

ENGINEERING CONTRACTS IN NIGERIA RIVER BASIN

AND RURAL DEVELOPMENT AUTHORITIES

T H E S I S

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BY

SHIFA'U ENEZE ATTA  
FACULTY OF LAW  
AHMADU BELLO UNIVERSITY ZARIA

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ENGINEERING CONTRACTS IN NIGERIA

RIVER BASINS AND RURAL

DEVELOPMENT AUTHORITIES:

CERTIFICATION

This is to certify that SHIFA'U ENEZE ATTA a student of the LL.M. programme, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria has worked under one close supervision and duly completed her thesis on ENGINEERING CONTRACTS IN NIGERIA RIVER BASINS AND RURAL DEVELOPMENT AUTHORITIES.

DATED THIS.....7<sup>TH</sup>.....DAY OF.....MARCH.....1986

S.E. ATTA

*AS*

Signature

(DR. G.T. MURKWA)

*G.T. Murkwa*

Signature

DESIGNATION: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

(DR. M.G. YAKUBU)

\_\_\_\_\_  
(Signature)

DESIGNATION \_\_\_\_\_

ADDRESS: \_\_\_\_\_

DEAN OF POSTGRADUATE STUDIES

*MS*  
\_\_\_\_\_  
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TO DROUGHT VICTIMS

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17. WHITE AND CARTER (COUNCILS) LTD v. MCGREGOR (1962) A.C. 413 (H.L.) pp. 68, 75.

18. WILLIAMS v. FITZMAURICE (1858) 3 H. & W. 844  
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19. WORKINGTON HARBOUR & DECKBOARD v. TRADE INDEMNITY  
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CHAPTER ONE

A. INTRODUCTION:

When the Federal Government of Nigeria in 1976 passed an Act<sup>1</sup> on the establishment of the River Basins, it had among its aims the development of both surface and underground water resources by the River Basin and Rural Development Authorities<sup>2</sup> for multipurpose use. This was with particular emphasis on irrigation, agricultural production, construction and maintenance of dams, wells, boreholes and drainage systems. The aims also included the implementation of other works necessary for the achievement of the Authorities functions.

The first ten Development Authorities were established in 1976.<sup>3</sup> They were further increased to eighteen almost on a statewise basis, in 1984. In implementing the programmes set up under this Act, construction agreements are usually entered into by the Development Authorities on behalf of the Federal Government of Nigeria on one part and the contractors and consultants on the other part.<sup>4</sup> Complex legal issues sometimes arise, which arbitrators are usually called upon to look into.

Most parties accept the results of the arbitration without circumventing the terms of their agreements. For those who disagree, judicial assistance is necessary. Obviously, the availability of such assistance is an essential underpinning for effective arbitration.<sup>5</sup> Difficulties often encountered during the implementation of the

basin programmes are a natural corollary of major innovation, especially in construction works. Disputes often arise out of claims for extra costs, as well as request by contractors for extension of time to complete the projects. Resettlement and payment of compensation for land acquired, and economic trees destroyed have also been aspects of constant worry to these organisations. Co-operation between the Development Authorities and the land owners is often unsatisfactory and conflicts often lead to political unrest.<sup>6</sup>

These disputes have grossly violated provisions of such construction agreements. Contractors would prefer on their part to issue agreements for services that tend to be in their favour. Lack of uniform standard forms contract documents in these Development Authorities have invariably worked immensely to their disadvantage since, for instance;

- (a) quotations and payment for similar projects may fluctuate from one organisation to the other, despite their common purpose;
- (b) contractors and consultants have a lot of say in the styling of the provisions of the agreements often based on the conditions of contract (International) for Works of Civil Engineering Construction.<sup>7</sup>

The Development Authorities as parastatals under the Federal Ministry of Agriculture, Water Resources and Rural Development, are closely guided in their activities by Federal enactments as being in force from time to time.

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The establishment of these Development Authorities even as bodies corporate does not require the preparation of memorandum and articles of association to govern the operation of their programmes.

This ease of operation in turn, offers:

- (a) avoidance of hardships of company floatations and all attached expenses,
- (b) easy attraction of loans from money lending institutions,<sup>8</sup>
- (c) rare evocation of the ultra vires doctrine to check any expansion programme and incidental activities of these organisations.<sup>9</sup>

These programmes measured by corresponding pressure on the Development Authorities are neither smooth nor easy despite the ease in their operation. A researcher<sup>10</sup> recently reviewed these aims and concluded that: given the urgent pressures on the Nigerian Government to produce more food in the face of a growing urban population and escalating food import bills;

given the release of money to invest in rural development projects coming from oil boom; and given the the planners' "modernisation" approach to development, the decision to irrigate is comprehensible.

A consultant<sup>11</sup> on his own part observed that there is no long tradition of irrigation in the country. There

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is, therefore, little expertise in the planning and design of projects. The rate of project implementation, according to him, is very high. This reflects the policy of speedy use of oil earnings in the less developed agricultural sector. The result of these features is a heavy dependence on expatriate skills. The decision to irrigate has forced Nigeria to turn to expatriates for help at all levels, for designing the scheme for construction and for the running of the top levels of management and the training of the lower levels. This is extremely expensive and has important implications for the introduction of the scheme into rural areas.

There is little wonder therefore that engineering contracts constitute no small part of the trade upon which the life of an industrially growing country like Nigeria, largely depends. This in essence, calls for harmonious contractual relationships between the parties to such contracts. This is because when programmes are highly standardized at a national level, mistakes, when made, are potentially more disastrous than might otherwise have been the case. This writing is therefore focused on the nature and benefits of engineering contracts in the Development Authorities. It is hoped that the suggestions and recommendations made, based on the case studies of some engineering projects will be found useful.

B. BACKGROUND AND FUNCTION OF RIVER BASINS:

A river basin is commonly defined as the area of land drained by a river and its tributaries.<sup>12</sup> It is a unit of water communication. Water has created a universal problem. Fresh water is one of man's vital needs. The distribution of water within river basins has a direct bearing on the organisation of water resources development to meet this ever-expanding need.

There is widespread acceptance within the past two or three decades of the river basin as the unit of optimal water resources development. Such acceptance poses the question whether this is a temporary phenomenon, reflecting the current stage of technology, administrative, economic and legal thought on the subject. One may also ask whether the influence of the physical unity of the river basin and the inter-dependence of its waters has always operated in the past and will continue to operate in the future.

The physical unity of the river basin has an enduring influence upon water resources development. This will continue to operate, even in an era of vast inter-basin transfers of water, engaging the efforts of scholars and practitioners in both domestic and international water law. The Development Authorities have always provided an organisational framework in Nigeria whose lifeblood depends on agricultural irrigation, and also for intensive uses such as inland navigation. The Development Authorities

have, therefore, become the appropriate legal entity for water resource development.

In this era of unprecedented pressure upon water resources, the battleline between "haves" and "have - nots" will be drawn along the drainage basin boundary. Reconciliation of their conflicting interests will in all probability constitute the main task of international and domestic water law. The rapidly accelerating growth of world population - from 4,250,000,000 in 1963 to a projected 6,500,000,000 by the year 2000<sup>13</sup> alone would be the cause for concern in careful handling of engineering contracts. This is measured against a resource which, even if renewable is not unlimited. In many areas of the world it has, in fact, often been deficient. In 1957, a team of United Nations experts stated:

"It is now widely recognised that individual water projects whether single or multipurpose - cannot as a rule be undertaken with optimum benefit for the peoples affected before there is at least the broad outlines of a plan for the entire drainage area"<sup>14</sup>

There is, however, insufficient co-ordination of data<sup>15</sup> as regards the scope of activities that should be centred on the Development Authorities. When it comes to legal writings, also, the physical unity of the authorities is taken for granted without clearly stating their potential and their limitations. It can be shown that whenever water is used and controlled for an individual purpose or combination of purposes on an appreciable scale, the Develop-

ment Authorities tend to acquire some form of legal unity.

The nineteenth century witnessed major reforms in the field of river basins. It became evident to men of vision that for fullest utilisation the waters of a stream or of an entire basin should be made to perform as many tasks as possible.<sup>16</sup> Greatly increased demand for water made this desirable, and technology made it feasible. Now, there is a need for well prepared engineering contracts, in the construction of projects to fulfil such tasks.<sup>17</sup>

By the mid 1950's the idea of basin wide planning seemed to be so widely accepted throughout the world that the United Nations Secretary General was able to report to the Economic and Social Council that:

"River Basin Development is now recognised as an essential feature of economic development."<sup>18</sup>

The legal status of the big rivers of Central and West Africa was determined by Conventions concluded by the major European powers in the nineteenth century and the first quarter of the twentieth century.<sup>19</sup> To the now independent African States, these Conventions are nothing but an unwelcome reminder of the colonial past. The Niger Basin Authority Commissions now recognise the need for multi-purpose development of water and other resources of international basins.<sup>20</sup> But the Commissions do not yet provide a definite plan for such development, and the machinery for future planning that they do provide is rather weak.<sup>21</sup> The future development of these basins will depend on how well

their Commissions manage to weld independently launched projects into a coherent whole to absorb the benefits of optimal water resources development.

Having given an account of the legal growth of the Development Authorities, it will be appropriate here to show the sequence of this writing. The arrangement of its subject-matter is as follows. As a preliminary and essential background, the first main chapter deals with creation of engineering contracts; the parties to such contracts, and their contractual relationship towards each other. It also mentions briefly, stages in construction processes as the contracts are usually for construction projects.

Chapter two is concerned with the basis of standard form engineering contracts in such construction projects and the need for uniformity amongst the Development Authorities. It also reviews some main clauses in the standard form contracts with special reference to Tungan Kawo Irrigation Project. This is followed, in Chapter Three by a consolidated review of resettlement and compensation issues, for land acquired for construction works. Often these issues create socio-legal problems. The findings from interviews and questionnaires with settlers are considered under this chapter. Chapter four is devoted to the socio-economic benefits derived from engineering contracts in the Development Authorities. Chapter five lays out the conclusion and also enumerates some recommendations on the subject matter of the study.

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NOTES

CHAPTER ONE

1. The objectives are set out in the River Basins Development Authorities Act No.25 of 1976 AS AMENDED by the River Basins Development Authorities Act No. 31 of 1977, S.2.
2. Which title is hereinafter referred to as the Development Authorities.
3. By the River Basins Development Authorities Act No. 25 of 1976, the Delta Basin Development Authority Act No. 37 of 1976.
4. An example is the contract on the construction of Tungan Kawo Irrigation Works between the Upper Niger River Basin and Rural Development Authority on the one part and Messrs. Dantata Land and Sea Company Limited on the other part: MINNA: PROJECT NO. UNA/82/EDGI/1 and 2: 1982.
5. A similar observation was made by the American Arbitration Association: 140 West 51st St.: Published by Oceanea Publications Incorporation in a book titled "New Strategies for peaceful Resolution of International Business Disputes: New York (1971) p.25.
6. An instance is the implementation of the Engineering Contract on the Bakolori Project of the then Sokoto Rima River Basin Development Authority. It led to political unrest in the area in 1970's.
7. **FEDERATION INTERNATIONALE DE INGENIEURS CONSEILS**  
This Condition of Contract is hereinafter referred to as "FIDIC". 3RD EDITION, 1977.
8. Such borrowing has to be generally approved by the Federal Government in Council as stipulated in the River Basins Development Authorities Act No. 25 of 1976, S.3(3).
9. S.3(1) of the said 1976 Act states that "subject to this section, each Authority shall have power to do anything which in its opinion is calculated to facilitate the carrying out of its functions."
10. Wells, J.C. "Agricultural Policy and Economic Growth in Nigeria" United Kingdom (1974) p. 306.
11. Rydzewski, J. "Irrigation Studies - Decision to Irrigate". A letter by the Author in his capacity as a consultant from Southampton University U.K. to A.B.U. Zaria, Nigeria Mimeo (1977) p.2.

12. Moore A Dictionary of Geography (1958) Webster New International Dictionary (1961).
13. Stateman's Year Book, New York 1963-64 Plate 2(1963).
14. U.N. Dept of Economic and Social Affairs, Integrated River Basin Development 1 (U.N. Doc. No. E/3006) (1958).
15. Publications like HYDATA by the American Water Resources Association should be framed or adopted in Nigeria, to overcome water scarcity and disarray of legal and technical information in the field.
16. LIGGINS v. INGE, 131 E.R. 263 C.P. (1831).
17. Ackerman and Lof: "Technology in American Water Resources Development" New York 1959 pp.221-232.
18. U.N. Eco Soc Council off. Rec. 21st Session Annexed at 6 (E/2827) (1956).
19. The General Act of the Berlin Conference (Mimeo) February 26, (1885).
20. E.g. (a) The Niamey Convention of February and October 1963,  
(b) The Nigerian Convention of April 29, 1965.
21. The Basin Commissions are primarily consultative bodies whose decisions, to be binding, have to be approved by the States concerned e.g. Guinea, Mali, Niger, Chad, Nigeria.

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CHAPTER TWO

TITLE: ENGINEERING CONTRACTS:

A(I) Creation of Engineering Contracts:

Almost every act in business life creates legal rights and duties: the right to receive benefits, the duty to pay for them, the duty to supply goods or services and the right to be paid. Typically, an engineering contract begins as an "inquiry" in response to a "Tender" or "Quotation". One may regard these documents as indications to the terms and prices upon which an offer by the contractor, will likely find acceptance by the employer. The Development Authorities require the "tender" to be made in a specified form and to be so worded that it can adequately be regarded legally as an offer. The purpose of this is to ensure that having received a number of competitive tenders, the employer is in a position to convert the selected tender without the tenderer having any opportunity for revision, of his submissions. In practice, it is frequently the fact that, interposed between the various stages of the transactions, are letters and telephone conversations between the employer and the prospective contractors. These are germane to the contract.

By the time the contract is regarded by the commercial or technical people concerned as having been placed and acknowledged, it is desirable for the critically minded who are concerned with the legal function to read through a number of documents and, it may be, decide how conflicting clauses can be reconciled. The tender is usually

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accepted by the issue of an order which sometimes states that it is placed "subject to our standard conditions, which thus purports by reference to reintroduce the rejection of other conditions, by the tenderer.<sup>1</sup> The first and principal point to be observed is that the existence of the conditions which it is desired to apply must be brought to the notice of the other party either made available upon request or printed on the obverse of the tender.

There is, however, some authority as laid down in *Parker v. South Eastern Railway*<sup>2</sup> for thinking that the courts may refuse to apply provisions which are contained in conditions incorporated by reference only, or printed on a document in such a way that they are likely not to be read in detail, if those provisions are so unreasonable as to be quite beyond the contemplation of the party whose assent is to be presumed. That is to say, courts have ruled that the employer who expects his contractor to take his conditions on trust is under the obligation not to include in them anything which is so foreign to the normal content of conditions in use in comparable situations as to constitute a hidden trap. In *Lisi v. Alitalia - Linee Aeree Italiane SpA*<sup>3</sup> it was recently held that a disclaimer of responsibility by an airline was ineffective because it was printed on tickets and baggage checks in such small print as to be unreadable.

