

# The necessity to presence by legal experts in the organizational chart of contractors and parties to administrative contracts to inform contractors about their legal rights in the technical and administrative sections of contract as well as observing the associated limits by the parties to contract in the provisions of treaty

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## ABSTRACT

To achieve macroeconomic and social objectives, building various infrastructures at all economic sectors is required, for which it also requires to define the suitable projects and plans which each has a great share in movement of country towards objectives of project. Implementing economic development programs at various areas is an objective in the current community, and implementing civil projects is of indicators of economic development which comes to realize in the light of signing contract. The necessity to presence by engineers and technical experts specialized in the area of civil projects has been considered from the past long lost, in order to acquire technical knowledge concerning necessary supervision and investigations, and harmonize proposing suitable approaches with the considered objectives to promote the projects. In this regard, in addition to recognition, accurate definition and various contractual structures to execute civil projects, the necessity to presence by contractors and sub-contractors has caused considering some regulations to use them in executing government's needs in the country. Hence, in the first budget law (1910), the first provisions have been formulated at this area, yet unfortunately it has remained in a traditional status to date, due to false beliefs on status of contractors in contracts and their agreements. The necessity to familiarity with contract and its legal properties as well as role of parties in the contract will help to modify the false beliefs of project brokers and improve legal entity of contractors within community as a party in the contract with equal rights of another party in the contract. In this regard, due to legal nature of the provisions of treaties and agreements, and to inform parties in contract, presence by legal experts at the engineering sector has been necessitated so as to resolve most of the challenges arisen from ambiguity or deviation in understanding the legal concepts of contract and observing legal rights in the framework signed previously, whereby this will help to prevent any legal conflict. In addition, presence by legal experts in the contract administration as a sector separate from executive sectors to resolve any concern or obtain outcomes of contract for the contractors, can avoid disturb in the process of execution of projects and delays.

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## 1.Introduction

Access to a rich civilization in countries is one of the cultural objectives in today's communities. Without doubt, civilization comes out of the cultural objectives governing the society. Principles and methods of social life and legislation in conformity with human dignity by macro-management governing the society all help for achieving the objectives such equality of rights, fair share of facilities, achievements, talent development and so forth, whereby this comes to realize followed by observing and respecting the traditions and customs governing at each society. Traditions and customs represent the beliefs governing any country. In

Iran, these beliefs have been arisen from our faith and represented in a framework of rules and regulations which are influenced of our religion.

Observing beliefs, traditions and customs at all sectors and parts of life causes the members are well-informed of their liabilities and the legal limits which are considered for respect for others' rights, stability and security.

Despite the policy governing the governments in the past and lack of governments' inclination to increase knowledge of members of society as well as lack of individuals' social rights, today training and providing the infrastructure for knowledge learning especially observing individuals' rights

together with macro management planning have guaranteed the success and progress of communities.

It is obvious that having knowledge about every individual's social rights within the community which is obtained from existence of individuals within the society and/or the rights which have been obtained based on agreements and legislation, manifests a clear horizon to accelerate the quality and quantity of executive policies and plans within the communities, whereby the civilized society will develop. In this regard, to achieve a stronger structure, any society requires economic development. Among most of economic characteristics of the planning and implementation of infrastructure projects especially civil projects, economic development is one of the major indicators. Since executing all the civil projects is not possible by the government, presence by the contractors has been necessitated. On the other hand, as the contractors move separate from managers within the community and use their investment at the beginning of projects, the necessity to draft a contract between the owner and the builder has been also necessitated. In Iran, drafting a document called the treaty by the legislative has paved the way, yet what seem more necessary are all parties' information and knowledge on their rights and other parties' rights to the contract in civil projects. Further, drafting a document called the treaty by the legislative paves the way to develop more interaction in execution of projects and removal of static factors in legal challenges to the treaty and access to civil projects and exploit from them.

