

الفصل السابع
عقد المقاولة في القوانين المدنية

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CONSTRUCTION CONTRACTS

﴿يَتَأْتِيهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ﴾ [المائدة: ١].

Construction Contract and Labor Contract

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١- عقد العمل وعقد المقاولة:

٣- عقد العمل وعقد البيع :

٣- عقد العمل وعقد الإيجار:

٤- عقد العمل وعقد الوكالة:

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Difference between a construction contract and a professional service contract

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حالة عملية ١:

المرجع التشريعي لوزارة الأشغال الكويتية:

القاعدة رقم (١٧٢):

حالة عملية ٣:

مقابلة، وكالة - القاعدة الصادرة سنة ٢٠٠٧ حقوق:

التي تضمنها حكم محكمة التمييز - دبي بتاريخ ٢٤-٠٤-٢٠٠٧ في الطعن رقم ٦٢ / ٢٠٠٧ طعن تجاري

موجز القاعدة :

نص القاعدة :

(Offer And Acceptance)

(Acceptana)

(Offer)

(Mutual Intent)

(Consider Ation)

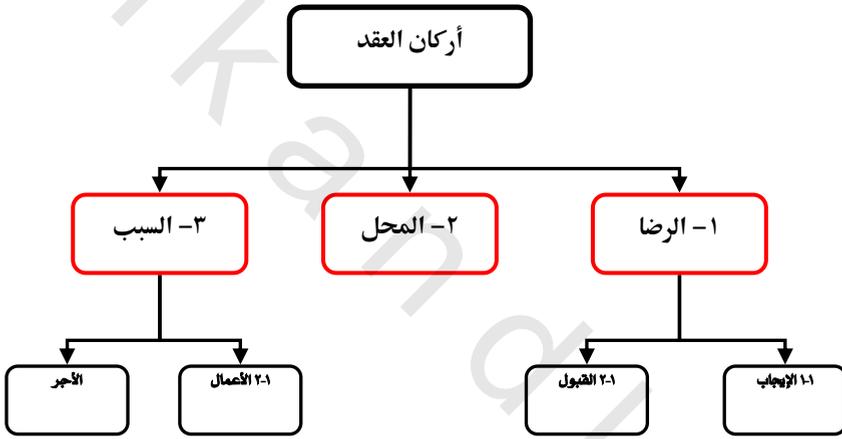
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(Legality)

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(Capacity)

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شكل ٧-٣ أركان عقد المقاولة

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Mutual councsent

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Offer

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1- " ... to constitute a contract, there must be an offer by one person to another and an acceptance of that offer by the person to whom it is made. A mere statement of a person's intention, or a declaration of his willingness to enter into negotiations is not an offer and cannot be accepted so as to form a valid contract"

(Acme Grain Co. v. Wenaus, 1917)

على سبيل المثال:

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2- "We quote you" has been held not to be an offer but "shall be happy to have an order from you to which we will give prompt attention" was held to be an offer. In each case of this type, it is a question to be determined upon the language used, and in light of the circumstances in which it is used, whether what is said by the vendor is a mere quotation of price or in truth an offer to sell." (Canadian Dyers Association v. Burton (1920))

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3- : Acceptance validates the contract ... It also must be clear, unequivocal, unconditional and made by the person to whom the offer is intended.

وقد نصت المحكمة على أن العرض البديل يلغي العرض الاصلي واللذي لم يعد مجالاً للقبول (حيث)

The court stated that a counter-offer normally terminates the original offer, which is no longer subject to acceptance.

(Livingstone v. Evans (1925))

مثال:

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4- "If, whatever a man's intention may be, he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Saint John Tug Boat Co. v.

(Irving Refinery Ltd. (1964))

Offer rules

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Offer refused

أولاً: رفض الإيجاب:

Acceptance

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حالة عملية ٣:

المرجع التشريعي لوزارة الأشغال الكويتية:

القاعدة رقم (١٩١):

التقدم بالعطاء في المناقصات أو المزايدات هو الإيجاب ، ولا بد أن يصادفه

القبول لانعقاد العقد بإرسال المناقصة أو المزايدة:

Offer and Acceptance

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Submission Contract

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حالة عملية ٤:

المرجع التشريعي لوزارة الأشغال الكويتية:

القاعدة رقم (٣٠٣) - العقد الإداري ليس من عقود الإذعان :

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حالة عملية ٥:

المرجع التشريعي لوزارة الأشغال الكويتية:
الشروط الواجب توافرها في عقود الإذعان :

