



TUESDAY: 28 November 2017.

Time Allowed: 3 hours.

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

**SECTION A**

**QUESTION ONE**

- (a) Describe FIVE reasons why an organisation should negotiate with its suppliers when buying goods, services and works. (5 marks)
- (b) Distinguish between a “void” and a “voidable” contract. (4 marks)
- (c) Explain THREE causes of disputes in procurement contracts. (6 marks)
- (d) Highlight FIVE requirements for a patent to be registered. (5 marks)

**(Total: 20 marks)**

**SECTION B**

**QUESTION TWO**

- (a) Appraise FOUR reasons why a procurement consultant may propose the use of an integrative approach instead of a distributive approach to negotiation. (8 marks)
- (b) Based on feedback from a previous negotiation with Udongo Ltd., Mr Ajabu, the procurement manager at Wajibika Ltd., has been informed by Udongo Ltd. that he acted unethically during the negotiation process. Mr Ajabu is of the view that it is impossible to avoid the use of unethical behaviour in negotiations.

**Required:**

- (i) Explain TWO reasons that could have led Mr Ajabu to behave unethically during the negotiation process. (4 marks)
- (ii) Examine FOUR sources of moral standards which would have guided Mr Ajabu. (8 marks)

**(Total: 20 marks)**

**QUESTION THREE**

- (a) Zuhura, the procurement officer of Mashinani Company Ltd. has been tasked with negotiating a contract for supply of goods. She is uncertain about the process of negotiation.

Advise Zuhura on a negotiation process model that is appropriate for the contract. (10 marks)

- (b) The doctrine of frustration was developed to mitigate the severity of breach of contract where performance of a contract becomes impossible.

Analyse FIVE circumstances under which the doctrine of frustration applies. (10 marks)

**(Total: 20 marks)**

**SECTION C**

**QUESTION FOUR**

**Case Study**

Mr Mrefu and Mrs Mfupi are procurement professionals at Jikaze Ltd. Their company wishes to procure raw materials for their plant from abroad. They have invited Randa Co. Ltd and Slowbi Co. Ltd., their potential suppliers, for a meeting for purposes of negotiating the contracts they intend to enter into.

During the meeting, Mr Mrefu, who is in charge of the process, observes that Mr Hasra representing Randa Co. Ltd. got very agitated at one point since he did not agree with Mrs Mfupi's remarks. In Mr Hasra's culture, a woman should not make "some statements" but should leave it to a male companion to talk on her behalf.

On the other hand, Mrs Polle representing Slowbi Co. Ltd. seemed very hesitant to participate in the negotiation. She explained that her company had very bad experiences in previous international contracts due to breaches including disclosure of their company information by the other negotiating party.

Jikaze Ltd. consults you for advice on the negotiation process which turned out to be less productive than they expected.

**Required:**

- (a) Advise Jikaze Ltd. on FIVE barriers to effective negotiation that Mr Mrefu could have considered during preparation and planning for the negotiation. (10 marks)
- (b) "Mr Mrefu noticed that Mr Hasra appeared agitated at one point".  
Describe FIVE other non verbal cues to watch for during negotiations. (10 marks)
- (c) Explain FIVE features of international procurement contracts for supply of goods that should be addressed by the parties before they contract. (10 marks)
- (d) Advise Jikaze Ltd. on the remedies available to them in the event of breach of a contract. (10 marks)

**(Total: 40 marks)**

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# KISM AND KASNEB

## CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL (CPSP)

### PART I

#### CONTRACT LAW AND NEGOTIATION

MONDAY: 23 November 2015.

Time Allowed: 3 hours.