In *Glynn v. Margetson*,<sup>4</sup> a consignment of oranges was shipped at a Spanish port for carriage to England. The

bill of lading constituted the contract document in respect of affreightment and buried in the small type on the back of the bill was a clause which purported to give the owners or the master of the ship complete liberty to divert the ship and to call at any port or ports within a wide area, in any order, to take on, or discharge cargo or for other reasons. Upon leaving the port at which the oranges were loaded, the ship proceeded to call at other ports which were not on the normal route to England, causing considerable delay, as a result of which the oranges, being perishable, were irretrievably spoiled, involving the merchants in substantial loss. The clause apparently applied to the contract and the diversion and delay were within its literal wording. Lord Herschell derived two rules to be applied in the interpretation of any common form contract of this kind;<sup>5</sup> as follows:

"Where, in the course of entering into a contract, a printed form is used upon which essential matters are written or typed into blank spaces, or letters are written by the parties which must be read in conjunction with the printed matter, the words which are written or typewritten must be given precedence over the printed matter in the event of any conflict, and, indeed, the printed clauses must in any case be read as ancillary and subservient to the written words. The essence of the thinking of the Courts is that the contract consists, in the last resort, in the identity of the minds of the parties touching their intended course of action, and it is clear that words inscribed by a pen or dictated to a typist constitute matter within the minds of the parties, whereas a printed clause on a document may not have been read by the parties for years, if at all. Printed clauses could only be allowed to apply in so far as they could be regarded as consistent with a contract.....and the contractors.....could not claim a liberty to introduce delays unto the voyage.

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(b) The second rule is a development of this. It is that in every contract there is ultimately some basic obligation assumed by the parties, and any clause which seeks to relieve a party from the basic obligations inherent in the very existence of the contract will not be enforced by the courts".

Final scrutiny of the documentation is necessary in every contract of any magnitude, and the proper time for the scrutiny is when the contract is entered into and not if and when disputes have arisen. The Development Authorities base their form of tender mainly on "FIDIC". Section 12 of "FIDIC" talks about sufficiency of tender. It states that the contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender. It should be noted that special instructions are usually given in writing to persons tendering despite the provisions of the above mentioned section. That provision is skilfully drawn to preclude the contractor from asking for increase or an upward revision in the Tender rates and price except as expressly permitted under the contract.

Since engineering contracts are generally of standard form not subject to negotiation between the parties to such contracts, the above principles laid down in *Glynn v. Margetson*<sup>6</sup> have had no strict relevance to the form of tender in construction projects in the Development Authorities. This, however, is not to say that such principles may not be applied in some standard form contracts which involve the sale of goods. To both forms

of contract for goods or services it is true that "a printed clause on a document may not have been read by the parties for years, if at all",<sup>7</sup> because they assume that its provisions are basically the same by all standards. It is pertinent here, to show an outline of instructions always issued by the Development Authorities to persons tendering.

A(II) Instructions to Persons Tendering for Engineering Contracts:

The Development Authorities usually advise the tenderer to read the instructions set out, carefully, since no claim will be entertained on the grounds of failure to comply with such instructions or for any alleged misunderstanding of their import. The tenderer is to visit and inspect the site, local conditions, means of access, availability of water and local materials and any other matters affecting his tender. It is the responsibility of the tenderer to examine carefully the whole tender documents and to satisfy himself that he understands their full import severally and jointly. Such tender documents consist of a complete set of form of tender, drawings, general conditions of contract, general specification and particular specification as well as the bills of quantities. The tenderer is also expected to obtain all the information he requires to arrive at his tender price and no claim for alteration of the Tender amount will be entertained on the grounds of failure to obtain accurate information.

Should there be any doubt or obscurity as to the meaning of any of the tender documents or as to the instructions, or as to any other matter pertaining to the contract, the Tenderer must submit such doubt or obscurity in writing to reach the Development Authority within a specified time but before the date fixed for delivery of the Tender. No alterations whatsoever may be made in any of the tender documents. If any such alterations are made or if the Bills of Quantities are incompletely or improperly filled in, the Tender may be invalidated. Should the Tenderer wish to offer any design, method of construction or any specified material, he must first complete the tender strictly in accordance with the tender documents and submit in addition his alternative, in duplicate, fully described and priced in a separate document attached to the form of Tender clearly indicating the items of the Specifications and Bills of Quantities it is intended to supersede and the aggregate difference in the total tender amount.

All items in the tender documents priced by the Tenderer are to be priced and monied in INK and any alteration must be initialled by the person signing the Tender Form. The rates and prices set down by the Tenderer against the items in the Bills of Quantities are to be the full inclusive value of the finished work described there under and are to provide for profit and all obligations and liabilities of every kind which under the contract are to be borne by the contractor.

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The Contractor whose Tender is accepted will be required to execute a formal contract in the form shown in the documents, and to enter into a Bond with an approved surety in the form shown in the tender documents for the sum stated in the Form of Tender. The Tender must be submitted on the Form of Tender provided. The tender amount is to be inserted in words and in figures in the space provided and all other blank spaces elsewhere in the Form of Tender must be filled in with the information required. If the Tenderer is asked to state the time he requires to complete the contract, he must insert in words the number of months he requires. The time stated will be taken into account when deciding on the award of the contract and will be incorporated in the contract Documents.

The Tender must be signed by the Principal of the firm or by a person properly authorised for the purposes, and the registered name and address of the Contractor must be printed in black capitals in the space provided. If a tender is incompletely or improperly filled, it will not be considered.

A(III) FORM OF TENDER:

This takes the form of an undertaking by the Tenderer offering to construct, complete and maintain the whole of the construction works being tendered for, in conformity with the provisions of the tender documents. It also serves as an acknowledgment of such tender documents which

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the Tenderer have examined. The tender sum is then stipulated or deemed to be such other sums as may be ascertained in accordance with the said conditions. The tenderer also undertakes to commence the Works within a specified period of receipt of the Engineer's order to commence, if his tender is accepted. Also, a time is stipulated for the completion and delivery of the whole of the works comprised in the contract. The tenderer will offer to provide two worthy and sufficient sureties, or obtain the guarantee of a Bank or Insurance Company subject to the Employer's approval. Such sureties will be jointly and severally bound with contractors in a sum not exceeding certain per cent of the total sum involved for due performance of the contract under the terms of a Bond to be approved by the Development Authorities.

The Tenderer usually agrees to abide by the Tender for certain period from the date fixed for receiving the same and it shall remain binding upon him and may be accepted at any time before the expiration of that period. Unless and until a formal Agreement is prepared and executed, the Tender, together with a written acceptance from the Employer normally constitute a binding contract between the Tenderer and the Development Authorities. The latter, are however not bound to accept the lowest or any tender they receive. An appendix, which usually contains a breakdown of the total contract sum, forms part of the tender.

These forms of tender have become a standard and are

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completely recognised and respected by all the Development Authorities and their clients. The tenderer for the project is only required to complete the tender form with strict compliance with the terms of the Employer. In this case, such employer appears to have made a determined attempt from the onset to exclude the conditions (if any) of the tenderer. The tenderer, however, is too familiar with these forms and since, through his own trade association he has had a hand in forming them, he is unlikely to seek to make substantial modifications.

B. Parties to Engineering Contract:

FIDIC<sup>8</sup> - Part One, gives some rather unsatisfactory definitions of interpretation of terms including those of parties to a construction contract. Section One states that:

"In the Contract, as hereinafter defined, the following words and expressions shall have the meanings hereby assigned to them, except where the context otherwise requires".

B(1) The Employer:

"Employer" means the party named in Part II<sup>9</sup> who will employ the contractor and the legal successors in title to the Employer, but not, except with the consent of the Contractor, any assignee of the Employer".

This definition, has neither said much nor enough. It has only stated in essence that an "employer" is a person that employs. The employer is however, the most important of <sup>all</sup> the parties. The initiative in any

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engineering contract comes from the employer; as the person who wishes to have the work done is usually called. It is he, who invites tenders, having engaged his architect or consulting engineer. This official, naturally and without question invites tenders upon the basis of the standard contracts familiar to him, and these forms have therefore become a norm in the constructional industries. The Development Authorities as employers sometimes seek to impose their own sets of conditions, hence deviating from the norm established by these conditions. These are generally very exacting towards the contractor.<sup>10</sup>

As laid down by the River Basin Act No.25 of 1976, the functions of the Development Authorities even as employers, are strictly subjected to the general approval of the Federal Executive Council or the Supreme Military Council as the case may be. The Development Authorities are therefore agents of the main financiers, the Federal Government.

B(II)(a) The Engineer:

Over the course of the negotiations the employer may be represented at different times by different persons whose authorities to make representations on its behalf may not be very clearly defined. In this respect, therefore, it is the representative's apparent authority that matters more than his actual authority. The Engineer falls within this description. He is a third party frequently present in engineering contracts which purports

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to lay extensive duties upon such consulting engineer, architect or surveyor, who is not a party to the Contract.

S.1(1)(c) of "FIDIC" gives a definition of an "Engineer" to mean "the Engineer designated as such.....the Engineer appointed from time to time by the employer and notified in writing to the Contractor to act as Engineer for the purposes of the Contract in place of the Engineer<sup>so</sup> designated." This infers that an "Engineer" for this purpose need not necessarily be a qualified engineer. The Engineer has to be under the employment of the employer or at the time of the contract or appointed as a consultant from a practising engineering organisation as and when his services are required by the employer.\* The contractor has to be notified in writing of whoever is so designated an engineer, for the purposes of the contract. The engineer prepares a complete project drawing and writes out the specification, engineering reports and advise the employer on probable construction cost. In some cases bills of quantities are also prepared by the Engineer. These contract documents as they are normally referred to, should be sufficient in all aspects, for the following purposes. They are to enable a competitive or negotiable tender to be submitted for the project. With them, the employer is able to assess the tenders and judiciously award the contract. Again, successful execution of the project is made possible just as was contemplated and sought for, by the employer.

The standard forms of contract like FIDIC, which are

often quoted defy fundamental changes. In each of the drafted sets of conditions and forms of contracts based on standard forms, the engineer appears as a person independent of both the employer and the contractor, possessing extremely wide rights and owing duties to the other parties without being himself a party to the contract in his own name. He is the agent of his client, that is, the employer, and the rights which vest in him do so in this capacity. Such engineer often stands in the position of an arbitrator between the employer and the contractor, and he is expected to be fair and just in holding the scales between parties to the agreement.

The engineer has a contract with the employer and even if it has not been reduced to writing as the case is with a practising individual appointed from a consultancy organisation, its terms are fairly clearly implied by the very fact of his appointment in the capacity he occupies. Although the contract between the employer and the contractor purports to lay duties upon the engineer as regards the performance of the contract, on which the contractor relies, the contractor cannot sue the engineer under the contract, if the latter fails to perform these duties. The only redress available to the contractor is to sue the employer, and to be successful, it is necessary for him to overcome the defence that in the absence of a <sup>job evaluation</sup> certificate there is no liability under the contract for the employer to pay. In a case fought on this issue it was necessary to show

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that the engineer had taken a wrong view of his powers, that the duty of the employer was therefore to appoint another engineer, and that the employer could not take advantage of his own failure to do so.<sup>11</sup>

The Engineer has very extensive powers. He, to the exclusion of the employer himself, gives instructions to the contractors. It is his satisfaction that has to be secured; it is he who gives instructions regarding the progress of the works; he can order the dismissal of any workman of whom he disapproves. The Engineer can order variations in the works and determine adjustments as to the payment to be made therefore when the contract documents are silent. By his power to issue certificates, it is he also, who wields power over the payments upon which the contractor relies, and by his certification creates the financial obligations between the employer and the contractor. Such an engineer indeed can decide that work is defective and must be repaired or done again. He can grant or refuse extension of time for completion, and can act as arbitrator when the need arises.<sup>12</sup>

When one considers these extraordinary powers and realises that the person wielding them is not amenable personally to the contractor in any contractual relationship; it becomes evident that in his own interest the contractor should satisfy himself, first, that the engineer is a person whose judgment he is prepared to trust. Secondly,

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the contractor should ensure that in the event of his having a serious grievance, he is able to appeal to some independent authority. This is especially the case when the nominated engineer is an official of the Development Authority and not an appointed individual from an engineering consultancy organisation, which is itself the employer. The forms of contract come nearly to breaching the fundamental rule of natural justice that a man should not be a judge in his own cause.

The engineer is the agent of his client in other cases where not directly employed. He carries a fiduciary obligation to serve his client's interest so that his duty to act with fairness in a professional capacity is, as it were, super imposed upon that basic obligation. Wherever constructional contracts are undertaken, it is important for the contractor to satisfy himself that the engineer has overriding obligation to exercise fairness which will be judicially recognised in any Court of Law. In the case of *Hickman and Co. v. Roberts Alverstone* L.J.<sup>13</sup> said:

"The position of these arbitrators is a very important one.....the system could not have been allowed to exist, had it not have been found that persons in the position of engineers.....are able to maintain, and do maintain, a fair and judicial view with regard to the rights of the parties..... It has to be remembered that in the great majority of cases they are the agents of the employers. It has also to be remembered that they not infrequently have to adjudicate upon matters for which they themselves are partly responsible..... It is therefore very important that it should be understood that when a builder or contractor puts himself into the hands of an engineer or architect as arbitrator there is a

very high duty on the part of that engineer to maintain his judicial position".

In the same case Shaw L.J.<sup>14</sup> added that:

"the position of an engineer in a building contract is one of great delicacy. He is placed in that position to act judicially, when, to the knowledge of both parties, the person who is his master and his paymaster is one of the parties to the contract. It has been affirmed by Courts of Law, however, that being the case, his judicial position must be accepted, and it follows from that in the peculiarly delicate situation in which such a man stands the courts of law must be particular to see that his judicial attitude is maintained".

B(II)(b) Engineer's Representative:

S.1(1)(d) of "FIDIC"<sup>15</sup> states that:

"Engineer's Representative" means any resident engineer or assistant of the Engineer, or any clerk of works appointed from time to time by the Employer or the Engineer to perform..... duties whose authority shall be notified in writing to the contractor by the Engineer".

In Moresk Cleaners v. Hicks,<sup>16</sup> the Courts established that an engineer has the power to delegate his responsibilities, and that if as a result of so doing a building proves defective, he cannot shelter behind the fact of having relied upon supposedly expert specialist designers so as to avoid personal liability. This decision sounds good enough to call for eradication of the Clause<sup>17</sup> quoted above, or its modification to an extent that will not absolve the main engineer from responsibilities arising from defects in the construction, not identified by such engineer's representative. Such representative is directly engaged by the employer on the advice and recommendation

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of his engineer for the project to represent and act for those responsibilities as he may from time to time delegate in connection with the execution of the project. The engineer's representative inspects, checks and otherwise oversees the quality of the contractor's material and workmanship. If authorised, he may instruct the contractor to stop work in whole or in part as deemed necessary especially when such work is contrary to the drawings, specifications and condition of the contracts or against accepted engineering standards and practice. In all cases, the representative must seek the consent of the Engineer immediately and show that he has satisfied himself of having given the contractors sufficient warning in writing.

Such representative is expected to render periodic written reports on the accomplishment and progress of the work, keep track of site development and cross check contractor's request from the Engineer or the Employer. The progress reports together with the contractor's interim statement, duly checked by the Engineer's representative and then certified by the engineer, form the basis for payment on work done. He is also required to verify any field change, that is, variation orders, which may have to be reflected in the original plans and specification and which may vary the existing scope of work and ultimately, the final cost of the project. Such variation may be carried out provided that it is within the total contract sum. If it is not, the employer must be kept informed through the

Engineer of the project. In connection with this, the Engineer's representative is required to certify that the project is completed in conformity with the laid down provisions of the contract and to cause the issuance of the final certificate of completion and/or acceptance of the finished work by the Engineer, on behalf of the Employer.