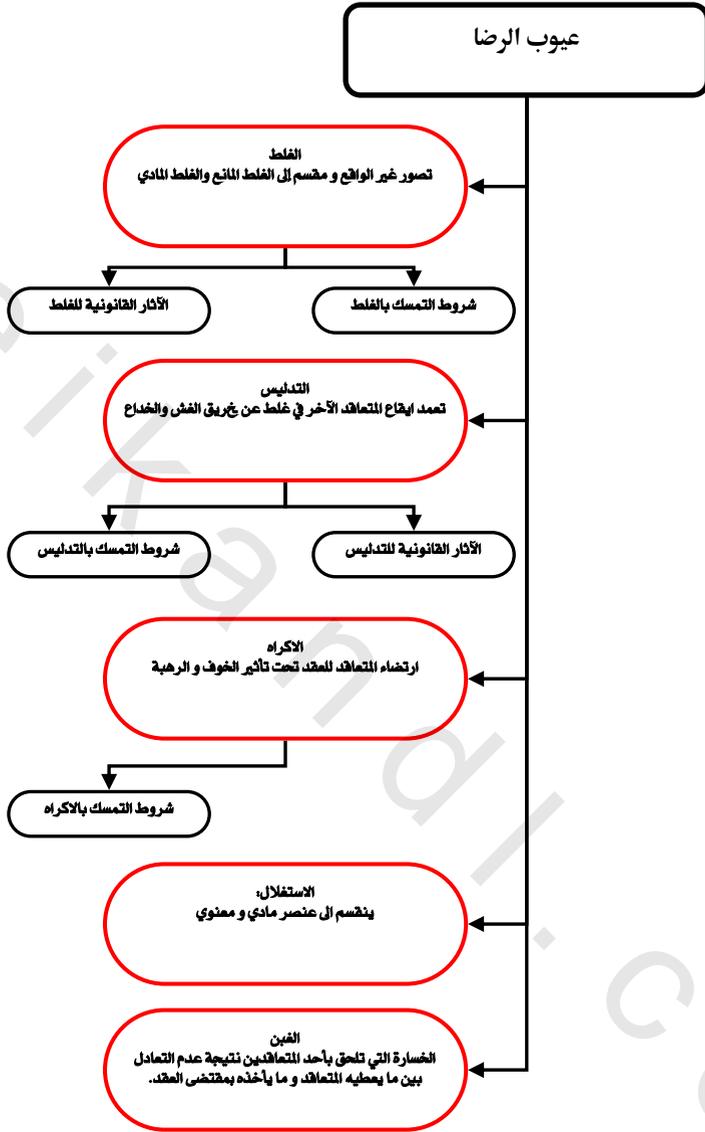
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Defects of Consent

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شكل ٧-٣ عيوب الرضا

Fault

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١- المقصود بالخط:

material

fault in fact

fault

mistake in fact

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material mistake

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مثال:

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حالة عملية ٦:

المرجع التشريعي لوزارة الأشغال الكويتية - القاعدة رقم (١١٠)
تدقيق العطاء و تصحيح الأخطاء الحسابية - ص(٢٤٧)

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حالة عملية ٧:

المرجع التشريعي لوزارة الأشغال الكويتية - القاعدة رقم (١١١)
تدقيق العطاء و تصحيح الأخطاء الحسابية - ص (٢٥١)

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حالة عملية ٨:

المرجع التشريعي لوزارة الأشغال الكويتية - القاعدة رقم (١١٣)

تدقيق العطاء و تصحيح الأخطاء الحسابية - ص(٢٥٤)

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حالة عملية ٩:

The City of Syracuse , New York , put out request for bids to construct a junior high school . Sarkisian Bros , the contractor entered an incorrect bid figure which resulted from a number being incorrectly transferred from the worksheet to the bid proposal . Because of the transfer error , the contractor inadvertently calculated a deduction of \$213,000 rather than \$21,300 .The contractor notified the city of the mistake on the day that the bids were opened and requested that the bid was withdrawn . the court determined that the bid price would not be enforced because the error was material and of a clerical nature . The court evaluates whether the contractor's mistake is known by the other party and whether 1) the mistake in the bid is of such consequence that enforcement would be unconscionable , 2) the mistake is material , 3) the mistake occurred despite the exercise of ordinary care by the bidder , 4) it is possible to place the other party in status quo.

(City of Syracuse v. Sarkisian Bros., Inc., 87 App.Div.2d 984, 451 N.Y.S.2d 618, 454 N.Y.S.2d 71, 439 N.E.2d 880 (1982, 4th Dep't))

(Syracuse)

حالة عملية ١٠ :

Case Study

5- Contractor priced bid on the assumption it would not be responsible for the transportation of union workers. Contractor's bid was low.