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

#### SECTION A

##### QUESTION ONE

- (a) Illustrate the sequence of events leading to the creation of a commercial agreement. (6 marks)
- (b) In relation to the law of agency, explain THREE circumstances under which an agent might be held personally liable to a third party. (3 marks)
- (c) Explain the validity of the following in Kenya:
- (i) A “contract” between Anne aged seventeen years and Smart College for vocational training. (2 marks)
  - (ii) A “contract” between Lucky hotel for supply of food to Dennis, an orphan aged 10 years at a price of Sh.10,000 per meal. (2 marks)
  - (iii) A “contract” between Sally and Tony whom Sally is aware is insane for the sale of a small aircraft for personal expeditions. (2 marks)
  - (iv) A “contract” between Otieno aged 16 years and his lawyer to defend him in legal proceedings against him. (2 marks)
- (d) Outline THREE forms of alternative dispute resolution mechanisms other than the court process. (3 marks)
- (Total: 20 marks)**

#### SECTION B

##### QUESTION TWO

- (a) Paula planned to stage a concert in Taarab hotel. She engaged a number of eminent musicians to perform at the concert. Amongst the musicians were Penina G., Jackie Jack and Strong Sounds. She paid each musician 10% of the agreed fees at the time of contract signing.

Penina G. could not perform at the concert since she had visited a neighbouring country to perform, but war broke out and she could not travel back to Kenya before the concert date. Strong Sounds too could not perform since one of their members was bed ridden with acute malaria. Jackie Jack could not show up since she was called to perform at State House on the same night in honour of a visiting foreign Head of State.

Paula was concerned and fearing that the concert would be a failure, decided to cancel the concert.

**Required:**

Advise Paula on her legal position.

(10 marks)

- (b) When parties enter into a contract, the law provides that where a written contract does not accurately express the intention of the parties, a court may rectify the contract to make it express the true intentions.

State the facts that parties seeking rectification must prove before a court.

(5 marks)

- (c) (i) Explain the concept of “illegal contracts”. (2 marks)
- (ii) Give THREE examples of contracts considered illegal in Kenya. (3 marks)

**(Total: 20 marks)**

### QUESTION THREE

Kobe Municipal Council invited a consultant to do the detailed engineering design of a municipal office block. The council advertised for contractors to carry out the construction. Granton Contractors Ltd. was selected by the council after the tender evaluation process. Granton Contractors Ltd. had indicated in their bidding documents that they did not have enough in-house capacity to carry out electrical work and wanted to select a sub-contractor to do the electrical work. However, Kobe Municipal Council nominated Electrex Ltd. as the electrical sub-contractor. Electrex Ltd. installed the generator and the entire electrical system for the building using the engineering drawings and the specifications from the consultant.

However, a month after the occupation of the building there was an explosion and fire which damaged part of the structure. A fire expert attributed the fire to “electrical failure”. The council then wrote to Granton Contractors Ltd. asking them to correct the damage in the building and the entire electrical system. The contractor in turn asked Electrex Ltd. to carry out the electrical repairs and provide money to carry out the structural repairs. Five months later Kobe Municipal Council sued Granton Contractors Ltd. to seek all structural and electrical corrections in the building and other damage.

#### Required:

(a) Discuss whether Kobe Municipal Council would succeed in their prayer to have Granton Contractors Ltd. carry out structural and electrical corrections and pay damages. (12 marks)

(b) Discuss whether Granton Contractors Ltd. has a right to sue Electrex Ltd. for the damage on the structure. (8 marks)

**(Total: 20 marks)**

### SECTION C

#### QUESTION FOUR

Study the case below and answer the questions that follow:

#### ENERGY FARMS Vs EVEREST UNIVERSITY

Energy Farms Ltd. produces vegetables, milk and fruits on a large scale. After a pre-qualification exercise, Energy Farms Ltd. made it to the list of prequalified suppliers for Everest University. They then signed a blanket agreement. The contract stated that Energy Farms Ltd. would supply vegetables, fruits and milk to the University over a duration of two years. The quantities to be supplied at each call would depend on the demand of the University but with an expectation of at least two deliveries per week. Unit prices for each of the commodities were agreed on.

Energy Farms Ltd. responded to the subsequent calls positively supplying high quality produce. The requirements of the University increased and the farm had to increase its production capacity. However, during the first quarter of the second year there was a strike at the University, and the campuses closed for over three months. The University wrote promptly to Energy Farms Ltd stating that they would not accept more deliveries until further notice. The University indicated that payments for the last delivery would be delayed accordingly. Energy Farms Ltd. then sought alternative buyers for the farm produce but could not find a suitable one. The University was reopened four months later when Energy Farms Ltd. had incurred significant losses and scaled down farm operations.

