

INFRASTRUCTURE AND CONSTRUCTION CONTRACTS



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“infrastructure”

The basic physical and organizational structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or enterprise

Oxford dictionary

- The basic physical systems of a business or nation.
- Transportation, communication, sewage, water and electric systems are all examples of infrastructure.
- These systems tend to be high-cost investments, however, they are vital to a country's economic development and prosperity.
- Infrastructure projects may be funded publicly, privately or through public-private partnerships.

INFRASTRUCTURE PROJECTS

- Modes of creating infrastructure :
 - By the Government on its own
 - Though its own agencies
 - By engaging private contractors
 - By public private partnership (Concession model)
 - Design, Build, Finance, Operations & Transfer Contracts
 - Operation and Management Contracts

■ PPP in Infrastructure Projects

- The “Public Private Partnerships” (PPP) model has established itself as a preferred mode of project implementation, especially in infrastructure projects such as highways, airports, urban infrastructure, transit systems, ports, etc.
- Combine private sector efficiencies and public sector safeguards in delivering services
- Concession Agreements are most prominent examples of implementation of PPP Model across infrastructure sectors

■ CONCESSION AGREEMENT

- Asset and/or service, which has traditionally been provided by the government are provided by the private sector entity under the contractual arrangement.
- In consideration of providing service, the private sector entity receives grant of certain rights and / or financial support from the government.
- The government may exercise some control over the functioning of the private entity by appointing supervising committees, or nominee or by requiring government approval of certain activities

CONCESSION AGREEMENTS

- Other essential features and good practices:
 - Generally a long term arrangement be made between the parties;
 - Time bound completion of construction activities;
 - Operation and /or management only for a specified period of time with extension or renewal potential;
 - Well defined allocation of risk between the private and public sector to the party best suited to manage the risks
 - Pre-determined performance or output standards measurable by public entity. Such structure are expected to leave room for innovation and technology.

CONCESSION AGREEMENTS

- Private sector entity receives cash flows for their investments and/or management of the Project either through a performance linked fee payment from the government entity and/or through user charges from users
- Payments to the Concessionaire / Contractor are typically regulated through rate-of-return or price-cap mechanisms, usually driven by the principle of “efficient financial equilibrium”
- Allows the Concessionaire to earn a fair rate of return on its investments.
- The central focus is on performance of the Services efficiently

ENABLING LAWS

- Legal and regulatory changes have been made in various acts to enable PPPs in the infrastructure sector, across power, transport, telecom and other sectors e.g.
 - The Airport Authority of India Act, 1994
 - The Electricity Act, 2003
 - National Highways Acts, 1956
 - Indian Port Act, 1908
 - The Indian Telegraph Act, 1885

CONCESSION AGREEMENTS

- Commonly adopted forms of PPPs contracts
 - build-own- operate-transfer (BOOT)
 - build-operate-transfer (BOT),
 - design-build-operate-transfer (DBFOT),
 - build-lease-transfer (BLT),
 - operate-maintain-transfer (OMT),
 - management contracts,

CONCESSION AGREEMENTS

- Awarding Concession Agreements
 - Competitive bidding is desirable to ensure economic and technical efficiency;
 - Process starts with some pre-qualification of potential bidders based on financial and technical criteria
 - Under a competitive bidding process some bidder often tend to quote tariffs that are lesser to get project.
 - CVC guidelines prohibits negotiations other than lowest bidder except in some exceptional situations where the government can award concession directly or through bilateral negotiations.