After bid opening, contractor learned of a union "precedent" which required it to provide transportation. Contractor asked to be allowed to withdraw its mistaken bid. Public owner refused.

The Supreme Court of Missouri ruled that a bidder cannot obtain relief from a mistaken bid if the mistake was judgmental, rather than clerical or mathematical, in nature.

This was an error of judgment; so contractor could not withdraw the bid. Owner could recover against contractor's bid bond because of contractor's refusal to sign contract.

حالة عملية ١١ :

Case Study

6- Contractor submitted low bid on construction contract. After bid opening, contractor discovered that it had made an error in transposing a subcontractor's price from a worksheet onto the bid sheet itself.

Contractor asked permission to withdraw the bid. Public owner refused.

When contractor declined to sign the contract, owner sued.

The Appellate Court of Illinois said a mistaken bid may be withdrawn only if the mistake occurs despite the bidder's exercise of reasonable care. In this case, contractor's bid checking procedures were so lax that contractor failed to exercise reasonable care. Contractor was not entitled to withdraw mistaken bid and was liable to owner for failure to honor bid.

Misrepresentation or Fraud : - - - -

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**حالة عملية ١٣: (من القضاء الأنجلوسكسوني):
التدليس في الإدلاء بالمعلومات عن الوضع القانوني لأرض البناء:**

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7- The judge quoted Lord Denning who, in an English case, *Esso Petroleum Co. Ltd. v. Mardon* (1976), said: "... if a man, who has or professes to have special knowledge or skill ... negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages." *Allan Vogt v. Saskatchewan Housing Corporation* (2.1.01.L) Saskatchewan Court of Queen's Bench Maher J. May 10, 1985

حالة عملية ١٣:

8- A leased property was sold on the representation that the tenant was “a most desirable tenant.” Turns out the tenant had been defaulting on his rent and, before the deal was closed, actually filed for bankruptcy. The purchaser asked the court to rescind the contract and the court agreed.

(1884) Smith v. Land and House Property Corp.

حالة عملية ١٤:

9- Properties were exchanged between the parties including a motel. When the new owner of the motel found out that the stated past earnings of the motel were false, he sued for rescission of the contract. The court found that there was fraud and went on to say that rescission is an equitable remedy.....

Kupchak v. Dayson Holdings Ltd. (1965)

Coercion and Duress

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الإكراه في الشريعة والقانون :

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حالة عملية 10:

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وذلك وفقاً للحالات الآتية من القضاء الأنجلوسكسوني :

10- The court suggested that all these instances “run on a single thread: inequality of bargaining power” and that “undue” does not mean wrongdoing, nor “that every transaction will be saved by independent advice, but the absence of it may be fatal.” The court then concluded that the bank had a relationship of confidence with the farmer, and a conflict of interest had arisen by their failing to suggest that he seek independent advice. The court therefore disallowed the foreclosure action.\

Lloyds Bank v. Bundy (1975)

11- A fishing boat was sold in a high pressured bid by the defendant. When “a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain.”

Harry v. Kreutziger (1978)

12- Through no fault of the bank, defendants signed a loan guarantee without reading the document first and relying on the representation of the loan debtor’s word that they were only signing an insignificant administrative document. When the bank tried to collect from the defendants, the latter pleaded non est factum. The court said no. The carelessness of the

party requesting non est factum should not be allowed against an innocent third party when it was through his own carelessness that he failed to discover the misrepresentation. "The party who, by the application of reasonable care, was in a position to avoid a loss to any of the parties, should bear any loss that results when the only alternative available to the courts would be to place the loss upon the innocent appellant."

Marvco Color Research Ltd. v. Harris (1982)

13- The English Queen's Bench Division considered the claim of a contractor who had accepted a reduced settlement for unpaid contract funds at a time when he was in desperate financial straits. It was clear from the evidence that the defendant was aware of the contractor's situation and had used it in negotiating the settlement. The court held that a settlement in these circumstances amounted to holding the contractor to ransom and therefore was not binding.

1966 case of D & C Builders Ltd. v. Rees

Exploitation : - - - -

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(١) العنصر المادي للاستغلال :

(٣) العنصر المعنوي:

Lesion (excessive inequity)

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شروط التمسك ببطان العقد لوجود الغبن:

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Construction Contract Object :

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Cause in The Construction Contract

Payments

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