



## Research article

## Enforcement of legal remedies against construction projects time overrun in Ethiopia: A critical appraisal

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## ABSTRACT

Construction time overrun is one of the common inefficiencies of public construction projects in Ethiopia. Laws and standard construction contracts stipulate different legal remedies against project time overrun. This paper is meant to unravel these legal remedies and their application to construction project time overrun in public construction projects in Ethiopia. To this end, the magnitude of time overrun, its common causes, and the practical implementation of legal remedies against it is exposed through literature review, primary data obtained from 18 roads and 10 public building projects, and interviews of 10 key informants. The result showed, although time is not the essence of construction contract in international standard conditions of contracts, it is a fundamental obligation the breach of which would give rise to termination of the contract under the laws and standard conditions of contracts applicable to public works in Ethiopia. However, the paper established that the practical implantation of these legal remedies against time overrun in public construction projects is very erratic although time overrun is a rampant challenge of the construction industry of the country in general and public construction projects in particular.

## 1. Introduction

Scholars by and large agree that there are three important factors of construction project efficiency (criteria of success); time, money, and quality. A construction project is said to be efficiently executed if it is accomplished within the contract duration, budget, and required quality. These factors of construction project efficiency are interdependent and it is not possible to put them in any order of priority. While a construction contract imposes on the contractor among others the obligation to complete and hand over to the client a particular project at least by the end of the due date, it likewise compels the owner to effect towards the contractor payment of a certain sum of money either in a lump sum or through several installments. If either of the parties fails to live up to these basic obligations, the failure shall constitute a breach of a contract which will entail on the defaulting party certain legal consequences (see Figure 1).

The emphasis of this paper is on the obligation of the contractor to complete a construction project within the contract period (original or revised) and the legal consequences for breach of such obligation with particular reference to termination/cancellation of the public contract and the application of liquidated damages in the context of public work contracts

in Ethiopia. In the course of establishing the legal consequences for late completion of construction projects, the paper will raise and discuss certain basic time-related principles and concepts such as commencement, progress, an extension of time, obligations after completion, and so on. In dealing with these and other issues related to time, reference shall be made to different international (particularly FIDIC forms of contract) and national standard conditions of contracts and the Ethiopian laws regulating public work contracts. The particular emphasis of the paper on FIDIC forms of contract is justified owing to its wider application in Ethiopian public work contracts as opposed to other international standard conditions of contracts.

## 2. Overview of some concepts and principles

The concept of time, particularly in terms of the time of completion of a construction project is one of the most important legal and managerial issues that rank among the top priorities of the project stakeholders (Lucas, 2015). All-time related issues in standard construction contract documents are entwined with the fundamental principle of balanced risk distribution among project participants (FIDIC Golden Principles, 2019). To put it otherwise, contracting parties' undue (unjustified) reduction or

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prolongation of the time durations set in the standard conditions of contracts will abuse the balanced risk distribution between or among parties in construction contracts. Construction contract documents contain many time-related issues such as commencement date, progress of work, extension of time, completion date, and so on. A judge who handles construction contract disputes needs to have a clear understanding of these concepts in the context of the law so as to apply them for the appropriate factual situation. Therefore, the explanations offered hereunder are not mere definitions of terminologies; rather, they are interpretations of legal rules related to the concept of time in construction contracts.

### 2.1. Commencement

It is not possible to find a hard and fast definition of commencement date in any standard construction contracts document. It is however possible to simply state that, the commencement date is any specific date in a period of time (which for this paper can be designated as commencement period) as of which the contractual due date starts to count down. According to the FIDIC standard condition of contracts, the commencement date shall be determined within 42 days after the contractor is awarded the contract with the issuance by the employer of a letter of acceptance (FIDIC Red Book, 1999, Cl.8.1). Standard conditions of contracts explain the commencement date with reference to different facts the fulfillment of which is a precondition for the contractor to commence the work. Among others, commencement presupposes the proper handing over to the contractor of the construction site by the owner of the work (FIDIC Red Book, 1999, Cl. 2.1, PPA Cl. 31). If the employer fails to transfer possession of the site to the contractor within the prescribed period in the contract which helps the later commence the work and pursue its execution within the prescribed work plan, such failure is considered a breach of a contract which may entail extension of the contract period and payment of compensation to the contractor if the later suffers a loss.<sup>1</sup>

Depending on the standard condition of contract adopted by the parties or their agreement, commencement may also require the prior fulfillment of certain preconditions other than the transfer of possession of the site to the contractor. For instance, the Multilateral Development Bank Harmonized Edition of the new FIDIC Conditions of Contract 2006 under clause 8.1 prescribes,

*“Unless otherwise specified in the particular conditions of contracts, commencement date shall require a prior fulfillment of signature and approval by the relevant public authority of the construction contract, proof of employers financial arrangements, receipt by the contractor of advance payment and engineer’s instruction on the fulfillment of these preconditions instructing to commence the work”.*

The provisions of this harmonized standard condition of contract further instruct the engineer to provide such instruction within 180 days counted from the date when the letter of acceptance is issued the failure of which may give rise to termination of the contract by the contractor (FIDIC, MDB 2006 Harmonized Edition Cl. 8.1).

In the context of Ethiopia, the period of execution of works shall commence at what is called “Start Date” fixed under Public Procurement Agency (PPA) general conditions of contract clause 71.1 which states that the “start date” shall be fixed by the client public organ and shall be stated in the special conditions of the contract or shall administratively

<sup>1</sup> According to the work of Murdoch and Hughes (2001) referring to the British legal system, there are circumstances where the employer may not guarantee possession and will therefore not be liable to pay damages if the contractor is prevented from gaining access by some third party such as unlawful pickets, over whose activities the employer has no control. Besides, even though the contractor is entitled to get access to the whole of the site, access to some parts may not be required until a later stage of the project.

be determined by the issuance of an order to that effect by the engineer (PPA, 2011, clauses 71.1 and 72.1). Save for otherwise agreement of the contracting parties, the “start date” shall be fixed with in120 days of commencement period (PPA, 2011, clause 71.2). The assumption is that within this period, the owner will finalize any administrative requirements including transfer to the contractor possession of the project site and thereby require the contractor to mobilize his material and human resource to commence the work.

### 2.2. Progress of work

The contractor, after commencing the work, shall also maintain it with due expedition and without delay (FIDIC Red Book, 1999, clause 8.1). In the absence of any standard of measurement of the swiftness of the work, the term “due expedition” appears to be very general so that courts may not be able to make any implication out of it. Besides, the absence of any mechanism of measuring this general terminology will provide undue discretion to the contractor as to how the work should progress. However, it is possible to argue that, the general terminology of “due expedition” has to be interpreted in terms of the obligation of the contractor to submit a detailed work program to the engineer who shall examine it and give approval or request the contractor to make changes to the program and carry on the work (FIDIC 1999a, b, c, Cl. 8.3 and PPA Cl. 72.2). This work program contains the order in which the contractor intends to carry out the works which include the anticipated timing of each stage of design (if any) and work (PPA, 2011, Cl. 41).