## **2. The importance of the contract on construction projects and nature of these contracts**

Civil project is one of the characteristics of economic development at any country, which is considered as the major indicator and criterion for the basis of economic development at that country. Progress, prosperity and progress of a nation concerning spiritual and material aspects largely rely on the success in country's civil projects, that success in execution of civil projects requires some mechanisms and factors so as to organize and accomplish the affairs in an optimal way with the lowest cost and highest profit. Technical engineering plays a major role in success of civil projects, yet there might be other factors with an important role, e.g. project management might be one of those effective factors that can end with success during the execution of project. Anyone might measure and rates these factors from one dimension and angle. Anyhow, despite this fact that what priority is given to these factors, alignment between all the factors involved in the project is of a particular importance. Project engineering and design from a legal perspective is one of the factors on which the basis of project has been grounded. It requires an exact engineering and design in agreements on the projects in order not to damage the project during the execution of projects and not raise conflict. For submission and implementation of projects, the treaty has been drafted by the the highest administrative organ of the state. Indeed, the treaty is signed by government representative( employer) on one hand and another party ( contractor ), and the third party (consulting engineer) undertakes the technical supervision in the project, so that these three

members(employer, contractor and consulting engineer) put their effort all together to start and end the civil project with their legal and contractual liability. The more liability of employer, contractor and consulting engineer is exact and in-depth, the ways to breach contract by them will be more ambiguous and general, and the possibility for breaking promises between parties will be easier. Economic and trade relations between private individuals all together concerning principle of governing will determination is of more flexibility. If one of the parties in the contract be the legal personality affiliated to public law, there will be less flexibility, and hardship and difficulty will be added to the contract.

Treaty has been regarded of administrative contracts, in which the employer who is executive (government) undertakes to sign it, and even client representative likewise private entities cannot play an independent role in determining and changing the conditions governing treaty. This lack of flexibility causes them to perform their liabilities and commitments without flexibility, whereby the conflicts arisen from this lack of flexibility will not be easily resolved. However issue of arbitration has been predicted in the text of treaty to modify the conflicts, accordingly legal objection arising from the conflict with the constitution will cause breach of this little flexibility from the treaty. Since treaty is a contract between legal entity on one hand and legal personality affiliated to public law on the other hand, and its conditions concerning the extension of issue largely rely on the rules pertaining to public and private law, thus these conditions have intensified hardening of the treaty. Administrative contract has its own particular features and nature which differentiate them from other contracts.

According to the definition of administrative contract, it can perceive that this contract refers to a contract signed by one of administrative agencies or by representative of them with one of legal persons aiming that fulfilling an action or service pertaining to the public interest in accordance with the specific provisions.

In other words, any contract which is signed by one of the legal persons with the intention of providing public services or public affairs under unconventional conditions in private rights with another person is called administrative contract. Administrative contracts differ from other contracts in terms of legal system for the purpose of observing rights and general benefits.

In the contracts signed by the legal persons concerning the principle of the rule will, the parties with the power of choice can sign any contract under the framework of rules, yet in the administrative contracts, opposite side of legal entities affiliates to the public law and lacks total authorities in signing contract.

Generally, three limits of freedom of contracts include:

1. law
2. Public order
3. Good behavior

Yet, in administrative contracts, in addition to the aforementioned factors, protection from the public interest is another limit of freedom of contracts. Rules and regulations rooted in protection from the public interest are regarded as limits of freedom of contracts in the administrative contracts concerning the principle of the rule will. Regulations refer to the rules which consider the do's

and don'ts of public order, and not just satisfy parties in favor of them, but also lack legal basis. Hence, in the administrative contracts, numerous limitations will be faced in the principle of the rule will. This is due to the fact that protection from public law causes this principle exposes to the bottleneck in the administrative contracts, so far as some of the jurists have not considered the administrative contracts as the contracts from their legal perspective, e.g. a contractor who signs a contract with one of the government agencies about one of the civil projects, cannot negotiate likewise the legal entities on how to negotiate considering the conditions in the contract, and agree with its opposite side at the same point. The contractor obliges to sign a document named treaty developing from three major sections: agreement, public conditions and private conditions. Text of treaty has been drafted by the Management and Planning Organization of Iran (MPO) as a "Uniform Contract Type" and granted to the executive agencies and government organizations, except the cases as the sections including the name of employers and contractor, title, no, date, amount, date of starting the project, parties' address, and other sections of private conditions must be filled, and no change and manipulation must be applied on the terms, sentences and provisions.