Energy Farms Ltd. then wrote a letter to the University seeking the outstanding payments for the last delivery plus the interest accrued. The farm also wanted the prices for remaining deliveries amended to cover the losses incurred during the strike. The University declined to pay accrued interest and amend the prices.

#### Required:

(a) Energy Farms Ltd. wishes to sue Everest University for accrued interest and other damages for late payment.

Discuss whether Energy Farms Ltd. would be granted the remedies they seek by the court. (10 marks)

(b) Explain the factors that the court may consider in assessing unliquidated damages in this case. (10 marks)

(c) Explain FOUR contractual provisions that you could include in the blanket agreement in order to avoid the scenario in the case. (10 marks)

(d) Everest University seeks to terminate the relationship with Energy Farms Ltd. due to the intended legal action.

Advise the farm on whether the court would grant claims for the termination. (10 marks)

**(Total: 40 marks)**

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# KISM AND KASNEB

## CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL (CPSP)

### PART I

#### CONTRACT LAW AND NEGOTIATION

TUESDAY: 24 May 2016.

Time Allowed: 3 hours.

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

#### SECTION A

##### QUESTION ONE

(a) Explain the following terms in relation to “BATNA”:

- (i) Must achieve objectives. (1 mark)
- (ii) Intend to achieve objectives. (1 mark)
- (iii) Zone of agreement. (1 mark)
- (iv) Deadlock. (1 mark)
- (v) Walk away. (1 mark)

(b) Outline FIVE types of questions which might be asked during negotiation. (5 marks)

(c) Explain the following terms as used in negotiation:

- (i) Negotiating at home. (1 mark)
- (ii) Negotiating away. (1 mark)
- (iii) Kinetic behaviour. (1 mark)
- (iv) Interest. (1 mark)
- (v) Position. (1 mark)

(d) Outline FIVE characteristics of effective listeners. (5 marks)

**(Total: 20 marks)**

##### QUESTION TWO

(a) Negotiations are used to resolve differences between buyers and sellers. Explain the specific prerequisites of the negotiation process. (10 marks)

(b) You have been newly recruited as the supply chain manager of Bahati INGO (International Non-Governmental Organisation) based in Nairobi. One of the areas cited by your immediate supervisor, the Director of Operations is your predecessor's inability to negotiate value for money from suppliers.

(i) Identify THREE negotiation approaches available to you and propose how you would use them to win your supervisor's confidence. (5 marks)

(ii) As a negotiator, state FIVE techniques you could use to conclude a negotiation. (5 marks)

**(Total: 20 marks)**

#### SECTION B

##### QUESTION THREE

Martin responded to an invitation to tender for environmental audit consultancy service which had been advertised by a state corporation. The evaluation criteria to be followed was the individual consultants selection method. Although he did not have a post-graduate degree which was one of the requirements, Martin satisfied all the other selection criteria. The bidders with post-graduate qualifications had less direct experience relevant to the task.

After receiving the letter of award, Martin carried out the work successfully and was promptly paid. He later sent Ksh.20,000 through mobile transfer to the Head of Procurement of the organisation as a gratitude payment. The Head of Procurement accepted the gratitude payment. The bidders who lost got to know about the payment. Two of them lodged a complaint with the ethics and anti-corruption body.

**Required:**

(a) Explain whether the Head of Procurement might be held liable for corruption and bribery, citing relevant cases. (10 marks)

(b) Draft a 5-point ethical code of conduct that might guide the Head of Procurement in handling the situation above. (10 marks)

**(Total: 20 marks)**

**SECTION C**

**QUESTION FOUR**

**Case study**

After graduating from university, Nisha was employed by Wonderlink Consulting Ltd., a company that had been in the enterprise resource planning software business for over 30 years. Nisha had studied business information technology. Her role at Wonderlink was to seek clients, negotiate contracts, install software for clients, train customers and offer after sales services. She also used her knowledge to make simple enhancements on the company's software. The company grew, employed more people and commanded a 70% market share in the city where it operated.