One may ask, ‘does the contractor have a contractual obligation to stick to the work schedule?’ Murdoch and Hughes (2001) argue:

*“... while many contracts require the contractor to submit a program for execution of the works, this in itself does not mean that there is a contractual obligation to keep to that program...It is for this reason that most construction contracts require the contractor to maintain a satisfactory rate of progress throughout the project”.*

On the other hand, the FIDIC standard form of contract prescribes that, if at any time, the actual progress of the work is too slow or progress has fallen (or will fall) behind schedule to complete within the contract period and/or progress has fallen or will fall behind the submitted program for a reason which does not warrant an extension of time, the engineer shall require the contractor to submit a revised work program and expedite the progress of the work at the contractor’s expense and complete the work within the contractual completion date (FIDIC 1999a, b, c, clause 8.6). Furthermore, if the employer incurs costs emanating from the implementation of the revised work schedule, he has the right to claim reimbursement from the contractor (FIDIC 1999a, b, c, clause 8.6).

A general reading of the PPA conditions of contract reveals that the contractor must follow the work schedule. Clause 41 prescribes, the contractor has to complete the “program of implementation” of tasks that will constitute part of the bid document. Besides, the cumulative reading of clause 41.3 and 41.4 dictates, the contractor shall submit to the engineer for approval an updated program which shows the actual progress achieved on each activity at the interval period stated in the special conditions of the contract (which normally is done every month). As the mode of payment adopted by PPA general conditions of contract is based on the quantity of the work implemented by the contractor (payment by installment), the failure of the contractor to submit progress reports as per the program of implantation would lead the engineer to withhold the amount stated in the special conditions of the contract from the next installment (PPA Cl. 59).

### 2.3. Completion

As a matter of rule, the contractor is said to have completed the project when every item of the project is fully performed devoid of defects. However, realistically speaking, it is often impossible to complete a

construction project neatly as it appears in the drawings and specifications. Consequently, standard conditions of contracts rather than providing a hard and fast definition of ‘completion’ prefer to employ terms like “practical completion” and “substantial completion”.<sup>2</sup>

Based on definition driven from several case laws, “practical completion” is “... a state of a project which would allow the owner to enter into full possession/beneficial occupation with no outstanding works remaining to be carried out save for very minor items of work being left incomplete on the ‘de minimis non-curat lex (the law does not concern itself with trifles)’” (Molloy, 2008, NK).<sup>3</sup> The “*diminims*” principle as an independent test of completion only makes trivial defects exceptions to the definition of completion which means that even though the project is fit for beneficial occupation, the existence of patent defects (which go beyond trivial) in the project may not warrant the issuance of a certificate of completion (RICS Practice Standard, UK, 2011). “Substantial completion” on the other hand refers to “completion to a state which permits the employer to take possession of the project and enter into a functional/operational occupation while ‘minor outstanding works’ and defects remain to be rectified within the defect liability period (Molloy, 2008, NK, FIDIC Red Book 1999, Cl. 10.1).

From the discussion made so far, it is possible to analyze that in both cases of substantial and practical completion, the issue of whether or not the employer can make use of the project is the basic criterion to issue a certificate of completion. However, the phrase “*minor outstanding works and defects*” within the definition of substantial completion reflects that the concept of practical completion is more rigorous than substantial completion. According to the FIDIC forms of contracts, “*minor outstanding works and defects*” are those which will not substantially affect the use of the works or section for their intended purpose. Therefore, it is possible to argue that even though the “*diminims*” principle is applicable in both definitions of completion (Chee Kheng, 2003), “substantial completion” does not make patent defects exceptions as long as they don’t prevent the employer from putting the works into their functional purpose.

The concept of completion is vaguely explained in the context of Ethiopian public work contracts. However, a closer reading of the clauses of PPA general conditions of contract divulge that a work should be substantially completed before it is provisionally accepted. The document for example states “*The works shall be taken over by the public body when they have satisfactorily passed the tests on completion and a certificate of provisional acceptance has been issued or is deemed to have been issued*” (PPA, 2011, clause 87.1). The issuance of the certificate of provisional acceptance heralds the commencement of the defect liability period and therefore shall not be deemed to be an admission that the works have been completed in every respect (PPA, 2011, clause 87.3).<sup>4</sup> If the defects or damages or unfinished works which have to be rectified by the contractor within the defect liability period are of nature which substantially or entirely deprives the public body of making use of the works, the public body shall, without prejudice to any other remedy, be entitled to recover all sums paid in respect of the parts of the works concerned together with the cost of dismantling such parts and clearing the Site (PPA, 2011, clause 88.4). The contrary reading of this clause carries the meaning that, defects and omissions which do not impose substantial

<sup>2</sup> While “practical completion” is a principle established by JCT (joint contracts tribunal) of England, “substantial completion” on the other hand is incorporated by the FIDIC contracts.

<sup>3</sup> In many other commercial contracts, the concept of *de minimis non-curat lex* does not apply and therefore, these contracts are said to be properly executed (subject to otherwise agreements of the parties) until all obligations stated in the contract are performed which means that the non-performance of even minor obligations would render it incomplete. Owing to the complexity of construction contracts as opposed to other commercial contracts, imposing the same standard of onerous requirement of completion is believed to be blatantly unfair.

<sup>4</sup> The defect liability period is the period stated in the special conditions of the contract immediately following the date of provisional acceptance, during which the Contractor is required to complete the works and to remedy defects or faults as instructed by the engineer.

deprivation on the use of the works by a public body are considered to be trifles which the contractor shall rectify within the defect liability period.

The practical or substantial completion of a project gives rise to certain legal and contractual consequences. The effects of completion may differ from one contract to another contract but in the opinion of the writers of this work, the most common ones include the following.

- The employer will be entitled and obliged <sup>5</sup> to take possession of the work.
- The defect liability period starts to run.
- The contractor's liability to pay liquidated damages will cease.
- The contractor shall be entitled to a release of the contract money save for the retention money which will be released after the expiry of the defect liability period.

### 3. Research problem

Construction project time overrun is considered to be one of the most serious challenges of Ethiopia's construction industry in general and public construction projects in particular. Previous researches have repeatedly established the magnitude of time overrun, its causes, and probable technical and managerial solutions to address the problem. Nonetheless, none of these researches has examined the available legal remedies and their practical application in the context of Ethiopia. This is so because, most of these research works were produced by engineering professionals, who are less-acquainted with legal knowledge and its affirmative role in tempering the rampant behavior of unduly delaying public works by contractors. As project time overrun happens when the contractor fails to complete a project within the contract period, unless this breach is sanctioned by the law in appropriate circumstances, the problem continues to worsen and eventually results in an industry that is driven merely by contractor's discretion rather than rule of law.

This study is meant to address two interrelated legal issues. Primarily on a conceptual basis, the research discusses the different legal remedies available for construction project time overrun. Secondly, the research will attempt to show the practical implementation of legal remedies on delayed public work projects. By so doing, the research will have the role of raising the awareness of actors in the industry regarding the legal remedies for project time overrun and their role in ensuring project efficiency. Besides, it will also be thought-provoking for legal professionals and academics to engage in further researches on construction law which will have academic and practical relevance.