Contractor must sign the treaty or disregard it. The instruction on how to fill and regulate the agreement under public and private conditions governing the treaties and their regulations under the appendix circular No 842/ 54-1088/102 on 1999 by Management and Planning Organization of Iran (MPO) is as follow:

Changing and manipulating terms or sentences in agreement are not allowed, and only the gaps are filled, where this instruction says about the public conditions in this way that public conditions must be used without any manipulation and change in the contracts, so that adding or ignoring a text is never allowed. According to the instruction, private conditions have been drafted in this way that they can be only filled under the framework determined by the public conditions, and adding the texts out of the determined range can be now allowed in private conditions. Since administrative contracts distort the principle of the rule will and appear them as additional contracts, it cannot consider administrative contracts as additional contracts because the public benefits have caused "the principle of the rule will" fades out in the administrative contracts, unless the additional contracts which are signed by large companies and massive economic enterprises to protect companies' private benefits with legal entities, cannot be compared with the administrative contracts which consider the public benefits by objectives and incentives.

Elements and features of administrative contracts include:

1. in administrative contracts, the necessity to presence by an organization to protect from the benefits of public law can be understood. The public organization refers to the government agencies such as ministries, public institutions and government agencies affiliated to the government. Yet, all the institutes above have not an independent legal entity such as physical education organization , management and planning organization , the environmental protection agency under the presidential suite.

2. The general objective is addressed in administrative contracts, where this derives from government's involvement in community and public affairs for public services. Administrative contracts are not the same as other contracts in which the coagulant has two private parties, but the third party(people around the country or the region) is also involved in these contracts who benefit the contract. For instance, a major duty of municipality or government is to grant services to the people, thus the administrative contracts are developed to meet people's needs through providing public services, such as the services pertaining to the public transportation such as public rail transportation.
3. administrative contracts follow special provisions, i.e. The necessity to provide public objective lies on a fact that any administrative contract has its own special provisions in order to differentiate it from civil and commercial contracts. special provisions refer to a certain categories of legal rules that grant preferential status to the administrative organization which is against the opposite side. special provisions cause the public offices to protect the opposite side of contract. Macro planning requires preparation of plans and budgets. These plans even with national aspect or regional and local aspects can be executed when the whole budget allocations are provided for executive systems. Execution of the projects pertaining to the general and regional planning in civil sector requires for signing contract with the private and public sectors. Because generation and transmission and distribution of a certain amount of electric power to meet the requirements stipulated in the law require building dams, construction of large tower and power distribution between people. If such affairs do not be possible by government officials, fulfillment of tasks will be much more difficult. A contract drafted by concerned government system and contractor to execute national and local projects will have the nature same as the administrative contract, and if we hesitate how many contracts must be drafted to achieve the objectives in such projects, thereby the economic importance of the projects pertaining to the national and international programs will be perceived.

### **3. Contractor 's place in contracts**

Contracting profession was started as a modern phenomenon with emergence of constitutional revolution in Iran. Modernity with culture, policy and industry emerged in Iran, and today it can consider the first economic planning document in Iran as the way for rescue by the Iranian engineer, Sani o Doleh. Sani o Doleh was assassinated when proposed this budget to the national legislative assembly to issue it by a Georgian citizen, and a short while later the Mostofi-al-Mamalek cabinet was cancelled, in which Sani o Doleh was authorized to control ministry of finance. Under such condition, assembly representatives agreed on this budget in order that Sani o Doleh's budget is used as the annual country's expenditure. Representatives of the constitution wrote in the first The Public Audit Act issued in 1910 in articles 23 and 24:

Article 23: all the state transactions including sales, rental and lease contracts must be notified to all the people, separate from the exceptions which are specified by the law. Article 24: in the cases below, the government transactions might be fulfilled without people's information and the order of auction and tender:

1. the transactions which must remain unknown for improving government competence.
2. in case of purchasing the objectives which are distinctive.
3. about the fine arts which will never be fulfilled unless by the special craftsmen
4. the actions which are delegated to the government
5. the transactions or actions with their permanent emergency beside the government board, for which it cannot wait for expiry of the public announcement period and the order of auction and tender, whereby the transaction will be fulfilled by being issued by the board of ministers.