B(II)(c) The Designer:

Closely linked with the Engineer is the Designer who is required during the execution of the project to assist in providing all the essential engineering and architectural details and other information that may be required for the expedient execution of such project. He is expected to keep track of the progress of the work at the job site and ascertain that there are no deviations from the approved working plans and specifications. Where unforeseen field conditions necessitate modifications in the plans and specifications, he should provide such modifications,

B(II)(d) The Contractor:

"FIDIC"<sup>18</sup> defines a "Contractor" to mean the person or persons, firm or company whose tender has been accepted by the Employer and includes the contractor's personal representatives, successors and permitted assigns. This invariably includes sub-contractors. The contractor, and may further say, is the party engaged by the employer to undertake both diligently and efficiently, the execution of the work in accordance with the engineer's drawings, specifications and conditions of contract.<sup>19</sup>

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As a specialist, he would normally be expected to adhere strictly to all professional codes and established standards and practices. He acquires all other necessary information needed for the successful completion of the work within a specified period of time. Where such information is already volunteered, he is expected to ascertain it. This is because he will not be absolved from responsibility through errors arising from misinformation. Despite that, it is in the interest of the employer that correct information is furnished to the contractor. This can reduce the risks chargeable on his contract. Depending on the method of tender preferred by the employer, the Contractor will be expected to submit to the former, a detailed breakdown of the total cost of the project. This should be in accordance to the employer's work classification or a sum embracing the entire cost for his consideration. Contractors are deemed to have read and understood the terms of the agreement for the contract they are negotiating for.

B(II)(e) Sub-Contractors and the Terms of sub-Contracts:

S.59(1) of FIDIC defines nominated sub-contractors as:

"all specialists, merchants, tradesmen and others executing any work or supplying any goods, materials or services for which provisional sums are included in the Contract, who may have been or be nominated or selected or approved by the employer or the Engineer, and all persons to whom by virtue of the provisions of the Contract, the Contractor is required to sub-let any work shall, in the execution of such work or the supply of such goods, materials or services, be deemed to be sub-contractors employed by the contractor".

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The position of the sub-contractor is capable of being a complex one, in the sense that he is often treated by the employer as though he were in direct contract with him. The position however suggests that the contract under which he has rights and duties is between himself and the main contractor. The employer has no contractual relationship with him. It is obviously necessary for his rights and duties to be defined with care. This is in order for the complicated situations brought into being by the presence on a constructional site of some dozens of sub-contractors, who are all to some extent reliant upon common services, to be reduced to a defined order. There is room for a good deal of argument in <sup>settling</sup> the terms of the sub-contractor. In practice too, there is a very considerable amount of inexact and careless thinking regarding the relationship which should exist between the terms of the main contractor and those of a specialist sub-contractor.

S.59(2) of "FIDIC" stipulates that the contractor shall not be required by the Employer or the Engineer or be deemed to be under any obligation to employ any nominated sub-contractor against whom the contractor may raise reasonable objection, or who shall decline to enter into a sub-contract with the contractor containing certain imposed provisions.

C. Contractual Relationships between the Parties:

Engineering contracts constitute no small part of the trade upon which the life of an industrially growing

country like Nigeria, largely depends. This in essence calls for harmonious contractual relationships between the parties to such contractual obligations. The major parties to such contracts as earlier on observed, are the employer, the engineer as well as his representative, and the contractor, who often engages sub-contractors, too.

C(1) Relationship at the time of tendering:

To understand better the complexities of the contractual relationship linking some of the participants, it should be borne in mind that, in a construction industry, the products such as dams, boreholes, building, et cetera, are normally sold before they are made. In manufacturing industry, on the other hand, the products are generally produced first and sold afterwards. The characteristic is at the origin of the complicated contractual obligations associated with construction industry. Documents like scale drawings, bill of quantities, general and particular condition of contract and so on, have to be elaborately written, as such. Adequate communication of information from the employer to the design team and from the design team to the production team is of utmost importance. According to the existing custom, the features of the final product must be described in unequivocal terms and quantified to enable the contractors to offer a firm price. It is, therefore, understandable that this stage of the process should receive so much attention.

Concerted efforts of all the participants will spearhead

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up and act as time - saving device for the completion of the project. The scope, quality and quantity of the information exchanged among the parties largely depend upon the type of contract linking them, and how far the contractor participates in the design process. It has come to be accepted practice in Nigeria that major contracts are awarded by competitive tender in which case adequate detailed description of the construction projects are to be forwarded to the contractor. The only legal obligation of the contractor to the employer it may seem, is to endeavour to produce or construct satisfactorily what has been described in the terms of the contract. If any deviation is required, the consent of all the parties have to be sought. This is known as variation.

Competitive tender, whether open or selective, has become a universal practice in the public sector of construction. The main objective is to safeguard public interest and prevent undue favouritism and corruption. It is at times claimed also that competitive tendering gives the employer the best value for his money. This view is however debatable since in the provisions of the form of tender it is clearly stated that the employer is not bound to accept the lowest or any tender he may receive. One noticeable disadvantage of competitive tendering is lack of commitment by the intending contractor. He cannot contribute to the output of the production team's design. It also tends to ignore the skills, plant and equipment

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such team may have provided. This could have the effect of freezing technological progress since competitive tendering largely favours conventional methods, procedures and techniques of construction.

An alternative contractual relationship in form of assignment of construction project is that of negotiated contracts. This embraces a wide range of procedures developed to enable the employer, the engineer and the contractors to come together at early stages of planning. Negotiated contracts are more frequent in the private sector and are generally used in the maintenance and repair work. By their nature, they cannot be quantified with precision in advance, and also for those highly specialised operations which do not lend themselves to competition negotiated contracts are of little use. In between competitive tender and negotiated contract, there are a number of hybrid procedures some of which have been used for many years, while others are still at an experimental stage. One of the well-tried procedures is the design-and-build type of competitive tendering applied to public civil engineering work. Here, joint teams of designers and contractors are invited to submit their proposals for a piece of work and at a given price. The employer only defines in general terms the main characteristic of the work to be undertaken. It is up to the joint team to satisfy the employer that its design meets his requirement as contained in the invitation to tender. Also the teams

has to prove that it has resources to adequately carry out the work within the price and the time limits specified by the employer.

C(II) Relationship after acceptance of tender:

The employer and his agent, the engineer appointed for the contract as a whole, have the right to expect that the sub-contractor should assume in relation to the work he undertakes, the same obligations as the main contractor. This is in so far as such obligations cannot be undertaken by the main contractor himself for example, the main contractor is under an obligation to remove any workman whom the engineer considers undesirable or incompetent. In the same manner, the main contractor will be expected to bind his sub-contractor.

It is in the interest of the main contractor to pass on to the sub-contractor as many of the burdens placed upon him by the employer as he can, but he has no right to do so. One of his functions as a main contractor, in consideration of which he is expected and entitled to take a profit upon the cost of sub-contract is to bear the impact of any differences between the terms of the contract which he has negotiated with the employer and that which he is able to negotiate with the sub-contractor. The contractor has a right however, not to be forced into what he may consider an unreasonably harsh contract with a sub-contractor merely because the employer has nominated the sub-contractor and

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the latter has proved to be intransigent in negotiations. The sub-contractor has the right subject to the foregoing to negotiate his own contract in terms that are properly applicable to his own industry and its products. In matters of payment, the main contractor and the sub-contractor are independent. The sub-contractor looks to the main contractor for payment, and unless specially agreed, has no interest in the payments made by the employer to the main contractor.

There is a tendency for main contractors to endeavour to pass on all the terms of the main contract. It is sometimes, considered sufficient however, for a sub-contractor to be invited to quote upon the general indication that the terms of the main contract will apply to all sub-contracts. At other times, the sub-contractor is not even furnished with a copy of the terms of the contract. He is either expected to take them on trust, or if he so wishes, to examine them at the main contractor's office. The tendency to require sub-contractors to assume all the obligations of the main contract, whether in vague and general terms or through the medium of this form of sub-contract has been strongly opposed in some quarters.<sup>20</sup> The British Electrical and Allied Manufacturers' Association once observed that:

The.....Committee frequently has to consider the case when a main contractor attempts to impose on a sub-contractor, a set of unsuitable conditions on the ground that these are the conditions which the main contractor

has to accept.

"Sometimes this is done by a short form of words in which the sub-contractor is asked to accept the terms of the main contract in so far as they apply to him. On other occasions, attempts are made to construct a garbled set of sub-contract conditions based on the main contract".

Both these methods are equally unsatisfactory and in the event of a dispute, can lead to difficult problems of interpretation and construction. A common one is to attempt to apply a set of construction conditions governing the main contract to sub-contractors who are delivering equipment only and have no construction works to do. In some fields, an attempt has been made to overcome the sub-contracting problems by introducing a single special set of standard sub-contracting conditions for use with standard main contracts.<sup>21</sup> This has never been a method which can be applied satisfactorily in the engineering industries. The variety of sub-contracts is infinite and it is impossible to provide one standard form which would do for all.

One recommendation that can be offered is that the standard conditions accepted as suitable for the work being done should be extended. Any special obligations arising from the special circumstances or the provisions which the main contractor has underwritten in the main contract should then be included by way of addendum.

The first requirement for the prevention of dispute is that each partner should know what the rights and obligations of both parties to a construction contracts are.

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Such parties should be discouraged from proceeding on the basis of merely vague ideas of what is required, each thinking differently from the other and acting accordingly. From time to time, things can go awry, when construction works are defective or due payments are not made, or when the good fellowship evaporates from the daily give and take of contractual or commercial relationship. The legal rights will have to be evoked and the strength of the structure that lies behind the facade of business or contractual enthusiasm will come to the test.

The evolution of the company as a legal entity after all provides the community with an exceptionally valuable form of association and ownership.<sup>22</sup> As a general principle, it will be universally agreed that the more precisely one can define the provisions of a contract the better, and it is desirable to be able to limit with certainty the documents which are to be examined in order to establish those provisions. In practice however, in any given contractual situation, the parties will agree where the limit is to be drawn.

D. STAGES IN CONSTRUCTION PROCESS:

Although it is difficult to generalise, it may be useful to describe briefly the conventional method in which construction projects are handled. This is in order to give a better understanding of the complex relationship between the participants to the engineering contracts. The major features of the conventional process are the

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sequential interaction between and intervention by the participants.

The first stage is the assessment of demand for construction and the study of user requirements. In the case of collective or public employers, the body of knowledge acquired may serve as a guide. For individual building or individual employer, however, the various aspects of the user requirements may have to be studied afresh on every occasion. Then, the employer formulates his brief to the designer based on user requirement. The brief should include terms of performance, limits of expenditure, bill of quantities, and other tender documents. At this stage, the designer undertakes a complex series of operations, whereby through successive approximations, he attempts to define the work to be done in accordance with his professional standards and local or social conventions. Ultimately however, this is done with a view to satisfying the employer. Increasingly precise proposals are submitted to the scrutiny of specialists and cleared with the client, until a set of documents is obtained. These documents serve as a basis of consultation with the production team. This includes, where applicable, contractors and manufacturers of the construction materials and components. Irrespective of the type of contractual arrangement, a point is reached when the documents must be sufficient to enable an estimate of the cost of the project.

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This process goes simultaneously with clearance of prepared proposals with the public authorities responsible for planning approval, building regulations, safety requirements, building licensing, financial sanction, insurance, et cetera.<sup>23</sup> Not all the constraints enumerated above apply to every kind of construction work or in every country. Consultation is also required with essential utility board. To enable a co-ordinated set of actions of the various authorities concerned, a joint meeting of all the bodies may be desirable.

In the next stage, tenders are called following which the contractor estimates the price to be paid for supplies of services and assembling of machineries. The employer will then decide on who to offer the contracts to. The contracts, when signed, bind the parties concerned. Necessary clearance would have been obtained by now. The site is then handed over to the contractor who would initiate the production and assembly for the project. The construction stage involves a lot of review, evaluation and redesign. More often than not, all the technical information required from the design team to complete the project may not be available, at the time of commencement of the construction. It is indeed customary for the design team to continue furnishing such information throughout the process and almost to the end of the construction.

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It is sometimes claimed that all production information should be made available before work starts on site or before the contractor is appointed. This is seen as a necessary step to avert the friction between the employer and the designers on the one hand, and the manufacturers and assemblers on the other hand. It is, however, obvious that if the designs were completed in all their details before the appointment of a contractor, there would be opportunity to make valuable contribution to the design process from his knowledge of the logistics, managerial and technical problems involved. There should, therefore, be a compromise to harmonise these conflicting interests. Their relative success or failure depends in the last resort on the professional competence of the participants, and on their willingness and ability to work together towards a common objective.

Throughout the construction period, the activities of the contractors are monitored by the employer or his professional advisers. To safeguard the interest of the employer against defects or malpractices and as a sign of genuineness of the contractor, it is almost a universal practice to defer the payment for a certain proportion of work done. This is known as retention money. Such balance is paid to the contractor after a specific period of time or after a maintenance period. This varies with different contracts. Upon completion of the project, and to the satisfaction of the employer, the work is handed over to

the latter. This is when its life as a valuable asset begins. This, of course, has implications in terms of management, operational and maintenance costs. It should be noted that a considerable part of construction activity lies with the maintaining, repairing, altering and conversion of existing works.

In every construction project, the non-professional group does seem to be larger, and the success of the project is determined in part, by the co-ordination between the professional and the non-professional parties to the contract.

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NOTES

CHAPTER TWO

1. See generally, FIDIC, (1978) 3rd Edition on instructions to persons tendering for engineering contracts.
2. (1877) 2 CPD 416.
3. U.S. Supreme Court (1968) 1 Lloyd's Rep. 505.
4. (1893) A.C. 351 (H.L.).
5. (1893) A.C. 351 at 353.
6. Supra.
7. Per Lord Herschell (Supra) p.14.
8. 3rd Edition March 1977, Sections 1 and 2.
9. Part II "FIDIC" consists of the Conditions of General Application to the Contract Agreement.  
Keating; Law and Practice of Building Contracts  
(Published by Sweet and Maxwell) 2nd Edition, 1975 p.257.
10. Durcan Wallace; (1969) Building and Civil Engineering Standard Forms (published by Sweet and Maxwell), p.112.
11. Panamena E.N. (Compania Limitada) v. Leyland (Frederick) and Co. Ltd (J. Russell and Co.) (1947) A.C. 428 H.L.
12. See "FIDIC" S.2 Part I.
13. (1913) A.C. 229 at 231 (H.L.).
14. (1913) A.C. 229 at 232 (H.L.).
15. See: Part I of General Conditions of Contract 3rd Edition (1977).
16. (1966) 2 Lloyd's Report 338.
17. S.1(1)(d) Part I of "FIDIC".
18. S.1(1)(b) of General conditions: "FIDIC" Part I (1977)
19. S.8(1) and (2) "FIDIC" Part I, specify the contractor's general responsibilities.
20. For example, see the Report on the relationship between main contractors and sub-contractors published in 1979 by the British Electrical and Allied Manufacturers' Association, p.12.

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21. See "FIDIC" Clause 59(1)-(6) Part I - General Conditions of Contract.
22. Murray Pickering - (1968) 31 MLR 481.
23. Such are the functions of the Ministry of Lands and Housing in each State of the Federation.