### 4. Literature review

It is not possible to quote several published works on Ethiopian construction law except for two notable works produced by Hagos (2009) and Zewdu, (2012). The two works are not directly related to the present paper; nevertheless, their findings are indirectly relevant to the discussions made in this paper. Hagos (2009) work concerns adjudication and arbitration of government construction disputes. In his work, the writer affirmed that the extreme delays, pervasive below-standard completion, and, at times, abandonment of construction projects perhaps tip it a bit of a grain of truth in Ethiopia and as a result, the industry is ravaged by a multitude of disputes. Tekle stressed, construction dispute resolution through the formal court process (litigation) is a tedious and expensive process that forces the imminent need for effective, economic, and efficient means of settling these disputes. He also stressed that the technical intricacies and the bundle of legal and technical documents render

<sup>5</sup> However, some other writers argue that, unless there is a clear indication in the contract that the employer shall take possession of the work upon a stage of either practical or substantial completion, there is no legal prescription which compels the client to enter into possession of and require the engineer to issue a certificate of completion until the work is fully complete.

construction contracts far-flung from lawyers and the formal judicial system. Emphasizing the fact that construction contracts because of their very nature are breeding grounds of disputes, Tekle encouraged the use of non-formal out of court dispute settlement of public work contracts.

Zewdu (2012) on the other hand wrote on construction project delivery modes in Ethiopia with a special emphasis on the Design-Build contracting mode. In his work, the writer emphasized that the existing legal frameworks of the country favor a Design-Bid-Build mode of contracting. He discussed the different advantages and disadvantages of the existing modes of contracting and mentioned that the Design-Build mode helps in reducing construction disputes thereby promoting construction project efficiency and hence, this mode of contracting has to be encouraged parallel to the other modes of project delivery. Other than the aforementioned two works, the rest of the published works in the context of Ethiopia do not make emphasis on legal issues. A few of them will be discussed in the forthcoming paragraphs.

Hiwot and Luo (2017) conducted empirical research on the analysis of delay and its impacts on a construction project with particular reference to the Ethiopian construction sector. The study investigated the typical causes of delay at different stages of construction and analyzed its effects. The finding of their research showed that the primary causes of construction project delays include corruption, shortage (unavailability) of utilities at site, inflation, lack of construction materials, late design and design documents, the lateness of employers in completing testing and taking over the projects and the like. The writers also discussed the five effects of delay in which two of them are the most critical while the remaining three are less critical. The research mentioned cost and time overrun as the most critical effects of delay while, the occurrence of legal disputes and termination of the contract as less relevant effects. This finding transpired that, even though the delay of construction works is a common feature of the industry in the country which has serious negative financial repercussions, recourse to legal remedies by the contracting parties to redress this breach is less frequent.

Kuhil and Seifu (2019) researched causes of delay in public building construction projects of Addis Ababa city administration in Ethiopia. The research-based on primary and secondary sources of data focused on assessing the main causes of delay and identified 42 causes of which the research emphasized the top ten factors. They are difficulty in project financing, poor project management, delay in issuance of designs and drawings, shortage of imported construction materials, design errors, delay in progress payments, the lateness of the contractor to mobilize resources and commence the work on time, inaccurate site investigation reports, inflation and so on. Other than identifying the causes of project delays, the researchers did not make investigations on the legal consequences against it.

Tesfa (2016) researched to investigate the magnitude of road projects' time overrun and its contributing factors in Addis Ababa city administration. The finding of the research showed that more than 80% of the road projects of the city administration are delayed and the top-ranking causes of the delay are, contractors' financial problems, inflation, delay

in effecting interim payments, inaccurate cost estimation, and commencement delay.

On another research by Koshe and Jha (2016) investigating causes of construction delay in the Ethiopian construction industry, the researchers found out that only 8.25% of the projects which were made case studies of the research were completed on time while the remaining 91.75% of the projects showed an average delay of 352%. Similar to the aforementioned researches, the main causes of project delays identified by this research are difficulties in financing projects, escalation of construction materials price, ineffective project planning, scheduling and management, and delay in effecting interim payments.

### 5. Research method

The traditional legal research method is conducted to find legal documents that will aid judges and practitioners to find solutions to different legal problems. This research approach is commonly known as doctrinal legal research. Legal researchers in the traditional doctrinal research employ secondary resources such as books, reports, articles, and other scholarly writings to critically examine and explain the contents of primary resources such as statutes, policy materials, and case laws so on and so forth. However, the traditional legal research method neglects validity issues as it makes no reference to methodologies of other social sciences and therefore, it has been a subject of harsh critic from scholars of other disciplines who struggled to recognize its outputs as a credible research contribution (Langbroek et al., 2017). At present time, however, it is not uncommon to witness researchers of juridical science combining doctrinal and non-doctrinal research methods to undertake a study “in-law” and “about the law” even though doctrinal legal research yet dominates legal scholarship. In this research, the research questions which are highlighted in the problem statement part of the work demand the adoption of a mixed approach of doctrinal and non-doctrinal investigation. The entire research design of the work is pictorially summarized in the chart below.

Through doctrinal analysis, different concepts related to completion time, the legal remedies of cancellation/termination, and liquidated damages in construction contracts have been analyzed in light of the law, standard conditions of contracts, and scholarly writings. Through non-doctrinal investigation, the research made use of data obtained from the latest project reports of 18 road and 10 building projects out of a randomly examined 40 road and 12 building projects to scrutinize the practical implementation of legal remedies against construction project time overrun. The researchers thoroughly examined each project report and extracted evidence on contract duration (either original or revised) of the projects, Extension of Time (EOT) given for each project, project status after the expiry of EOT, slippage of work, and causes of delay as reported by the consulting engineers of the projects. The data of 12 road and 2 building projects were discarded because the delay examined in these projects does not warrant the enforcement of legal remedies and therefore, these projects are irrelevant for the main theme of this work.

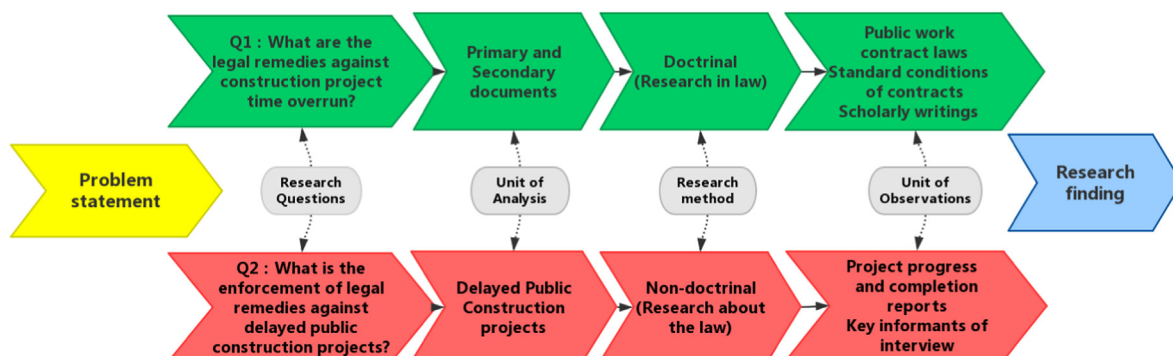


Figure 1. Research design.