CONSTRUCTION CONTRACTS

- In PPP Concession projects typically the scope of works involves:
 - Construction
 - operation & maintenance.
- For undertaking construction part of the concession, there can be various types of construction contracts which can be awarded by the Concessionaire / Developers

■ Construction Contracts

- Fixed Price Lump sum Contract
- Cost plus
 - Cost Plus (Fixed Percentage) or Guaranteed Maximum Price
- Unit Price (Bill of Quantity or Schedule of rates based)
- Cost-reimbursable alternative

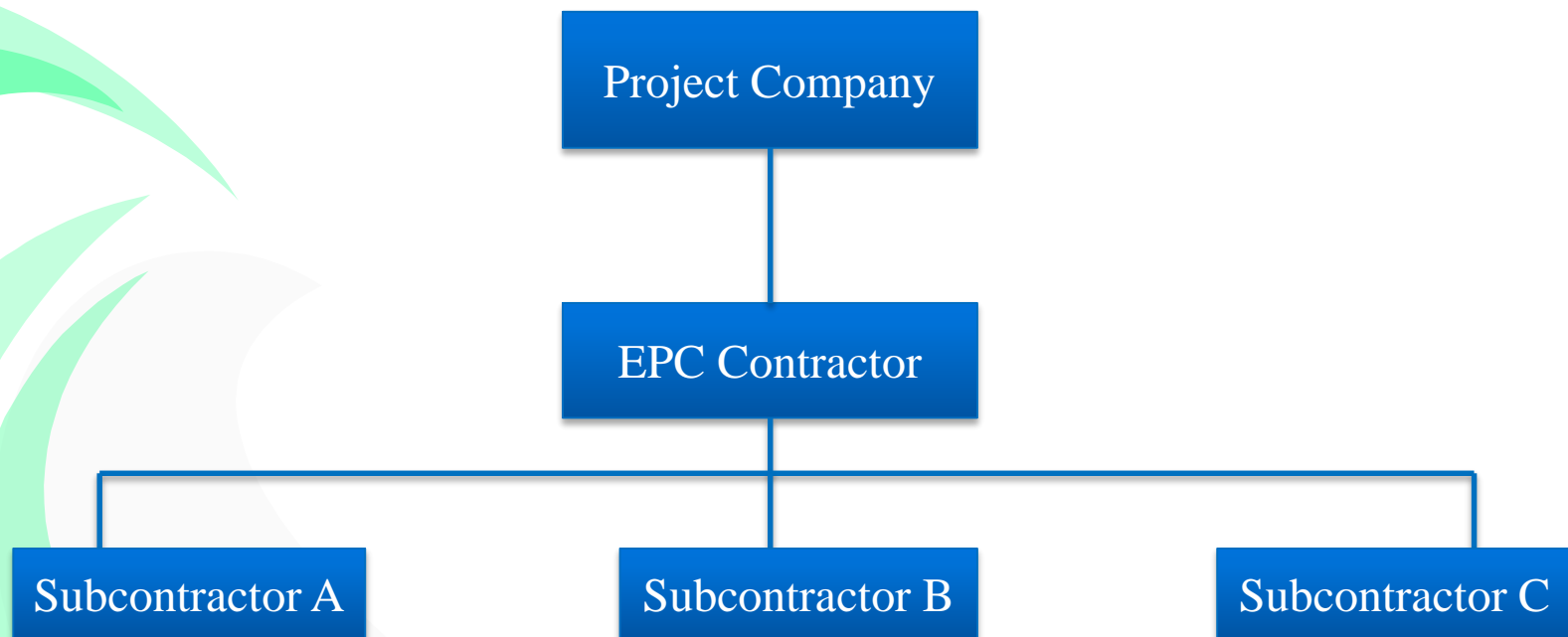
- Types of standard form construction contract
 - FIDIC (Fédération Internationale des ingénieurs–Conselis)
 - NEC (The New Engineering Contract)
 - JCT (Joint Contracts Tribunal)
 - ACA (Association of Consultant Architects)
 - Chartered institute of Building
 - Other forms (less user)
 - I Chem E (Institution of Chemical Engineers)
 - ICC infrastructure Conditions of Contract
 - ICE (Institution of Civil Engineers)
 - GC (Government Contracts forms)