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CHAPTER THREE

STANDARD FORM OF ENGINEERING CONTRACTS:

(A) Basis for Standard Form Engineering Contracts:

It is general for the operations involved in construction works to be subject of a written contract, Engineering contracts, strictly speaking, have no code sanctified by statute. In the absence of a properly detailed written contract, therefore, such contracts are left to be governed only by such rules as can be evoked by custom<sup>1</sup> or deduced from Laws in force from time to time. Engineering contracts remain avowedly contracts for the sale of goods, the price being essentially the price of the goods plus a provision for the technical labour and supervision involved in construction work. When contracts are conducted by means of the parties' standard terms of trade, they are said to be of "standard form".

A.(1) Kinds of Standard Form Contracts:

There are two broad kinds of standard form contract, as observed by Lord Diplock in the case of *Schroeder Music v. Macaulay*.<sup>2</sup>

"The first of very ancient origin, are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade".

Such contracts present few problems. The parties are on a more or less equal footing. They have developed a form of contract which suits them both, and so they use it

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each time they trade together.

Lord Diplock continued by saying that:

"The other kind of standard form of contract.....is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands..... The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it..... They have been dictated by that party whose bargaining power..... enables him to say; 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'"

To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power.

The Development Authorities present an interesting illustration of standard form contracts of this kind, in action, as regards their construction works; usually assigned to specialist contractors. There is then bound to be conflict, because the employer and the contractor are both used to getting their ways; with years of professional experience behind them.

A.(II) "Battle of FORMS".

The phrase used when standard contracts clash is called a "battle of forms," which often arises, for instance, in payments' clause. This will be fully discussed later under the review of some main clauses. There has been a recent decision of the court of Appeal which serves as an illustration of a battle of forms. It is also something of a reminder of the technicalities of formation of construction

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contracts. This was laid down in the case of Butler Machine Tool Co. Ltd v. Ex-Cell-O Corporation (England) Ltd.<sup>4</sup>

In this case, the contract was for a machine tool. The dispute arose about the price to be paid. The buyers had made enquiries about the tool and in response, on May 23, 1969, the sellers quoted a price of £751,535 and a delivery date ten months later. This offer was stated to be subject to terms which "shall prevail over any terms and conditions in the Buyer's order". The vital term was for price variation. This meant that the price for the goods was to be that prevailing at delivery and not when the order was placed, which was on May 27, 1969. This order was made on a standard form, the terms of which differed in several respects from the sellers' terms. Of particular importance was the fact that it contained no price variation clause. At the bottom of the order there was a tear-off acknowledgment slip. It read,

"We accept your order on the Terms and conditions stated thereon".

This slip was completed and returned on June 5. However, it was accompanied by a letter stating that the order was accepted in accordance with the quotation supplied on May 23. When the machine was delivered the price has risen by £2,890. The action was brought on the issue of whether this increase was payable. That is, to decide which of the two terms applied to the contract.

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The court of Appeal held that the buyer's order of May 22 was a counter-offer, destroying the offer made by the sellers on May 23. The return of the acknowledgment Slip amounted to an acceptance of the counter - offer. The contract was, therefore, made on the buyers' terms.

Thus, the increased price was not payable. The letter sent with the slip was held to have been irrelevant. It merely referred to the price and identity of the machine. It did not operate to incorporate the seller's terms into the contract.

The principle in *Hyde v. Wrench*<sup>5</sup> was applied; where a counter - offer was regarded as having violated a standing offer. No acceptance, therefore, existed on the basis of the first offer or even the counter offer if the seller was not willing to accept the latter.

A.(III) Precedented Standard Forms Contract:

Standard form engineering contracts in the Development Authorities, are governed by some assumptions and principles. Such contract supposes no identifiable moment. It looks to a period during which a number of physical operations will take place upon a defined piece of land. At the end of such period, the land will include appertunances in the shape of buildings, dams and so on. Such buildings are not there before. During this period, there will be a succession of alterations of property rights.<sup>6</sup>

There is inevitable complexity in writing such standard form contracts which must cover multiplicity of details. This makes the task of this type of writing a serious undertaking of legal draftsmanship. Such an undertaking is, however, seldom needed, because the very fact that the engineer is likely to be involved, has led to the existence of elaborate precedents, in the shape of standard contracts.

The Development Authorities often rely on "FIDIC"<sup>7</sup> as of standard form. The document is extensive and space alone precludes its inclusion in this writing by way of reference. It is seen as a serious attempt to deal with all contingencies which can be foreseen in the class of contract with which it deals. It is readily available from the sponsoring association; that is, the Institution of Civil Engineers, the Federation of Civil Engineering Contractors and the Association of Consulting Engineers.

There is a broad similarity in principles between "FIDIC" and some other standard form Contracts - like the Model Forms of General Conditions recommended by the Institution of Mechanical Engineers: "I.M.E.". No neat precedent is, however, available in writing construction works agreement, for the Development Authorities. In general, business transactions are tending to be increasingly integrated into routine procedures. This is achieved through the use of printed forms, standard conditions and the like. Parties are found to exercise little or no care

to ensure that most conditions do apply. H.B. Sales,<sup>8</sup> in advocating the suggestion that the legislature should itself impose standard conditions for certain typical contracts, for example, argued that it would be advantageous and that "far less time would be wasted in solicitor's offices, barrister's chambers and the courts, in trying to find out which documents, if any, formed part of the contract; and how they could be read together, if at all".

The Development Authorities should welcome this type of suggestion with some reservation. Sales cannot have been more correct in the time-saving advantage he foresees in the process of legislative drafting of standard form contracts. Like all other legislations,<sup>9</sup> however, its review is hardly advocated or implemented. Law cannot afford to remain static in a developing Nation like Nigeria. Contractors may even manoeuvre it to the disadvantage of the employer.

B. Review of the Main Clauses in a Standard Form Construction Project:

5 TUNGAN KAWO IRRIGATION PROJECT: A Case Study:

B.(1) To a large extent, all the Development Authorities base their engineering contracts on "FIDIC".<sup>10</sup> It will therefore not be surprising to find most clauses in the contract for the irrigation Works chosen for case study identical with those in "FIDIC". Such main clauses are:

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| LIST OF CLAUSES                 | CLAUSES NO.<br>IN TUNGAN<br>KAWO AGREE-<br>MENT | CORRESPONDING<br>CLAUSE IN<br>"FIDIC" |
|---------------------------------|-------------------------------------------------|---------------------------------------|
| 1. Commencement of Works        | 41                                              | 41                                    |
| 2. Variations                   | 51                                              | 51                                    |
| 3. Force Majeure                | 65                                              | 65                                    |
| 4. Liquidated Damages           | 47                                              | 47                                    |
| 5. Performance Bond             | 10                                              | 10                                    |
| 6. Completion Time              | 43                                              | 43                                    |
| 7. Delay in Completion of Works | 44                                              | 44                                    |
| 8. Right of Cancellation        | 70-71                                           | 70                                    |
| 9. Certificates and Payments    | 60                                              | 60                                    |
| 10. Arbitration                 | 67                                              | 67                                    |

Many contractors could convincingly argue their case to exaggerate unnecessarily any such expenses incurred, or even allege that some expenses were incurred when they were not. Also, what can be considered "fair" by the Engineer as an amount incurred is relative. The standard form contract should include a conservative estimate from available data, on such incurred expenses and the amount payable in respective Development Authority.

**B.J.(ii) Variations:**

This includes alterations, additions and omissions under Clause 51 of the Agreement under case study as well as in the corresponding clause in FIDIC. The clause empowers

the Engineer to make any variation of the form, quality or quantity of the works which in his opinion seems necessary and desirable. He shall give order to that effect to the Contractor; to

- (a) increase or decrease the quantity of any work included in the contract;
- (b) omit any such work;
- (c) Change the character or quality or kind of any such work;
- (d) change the levels, lines, position and dimensions of any part of the works; and
- (e) execute additional work of any kind necessary for the completion of the works.

Such variation shall be made in writing and shall not in any way vitiate or invalidate the contract. Its value (if any) however, shall be taken into account in ascertaining the amount of the Contract Price. Verbal orders have to be confirmed in writing, subsequently.

The main legal obligation of the contractor towards the employer is to produce satisfactorily what has been described in the conditions of contract. This means that any alteration in the characteristic of the project as so described in the contract implies departure from the conditions of contract, and requires the consent of all the participants. The problems associated with "variation order" in the construction industry are complex and have confounded

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many specialists and led to innumerable complaints and disputes. It is not often that contractors abide by the Engineer's order and even seek to reduce it into writing for further confirmation by the Engineer. The contractor is usually placed in a difficult situation, because variation orders, strictly speaking, involve increase in construction price, which the employer always seeks to convince the contractor to absorb as part of the original contract price.

The problem associated with variation order deserves to be treated with open mind where arbitrator allows all the parties to the contract a fair hearing. Engineering contracts are entered into in a clear recognition that the Construction Projects which are to be brought into being exist only in the mind of the designer. Also, during the time which will elapse between the signing of the contract and its completion, changes in design may be decided upon or may be forced upon the engineer by circumstances.<sup>12</sup> This fact accounts for the clause which appears in all contracts regarding variations. Variation clause sometimes contains a proviso that no variations, shall, except with the consent in writing of the Engineer and the contractor be such as will with any variations already directed to be made, involve a net increase or decrease in the contract price of more than certain percentage.<sup>13</sup> This limiting percentage is a valuable protection to the contractor, since without it, he may be required to continue work of any particular type indefinitely. The price quoted in his tender

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....., or at a price fixed by the engineer.

event of delays, due to force majeure; Also, if the engineer has acted in accordance with the contract, the extension will be reasonable, having regard to the circumstances complained of

There is no apparent reason therefore why the contractor should not finish at the proper time except for recent restrictions on importation of goods generally. If he however defaults, he is in breach of his contract. The remedy for breach of contract is damages. The aggrieved party may be able in addition, if the contract is broken; to claim that he is himself discharged from obligations resting in him. He can eject the contractor from the Works and hence employ another contractor to finish the work. This would be done in practice only in the most extreme cases because the change of contractor would itself occasion serious delays and aggravate an already unsatisfactory position.

Quantum of damages bears no relation whatever to the magnitude of the subject matter of the contract. Certainly, a clause on liquidated damages serves as an advantage to both sides in a construction contract and, is really of more value to the contractor than to the employer. The tests to be applied in order to ascertain whether a fault deserves liquidated damages were reviewed by Lord Dunedin in the case of Dunlop Pneumatic Tyre Co. V. New Garage Co. Ltd<sup>21</sup>

The tests are that:

- (a) the expression used, is not conclusive, although prima facie the parties may be presumed to mean what they say.

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- (b) the essential nature of liquidated damages is that it is genuine pre-estimate of the damage likely to be suffered.
- (c) the construction of the contract and the light of existing circumstances at the time the contract was made to guide the assessment of damages.
- (d) a sum may be a genuine pre-estimate of damages, even though any precise pre-estimation is impossible.<sup>22</sup>

In Nigeria, a form of words will be found in the engineering contracts, which renders the right of the employer to claim damages on the basis of a stated percentage for each week of delay to be without prejudice to his right to recover the actual damages suffered. A Clause of this kind is manifestly inequitable and should be resisted. Liquidated damages should be unenforceable, whether so designated or not. A main contractor can be faced with a liquidated damages clause, which by percentage is related to the whole contract sum. This may be dependent for the fulfilment of his obligations upon a number of subcontractors, whose contracts are much smaller in size leading to a difficult problem. It is clear that the sub-contractor may enter into a commitment to complete his section of the work by a stated time. This is in the knowledge that if he fails, the main contractor may be involved in payment of liquidated

damages on the whole contract. Then, in the absence of any provision to the contrary, he will be liable under the rules of Hadley v. Baxendale<sup>23</sup> to indemnify the main contractor.

In an <sup>hypothetical</sup> / case, if the main contractor is some weeks late in handing over a complete building, contributory factors being that the lighting sub-contractor, the flooring sub-contractor and the lift installation sub-contractor were all in default to the same approximate extent, all the Sub-Contractors may be equally apportioned the blame for default. This is sometimes inappropriate since their sub-contractors awards vary.

Indeed, it gives the impression of having been drawn without reference to practical realities of the industry and on the basis of a purely legal approach to a hypothetical situation. In some aspects, the consequences of default could be so out of proportion with the magnitude of a sub-contract that it would be wise for a sub-contractor not to accept the obligation if he clearly envisages what it could mean.<sup>24</sup> There is probably no completely fair solution of the problem how to apportion any amount suffered in the form of liquidated damages by a main contractor between that contractor and one or more sub-contractors who are themselves responsible for the delay in varying degrees. Such problem should be clearly faced at the time when sub-contracts are placed, and clearly expressed in those sub-contracts. It may be possible for this risk to be made the subject of insurance in some circumstances. This is in spite of the fact that it is not normally possible to insure against the consequences of one's own contractual default. It is not

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impossible however to insure against the consequences of default of another party. Such insurance would, however call for a specially negotiated cover, and it would be necessary to write a policy around the actual circumstances of the case. To enforce liquidated damages clause by the courts is sometimes difficult if the Contractor can show that any part of his apparent default was due to a failure on the part of the employer or the Engineer.

B(I)(v) PERFORMANCE, BOND:

Clause 10 Part 1 of the conditions of contract of the Tungan Kawo Irrigation Project under study stipulates that:

"If the Tender shall contain an undertaking by the Contractor to obtain when required the guarantee of an Insurance Company or Bank or alternatively to provide two good and sufficient sureties to be jointly and severally bound with the contractor to the Employer, in a sum not exceeding ten percent of the Tender sum for the due performance of the contract under the terms of a Bond the said Insurance Company or Bank or Sureties and the terms of the said Bond shall be such as shall be approved by the Employer and the obtaining of such sureties and the cost to the Bond to be so entered into shall be at the expense in all respects of the contractor unless the Contract otherwise provides."

A surety is one who promises to be answerable for the debt, default or miscarriage of another. The document by which he gives the promise is executed under seal in practice, since no consideration moves to him from the promisee in respect of his promise. It is therefore called a "bond", this word denoting a solemn promise given under seal. In form a bond is a "promise defeasible upon condition subsequent", which is to say that it is an unqualified

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promise to pay a sum of money. This is subject to the condition that if a certain event happens then the promise will be of no effect. The event which defeats the promise in cases like this is the fulfilment of the contractor's obligations under the contract.

Where Bonds are given by sureties or guarantors the courts will enforce them only to the extent that the employer, in whose favour they are given can show that he has suffered loss by the default of the contractor.

The bond or guarantee therefore operates just like an evidence of the existence of the surety. Some employers insist upon this so as to ensure that the burden of settlement of damages will fall <sup>on</sup> some person, in the event of the contractor being in default and insolvent.

A "bid bond" is introduced at times. In such cases, instead of a personal bond being given by an individual the undertaking to make payment is given by a bank or insurance company in the territory of the employer. He will be instructed and indemnified by the contractor's own bank, which in turn will take a counter - indemnity from the contractor himself. No money will actually pass, except for payment of commission and charges, unless and until the employer evokes the guarantee. To enter into such an arrangement, however, involves a contingent liability on the part of the contractor. The terms of the contract will usually provide that if the tender is accepted and the

contract awarded to the contractor the "bid bond" or "tender guarantee" will be increased in amount and converted into a "performance" bond or guarantee whose effect will be substantially the same as the bond entered into by the surety under the construction contract.

Both in the bid bond and the performance bond there is a promise to pay, defeasible upon the happening of a stated event. In the case of the bid bond, the payment is relatively small, and the event is the signing of the contract. In the case of the performance bond the payment is larger and the event is the completion of the contract. It may be noted here, that much emphasis is not laid upon the creation of "bid bonds" by the Development Authorities. Fifteen per cent of the contract sum is generally required for a performance bond, while one or two percent is required for a bid bond where applicable.