The research also made use of information obtained from an in-depth interview of 10 key informants' to substantiate the information gathered in the aforementioned means. The interview was made face to face with each key informant after securing their informed consent by maintaining the anonymity of their names and designation. The key informants are stakeholders of the projects analyzed in the work and include project managers, consulting engineers, site engineers, construction lawyers, client representatives of projects, government officials assuming different official positions who have first-hand information regarding the projects under study. The data obtained from each interviewee was thematically organized based on the interview questions to obtain a meaningful result from the responses of each interviewee. The thematically organized responses were checked for any contradictions and finally, the report as discussed in the last part of this paper was produced. The data presentation and analysis will be descriptive and inferential.

## 6. Results

The law and all standard conditions of construction contracts impose on the contractor the obligation to complete the contract within the contract period. Owing to the very nature of construction contracts, however, projects are very often delayed. Accordingly, standard construction contracts and laws stipulate provisions that entitle the contractor to an extension of time provided that there are justifiable grounds to do so. Whether the contractor will be entitled to additional time depends on which party is responsible for creating the delaying event, or has otherwise taken responsibility for it under the terms of the contract. In simplest terms, the contractor is not entitled to EOT for delays it has caused itself but will have a basis to obtain relief to some degree for delays caused by the owner or delays caused by events entirely beyond the contractor's control (Ness 2010). Leaving the details for subsequent discussion, let us now examine the magnitude of time overrun and EOT in public work projects in Ethiopia based on primary data of road and public building projects.

As shown in the table, the average contract duration of the 18 road projects is 950 calendar days. Among the projects, only two of them (project number 13 and 14) were not given an extension of time while the remaining project on average required an extension of 668 calendar days. Despite the extension of date of completion, however, none of these projects were finalized resulting in an average time overrun of 22.37% and/or an average work slippage of 28.5%.

In the next table, the magnitude of time overrun and/or slippage of work and extension of time in public building projects are presented. The data is taken from Jimma University, one of the public Universities in Ethiopia. Even though the data is obtained from a single public institution and seems to be limited, the information corroborated by the previously discussed road projects data and the information gathered through interviews will provide reliable evidence.

The data described in Table 2 contains ongoing and completed building projects. Accordingly, the average original contract period of the projects is 470 days while the average extension of time given for the projects till Feb. 2020 is 863 days. Therefore, one can see that the employer has granted an extension of time more than twice of the original contract period. Even though the average time overrun of the projects is not more than 30%, the average extension of time and slippage of work (40%) makes it clear that all the projects are extremely delayed.

The above tables presented the magnitude of time overrun in road and building projects. It has to be noted that since the main purpose of the paper is to explore the implementation of legal measures against time overrun, the delay we are considering is limited to the period to which valid EOT was not granted. For the employer to have a valid ground of imposing legal measures against time overrun, the cause of the delay has to be considered. In the following tables, we will present the causes of delay in the studied project and measures taken against time overrun by the employer. As the subsequent two tables are self-explanatory, it will be redundant to make further elaboration of the tables, and therefore, after

presenting the data, we will directly proceed to present the result corroborated by the information gathered from key informant interview.

## 7. Discussion

Writers classify delays into excusable, compensable, and inexcusable delays (Ullah et al 2017). An excusable delay is a delay for which the contractor is entitled to EOT. The contractor's late completion is excused when the cause of delay is a neutral event on which the contractor has no control. A typical example of excusable delay is one caused by force majeure (PPA clause 74.1, FIDIC Red Book 1999, clause 8.4(c)). Compensable delays are a subset of excusable delays for which the contractor is entitled not only to EOT but also to compensation. Compensable delays often are attributable to the act or omission of the employer or his representative (Ullah et al., 2017). The compensation takes the form of an adjustment to the contract price for any added costs directly caused by the delay (that is, delay damages). Instances of the cause of such delays include failure of the public body to give possession to the contractor of the project site, delay of the employer to effect interim payments, the employer's or his representative's failure to issue drawings, specifications, or instructions required for the execution of the works on time, variation orders and supplementary contracts and so on (Ullah et al 2017).

From the data presented under Table 1, it is found out that 16 of the 18 road projects required EOT while under Table 2, there is no project which is completed within the original contract duration so that, the employer was compelled to extend the completion date for all of the building projects. The existence of EOT in principle proves the existence of either a neutral event or a cause of delay attributable to the employer. In road projects, the data shows that the common causes of EOT are, adverse weather condition, delay in the removal of ROW obstructions, design errors and late approval of design changes, public resistance in the project route, frequent variation orders, supply chain problem, acute shortage of work crew and the like. Even though these are acceptable causes that warrant EOT, it is also observed that in many of the projects EOT was granted while the cause of the delay is entirely attributable to the contractors' inefficiency, incapacity, or inexperience. For instance, the project status reports studied in this research reported that some foreign construction firms were granted a much flexible completion date taking into consideration their business inexperience in Ethiopia.

From the building data, on the other hand, the most frequently mentioned valid causes of EOT are attributable to the employer's failure to effect interim payments as a result of deficiency in budget, design changes, and supplementary contracts that increased the volume of the works. However, it is also observed that EOT was being given for inexcusable delays for which the contractor should have taken full responsibility. As inexcusable delay entitles the contractor to neither a time extension nor compensation, it is within this context that the issue of enforcing legal remedies to construction time overrun will be discussed.

The failure of the contractor to complete the project within the provided contract duration and the consequent legal remedies are issues raised and settled within the scope of basic contracts law. General contracts law prescribes that, when a contracting party fails to live up to his obligations, the other contracting party may require specific (forced) performance or cancellation of the contract (either unilateral or through court order) and/or request for damages to be paid to him (Civil Code of Ethiopia, 1960, Art.1771). The option of specific performance does not

<sup>6</sup> This time overrun of the projects is calculated in terms of the revised contract period of each project counted from the time when the revised contract period expires.

<sup>7</sup> This percentage is calculated in terms of the money paid to the contractor rather than in terms of the total volume of the project work. Therefore, it has to be noted that this project is still one of the seriously delayed projects of the employer.

**Table 1.** EOT, time overrun and/slippage of work of road projects.

No	Project Name	Contract duration in days		Project status at the end/after the revised contract period	Time overrun after EOT <sup>6</sup>	Slippage of work
		Original	EOT			
1.	Ageremariam – Yabelo	1095	560	100%	6.28%	0%
2.	Aposto-Wondo-Negele Con.1	1095	793	98.74%	8.10%	1.26
3.	Arbaminch-Kemba-Sawla contract I	1095	1223	94.91%	47.23%	5.09%
4.	Arbaminch-Kemba-Sawla Lot II	1095	1030	90.10	0%	9.84%
5.	Arbereketi-Gelemso	1095	365	66.23 %	4.45%	33.77
6.	Chanka- Dembidolo	910	224	100%	17.19%	0%
7.	Gelemso-Mechara-Micheta	1095	90	56.53%	12.65%	43.47
8.	Kong – Begondi – Wombera	1095	1215	82%	2.6%	18%
9.	Mekenajo-Ayra	910	354	100%	6.76%	0%
10.	Otolo-Sawla lot III	1095	810	98.31	7.95%	1.61
11.	Sawla-Kako	910	180	89.84%	44.75%	10.16
12.	Sembo – Sholagebeya – Gorfo – Gindeber	1095	1075	94.63%	40.78%	5.5%
13.	Shambu- Bako	1095	None	84.33%	2.19%	16%
14.	Dalol-Musli-Bada	1095	None	86.14	16.43%	13%
15.	Dejen-Felegebirhan	1279	1155	94.6	7.5	5.4%
16.	DichotoGalafi Junction - Elidar – Belho	1170	179	90.7%	0%	9.3%
17.	Jinka – Medir	730	515	43%	0%	57%
18.	Sawla-Maji, Contract II	1095	1245	89.66%	0%	10.34%