- EPC (Engineering, Procurement and Construction)
 - **Engineering** – preparation of engineering designs, plans and technical specifications of equipment, cost estimations, preparation of performance standard maintenance and training manuals etc.
 - **Procurement** – provision of all temporary and permanent equipment, procurement of same from third parties OEM, procure delivery to the site, make provisions for preventive and breakdown maintenance and spare parts;
 - **Construction** – arrange for construction /erection, carrying out tests and completion of the work and correction of defects

CONTRACT STRUCTURE

COMPOSITE CONTRACT

A contract with a single entity to complete work on time and to meet performance requirements, for a specified sum



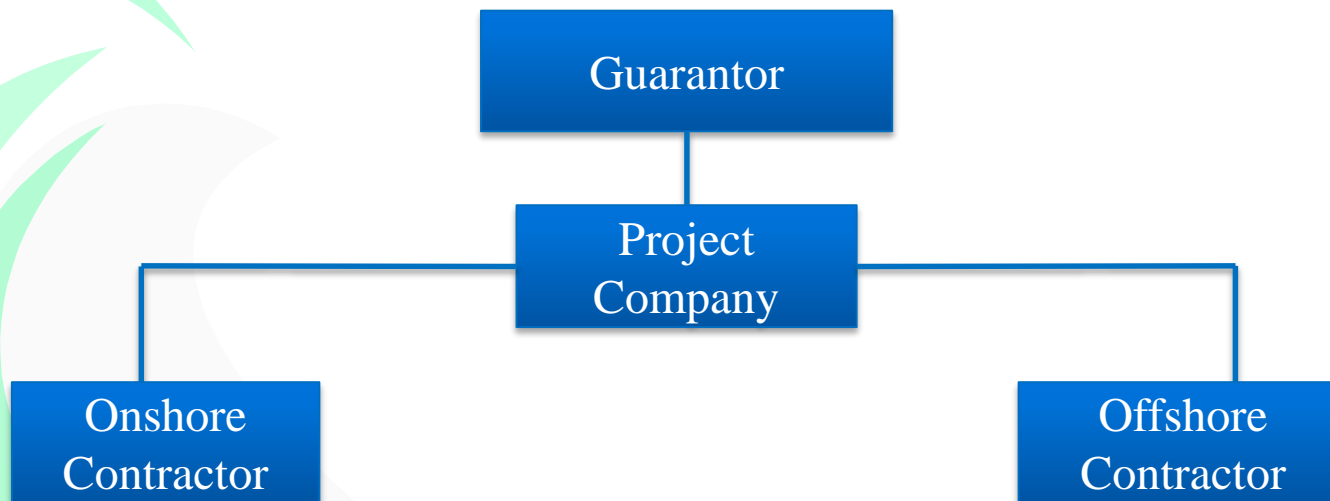
CONTRACT STRUCTURE



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SPLIT CONTRACT

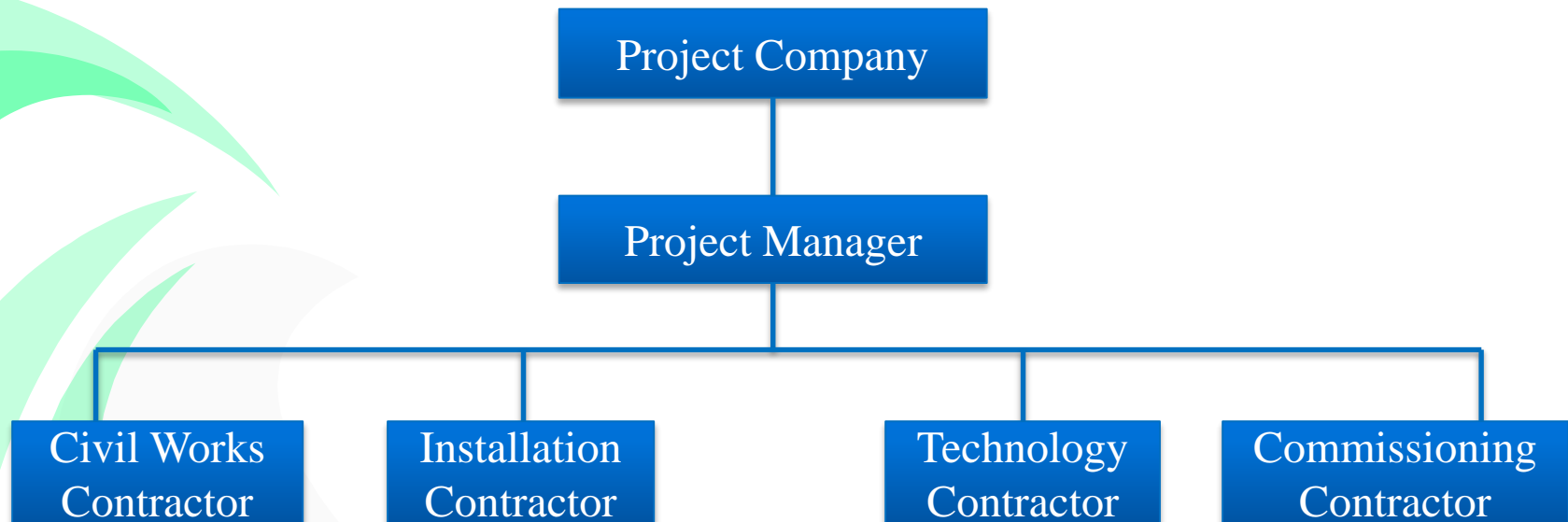
- Consists of the following contracts:
 - Supply Contract/ Offshore Contract
 - Services Contract/ Onshore Contract
 - Wrap Agreement



CONTRACT STRUCTURE

PROJECT MANAGEMENT CONTRACT

The project company enters into contracts, and engages a project manager to manage contracts



CONTRACT STRUCTURE

- The suitability of a structure depends on:
 - Nature of project - complexity of engineering, time constraints,
 - Parties involved
 - Commercial consideration
 - Taxation advice
 - Bankability – requirements of equity and debt financiers

CONTRACT CLAUSES

■ Important Clauses

- Scope of work
- Step down Provisions
- Conditions Precedent
- Obligations of the Parties
- Contract Price
- Payment Terms
- Financial Obligations
- Extension of Time
- Claims and Procedure of Claims
- Event of Defaults and Cure Period
- Termination & Termination Payments
- Dispute Resolution

- In Design & Build Contracts