In general terms, it may be said that the reasonable amount for a performance bond is the amount of the retention money. This means, that portion of the contract price which is paid only at the end of the period for which the contractor is required under the contract to maintain in the Works. The purpose inherent in this machinery is the protection of the employer against default by the contractor. It would otherwise be difficult for the employer to sue the surety owing to his being outside the jurisdiction of the employer's country. The bid bond lapses, if upon being offered a

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contract on the basis of his tender, the contractor refuses to enter upon the contract. It therefore operates as a sanction against the possible submission of frivolous tenders. The performance bond is forfeited in the event of failure to carry out the contract according to the terms. Such bonds follow a regular pattern, and the machinery of their establishment and operation is well understood by the Banks and Insurance Companies.

B.(I)(vi) Completion Time:

Clause 43 of the condition of contract of the Tungan Kawo Irrigation Project under study lays down in Part one, that,

"Subject to any requirement in the specification as to completion of any portion of the Works before completion of the whole of the works shall be completed within the time stated in the Tender Calculated from the last day of the period named in the Tender as that within which the works are to be commenced or such extended time as may be allowed under Clause 44 hereof".

In modern construction industry the problem of late dispatch is a serious one, and in the opinion of many observers failure to keep quoted dispatch time is a very grave offence in modern engineering industries. Compromise, is, however, readily reached on this issue amongst the parties, where there is delay. Liquidated damages are often of worthless value if as a result of the delay higher loss of profit is estimated and cost of law suits where peaceful negotiations cannot be reached from the breach of such contract may not be covered by such payment, neither

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can loss of reputation be appraised. The best position is to be able to recognise time as of the essence of the contract. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the contractor's breach of contract.

The contractor too has his point of view. When he quotes a time for the completion of the Works he is looking into the future which is always a risky business. Force majeure apart, his chief designer may fall sick, or find another job, or a flaw may be found in a major casting. This will therefore have to be replaced from the foundry, or he may be kept waiting for components he has ordered from the suppliers. He may find it difficult to work to required expectations without seeking new standards of material. It may simply happen that a job takes longer than he had expected, or that a sub-assembly has to be redesigned because of initial problem.

The truth however is that the practice which employers wish to be armed against is the tendency of the contractors to quote completion date frivolously or recklessly or fraudulently. It is very frequently the case that the time quoted for job completion is of more significance in the award of a competitive tender than is the price quoted. In that case the tenderer with the lowest quotation but longer completion date estimate may not get the award.

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B.(1)(vii)(a) DELAY IN COMPLETION OF WORKS:

Clause 44 of Conditions of Contract Part One of Tungan Kawa Irrigation Project states that:

"should the amount of extra or additional work of any kind or other special circumstances of any kind whatsoever may occur be such as fairly to entitle the contractor to an extension of time for the completion of the work, the Engineer shall determine the amount of such extension. Provided that the Engineer is not bound to take into account any extra or additional work or other special circumstances unless the contractor has within 28 days after such work has been commenced or such circumstances have arisen or as soon thereafter as is practicable delivered to the Engineer's Representative full and detailed particulars of any claim to extension of time to which he may consider himself entitled in order that such claim may be investigated at the time!"

Time other than that relating to payments is of the essence of the Contract of Sale of Goods.<sup>26</sup> In construction contracts, however, the law has never been codified, but it is clear that upon general principles anytime quoted for the completion of the work, or for the attainment of any specific stage in the process of completion is "of the essence of the contract". This is in the sense that failure to comply with the undertakings given in relation to completion entitles the aggrieved party to claim that the Defaulter is in breach of the contract, and to sue him for damages, and, taking an extreme view, which in practice would only be taken in the case of serious default, entitle him to eject the contractor from the contract so that the work can be completed by another.

The vesting clause may operate so as to enable the employer to require all plant, tools and tackle and all

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unfixed material to be left upon the site for the new contractor to use. "Contract" is said to include "all documents<sup>27</sup> to which reference may properly be made, in order to ascertain the rights and the obligations of the parties".<sup>28</sup>

Looking at the matter from the point of view of the employers, the observance of quoted completion time is often more important than the price quoted. It is so considered in reaching a decision for placing a contract which has been open to competitive tender. The completion or non-completion of Civil Works involved in an irrigation scheme before the time for sowing or harvesting can involve a government in gains or losses far out-weighting any difference between the quoted prices. Similarly, the non-completion of a contract for erection of productive machinery, for example, a Rice Mill, can involve a buyer in losses of production, much greater than could be compensated by the monetary advantage of a cheaper price.

Unless the buyer adopts a strict attitude in the matter of compliance with quoted times, there is a danger of early completion dates being quoted irresponsibly in order to obtain contracts. Even where there is a liquidated damages clause, there is a temptation for the "smart" contractors who knows that the contract will be awarded on the basis of completion date, to inflate his price to cover the damages which he realises he may have to pay. A time for completion is, therefore, quoted. By actual inclusion in

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contract or by reference, it forms part of the contract. It is always clear that at the moment of signing a contract for engineering works, the whole picture of the operation is far from clear. Every contract must, therefore, make provision for an adjustment of the date in the event of some contingencies rendering completion impossible within the time.

Examples of the causes which may be pleaded as entitling the Contractor to an extension include:

- (a) Causes arising from the act or default of the employer, such as
  - (i) Delay in giving access to the site
  - (ii) Variations or additions to the work
  - (iii) Delay in giving particular or decision.
- (b) Causes arising from natural phenomena:
  - (i) inclement weather (as affecting outdoor work, for example, feasibility study
  - (ii) flood, tornadoes, plague, epidemics
  - (iii) Earthquake
  - (iv) an Act of God.
- (c) Causes arising from circumstances extraneous to the parties:
  - (i) industrial dispute
  - (ii) riot or civil commotion for example, war, inundations, change of Government, et cetera.

B.(1)(vii)(b) POSSIBLE SANCTIONS FOR DELAY IN COMPLETION ON SCHEDULE:

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The right of employer to cancel the contract and reword to another contractor is a sanction. This is often impracticable and operates unjustly against the contractor who has made a reasonable effort to fulfil his obligations but has met with unexpected difficulties, even though those difficulties do not come within the usually accepted meaning of force majeure; as in the case of administrative upset. It is however a sanction which should be available as a last resort to relieve the employer from an uncompleted contract. This may be in the event of complete incompetence on the part of the contractor, especially where a substantial part of the construction project has not been completed thereby leaving it unidentified.

The right on the part of the employer to claim damages at large which can include loss of profits provided they are reasonably foreseeable. This operates excessively harshly against an honest contractor who has met with unexpected difficulties, but is fully justifiable against a contractor who has quoted recklessly or fraudulently in the matter of completion time. Liquidated damages are usually subject to an escape clause dealing with the more obvious kinds of force majeure. This is unlikely to recompense the aggrieved employer adequately, but provides an incentive to contractor to do his utmost to minimise delays which occur in respect of promises made in good faith. They only arise in the course of construction process when there has been some lack of alertness on the part of the engineers.

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The employer declares that in the event of delay beyond that date he is liable to suffer damage and, subject, as hereinafter provided reserves the right to claim damages at large in the event of default by the contractor. The contractor in turn declares that the said date is based upon his reasonable expectations at the date of entering into the contract. He acknowledges that he shall forfeit his right to the benefit of the next suggestion, if it shall be shown that such date was not quoted in good faith.

The contractor shall advise the employer in the event of any circumstances arising or becoming evident which shall cause completion of the contract to be delayed. Provided such circumstances are such as could not reasonably be foreseen at the time of entering into the contract. The said date shall be extended by such period as shall be reasonably necessary, but unless the delay shall be due to force majeure, this shall be without prejudice to the employer receiving by way of liquidated damages in full satisfaction, a reduction of the contract price at specified rate per period of time.

If any delay exceeds at stipulated period of time, then the employer shall be entitled to give notice in writing to the Contractor. If the contractor shall not have fulfilled the contract within a further stipulated time, the employer shall be entitled to treat the contract as having been terminated.

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the anticipated profit on the cancelled project ordinarily as quantity of work done increases, as the cancellation charge increases steeply. It will be against the interest of the contractor to include any provisions in his conditions to deal with the contingency. Such clause is known as the "Breach Clause". It only operates when expressly included when a contract is made. This does not give the contractor a fair settlement and the fact that he is better served by not having such a clause at all, has prevented the emergence of any norm.

B.(1)(ix) CERTIFICATES AND PAYMENTS:

In his supervision and direction of the work, the engineer acts as the agent of the employer, but it is in respect of the issue of certificates that the principle of his position as an arbitrator standing fairly and disinterestedly between the parties has been emphasised in *Hickman and Co. V. Roberts*.<sup>30</sup>

In that leading case, the engineer withheld his certificate under pressure from the employer and upon being pressed by the contractor, wrote to the effect that:

" "he had better call and see my client because in the face of their instructions to me, I cannot issue a certificate whatever my own private opinion in the matter".

It was made abundantly clear in the course of the judgment that, in subordinating his power to issue a certificate in accordance with the facts and his own conscience, he had lost his independence. Judgment was how-

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ever given against the employer and not against the engineer, illustrating the principle that the engineer is not himself a party to the agreement, notwithstanding that it purports to lay duties upon him.

Clause 60 of the Condition of Contract of the Tungan Kawa Irrigation Project states in part that:

"Unless otherwise provided, payments shall be made at monthly intervals in accordance with the conditions, set out in part II"

It is usual in construction contracts carried out under the supervision of an engineer for the contractor to be paid in accordance with certificates issued to him. To some degree his estimation of the amount may be subjective, in the sense that it will be affected by his own opinion regarding the completion and satisfactory quality of the work.

Many engineering contracts never reach a point at which diligent search could not find something which still needs to be done. Also, an unreasonable attitude in this regard by the engineer can involve delays which are very costly to the contractor.

A Ministerial order may be passed in a conventional government engineering contract which would effectively remove from its own engineer, any power to certify payments and instead vest the power in its own technical committee. Contractors in effect may have to observe delay in getting their money; a fair dealing is called for, here. It is

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possible for an unreasonably exacting attitude to lead to such delays in the issue of completion certificates that normal wear and tear became confused with, and treated as constituting defects in completion. Thus, the principle *de minimis non curat lex* is not left to be evoked by inference, but finds express embodiment in the contract. It must, however, be admitted that whilst the course of dealing between, the contractor and consultant is normally smooth and reasonable, where any tendency to small-mindedness becomes evident, it is possible for an engineer to adopt a legalistic attitude and by so doing, to involve a contract in very considerable expense.

B.(1)(x) ARBITRATION

The first requirement for the prevention of disputes is that each party should know what the rights and obligations of both parties to a contract are. They should never proceed on the basis of merely vague ideas of what is required, each thinking differently from the other and acting accordingly. From time to time when things go awry, when construction works are defective or due payments are not made, the good fellowship evaporates from the daily give and take of contractual or commercial relationship, the legal rights will be exercised. The strength of the structure that lies behind the facade of business or contractual enthusiasm will come to the test. Such intrincating legal issues usually make the presence of arbitrators necessary to look into the controversies.

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Arbitrators are ordinarily experts in the field of works in dispute. It is usual therefore that engineers are invited to arbitrate. Most parties to contracts providing for arbitration do not try to circumvent their agreements to arbitrate when an actual dispute arises. They often accept and sometimes judicial assistance is necessary to make private arbitration work. Obviously the availability of such assistance is an essential underpinning for effective arbitration.<sup>31</sup>

About the most controversial aspects of construction contract is the matter of claims for extra costs, closely followed by extension of time to contractors. This may take the form of extra work orders, changed conditions at site, delay due to acts of the employer, delay to the events beyond the control of the contractor, conflicting and ambiguous contents in the contract documents, to mention a few. Such cases are elaborated under clause 67 of the Tungan Kawo Irrigation Project, Part One of the Condition of Contract. The clause has the effect of perpetrating dispute, since the arbitrator may have to decide the necessarily subjective question of the states of mind of the parties. Such a clause presupposes that the parties will have confidence both in the fairmindedness and the ability of the arbitrator, who would need to be a person with considerable knowledge of the construction project concerned.<sup>32</sup>

A sanctified code on the extent of arbitration on disputes involving construction contracts would probably be

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a fair solution and a fair measure which will curtail judicial proceedings. Frequent disputes amongst the contracting parties only indicate the inadequacy of the condition of contract. Its review should therefore constantly engage the minds of the professional bodies indentified with its preparation asking for information, suggestions and recommendations from parties to construction contracts. They are likely to give an account of their experiences leading to the disputes, for better drafting.

As Lord Diplock said in *Schroeder Music v. Macaulay*,<sup>33</sup> standard form contracts are of comparatively modern origin and t can sufficiently account for its lack of concise conditions. Basing condition of Construction Contract of any particular project on General Conditions of Contract Like "FIDIC" will only serve as putting old wine in a new bottle.

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NOTES

CHAPTER THREE

1. See generally, "FIDIC" - Conditions of Civil Engineering Contracts, (1977) 3rd Edition.
2. (1974) I.W.L.R. 1308 at 1310-1312.
3. Peter Shears: Business Law 2nd Edition, published by Houtton B.E.C. Books (1981) P.157.
4. (1979) 1 All E.R. 965.
5. (1840) 3 Beav. 334.
6. Quic quid plantatur solo, solo cedit - Whatever is fixed to the land becomes part of the land.
7. See "FIDIC" 3rd Edition, 1977.
8. SALES H.B.: "Standard Form Contracts" (1953) 16 MLR 318.
9. E.G. The Nigerian Companies Act, 1968.
10. See: Conditions of Contract (International) for work of Civil Engineering Construction, as approved by Federation International Des Ingenieurs Conseils. FIDIC.
11. Emphasis in capitalized letters is mine.
12. E.G. ZOBE DAM Built by Kaduna - Karaduwa River Basin and Rural Development Authority was varied so that flood can be checked by the construction of Sand domes.
13. See: "FIDI" 3rd Edition, 1977, Part I, Clause 51.
14. Conditions of Contract (Tungan Kawo) and "FIDIC" 1977, 3rd Edition.
15. Williams v. Fitzmaurice (1858) 3 H. & N. 844.
16. See: Clause 52(1) and (2) of the Tungan Kawo Irrigation Project - Conditions of Contract.
17. See: (a) Parkinson (Lindsay) & Co. v. H.M. Commissioner of Works and Public Buildings (1949) 2 K.B. 632.  
(b) Thorn V. Mayor and Commonalty of London (1876) 1 A.C. 120.
18. (1915) 1 K.B. 681.
19. (1920) 2 K.B. 714 at 716.

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20. See: Clause 65(1) - (7) of the conditions of Contract of Tungan Kawa Irrigation Works Volume One, 1981.
21. (1915) A.C. 79 at 86 (H.L.).
22. Clauses on liquidated damages which are enforceable have become more familiar than clauses on penalty in construction work both in the United Kingdom and Nigeria.
23. (1854) 9 Ex. 341.
24. E.G. Liquidated damages clause at the rate of half percent per week is worth one million Naira where a sub-contract is worth only ten thousand Naira.
25. See: Workington Harbour and Dock Board v. Trade Indemnity Co. Ltd (No.2) (1938) 2 All E.R. 101.
26. Sale of Goods Act (1893) S.10(1).
27. Such documents as conditions of contract. Specifications, Drawing, Priced Bill of Quantities Schedule of Rates and Prices, if any. They also include Tender, Letter of Acceptance and the Contract if completed.
28. See Clause 101(f) Part I of the General Conditions of the case study project.
28. This is contained in the Royal Institute of British Architects standard Agreement and Schedule of Conditions of Building Contract - "R.I.B.A." Clause 21(1). Such definition is more comprehensive than that contained in "FIDIC" which is reflected in part One Clause 1(1)(f) referred to above.
29. (1962) A.C. 413 (H.L.).
30. (1913) A.C. 229 (H.L.).
31. See: The Publication by the American Arbitration Association 140 West 51st St. New York 10020 Published by Oceanea Publications Inc. in New Strategies for peaceful Resolution of International Business Disputes - P. 25.
32. See: a recent case for arbitration in the Tungan Kawa Irrigation Project: vide a letter reference DLS/K.46/1245/85 of February 25, 1985 concerning change in wages and escalation in contraction cost.
33. (1974) I.W.L.R. 1308 at 1310.