**Table 2.** EOT, time overrun and/slippage of work of public building projects.

No	Project Name	Contract Duration in Days		Project status till Feb. 2020	Time overrun	Slippage of work
		Original	EOT			
1.	Teaching Hospital Expansion	730	861	81%	22.56%	19%
2.	Sports Courts Project	270	1662	113% <sup>7</sup>	?	?
3.	Hospitality And Tourism institute	600	684	31.06%	13.7%	69%
4.	Head Quarter BLD	730	931	80.46%	0%	19.5%
5.	Student Canteen Complex	400	793	73.86%	7.5%	26.15%
6.	Veterinary teaching hospital	360	729	45.07%	52.52%	55%
7.	Agaro Campus Remaining Vol -I & Vol-II	540	259	38.62%	0%	60%
8.	Research Center and Conference Hall	600	730	100%	37.21%	None
9.	Research Center and Conference Hall (supplementary contract)	210	63	100%	60.2%	None
10.	Maintenance & Road upgrade work with Asphalt con	365	710	92.12%	17.67%	8%

apply to contracts that require a contracting party to do something. For example, forcing a contractor to finish a public work which he is not able to complete within the contract period will impinge personal liberty which in the eyes of the law is a superior right than right of the client to get his works completed (*Civil Code of Ethiopia, 1960*, Art.1776). Therefore, the possible legal remedies for failure to complete a construction project within the contract period are either cancellation of the contract or the imposition of liquidated damages or both.

It is important to note here that, standard construction contracts employ the word "termination" instead of "cancellation" as one of the remedies of non-performance of a construction contract (PPA, Cl.19.2). Even though the two terminologies appear substitutable, they have fundamental differences that make them independent remedies of breach of a contract.

## 8. Cancellation vs termination

According to the *Civil code of the Empire of Ethiopia 1960* (hereafter the Civil Code), contractual obligations extinguish in different ways. Cancellation and termination are two among the different modes of extinguishing obligations (Arts. 1806, 1807 of the Civil Code).

Cancellation is a mode of extinguishing obligations which necessarily follows non-performance of a contract. Termination on the other hand can happen either for cause or convenience (*Klinger and Hicks, 2011*). If a contract has to be terminated for cause, particular defaults of material nature have to either be specified by the parties in the contract or provided in the laws or can be inferred from the interpretation of the laws. Most standard form construction contracts make provisions that allow for termination upon the occurrence of specified breaches of the contract, such as suspension of works by a contractor or consistent failure by an employer to make payment.

On the other hand, in the absence of breach of the contract by the other contracting party, the contract may be terminated if there is a specific situation to that effect in the contract or when the law dictates so (Art. 1819 ff. of the Civil Code). A good example of termination for convenience is provided under Art. 3180 of the Civil Code. The provision states, "The administrative authorities may terminate the contract, notwithstanding that the other party has committed no fault where the contract has become useless to the public service or unsuitable to its requirements". Even though breach or fault of one of the party is not a requirement while the discretion of terminating a contract for convenience is exercised, the aforementioned Civil Code provision itself made it clear that the public

body has to prove that the contract has become useless for the public service or unsuitable to its requirements. In other words, exercising termination for convenience clause in bad faith for example simply to obtain a better price to complete the works from another party would amount to a breach of contract (Reilly and Shannassy (2017)).<sup>8</sup>

The other distinguishing feature of cancellation and termination concerns their effects. When a contract is canceled, it has both prospective and retrospective effect which means that cancellation nullifies the entire obligations of the parties which are already discharged and yet to be executed. As a result, when a contract is canceled, save for exceptions stated under Art. 1817 of the Civil Code, the parties shall as far as possible be reinstated in the position which could have existed had the contract not been made because acts done in the performance of the contract are considered to have no effect (Art. 1815 of the Civil Code). Termination on the other hand lacks a retrospective effect and only nullifies future unexecuted obligations of the parties (Art. 1819 (3) of the Civil Code). It is the position of the writers of this work that, even though the existing standard construction contracts prefer to use the term "termination" instead of "cancellation" as one of the legal remedies to breach of construction contracts, "cancellation" is also applicable upon breach of a construction contract in circumstances where reinstating the contracting parties to their previous position is possible.

### 9. Cancellation/termination against time overrun

To get a contract canceled, save for a clear otherwise stipulation by the parties expressing their intention upon breach of a particular provision of the contract (Art. 1785 (1)),<sup>9</sup> the court should principally examine the nature of the breach. In the context of Ethiopia, for example, cancellation of a contract shall not be ordered except in case of a breach of fundamental provisions of a contract (Art. 1785 (2) of the civil code). In the common law legal system, contractual obligations are classified into 'conditions' and 'warranties' (Goh, 2008). While conditions are fundamental obligations that determine the essence of the contract the breach of which may merit termination of the contract, breach of warranties on the other hand is remedied only by payment of commensurate damages (Goh, 2008). In Ethiopian laws, if the intention of the parties regarding the fate of their contract upon breach of any obligation is not clear from the contract, the court shall grant a decision of cancellation where non-performance affects the essence of the contract and it is reasonable to hold for such reason that the party requiring cancellation would not have entered into the contract without the term which the other party has failed to execute being excluded (Art. 1785 (3) of the Civil Code). So the question that requires a precise answer is whether or not, the completion date of a construction project is an essence of the contract.

In the FIDIC conditions of contracts, the cumulative reading of clauses 8.2 and 8.7 makes it clear that, if the contractor fails to comply with his obligation to complete the work on time, he shall be subject to the employers' notice (claim for damages) pay delay damages. Besides, among the several causes of termination of construction contracts, the FIDIC forms of contracts do not mention time overrun/delay as one of the causes (FIDIC 1999a, b, c, Red, Yellow and Silver Books, Cl. 15.2, FIDIC, 1987, Cl. 47.1). This is a clear indication that the obligation of the contractor to complete the work within the contract period is not a fundamental obligation that determines the essence of the contract in FIDIC.

<sup>8</sup> This paper is about legal remedies against time overrun which is one form of nonperformance of a contract; therefore, termination for convenience is out of the scope of this work.

<sup>9</sup> Art. 1785(1) of the civil code of the empire of Ethiopia states that the court while rendering its decision on termination of the contract, shall take into consideration the intention of the parties.