 - Contractor is responsible for designing, preparation of technical specifications and detailed drawings, procurement, construction, testing and commissioning;
 - Meeting the Employer's requirements
- Employer's requirements can be prepared by Employer or its consultant or Design-build contractor
- Design and Build contract has advantage of single point responsibility and thus there is scope for innovation.

- A case study on design and build contract
 - The Client wishes to set up a facility for research in the field of Molecular Biotechnology. The proposed facility is required to be set up in highly populated area in the city and safety of the population on account of possible leakages of virus and bacteria may lead to serious health hazard.
 - **Description of work:** to Set up a laboratory for carrying out of prescribed activities as per internationally accepted principal of construction. The Facility to include in development of area of 45 Acres of land to include :
 - Administrative block to accommodate about 200 employees
 - Residential Block
 - Technician rooms

CASE STUDY

- 15 laboratories
 - 4 training rooms
 - 10 isolation rooms
 - Storage areas
 - X- ray Facility
-
- The scope of work to include all designing, civil, electrical, technical / mechanical, landscape and other related works for completion of the Project on design and build basis.
 - Payments to be made on achievement of milestone agreed.
 - Time for completion 36 months from date of letter of Intent

- Two bids received for execution of the Project:
 - L-1: Rs. 75 Crores (based on BoQ items and price for each item of Work was separately provided)
 - L-2: Rs.140 Crores (Lump Sum price)
- Technology :
 - L1 : Concrete Box (Old & primitive Technology)
 - L2: Steel Box (Latest State of Art Technology)
- Award of the work to L1 was challenged by L2 in Court.



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THANK YOU



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