CHAPTER FOUR

LAND ACQUISITION FOR ENGINEERING CONSTRUCTIONS  
IN THE RIVER BASINS AND RURAL DEVELOPMENT AUTHORITIES:

With land as Nigeria's most valuable asset, successive central state and local governments have sought to control the acquisition of land so that it may be put to optimal use. Despite lots of constraints on land use in the different states of Nigeria, there is a growing demand for land in both rural and urban areas. Of particular interest is the frequent demand for land by the Development Authorities for the construction of irrigation and other related projects. This issue will form the subject - matter of this chapter. Here too, related topics as resettlement and payment of compensation for economic trees and land so acquired, will be discussed.

A case study will also be made of the Bakolori Project under the Sokoto River Basin and Rural Development Authority.

1. LAND ACQUISITION:

The acquisition and consequent use of land by a group or an individual have always been governed by specific rules of the Nigerian Land tenure system.<sup>1</sup> Land tenure represents the numerous ways in which land is used. It embodies the values and metaphysical belief associated with land use. Throughout the world, the registration of title to land, is associated with the individualisation of title. The purpose of registering land title is to make it absolutely secure especially when it comes to asking for compensation on its

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acquisition.<sup>2</sup> The system of land tenure in any country as observed by Robert Forsyth Irving<sup>3</sup> cannot be separated from the tradition and custom of the people. It may also be affected by the economic and social set-up of a community. Again, in a Convention in 1966<sup>4</sup> it was observed that the land tenure system has always created impediments to economic progress. Massive national programme for river basins and rural developments is often hindered or hampered by the unresolved issue of claims to interests in land, demand for "adequate" compensation for land acquired and for economic trees destroyed as well as peaceful resettlement. Such was the controversy in the Bakolori Project in Sokoto State during its construction stage.

The River Basins Development Authorities Act<sup>5</sup> does not say much on public acquisition of land for the projects of the Authorities. In its section 6(1) it states that:

"For the purpose of this Act, the Land and Native Rights shall have effect as if references in S.13<sup>6</sup> to the Government of the Federation include references to each of the Authorities established by this Act".

Perhaps one of the greatest problems which prevent a more rational utilization of land for agriculture in rural Nigeria is the traditional concept of land ownership. In most parts of the country, agricultural land belongs to communities. With the development of a land market active in the urban areas of Nigeria only, and land transactions being governed more by sociological rather than purely economic forces, the existing traditional situation did not make it

possible for a greater proportion of the society to become better off from an economic stand point. Rights and obligations relating to land were complex thus affecting full obligation of land as a physical asset. The Government either at the state or local level has changed such emphasis from land ownership to land use.<sup>7</sup>

I have not attempted to collect detailed data on all aspects of effect of the Land Use Act, as that is not within the scope of this piece of work and, of course, such an endeavour would be infringing upon the field of Land Law researchers. It would also be meaningless to try to penetrate sensitive political aspects which may be carried out to enable the summing up of the impact of the Land Use Act on the States and society. <sup>however</sup> This is important because it has been rightly observed once, that the Act has opened the door for far reaching structural changes in the rural areas despite its electrifying effect on the rural dwellers on imminent loss of land.<sup>8</sup> Such an under-should be of interest to land law researchers, because it taking is not only of academic interest; but ~~it~~ <sup>it</sup> is of vital political importance to understand the character of structural change that Land Use Act has initiated.

Large dams built for flood control and to provide dependable source of water for agriculture and fisheries are becoming an increasingly important feature of the African landscape.<sup>9</sup> As in all areas where there is either inadequate or irregular rainfall, a decision is made to irrigate, and one of the essential considerations is to

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identify suitable areas where land is available. Such availability depends upon a number of factors. The man-land ratio in the affected area is the first consideration as population densities vary notably well in Nigeria. In a particular area there may be an abundance of land but such land may nevertheless prove useless for irrigation. The size of the project is also worth mentioning. It has been postulated<sup>10</sup> that the problem of acquisition is directly proportional to the size of land required for a particular project. Availability of land also depends upon the nature of the rights of the people and the state.

The next factor is the existence of alternative opportunities available to people likely to have their land appropriated and who may not participate in such a project. A fourth set of conditions involves socio-economic factors and includes illiteracy, religious and ethical beliefs, technology and technical skills as well as the nature of existing infrastructure. According to R. Palmer Jones,<sup>11</sup> <sup>irrigation</sup> the projects met with little success in Northern Nigeria; many failed. Their failure was blamed on a multitude of faults; including traditional land tenure, illiterate peasants, poor managements inadequate understanding of what crops to grow, salinity, and so on. As is common all over Africa, failed projects were predominantly blamed on poor management and unco-operative peasants. <sup>noted that no</sup> He /reference to such

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failure in recent Development Authorities' plans.

Certain procedures are followed by the Development Authorities when seeking to acquire land. First of all the land has to be identified and the consent of the inhabitants of such area have to be sought, with all familiarity by a representative of the Authority. The sole Administrator in the Local Government Area will then be notified, who in turn will go to discuss the matter with the inhabitants of area, and feed back the authority's representative. Necessary resettlement and compensation are usually made through such local government officials; and all arrangements for these should involve a spokesman of the inhabitants.

Site visit is then arranged by all the parties concerned; that is the local Government Authority, the local inhabitants as well as the Authority's representative. A site Board Meeting will further be conducted seeking an approval of the state Commissioner for Land and Survey for use of the Land to be so acquired. When this stage is completed, a time is fixed for the counting and assessing of economic trees and farm crops. There are fixed values for the economic trees and cash crops.

The next stage is the preparation of the site plan covering the area agreed upon by all the parties during the site visit. The Local Government Authority has to

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approve the site plan before any work can commence in the area. Such site plan has to be accompanied by written agreement signed or initialled by the inhabitants affected by the acquisition of land, or their nominated representative, who may not be affected; for example, the village head. All compensations should be channelled through the State Government or the Local Government Authority in which the affected area is. This may be for tax or record purposes.

Irrigation projects usually involve the appropriation of large areas of land and can constitute a source of landlessness where the occupants are not the ultimate or the Sole beneficiaries. Although an Authority may consider it expeditious to acquire more land than it needed at a given point in time, farmers may often consider it unreasonable to operate on holdings of minimum to standard size, while land lies unused.

## II. COMPENSATION:

Compensation connotes what is paid to landowner or landowners either in form of cash or alternative lands when their original rights have been compulsorily acquired by the Development Authorities. The basis for payment of compensation is that when an acquiring Authority takes land compulsorily, the landowners lose what has hitherto constituted a source of income in addition to loss in social status.<sup>12</sup>

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Compensation for resettled farmers is crucial. Scrutiny of compensation payments for farmers on irrigation schemes, given that scanty evidence is available, is depressing. Famoriyo went on to observe that under the Kano River Project of the Hadeija River Basin and Rural Development Authority, there was inconsistency. The farmer who lost his land was first paid ₦80 per acre although this was later increased to ₦250 per acre. The farmer who actually benefitted from irrigation was benefitting to the tune of ₦3,000 per acre, which demonstrates a substantial income differential.

Section 6(3) of the River Basins Development Authorities Act<sup>13</sup> states that:

"Any person who suffers loss by reason of subsection (1)<sup>14</sup> of this section shall -

- (a) be paid adequate compensation by the Authority in respect of the loss; and
- (b) be entitled to refer any question as to his interest in the subject-matter of the loss and as to the amount of any compensation payable in pursuance of this sub-section for determination by the High Court having jurisdiction in the area in which the subject-matter is situated". 13(a)

An inclusion of a provision on "disturbance payments" for persons who do not have compensatable interests but yet living in the area acquired, should form part of the contents of the provisions under the River Basins Development Authorities Act. More appropriately perhaps, what should be suggested, is a separate "Land Compensation Act" which would adequately resolve most of the

sensitive land compensation issues in Nigeria. If successful, such Act will result in better and timely development of land.

The socio-economic implication of acquiring farmers' lands without paying adequate compensation can be serious. An "on the spot" report on the reactions of farmers in one of the villages involved in the Kano River Project stated that men lost substantial amounts of land; they received very little compensation and often the compensation they were entitled to, never reached them. In a village, called Chiromawa, it was the bitterness about this arbitrary unexplained removal of land which dominated farmers' reactions to the scheme. As a result, many farmers were disenchanted and felt cheated and agitated especially since they were aware of the economic potential of their lands in view of population pressure on land and its eventual commercialization in Kano State. Many farmers quite naturally fear resettlement in a different environment and remained skeptical about the desirability of the irrigation schemes.

In 1976, farmers affected by the South Chad Irrigation Project under the Chad River Basin Development Authority also voiced their protests against their not having been adequately compensated for the lands compulsorily acquired. In his defence the General Manager of that Authority stated that a total amount of

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In the Development Authorities, the assessment of compensation takes various forms. When giving compensation for economic trees destroyed, the charges are made per tree. The rate varies in accordance with the state of the tree. A bearing tree earns more than matured or non-bearing tree and this earns more than pre-matured tree. Crops are assessed per hectare and they earn according to their usefulness to the community. Payment of compensation can either be in cash or kind. When it is in kind fresh area of land will be cultivated and processed for the dispossessed farmers. The annex further clarifies this assessment.

### III. RESETTLEMENT

Resettlement is not a new idea. At various times during the last three hundred years, it has been seriously considered, and on a small scale it has even been tried.<sup>16</sup>

Apart from payment of compensation, public land acquisition is usually expected to be followed by a resettlement programme. Although the act of public acquisition of land for public purposes is not negotiable by individual or groups, it is usually desirable to ensure that farmers are adequately settled.

#### A. Kano River Project:

In the case of the Kano River Project where 13,000 Farmers were removed from their homes and farms for the

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Kano River to be dammed and the Tiga dam built, the farmers were to be resettled in seven new villages around the project areas. According to reports, it would appear that many farmers did not move to the designated areas. They faced problems of poor quality farmlands as well as a poor infrastructure. Although only preliminary information is available for the programme of resettlement of farmers under the Kano River Project, it has already been alleged that resettlement had been on the whole very poorly handled, causing a great deal of unnecessary upset and harm to the farmers and also to the relationship between the farmers and the irrigation schemes.<sup>17</sup>

Those who lost their land were classified into types. Firstly, people who lost all their lands to canals, government farms, the Tiga dam and roads. The second group included those who lost part of their lands but were still in their villages. A third group obtained some access to irrigated land on the scheme; and a fourth category of farmers based their farming on fadama and shadoof but whose land use became affected by the altered flow of the river.<sup>18</sup>

The farmers were compensated on the assumption that they could find alternative land elsewhere. There was difficulty however, in obtaining land under permanent tenure of holdings since there was shortage

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of farmlands in the project area as well as high incidence of land speculation which emanated as a result of inadequate information about government plans.<sup>19</sup>

This illustrates the importance of adequate pre-investment planning of irrigation projects. Feasibility studies give essential guidelines for establishing new man-land relationships as well as for the provision of an adequate infrastructure for farmers whose land is to be appropriated. It is difficult to pacify a farmer who finds that he has lost his land to an impending irrigation project and would have been quite willing to let it go for the "national interest" except that he notices that his neighbour is still continuing on his own land undisturbed. Wallace noted that "the (Kono River) Project made no attempt to explain to the farmers why one man lost land and his neighbour did not. No time has been spent with the farmers and this has caused unnecessary confusion. The whole procedure appeared to the people as a totally arbitrary act of God".<sup>20</sup>

B. The Bakolori Project - A case Study

"There ought to be a law to make some men wear a black furcoat with a white stripe down the back". So said Miss Babe Williams, 75, of Paducah, Kentucky, about the Army Corps of Engineers who bulldozed her 135 year-old home for Barkeley Dam over 15 years ago.<sup>21</sup> She still refuses to cash their cheque for \$6,400 because "They

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didn't have any right to take my home and by accepting the money I would be agreeing they did have.

This is one woman's reaction to forced change in the form of reservoir dam.<sup>22</sup>

The situation in the area where the Bakolori Project is situated was more tense not because it was a collective reaction, but because most of the inhabitants first expected compensation but were asked to move for resettlement and when they resisted they were later paid compensation. The farmers or inhabitants had no "check" in their hands for a long time, unlike Miss Williams.

The major group of people who pay when reservoirs are constructed, and pay most heavily if the subjective costs are added to the objective ones, are those who have to move. Since dams constructions are usually constructed in fairly isolated rural areas, those affected are rural people who form a distinct subculture. They fall in the lower socio-economic status brackets; mostly subsistence farmers. Their values are person-centred, traditional, fatalistic and familistic.<sup>23</sup> Sociologists often call them "Laggards" while historians prefer to say "Peasants", and the farmers see them as stumbling blocks to reservoir construction and watershed programmes. "Laggards" tend to have small farms, low incomes, relatively little formal education and are tradition-directed.<sup>24</sup>

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Delay in payment of compensation or even lack of knowledge of the project (as in the Kano River Project is also thought to be a factor in negative attitudes toward water resources development. The Bakolori Project is an interesting case concerning irrigation projects and currently it caused a furor, worth mentioning. Many of the most vocal in opposing the continuation of the project, technically in the construction phase, had the characteristics just described.

The Bakolori Project was the first phase of the then Sokoto - Rima River Basin Development Plan. Costing over ₦200m; the dam was designed to provide irrigation for an area of 75,000 acres in the districts of Talata Mafara, Maradun and Bakura, all in Sokoto State. The contractors were Impresse Italiane all Estero - IMPRESIT S.P. A of Milan with its Nigeria affiliate - Impresit Bakolori (Nig.) Limited. The consultants were the Nigerian/English M.R.T. Consulting Engineering (Nig) Ltd. The project site is 130 kilometres South of Sokoto.<sup>25</sup>

The grievance which resulted in the massive organised and armed struggle waged by the peasantry or laggards against the project was a protracted struggle; a confluence of different grievances which had built up since the Italian contractors first entered the area in 1975. Compensation was just one of the factors. Central to these factors however, "was the effort to

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subordinate peasant land and labour to the requirements of large scale irrigation capital.<sup>26</sup> Beckman's view can however be seen to be contrary to the intention of the Federal Government as stated in the preamble of the Land Use Act, 1978, that land will be acquired for public purpose and for public interest. Also labour cannot be subordinated where farmers are on "contract" with the Authorities and not compelled to work on irrigation farms. It also gives the impression that no compensation was arranged or indeed an alternative settlement provided after such acquisition of "peasant" land.