In the context of Ethiopia, since public work contracts are part and parcel of administrative contracts regulated under the provisions of the *Civil Code of the Empire of Ethiopia 1960*, the administrative authority's power to terminate the contract as long as warranted by the requirement of public interest is absolute. As it was shown earlier, the civil code under Art. 3180 envisages a right of an administrative authority to terminate a contract for convenience even though there is no default on the part of the contractor if the public body in good faith believes that maintaining the contract does not serve the public interest. Therefore, for a stronger reason, it is possible to assert that when a project is delayed and public interest is at stake, the public organ can require cancellation/termination of the contract if doing so better serves the interest at stake. The PPA standard condition of contract further strengthening the above legal provision of the civil code states, "*The public body, in its sole discretion and for any reason whatsoever, can pass a decision to terminate the Contract*" (PPA, Cl. 21.2(O)). For a stronger reason, therefore, the PPA general conditions of contract affirm that the failure of the contractor to carry out any or all of the works within the period specified in the contract or within any extension thereof granted by the public body shall constitute a ground for termination of the contract (PPA, clause 21).

In the data presented under Tables 3 and 4, even though the clients have adequate grounds in many of the road and building projects to terminate the contract, they opted to resort to grant a further extension of time or render the project time at large. It is found out both in road and building projects that there is a rampant practice of unjustified approval of an extension of time while the incapacity or inefficiency of the contractor has caused the delay. In the opinion of the authors of this work, this is an improper administration or misapplication of the extension of time provisions in the contract. For example, in the 2019 report of the legal affairs department of Ethiopian Road Authority, it was reported that the department only had one dispute which was being entertained through arbitration as a result of the decision of the authority to interrupt the contract on the ground of poor performance throughout the contract period. In the case of building projects data presented under Table 4, the employer public agency terminated the contract for two of the projects not by invoking time overrun but on the ground that the contractor cannot pursue the project up to its completion given the fact that the project status remained very low despite a repeated extension of time. In the very latest report of the institution itself, it was stressed that contractors' incapacity and inefficiency is the prominent cause for all the unduly delayed projects.

It was further revealed from the data presentation that, several of the studied projects are rendered time at large. Time for completion of the works is said to be "at large" when the contractor's obligation to complete the works within the specified time or certified extended time is lost and consequently he is allowed to complete them within a reasonable time frame (Fawzy and El-adaway 2014). Different circumstances may render time for completion at large. The first cause is explained in the context of the "*prevention principle*" which refers to the circumstance where the contractor is prevented from completing a project for a reason attributable to the employer, and there is no right to extend the time for completion or it is not properly extended (Salwa and Islam, 2014). The other reason which renders the construction contract time at large is if the contract neither explicitly nor implicitly prescribes a specific date of completion (Hewitt, 2011).<sup>10</sup> The most frequent cause (at least in the context of Ethiopia) of time at large is the improper administration or misapplication of the extension of time provisions in the contract. For instance, a scenario where the contractor claims for extension of time but it is either not responded to or an extension of time is not awarded and the

<sup>10</sup> This often is the case with projects of small size. In large scale projects, there is always an invariable inclusion of specific completion date or period and EOT rules.

**Table 3.** Causes of time overrun in road projects and measures taken by the employer.

SN	Project Name	Cause of Delay	Measure(s) taken by the employer
1.	Ageremariam – Yabelo	- Poor work management by the contractor, Contractors lack of experience in Ethiopia	No legal measure (Time at large)
2.	Aposto-Wondo-Negele Con.1	- Delayed mobilization of resource, Delay in thoroughly undertaking investigations for potential sources of construction materials, Shortage of skilled manpower at site	No legal measure (Time at large)
3.	Arbaminch-Kemba-Sawla contract I	- Unsatisfactory resource management and site organization	No legal measure (Time at large)
4.	Arbaminch-Kemba-Sawla Lot II	- Adverse weather condition, Delay in the removal of ROW obstructions, Design errors and late approval of design changes, Shortage of work crew	Additional EOT being considered
5.	Arbereketi-Gelemso	- Significant reduction in construction equipment and manpower from the site, Lack of close follow up of the daily output of the available critical equipment, Failure to organize sufficient structure crew to expedite drainage and structure works	Additional EOT being considered
6.	Chanka- Dembidolo	- Very late mobilization of plant and machinery, Failure to mobilize adequate manpower	Liquidated damages imposed
7.	Gelemso-Mechara-Micheta	- ROW obstruction, Shortage, and frequent break down of construction machinery	Extension of time being considered
8.	Kong – Begondi – Wombera	- Variation of work, Unfavorable weather condition, Suspension of the work by the client as a result of budget issues, Security problems at the project area	On an interim extension period
9.	Mekenajo-Ayra	- Contractor's poor Site Management, Contractors poor planning of the works Contractor's lateness in the mobilization of equipment and resources, the supply chain problem of construction materials.	liquidated damages imposed
10.	Otolo-Sawla lot III	- Frequent break dawn construction machinery and the contractor's failure to get the machines fixed in a short time and continue the work.	No legal measure (Time at large)
11.	Sawla-Kako	- Inefficient utilization of resources, lack of proper planning, Problem of mobilizing manpower	No legal measure (Time at large)
12.	Sembo – Sholagebeya – Gorfo – Gindeber	- The contractor abandoned the site without finalizing the work claiming that the project is substantially completed.	No legal measure (Time at large)
13.	Shambu- Bako	- Public resistance, Problems in the removal of ROW obstructions, Unfavorable weather condition	EOT being considered
14.	Dallol-Musli-Bada	- Deficiency of reinforcement bar and truck mixers, Harsh weather condition, Lack of delivery of construction material sufficiently as per the schedule, Demobilization of key personnel's leading to poor organization of site activities, Incapacity of the contractor to deliver fuel	EOT being considered
15.	Dejen-Felegebirhan	- Delay to finalize design on time, Late in commencing permanent activities, Delay to avail sufficient resources for the construction of embankment and Roadway construction, Cash flow problem of the Contractor, Inefficient project management	No legal measure (Time at large)
16.	DichotoGalafi Junction - Elidar – Belho	- Critically serious water shortage, Very poor performance of subcontracted works	No legal measure (Time at large)
17.	Jinka – Medir	- Additional work, Right of way issues, Adverse weather condition	On the 5 <sup>th</sup> interim EOT
18.	Sawla-Maji, contract II	- Contractor's failure to finalize the design, Problems of cash flow, Problems of accessing the site because of poor infrastructure.	No legal measure (Time at large)

contractor completes the project after the date of completion (Hewitt, 2011).