Article 25: the transactions without any volunteer in a certain period of time, or the volunteers who propose some conditions which are not acceptable, the government can fulfill the contract with anyone provided that no breach of the principle considered previously. Over 51 years, the budget act was issued by the representatives that its third discourse and articles 512 and 517 are characterized as follows:

Part IV of the Civil Code

Third discourse - persons rent

Article 512-according to persons rent, the tenant is the one who rents, mentioned that a tenancy which may be terminated at any time by giving reasonable notice by either the landlord or the tenant.

Article 513- the rent of persons include the categories as follows:

- [1]. rent of workers
- [2]. rent of transport providers

First item-rent of worker and crew

Article 514-the crew or worker cannot be hired unless for a certain period of time or to do a certain affair

Article 515-if a person is hired without determination of the hiring period, the period of a tenant's occupancy will be limited for a period of time for which the wage has been determined. Hence, if a certain amount of money had been considered for the period of a tenant's occupancy, the period of a tenant's occupancy will be limited or ended in a week, month or year. After expiry of the period of a tenant's occupancy, the process will come to an end. In this way, the traditional thinking against changes in persons' rights at business will resist, so that after a quarter century of civil law, *assumpsit* has been followed in persons rent.

Although modern phenomena have been emerged at the arena of economic activities, still the contractor is called hired at the area of civil law. Additional contracts at the 40-50s solar decade were defined based on new requirements, yet still contracts have not been recognized as a new contract in the category of civil rights. This contradiction of tradition and modernity has continued for about one century, and what has represented from the 40 years ago to date has remained constant in sake of the legal approaches and basis; for this, there is no great difference between contractors' definition for contracting profession and the

definitions for provisions of treaty. still the contractor has not been assumed as the opposite side of contract with the equal rights, but he is assumed as the one who is hired. Sellers and traders are called "respectable businessmen" due to their long reputation and are remembered enjoying special rates of tax and public law, yet the contractors at production lines must pay taxes before gaining profit. The workers must pay premium to the social security organization about two and half of the facilities that social security grants to them under support by contractors. In paying the taxes, production classes are not recognized well, yet they are attributed as the service profession. Mutually, contracting profession has sustained away from its real functions, due to its economic nature. In contracting profession, competition over quality, reputation and independent identity have been in turn replaced with competition over price, relationship orientation, and adjustment to the inefficient environment at public sector. Social capital is the most important agent which has annihilated, where it cannot be considered in a term as reliability. Despite legal measures, sustainable development will be just a lie in a society without the reliability. Lack of balance in contract has been regarded as the effect which affects the environment in which economic activities come to realize, and damages to the contract at public sector rather than the contractors. This damage causes a big challenge in the efficiency and functionality at public sector from various aspects, and causes prolongation of project period, legal claims, administrative corruptions and etc.

To have a revision on new challenges in the rules and regulations of consistent contracts, Management and Planning Organization of Iran (MPO) may enable to propose a solution to remove these challenges, yet these efforts will come to realize when engineers and managers reach to an agreement on the necessity of major changes before issuance of them in the instructions, standards and circulars. If the belief on hiring independent contractors remains at the public realm and scholars' thoughts, any new rule and regulation will face administrative and bureaucratic barriers without required efficiency.