2.(a) Life Pattern Before Commencement of Project:

The project area was to a large extent intensely cultivated by a population that mostly lives in villages within this area. The population density had caused a considerable land division and an evolution of land tenure rights. The population of the Bakura and Tolata Mafara districts was about 80,000 inhabitants, some involved in non-agricultural activities and some with farms outside the project area. It was therefore estimated that the population concerned in the project area was really about 50,000 inhabitants. From a phenomenological point of view it can be argued that 50,000 is a highly acquiescent population; it is interesting to speculate as to why. It is my guess, based on knowledge of the community, that their

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responses to the project were disinterested because of high expectations from compensation as well as lack of sufficient knowledge of the project. They said what they thought the interviewer wanted to hear. Moreover there were 80 people in this random sample whose land was directly affected. When I compared their scores on the project scale with the means of the rest, there was no significant difference; indicating that they too (that is those whose land was not directly affected) had little awareness of the proposed project. Whether the community was ambivalent in 1978 or just unaware, the situation has definitely changed.

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C. Responses to Irrigation Development Scale:

BAKOLORI PROJECT

|    | Statement                                                                              | Strongly Agree<br>% | Agree<br>% | Undecided<br>% | Disagree<br>% | Strongly Disagree<br>% |
|----|----------------------------------------------------------------------------------------|---------------------|------------|----------------|---------------|------------------------|
| 1. | More dams are being built than are necessary for agricultural purposes                 | 6                   | 6          | 20             | 57            | 11                     |
| 2. | Money spent on building dams exceeds the benefits we get from them.                    | 6                   | 27         | 30             | 30            | 7                      |
| 3. | Dam construction often floods land that is worth more than the land it protects.       | 2                   | 3          | 32             | 53            | 10                     |
| 4. | Dams should only be constructed when they won't take people's homes or good farm land. | 11                  | 9          | 18             | 53            | 9                      |
| 5. | Dam projects always help more people than they hurt.                                   | 8                   | 13         | 20             | 48            | 11                     |
| 6. | Fish and irrigation development alone provide reasons for dam project.                 | 0                   | 9          | 10             | 68            | 13                     |
| 7. | Since it rains satisfactorily it is not wise to give up good land for dam project.     | 0                   | 10         | 5              | 73            | 12                     |
| 8. | Dam project is a good investment for reducing water shortage in the dry season.        | 55                  | 11         | 16             | 5             | 3                      |

Agriculture consisted of traditional staple food production and some industrial cultivation. Semi-permanent and semi-nomadic livestock breeding was another important activity in the area. Such activity was limited however by seasonal variations that required periodic transfer of herds to other pastures and watering places. Hausa farmers formed 80% and so are in the dominant group. Minorities of Fulani and Adarwa Shepherds (and secondarily farmers) constituted the remaining 20%. The inhabitants were muslims and their men (except the nomadic fulani men) segregated women of child - bearing age. During the dry season, less farming activities were carried on. Even though, there was an original divergence between agriculture and breeding, there were reciprocal relationships between farmers and Shepherds. Herds were stable on farmers' land to enrich it with animal manure, for which the herds-men were paid in agricultural produce and cultivation left - overs for fodder.

Regarding the family and social structure, the inhabitants practised nuclear (iyali) as well as extended (gandu) systems, which were preferred form of family organisation. The society was very uniform without large class differentiation.

Agriculture based on manual labour was the predominant activity, and there were no families that owned no land, salaried labour was still relatively rare.

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The traditional land tenure had been in fact, if not juridically, turning toward individual land ownership, which had become a commodity for trade or for hereditary trust. This change was also part of modifications in the family organisation, which was in a phase of continual transition from the complicated extended family institution (gandu) to the simple (iyali) one.

The process of division and cession of land had created an imbalance in the relationship between the labour force and the family lands, in that some families possessed more land than they could themselves cultivate, and others did not have sufficient land for their own needs and work force.

Four principal economic groups could be recognised based on the land/labour relationship:

"The land/labour ratio could show surplus, more or less equilibrium, or deficit and is the basic criterion categorising the four identified economic groups,

- (i) supply and demand of labour: these characterised the stronger and the weaker groups, while intermediate groups were self-sufficient;
- (ii) the use of more advanced production techniques, for example, ox-drawn plough, fertilizers, pesticides, etc; such use is more widespread among the stronger economic groups, which through these had higher unit yields;
- (iii) the ownership of livestock (cows, sheep and goats) and smaller animals; the more prosperous farmers had more head of livestock;
- (iv) the cropping pattern was generally more diversified and oriented toward the market in the more prosperous and organised farms".

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Development of salaried labour had arisen from the imbalance in the land/labour ratio. Families who owned more land than they could work employed adult males from families who did not have enough land. There were two principal forms of salaried agricultural labour; the more productive piece - work (jinga) and more commonly, work paid according to time (kwadaga), not more than 20% of the adult males, from the weakest economic groups, worked for wages in others' farms, with a daily salary of two to three Naira plus meals. The industrial crops being grown included groundnuts, cotton, sorghum and cowpeas whose prices were fixed annually by official and processing agencies.

Social infrastructure was adequate but not in abundance.

This was the village structure before the introduction of the project to the area. The village investigation was carried out using a questionnaire on demographic, social and economic characteristics.

D. Review of the Bakolori Project:

The Bakolori Project has been described as a cornerstone of Nigeria's agricultural policy since the end of the civil war and the beginning of the first oil Boom.<sup>27</sup> The Federal Government decided that compensation should not be paid for lost farm land, but insisted that alternative farmland be prepared for the

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farmers, contrary to promise by the Sokoto State Government to the inhabitants.<sup>28</sup> The farmers rejected the land cleared for them because they were anticipating cash compensation and also because they claimed that, the cleared land was less fertile than the one they were ejected from for the project. Funds had been allocated however, for the economic trees destroyed. Compensation rate was worked out for lost economic trees as follows:<sup>29</sup> Mango: ₦200; Dorowa: ₦90; Kuka: ₦60; Dinya: ₦24; Ketiwa: ₦21; Lalle: ₦51; Tsamiya: ₦30. It was however claimed that the compensation money was not conscientiously dispensed. Another observer<sup>30</sup> said that it was rushed affair as flood was about to start.

While dispute aggravated construction work continued in the project site. Farms, farm-land and economic trees were destroyed; and hunger dictated the next course of event. Farmers resisted further construction on their land, and the obstruction resulted in turn in another compensation claims but this time from the contractors. Farmers on their own part sought compensation not just for crops directly destroyed but also for those which had been lost because farming on the project site was prevented for several seasons.<sup>31</sup> The situation was becoming desperate. The struggle for compensation thus united the people who had been displaced by the dam and those whose farms had been taken over for construction. For the latter group, the problem was exacerbated by

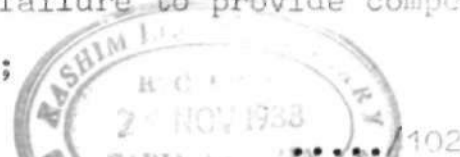
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the uncertainty about how the land was going to be reallocated. Reallocation implied a standardization of plot sizes in minimum units of rectangular shapes, and farmers might not get back exactly the same amount of land they had given up. In late 1979, as farmers' resistance grew, the issue of land reallocation came directly linked to the question of compensation for lost crops, and trees. Farmers refused to accept any land allocated to them unless compensation for such losses were first paid. They found that if they accepted the new land that they had conceded a deal; that the new land had been accepted as compensation for the losses.<sup>32</sup> Farmers also resisted the use of land for growing wheat (which was not part of the industrial crops of the area) in the dry season, as part of the national policy of import substitution. Project authorities in turn insisted that farmers should not be allowed to plant Sorghum on the land which was handed back to them. The enforcement of cropping schedules thus added one more serious dimension to the struggle which was by then moving towards increasingly militant phase.

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The main areas of immediate conflict were:

- (i) the failure of the project to provide either adequate land or compensation for the people;
- (ii) the destruction of trees and crops and obstruction of farming in the area being prepared for irrigation, and the failure to provide compensation for such losses;



- (iii) the manner in which land reallocation was administered and the losses incurred;
- (iv) the enforcement of cropping schedules which conflicted with the established food economy of the area; and
- (v) failure to adequately re-settle the inhabitants whose houses and lands were inundated by the lake that was created at the dam.

As Wallace has pointed out in a report to the consultants MPT, concerning a problem, item (4) above, "More thought should be given in the cropping patterns to growing food for consumption and not forcing these farmers to be totally commercial, relying on an unreliable and expensive market for their food."<sup>33</sup>

As an initial step, then a development project should include a systematic study of local, social and economic characteristics and of evolutionary factors that favour the assimilation of new techniques introduced by the project. It should evaluate the real effect over time on the populations for whom the project is planned.<sup>34</sup> In the case of the Bakolori Project, the MPT Consultants described the situation as "the blind leading the blind". The exception to this general condition, according to Y.B. Usman, is that "both the exporters of Italian technology into this sector of Nigerian economy and the funds leaving Nigeria are the only ones who are not blind."

The casualties which resulted from the grievances and reactions reflected little credit on the part of anyone concerned with such protracted chaos. Informal evidence at variance was found in different newspapers and books regarding the attitude of the affected population towards the project as well as the estimated human casualties; no comprehensive official compilation is available.

E. QUESTIONNAIRE

1. Was the Government Payment to You Adequate Compensation?

|     | Yes  | No.  | No Response | Total  |
|-----|------|------|-------------|--------|
|     | 65.0 | 34.5 | 0.5         | 100.00 |
| %   | 65.0 | 34.5 | 0.5         | 100.00 |
| No. | 260  | 138  | 2           | 400    |

2. Did you prefer compensation to Resettlement because of the earlier promise or because of influence by others?

|     | Yes | No. | No Response | Hard to tell | Total |
|-----|-----|-----|-------------|--------------|-------|
|     | 70  | 2   | 5           | 23           | 100   |
| %   | 70  | 2   | 5           | 23           | 100   |
| No. | 280 | 8   | 20          | 132          | 400   |

3. Judging by the hardship you encounter and the benefits you now derive from this scheme will you elect to go militant if similar incidence ever arises?

|     | Yes | No  | No Response | Hard to tell | Total |
|-----|-----|-----|-------------|--------------|-------|
|     | 5   | 30  | 15          | 50           | 100   |
| %   | 5   | 30  | 15          | 50           | 100   |
| No. | 180 | 150 | 75          | 75           | 480   |

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The inhabitants of Bakolori, Maradum and Talat-Mafara, are neither the first nor the last episodes of persons being forcibly moved to make way for highways, irrigation constructions, airports, urban renewal and the like. Whether people have the right to refuse to be "developed" because of delay in payment of compensation or because they were offered an inadequate alternative (resettlement) is a question full of sticky ethical issues, and it is far from being answered. That may be a step toward alerting decision makers to more humane ways of dealing with the human problems of reallocation and compensation. The intangible costs of being forcibly relocated are great enough that it seems that merely covering the monetary cost perpetuates injustice. The real need is to preserve and enhance the sense of personal, social and community integrity that gives the settler's lives meaning, and money alone cannot buy that. Time and care from federal agencies are necessary to lessen the social costs of projects built for the public good.

F. Suggestions on Resettlement:

Resettlement is a necessary condition: a "push" factor encouraging people to migrate. The mental picture which the prospective migrants have concerning the area to which they can move also influence their decisions to move or not to move. This picture will be built up through experience and information which has been obtained and is unlikely to be completely inaccurate.. Fear of

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change of environment and attached economic loss is also a factor. Some move passively because others are.

Prompt payment of compensation is necessary both to ensure that the potential migrants were at the time of migration in a sufficiently healthy state to be able to undertake the journey and also able to provide themselves with sufficient food for support until they derive economic profit from the new land.<sup>35</sup>

The agricultural aspect of resettlement is critical not only because it is the basis of the scheme and means of support of the settlers but also because failures in this system will necessitate greater Government provision, thus increasing the danger of the development of an attitude of dependence rather than self-sufficiency among the settlers. Failures in the agricultural aspects of resettlement tend also to have psychological as well as practical impacts upon the settlers because of the total involvement a farmer has with agriculture. Despondency may occur if failures are frequent and even if these failures do not directly affect a farmer's well-being or are counter balanced by increased assistance they may deeply influence his evaluation of the resettlement and hence its success. Besides cultivating small areas; it is likely that yields were reduced from the high potential possible for first crops on newly cleared land, by the restricted guard resulting from social unrest, illness and lack of experience which the settlers had

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in this activity.

It is generally desirable to avoid force and so it is important to provide prospective migrants with information which will encourage them to move voluntarily and means to facilitate such movement. Transport can be provided in such instance. Also, even in emergency resettlement schemes, a considerable measure of planning is necessary. In the first place, the basis for distributing the means of support, usually land, has to be decided. However, a measure of flexibility should be maintained in such decision. Provision may have to be made to allocate land according to the efforts of each farmer. Land also could be reserved for distribution according to the needs of the settlers but this might involve conflict amongst the settlers. To ensure equality in the quantity of land available for the support of each settler over a certain age, a detailed registration of settlers is necessary with provision for annual revision. Unfortunately, distribution according to peoples' needs is complex involving careful assessment of requirements and how they change, and so increases the costs of resettlement schemes.

In all resettlement schemes it is essential that necessary vaccinations and other measures are carried out when appropriate and without delay, to safeguard the health of both settlers and their livestock. It is also important to consider the agricultural potential and health risks of the possible settlement areas. The advantages of resettling people in an area where they can grow crops which they have

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previously grown cannot be overstressed. The correct choice of site is naturally sought but the penalties of a wrong choice affect not only the settlers but also the Government; The settlers will probably need assistance for a greater period than if they had not moved.<sup>36</sup>

One final aspect of planning which also affects the length of time for which the settlers may require assistance before they can become self-sufficient concerns the time of year at which the settlers move. The problem is that if settlers do not have very much time in which to prepare land for cultivation before the first growing season they will be unable to grow sufficient food to support themselves and will be dependent upon assistance for a longer period than might otherwise be necessary. Settlers may be tempted to undertake "off-farm" employment hence reducing food production output. It is thus preferable in the case of planned resettlement area before the first growing season in an attempt to achieve self-sufficiency from the first harvest.

Where compensation is not instant, the provision of assistance, either food or money for food, is generally necessary to ensure that settlers upon their arrival in the settlement area can concentrate upon clearing land and other agricultural tasks necessary. Such assistance must be carefully considered so that it meets the needs of the settlers. It must be of the correct type, in the necessary quantities and provided at the appropriate time. Unless this is done the Government may find it difficult to direct the settlers and obtain their confidence.<sup>37</sup>

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Accommodation and food are important upon arrival in settlement area. Settlers should be introduced to changes slowly. Accommodation is necessary to protect the settlers from the environmental changes which may cause illness. Good health amongst the settlers is especially important during the first few months after arrival in the settlement area.

Although rest will be necessary for the settlers after their journey, it is important that they are allocated land quickly so that they can start the process of settlement while they are still enthusiastic and before they consider moving elsewhere. Sufficient assistance (not in excess) should be offered to the settlers to ensure that they are able to concentrate upon clearance and other agricultural activities until they become self-sufficient. The terms upon which assistance is provided should be clearly stated from the start of the resettlement and the emphasis laid not upon the Government to provide assistance but the settlers to achieve self-sufficiency as soon as is possible.

Resettlement of farmers does not in general require a great deal of agricultural advice provided that the environmental changes are not too extreme, for farmers appear aware of environmental changes. However, the agricultural and practical aspects of resettlement are only one part of a range of considerations which must be studied if settlers are to be provided with conditions where their own efforts may lead them to achieve success and self-sufficiency.