In the data presented earlier, nine of the delayed road and two of the building projects are in time at large and which means the employer public organs recognized that the projects are delayed and there is no

valid cause of awarding extension of time. However, no legal remedies were imposed on the contractors; rather, they were left to complete the remaining works within a reasonable period. Determining, 'reasonable period' however is not an easy task to do. Regarding this matter, Chee Kheng (2003) wrote;

**Table 4.** Causes of time overrun in building projects and measures taken by the employer.

No	Project Name	Causes of Delay	Measure(s) taken by the employer
1.	Teaching Hospital Expansion	Variation orders and delay in payments	EOT being considered
2.	Sports Courts Project	Contractor's incapacity, variation orders, and delay in payments as a result of budget deficit	Liquidated damages to be imposed for unjustified delay
3.	Hospitality And Tourism institute	Right of way, delay in payment	EOT being considered
4.	Head Quarter BLD	Variation orders and delay in payment	EOT approved
5.	Student Canteen Complex	Contractors incapacity, variation orders, supplementary contract, delay in payment	Liquidated damages imposed
6.	Veterinary teaching hospital	Design defects, inefficient project supervision, the incapacity of the contractor, aviation orders, and delay in payment	EOT being considered
7.	Agaro Campus Remaining Vol -I & Vol-II	Contractors incapacity, variation orders, delay in making payments because of deficit of budget	The original contract with another contractor was terminated. EOT being considered for the second contract
8.	Research Center and Conference Hall	Contractors incapacity, variation orders, supplementary contract	No legal measure (Time at large)
9.	Research Center and Conference Hall (supplementary contract)	Contractors incapacity	No legal measure (Time at large)
10.	Maintenance & Road upgrade work with Asphalt con	The contractor's incapacity, variation orders, and delay in payment, the contractor has stopped the work.	Contract terminated



*“The question of what duration of time is reasonable is one of fact, not law. It is a question of fact taking into consideration all relevant factors and circumstances, objectively assessed. Regrettably, as it is, this is one of the elastic concepts for which there will be no fixed answer. What constitutes reasonable time has to be considered in relation to circumstances which existed at the time the contract obligations are performed but excluding circumstances which are under the control of the party performing those obligations, normally the Contractor in our case”.*

When time is at large, the contractor is expected to make reasonable efforts to pursue the project and finalize it within a time regarded by the owner as reasonable. But what was observed in the project status reports examined by this research is the contrary. In the projects where time is at large, the status of the projects remains static over a long period which transpires that the contractors have almost abandoned the projects even though they claim that the projects are being pursued. The researchers had a chance to make a personal visit of these building projects and witnessed that there is no work being carried out on-site even though the monthly progress reports submitted to the employer by the consulting engineers claim that works have not ceased.

## 10. Damages

As it was highlighted earlier, breach of a contract can also be remedied by the payment of damages. Damages as a remedy for breach of contract can be ordered in addition to or instead of termination of the contract. The Civil code of the empire of Ethiopia under Article 1790 (1) establishes that apart from or in addition to the cancellation of the contract, a party may require that damages caused to him by the other party be made good. The fundamental principle of damages states that compensation has to be equal to the loss suffered (Art. 1799 of the Civil Code). Nevertheless, the quantum of loss and determining the equivalence of compensation to loss is not an easy task in construction contracts. Therefore, laws and standard conditions of contracts established the custom of awarding liquidated damages in case of breach of contractual obligations.

Liquidated damages, therefore, is a fixed amount of compensation which is determined at the time of contracting (Year Book OF UNCITL, 1979). A fixed amount of damages serves two purposes; first of all, it eliminates the expenses caused by the proof of loss, and second of all, it eliminates or at least reduces the possibility of awarding uncertain and not fully compensatory decisions after litigation. But one may ask whether the employer can automatically impose liquidated damages on the contractor upon breach of the contract without there being a need to prove loss. From the reading of Article 1800 of the Civil Code of the Empire of Ethiopia 1960, it is possible to infer that, this right cannot be automatic. The provision establishes that where the debtor (contractor) can show that the amount of damages assessed is greater than the damage caused to the creditor (client public body), he shall be liable to the extent of the damage caused. Equally speaking, it is possible to argue that, the client public organ should prove loss if it has to make use of the provisions on liquidated damages. Likewise, it is possible to argue that the client public body may request the payment of actual damages in addition to liquidated damages if the loss it suffered is greater.

When we resort to the provisions in the standard conditions of contracts, the PPA conditions of contract state that "If the contractor fails to complete the work within the time specified in the contract, the public body shall without formal notice and prejudice to its' other remedies under the contract be entitled to liquidated damages... and if the public body has become entitled to the maximum liquidated damages (10% of the contract price...PPA clause 27), it may after notice terminate the contract and enter into another contract at the expense of the contractor (emphasis added)" (PPA Cl. 78.1, 78.2, 27.1, 27.2). Furthermore, if the delay in performing the contract affects its activities, the public body may

terminate the contract by giving advance notice to the contractor without there being a need to wait until the penalty reaches 10% of the value of the contract (PPA, Cl27.2).

The data presented earlier shows that except for 2 of the 18 road projects, the rest were not completed within the validly extended period. Even though the client public authority had every reason to impose liquidated damages on the 16 projects, it rather opted to consider further extension of time for five of the projects, left 9 of the projects on time at large, and only on 2 of the projects liquidated damages was imposed. Regarding the building projects, the delay of the projects is even worse, nevertheless, the employer public organ imposed liquidated damages only on two of the projects.

As regards the requirement of notice, general contracts provisions prescribe that except in certain specific circumstances where notice may not be required, a party who wants to avail himself of the remedies of nonperformance of a contract has to duly notify the defaulting party to carry out his contract or else he shall invoke non-performance (Art. 1772 of the Civil Code). In this respect, PPA conditions of contract Clause 21.2 regarding notice states; the public body shall provide a prior written notice of 30 days which states the reason for termination and the date on which such termination becomes effective. However, in the instance where the contract is terminated as per Clause 21.2(O) (sole discretion of the public body), the notice period shall be 60 days. The imposition of liquidated damages on the contrary does not require the employer public organ to make a formal notice (PPA, Cl. 27).

Generally, the implementation of legal remedies against breach of completion date of construction contracts in Ethiopia is very weak to the extent that the operation of the law is successfully downgraded. The question is why is it so? To find answers to this question, the researchers interviewed 10 key informants selected from Ethiopian Road Authority, Ethiopian Construction Design and Supervision Works Corporation, and Jimma University. The questions presented to the interviews were the following.

1. Which standard condition of contract is used by your institution, FIDIC, PPA, etc...?
2. Does the contract incorporate a clause that allows the employer to terminate the contract if the contractor fails to observe the date of completion/if the contractor did not finish the contract within the contract period (original or revised)?
3. Even when there is no legal or contractual reason to grant an extension of time, the employer considers a further extension of time. Why legal remedies are often ignored in these circumstances?
4. What consideration does the employer take into account when it makes the completion date at large?
5. How do you determine the reasonability of the completion date when time is at large?
6. What is the standard to say that the work is progressing? We witnessed that works had practically been stopped in some projects where contractors had already vacated the site leaving insignificant number of staff and construction equipment!

From the response of the interviewees, it was understood that both PPA and FIDIC standard forms of contracts are used by these institutions. However, respondents of the Ethiopian Road Authority informed us that nowadays, more or less all road projects are contracted under the FIDIC forms of contracts while few road maintenance projects are contracted under the local PPA conditions of contract. In Jimma University, on the other hand, PPA is a default condition of contract which is being used in all construction works the institution is carrying out.

As it was discussed before, the completion date is not a fundamental obligation under FIDIC general conditions of contracts. However, if parties wish to make it essence of the contract, it is possible to state it in the special conditions so that breach of it shall render the contract

terminated. In this regard, the interviewees made it clear that there is no practice of establishing a date of completion as a fundamental term in the contract. The interviewees further indicated that in the rare circumstance of a decision to terminate the contract, the justification offered by employers often is the inability of the contractor to finalize the project rather than mere delay. One of the lawyers (interviewees) boldly said that, in her long years of experience in her official position, she never witnessed a construction contract being terminated for a reason of time overrun.

