e). The adjustment will be evaluated in accordance with the methodology specified in the BDS Sub-Clause ITB 39.3

### **Specific additional criteria**

*Other specific additional criteria to be considered in the evaluation, and the evaluation method, shall be detailed in BDS Sub-Clause ITB 39.3 (e)]*