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Because of these many considerations, resettlement is not an activity in which a government should be involved lightly. One of the criteria by which resettlement which aims to provide traditional farmers with the means to continue their livelihood in a given area may be judged, is whether the settlers have remained in the area.<sup>38</sup> While one may see or assess the Bakolori resettlement Scheme for instance as rather unsuccessful in many aspects, a number of lessons can still be learnt from it concerning settlement of people in both emergency and planned resettlement schemes. As a means of supporting the general agricultural and economic development of a semi-arid region, as northern Sokoto is, the resettlement scheme of Bakolori Project should have been almost fault proof.

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NOTES

CHAPTER FOUR

1. e.g. (a) Public Lands Act, 1976  
(b) The Land Use Act, 1978  
(c) The Native Land Rights Ordinance 1916  
See also: Fameriye, S.: Land Acquisition and Irrigation in Nigeria - (1981) P.55.
2. Report of a committee appointed to consider the registration of Title to Land in Western Nigeria in 1962.
3. Irving, R.F.: Titles to Land in Nigeria (1968) P.12.
4. Food and Agricultural Organisation of the United Nations Agricultural Development in Nigeria 1965 - 1980 (ROME 1966) Mimeo) p.4.
5. See: Act No.25 of 1976, supra.
6. S.13 (cap.96) is on compulsory acquisition of land.
7. Presentation by the Federal Ministry of Agriculture and Water Resources: Agrarian Reform and Rural Development in Nigeria - Country Review Paper, for the World Conference on Agrarian Reform and Rural Development RCME, Mimeo (1980) pp. 10-12.
8. Somavina Nwoko: You and the Land Use Decree (1979) p.1.
9. NATURE: Vol. 220 The New Dam in Nigeria (1968) pp.957-958.
10. Adegboye, R.O.: "Compulsory Acquisition and the subsequent problems of Land resettlement and compensation" - (1973) pp.125-145.
11. CSER (ABU) "Irrigation Development and Irrigation Planning in Northern Nigeria" (Mimeo) (1977) p.5.
12. Fameriye S.: "Compulsory Acquisition of Land in Nigeria": A case study, Vol.8, No.4 (1981) pp.255-269.
13. Act No.25 of 1976. 13(a) Note that in case of a conflict between this provision and that of the Land Use Act, 1978, the latter prevails.
14. Subsection one is on compulsory acquisition of land.
- 15.
16. Arthur J. Demarest, "Resettlement" Campx p.123 - The case for relocation of the American Negro.

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22. Field, Barron, Long: Water and Community Development (Social and Economic Perspective) An analysis of community and individual reactions to forced Migration due to Reservoir Construction by Sue Johnson and R.J. Burdge, pp.168-186.
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25. West African - Technical Review - "The Bakolori Project" Magazine December 1977, pp.85-87.
26. Bjorn Beckman, (1984) - Bakolori: Peasants versus state and Capital.
27. Forrest T.: "Agricultural Policies in Nigeria 1900-1978 (1982) pp.15-17.
28. This was in line with the provisions of the River Basin Development Authorities Act No.25 of 1976, S.6.
29. Usman Y.B.:- Political Repression in Nigeria - p.109.
30. Bjorn Beckman (quoted Bird) Peasant versus state and capital Bakolori 1980 mimeo. p.6. A. Bird (1980) Bakolori Irrigation Project MRT Land Tenure Survey: An Account.
31. This extra demand contravenes S.29(1) of the Land Use Act, 1978.
32. S.33-(3) of the Land Use Act, 1978.

33. Tina Wallace - "Report on some of the Social and Economic Issues and Problems raised on the Bakolori Irrigation Scheme (mimeo, March 1980).
34. (1) New Nigerian Newspapers of 29/4/1980, 1/5/1980, 3/5/1980, 22/2/1980, and 22/6/1980.  
(2) Sunday Triumph Newspaper of 4/7/1982.  
(3) Sunday Sketch Newspaper of 22/6/1980.  
(4) Y.B. Usman - "Political Repression in Nigeria, pp.88-94.
35. On this aspect the Kainji Dam Resettlement Scheme is a success.
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37. Boserup, E. "The conditions of Agricultural Growth" - George, Allen, and Unwin, London. (1965) p.16.
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CHAPTER FIVE

1. Socio-Economic Benefits Derived from Engineering Contracts in the Development Authorities

Engineering contracts in the Development Authorities primarily cover the execution of projects for irrigation and other water resources development. Water in these Authorities is reserved, primarily for dry season cropping except in the rice growing areas. The projects are being gradually integrated into local political economy, as evidenced in the Bakolori Project, discussed in the last chapter. Political rhetoric is, however, hardly matched by economic performance in rural sector, hence the growing disillusionment between the government and the people. The advent of an irrigation based agrarian bureaucracy accelerates the restructuring of class relations. Some project managers may believe that it gives them a choice out of the stalemate in line with project designs, though.

As once observed by a group of reserchers,<sup>1</sup> the emphasis throughout the plan and the consultants' reports, was how the scheme could "influence the farmer and change him from a traditional rainfed agriculturalist into a modern irrigator, the transfer of knowledge from the knowledge system". In his own contribution, one lecturer commented thus.

"By choosing to irrigate in this way the Nigerian Government has accepted the constraints it involves: using imported capital - intensive equipment, manpower and methods to build the scheme".<sup>2</sup>

He further gave an example that in 1979 a Yugoslava firm, NECCO, was given the contract to complete the canals for the first phase of the Kano River Project Scheme. Seventy Yugoslavas had arrived to work on the three year contract. The project was designed by the Dutch. They had to use an expatriate and urban - based bureaucracy to run the scheme. They also used extension workers to teach the farmers how to adapt to this new farming. By bringing this new technology to the farmers and teaching them how to use it, increased production and welfare were expected to follow. The standpoint taken could be characterised as technocratic and authoritarian. However, up to the present, the weak point in most agricultural development has been the relative neglect of human and social aspects. It is apparently taken for granted that by introducing technical innovation or economic measures to stimulate production on orders from above a betterment of social conditions will ensue automatically.

In another report<sup>3</sup> it was noted that the Development Authorities, at some point, have to decide on several key issues which will affect the future of these irrigation schemes and those involved in them. The issue of who should control production will have to be resolved eventually. This is because the present division of control between the farmers who own the land and the scheme who own the technology leads to serious conflicts between them. It is possible for the Development Authorities to take more control, by taking over the land, or passing legislation concerning the role of

the farmers in the production process. They could decree a minimum land holding, create tenant farmers and so on, as had been done for example, on the Chad Scheme, and in Gezira.

According to a one-time General Manager of Ogun-Oshun River Basin Development Authority<sup>4</sup> the social benefits derived from the Authority's programme include:

- (a) Production of sufficient food for Nigeria's population and supply of raw materials for agro-based industries;
- (b) gainful employment especially for people in the rural areas;
- (c) Savings in foreign exchange which would otherwise have been used for food importation;
- (d) Substantial contribution to the Nation's social and economic stability; and
- (e) Curtailment of rural - urban drift of population as a result of rising standards of living of the rural dwellers where most of the projects are situated.

The role of agriculture in the economic development of Nations has been the subject of much discussion.<sup>5</sup> The poor performance in the rate of Nigeria's agricultural production has been a subject that has occupied the attention of policy makers, as was observed in that presentation. Even with the present dominant position of the oil sector, agriculture still retains a major place within the Nigerian economy.

According to researcher<sup>6</sup> whatever policy is formulated, agriculture is likely to continue to provide income and employment for the bulk of Nigeria's labour force. It will also provide the domestic food needs for a substantial majority of the population. It will remain a source of foreign exchange for the national economy and contribute some of the inputs needed for the growing domestic industries.

When, however, water resources planners draw up development programmes, they often fail to realise that such development pattern will imply all-important socio-economic consequences. Over the years, policy makers and planners measure the performance of the economy in macro-economic terms such as the growth rate of the Gross NATIONAL PRODUCT (G.N.P.) and per capita income. Whilst these highly aggregated economic indicators may be convenient in measuring the level of economic growth, they do not generally direct attention to the quality of life of the people especially those in rural areas.

Overall, the analysis of the various research efforts in the area of agrarian reform and rural development in Nigeria reveals that very little research has been done on appropriate technology in the rural sector. This is more so, on zonal specialisation in food production and on the possible remunerative activities in the non-farm sector in the rural areas. There is a need also to develop a rural

event of delays, due to force majeure; Also, if the engineer has acted in accordance with the contract, the extension will be reasonable, having regard to the circumstances complained of.

There is no apparent reason therefore why the contractor should not finish at the proper time except for recent restrictions on importation of goods generally. If he however defaults, he is in breach of his contract. The remedy for breach of contract is damages. The aggrieved party may be able in addition, if the contract is broken; to claim that he is himself discharged from obligations resting in him. He can eject the contractor from the Works and hence employ another contractor to finish the work. This would be done in practice only in the most extreme cases because the change of contractor would itself occasion serious delays and aggravate an already unsatisfactory position.

Quantum of damages bears no relation whatever to the magnitude of the subject matter of the contract. Certainly, a clause on liquidated damages serves as an advantage to both sides in a construction contract and, is really of more value to the contractor than to the employer. The tests to be applied in order to ascertain whether a fault deserves liquidated damages were reviewed by Lord Dunedin in the case of *Dunlop Pneumatic Tyre Co. V. New Garage Co. Ltd*<sup>21</sup>

The tests are that:

- m (a) the expression used, is not conclusive, although prima facie the parties may be presumed to mean what they say.

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welfare index or poverty line in Nigeria and find appropriate criteria for measuring it. This can be done by way of random sampling of variation in standard of living at periodic intervals.

The assessment of public projects is a complex and difficult issue. The repercussions of public sector activities are often subtle and widely dispersed. Moreover, evaluation of these activities should properly reflect society's preferences, but often these preferences are neither self-evident nor directly measurable.<sup>7</sup> Finally, programme evaluation may be resisted by public agencies because it is viewed as a threat.

## 2. CONCLUSION

Engineering Contracts in the Development Authorities in Nigeria are of a standard form. Such contracts have no code sanctified by statute and in the absence of a properly detailed written contract, are left to be governed only by such rules as can be evoked by custom<sup>8</sup> or deduced from the Federal Laws.<sup>9</sup> The contracts remain avowedly those for the sale of goods, the price being essentially that of goods plus a provision for the technical labour and supervision involved in construction work.

As a general principle, the more precisely one can define the provisions of a contract, the better. It is also desirable to be able to limit with certainty the documents which are to be examined in order to establish those

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provisions. Strictly speaking, engineering contracts tend to be increasingly integrated into routine procedures, achieved through the use of printed forms. Such forms are those of tender and standard conditions of contract.

Parties sometimes exercise little or no care to ensure that most conditions do apply. It is often difficult if not impossible to spell out a contract from the documents because informal conversations between the parties may eventually form part of the agreement. Sales,<sup>10</sup> in advocating that the legislature should itself impose standard conditions for certain typical contracts, said that;

"for less time would be wasted in solicitors' offices, barristers' chambers and the courts in trying to find out which documents, if any, formed part of the contract, and how they could be read together if at all".

In any given contractual situation the parties hardly agree where the limit is to be drawn. The first step for the prevention of disputes therefore, is that each party should know what the rights and obligations of both parties to a contract are: They should never proceed on the basis of merely vague ideas of what is required, each thinking differently from the other and acting accordingly.

The execution of engineering contracts also primarily involves the appropriation of large areas of land. Land acquired for such purposes, must always be used to advance the social, economic or even the aesthetic requirements of the Nigerian people particularly the occupants of the

appropriated areas. It has also been observed<sup>10</sup> that the resettlement of people displaced at dam construction sites and by the impounding reservoir especially where the irrigated farms are far from the dam, pose serious sociological problems if not carefully handled.

As an initial step, then, a development project should include a systematic study of local, social and economic characteristics and of evolutionary factors that favour the assimilation of new techniques introduced by the projects. Such projects should evaluate the real effect over time on the populations for whom the project is planned. Also a fair dealing amongst all the parties to the engineering contract dictates the extent of success of the project. Undue delay in the settlement of claims by the contractors from the Ministerial technical committee can create discord amongst the parties. Consultants and contractors should foster smooth and reasonable course of dealing, because any tendency to dispute becomes evident. It is possible for an engineer to adopt a legalistic attitude and by so doing involve a contractor in very considerable expense.

Whilst the legislature may be looking at the possibility of imposing standard conditions for certain typical contracts, perhaps an essential aspect worth codifying is a possible Land Compensation and Resettlement Act, for land acquired for engineering projects. Engineering contracts after all

constitute no small part of the trade upon which the life of an industrially growing country largely depends. Nigeria has the resources to achieve a meaningful rural transformation and attain a decent level of living for its rural masses. This, of course is on condition that the succeeding governments at both Federal and State levels maintain the commitment and the momentum of the present administration.

3. SUGGESTIONS AND RECOMMENDATIONS:

There is a need for sufficient co-ordination of data as regards the scope of activities that should be centred on the Development Authorities. This makes legal writings like drafting of conditions of engineering contracts, easy, without taking for granted the potential and limitations of such Development Authorities. Provisions of such contracts should be uniform and more precisely defined for respective contracts. It is also quite desirable, since such uniformity limits with certainty the documents which form the contract. Smooth relationship between the parties to the contract in all construction stages will often overstep the boundaries of bureaucracy.

The Niger Basin Authorities Commissions need to provide a definite plan for multipurpose development of water and other similar resources of the Development Authorities. They should also provide a machinery for future planning. This is because there is a need for detailed study and

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implementation of the relative economic efficiency of producing different food crops in different areas of the River Basin Projects. Such detailed study improves the development of zonal specialization in food production in line with the ecological diversity in Nigeria. This will also ensure the optimal use of engineering construction projects.

It appears that Nigerian Federal Government through the Development Authorities intend to continue to build dams and irrigation works in a bid to increase food production in the country. Consequently, it can be safely presumed that more lands would be needed in the future for the successful execution of the irrigation and other water and land development programmes. More farmers are, in fact likely to lose their lands in the process of compulsory acquisition. In view of this, a number of policy guidelines would seem to be appropriate for future considerations.

In every case where land is to be compulsorily acquired for public purposes such as irrigation of other engineering contracts in the Development Authorities, there should be a pre-acquisition exercise in the form of an inventory of the social and economic factors in the particular area. If such an exercise had been adequately conducted in the engineering project areas, there would have been less agitation and more co-operation. Such an exercise should not however be undertaken by foreign experts but by individual closely in touch with the local situation.

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The aims of such an exercise should be to study the resource endowments of the area such as the quality and quantity of land, labour and social relations and capital availability. Indeed, a capital profile study of the farmers seems advisable, especially when matters of compensation payments arise. Irrigation, dams and future development projects in Nigeria continue to require more lands: but the latter constitutes the major property asset of the Nigerian farmer. There should therefore, be an intensive educational programme in all the areas where land acquisition for such contracts take place. Those who expect to lose land should be told clearly and unambiguously, exactly why this is necessary and why it is important and would be beneficial to themselves and their children.

Irrigation projects should be sited only in areas where according to the feasibility study, there exists a comparative advantage for the purpose at hand rather than for mere political reasons. Again taking too vast an amount of land for future use and not being seen to be in use gives rise to speculation, uncertainty and discord.

Payment of adequate or reasonable compensation is also a point. This implies that those affected are better or at worst, in the same financial position after the acquisition as before it, in social and economic terms. This means that adequate machinery should be set up to make recommendations for the payment of compensations in the area of acquisition.

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NOTES

CHAPTER FIVE

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