#### **4. The necessity for the presence by the technical and legal expertise in the treaties**

If the contracts signed between private individuals are known as the parties law, and if this law is known as the social contract, the treaty will be considered between these two. Because what organized as treaty by an official organ and notified to the executive systems and public organizations is far from the contracts between private individuals and considered as a collective contract. However treaty is neither a law nor a contract, it is more likely similar to additional contracts. In today's world, relatively all the serious economic activities are fulfilled via a contract, for this contract has been regarded as one of the most important indicators to prove the parties' rights. The technique to organize and draft contract in a way that the agreements and satisfaction by parties to the contract are defined clearly has been embedded at the area of law. The ones who are well-informed of the importance of this science, know how to draft the contract and use what terms in it. Thereby, drafting contract and representing a clear definition for parties' will

cannot be devolved upon anyone, which requires a person specialized at this field of science, and further it has been mentioned of a great importance due to nature of civil projects in technical perspectives and engineering calculations as well as legal aspects. Treaty is one of the most important administrative contracts that billions of dollars of state funds are exchanged per year relying on the treaty as a unilateral credit. Indeed, treaty is of a particular importance as encompass a large area of activities pertaining to the civil projects. Since treaty encompasses a large body of issues and so many rules and regulations have been organized for it, thus representing an explanation for it based on legal basis is an important factor to analyze legal aspects of contract. Accordingly, presence by legal experts can be a positive step to facilitate understanding the concepts for the engineering community especially those ones who involve in the civil projects. Since treaty has been organized by a governmental entity and signing the contracts pertaining to civil projects can be accepted only in the form considered by governmental entity, thus the necessity to describe and justify this contract will reveal when the parties to contract disagree on interpretation of contract to protect their benefits. Accordingly, the contractors' competence to execute the contract can be determined via the ways below:

1. evaluation of technical knowledge of contractors: this comes to realize by hiring an expert specialized at the issue of contract registered by the competent authorities. Physical presence by an expert specialized at the issue of legal entities is required. Presence by an expert is required in legal registry of the legal entities and determination of their technical competence as well as determination of rank to devolve responsibilities upon them. Determination of contractors' competence to devolve responsibilities upon them comes to realize during the question-response meetings by the technical committees in the province. The stages to determine contractor's competence will be much more shorter and easier due to the capacity of work.
2. financial evaluation of legal entities: this comes to realize based on an overview on the contractor's financial resume and the bank account or any documents which indicates financial ability of them.
3. evaluation of executive ability: in addition to considering the ranking of these legal entities, overview of their executive resume and their previous contracts comes to realize based on the interim and final reports in previous treaties.

## **5. Conclusions**

All what aforementioned above might guarantee contractors' competence in terms of their executive abilities in workshops to improve their technical and executive operations, yet here it is asked whether their competence can be acquired by observing the aforementioned factors or having them. To assure from observing legal limits under the framework of rules, the employers ask help from their legal consultants in the concerned systems. Observing and believing in equal rights of parties to the contract will come to realize when the parties know that the opposite side is well-informed of the law. Since, any correspondence and

written agreement or making agendas represent the documents of treaty, thus observing the legal entities is of importance. Organizing the correspondence under the framework of provisions of treaty between parties to a treaty can play a major role in order of behaviors of parties to a contract and the outcomes arisen from their responsibilities for the parties in financial perspectives. This important fact that most of employers have misused this age and adopted some decisions to impose their beliefs is clear for everyone. Thus, it is suggested to contractors getting help from their legal consultants to familiarize with the legal limits pertaining to the contracts. To avoid the misuses arisen from changing the employers' and consulting engineers' false beliefs, the contractors are required taking actions to improve their awareness from treaty together with their technical knowledge.

Definitely, with regard to the aforementioned factors, the necessity to presence by legal consultants together with executive activities is required for contractors to achieve the objectives below:

1. awareness from civil and legal rules and the rules associated to treaties
2. avoidance from any duality in the provisions of treaties regarding illegal manipulation by employers in organizing the provisions of contracts during execution of contracts
3. avoidance from waste of time during execution of operations regarding the commitments by the parties to the contract and also avoidance from interpretation of rules and regulations by employer and avoidance from any conflict
4. asking for observing contractor's legal rights based on provisions of civil law and the associated rules by the employers
5. avoidance from any inattention to rules or lack of observing the rules by the contractor
6. observing the principles to execute any operation concerning the financial commitments under the legal provisions of contracts.
7. developing field of law at bachelor, master and Phd degrees in the law universities or technical engineering faculties, or passing several law courses in the engineering fields, concerning the country's requirements, that shortage of law is increasingly felt in our country, mentioned that spread of this field of study can help for achievement of objectives.

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