At this juncture, it is important to raise and discuss a question of whether the non-inclusion of time overrun as one of the causes of termination in the special conditions of contract concluded based on the FIDIC general conditions of contract deprives the public organ of terminating the contract or not. Even though there is no clear legal provision that can directly answer this question, it is possible to make an inference from the contents of some provisions that the contractual obligations of the public organ need to be expressly established and accepted. For instance, the Civil Code under Art. 3134 (1) states, "Unless otherwise provided by administrative laws or regulations the conclusion of a contract by the administrative authorities implies an express manifestation of will on their part". In other words, administrative contracts dictate that rights and obligations need to be clearly established and there is no implied acceptance of contractual terms by an administrative authority. Hence, it is implausible to take the position that non-inclusion of delay among the grounds for termination of the contract is equal to excluding the public authority from invoking it in the face of the fact that project delay seriously curtails public interest in the projects.

Although PPA conditions of contracts coupled with the civil code provisions on public work contract offer the right to terminate the contract by the public organ upon delay of the project, the practice is a total opposite. The interviewees added that, in Ethiopia, construction companies operate in a very difficult situation. Contractors face lots of barriers to successfully complete the project within a specified project duration. In the opinion of the interviewees, two circumstances govern the decision to either terminate or not to terminate the contract. The first is the determination and will of the contractor to complete the project despite sluggish work progress. If circumstances prove to the satisfaction of the client that the contractor has such determination to finalize the project, it is generally accepted that the contract has to be maintained rather than terminated. The second important factor is the ease and cost of remobilization after terminating the contract. The interviewees are of the view that inviting another contractor after interrupting the first contract is a tedious and costly process. Therefore, employers often encourage the work to be completed by the same contractor even though the time it takes to finalize the project is unreasonably long. In their opinion, if the rules on termination of the construction contracts are to be interpreted and applied strictly, no contractor would wish to engage in public works.

On the other hand, the legal affairs departments of the institutions studied under this research blame the wrong perception of employers that construction contract matters are technical than legal matters that require technical and administrative solutions. As a result, employers, engineers, and contract administrators are observed hustling to solve everything administratively while the issues at hand require the operation of the law and the involvement of a lawyer. They reflected, legal professionals are allowed to involve in construction contract matters very late when projects are completely abandoned and public money is all squandered. The interviewees opined that as much as they are technical, construction contracts issues are equally legal matters that call for a lawyer's assistance and thus the involvement of the lawyer throughout the process improves construction management and adds worth to the timely completion of the project. The interviewee legal professionals commented that this perception needs to be reevaluated, and legal matters which require a lawyer's intervention have to be left to the lawyer.

According to the interviewees, even though the construction industry, in general, suffers from a multitude of problems that have a direct and indirect contribution to project time overrun, the problem of delay can substantially be reduced if local contractors' capacity is boosted. The government of Ethiopia has taken several policy measures to encourage and nurture local construction firms by easing stringent legal requirements as they operate. It is, however, true that the system based challenges coupled with opportunistic behavior of different participants of the industry exacerbate the existing inefficiency of the sector in terms of timely completion of public projects.

It was acknowledged that "time at large" is one of the characterizing features of public work contracts in the country. The interviewees made it clear that time will be made at large based on the recommendation of the engineer and basically, it has to be proven that the contractor has the necessary human and material resources available on-site to finalize the project within the administratively determined reasonable time. Some of the interviewees opined, time at large also is justified by the unrealistic determination of completion date. They said it is very frequent to hear complaints from contractors and consulting engineers that, contract durations are unrealistically fixed. For example, one interviewee mentioned road projects contract duration is often fixed to 1095 calendar days even though the projects are of different lengths and are located at different geographical sites. However, it was also acknowledged that some contractors abuse this right and it was witnessed that projects are abandoned before they are finalized. Regarding the factors that have to be taken into consideration to determine the reasonability of the completion date, the interviewees mentioned several factors. Most importantly, they stressed that emphasis shall be given to the basic causes of delay of the project and a reasonable completion date shall be determined based on whether these factors of delay are contained or not.

## 11. Conclusion

The paper underscored construction project time overrun and the implementation of legal remedies against it. It showed that construction project time overrun is a breach of a contract which can be remedied either by payment of liquidated damages or cancellation/termination of the contract or both. Even though time is not the essence of a construction contract in the FIDIC standard forms of contract, it is of the essence in public work contracts under the provision of PPA standard conditions of contract and [Civil Code of the Empire of Ethiopia 1960](#). However, even though construction time overrun is the general characterizing feature of public works in the country, the practical implementation of the legal remedies against it is very limited. Particularly, the implementation of termination as a remedy for non-performance on the part of the contractor is often justified by causes other than the failure of the contractor to perform his obligations within the original or extended period.

As a result, it is very common to observe that, public work contracts are completed in an extremely delayed schedule, and according to the opinion of legal professionals that are interviewed for this research, construction firms only rush to win bids and start projects without giving much attention to complete the work in time. The prevailing mal-administration of construction projects provides an incentive for contractors to develop undue confidence that they finally will have a way to bargain out of the contractual complications since the operation of the legal rules governing the work is undermined. Extremely frequent extension of completion date and rendering time of completion at large which are distinctive features of public work contracts in Ethiopia have abused the balanced risk distribution principle enshrined in standard conditions of contracts exposing the employer public agency to damages in the form of delayed yield (or public benefit) from an investment, increase in the price of work and loss of the public organ's goodwill.

Even though the writers of this paper do not have the stand that for every delay of a public work project, legal sanctions either in the form of liquidated damage or termination of the contract has to be imposed, we,

however, believe that the improper administration or application of the extension of time provision as demonstrated by the data presented in this research exacerbates inefficient execution of the works. The building of roads, hospitals, schools, irrigation projects, dams, and so on immensely involve public interest and their timely completion is a means of ensuring this interest. Therefore, the application of legal sanction in appropriate circumstances parallel to providing technical solutions in public work projects is the key to nurturing project efficiency.

To end with, even though the research is a case study of public work projects in Ethiopia, the result of this study can be transferred elsewhere for two reasons. First of all, construction project time overrun happens everywhere and researches have established that the problem is often severe in public work contracts. However, the tendency of implementing legal remedies against construction time overrun is weak because issues that call for the strict implementation of the law are routinely left for managerial resolution and in effect, the operation of legal rules seems to be relegated in construction disputes. Secondly, the legal analysis in this work contains a critical appraisal of FIDIC forms of contracts that are applicable in international construction contracts across jurisdictions. Therefore, the work can be used as a relevant authority by construction lawyers, engineers, or other construction professionals who seek information on the legal interpretation of the specific FIDIC rules discussed in this work.

## Declarations

### Author contribution statement

Sintayehu D. Kebede: Conceived and designed the experiments; Analyzed and interpreted the data; Contributed reagents, materials, analysis tools or data; Wrote the paper.

Zhang Tiewei: Conceived and designed the experiments; Wrote the paper.

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The authors declare no conflict of interest.

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