After working for Wonderlink Ltd., for five years Nisha thought of setting up her own business. She registered a company called Wunderblitz Consulting Limited and then presented her resignation notice. Her company's vision was to target the low end of the enterprise resource planning software market by developing solutions that suited their needs but at affordable prices.

The Managing Director of Wonderlink Consulting Limited accepted Nisha's resignation letter but on condition that she would keep any proprietary information confidential. He also put a clause in the resignation letter that Nisha should not establish a similar business in the same city for a period of five years from the date of her resignation. Nisha did not object to the conditions because she wanted to receive her terminal benefits upon resigning.

Nisha set up her software business in the same city. She developed her own software and sold them under the Wunderblitz consulting Ltd. brand. Her company grew and had a good market share within 4 years. Wonderlink Consulting Limited sued Nisha at the local court. They sought compensation for patent infringement, breach of confidentiality, trademark infringement and breach of terms of disengagement.

**Required:**

(a) Discuss whether the court would find Nisha guilty of breach of confidentiality. (10 marks)

(b) Explain whether Wonderlink Consulting Ltd. would get any reprieve for goodwill protection under the tort of passing off. (10 marks)

(c) Describe the legal position of the Competition Authority of Kenya on restraint of trade clauses. (10 marks)

(d) Nisha wishes to patent her software products. Discuss whether Wonderlink Consulting Ltd., would get an injunction restraining her. (10 marks)

**(Total: 40 marks)**

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# KISM AND KASNEB

## CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL (CPSP)

### PART I

#### CONTRACT LAW AND NEGOTIATION

TUESDAY: 23 May 2017.

Time Allowed: 3 hours.

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

#### SECTION A

##### QUESTION ONE

- (a) Distinguish between written contracts and specialty contracts. (4 marks)
- (b) Explain the following terms as used in contract law:
  - (i) Least Acceptable Agreement (LAA). (1 mark)
  - (ii) Most Desired Outcome (MDO). (1 mark)
  - (iii) Framework Agreements. (1 mark)
  - (iv) Assignment of Contract. (1 mark)
- (c) State FOUR warranties implied into a procurement contract for supply of goods. (4 marks)
- (d) Briefly describe the circumstances under which a negotiation process is considered to have been effective. (4 marks)
- (e) Contrast between "anticipatory breach" and "actual breach". (4 marks)

(Total: 20 marks)

#### SECTION B

##### QUESTION TWO

- (a) There is a dispute between Top Norch Ltd. and their supplier. The conflict has strained their business relationship.  
Advise the supplier on FIVE styles of handling conflict. (10 marks)
- (b) Effective integrative negotiators should have certain characteristics in order to ensure that negotiation is effective.  
Explain FIVE of those characteristics. (10 marks)

(Total: 20 marks)

##### QUESTION THREE

- (a) Using relevant examples, explain the term "Limitation of Liability Clause". (4 marks)
- (b) Describe THREE conditions that must be met in order for a limitation of liability clause to be enforced by the court. (6 marks)
- (c) Discuss THREE presumptions that have been developed by the courts over the years that apply with respect to "intention of parties to be legally bound" where the parties have not expressed their intention in their written contract. (10 marks)

(Total: 20 marks)

#### SECTION C

##### QUESTION FOUR

Mizani Ltd. finalised the tendering process for the purchase of a laundry plant/machine whose estimated cost was Sh.500 million with an estimated working life of 10 years. The management of Mizani Ltd. wishes to negotiate with NSS (manufacturer of the laundry plant/machine) who was considered to be the most economically advantageous bidder. During the technical evaluation

process, the Evaluation Team from Mizani Ltd. which was led by the Head of Supply Chain assisted by the Head of Operations noted that NSS met all the criteria for the technical evaluation as set out in the bid/tender document. The specifications for the laundry machine had been prepared by the Head of Operations at Mizani Ltd., a layman in the field of laundry plants. The Head of Operations had obtained the specifications from NSS website.

It was also expected that Mizani Ltd. would engage NSS in the periodic preventive maintenance (including supply of spares and consumables). The Head of Supply Chain at Mizani Ltd., located in Nairobi CBD, set up a negotiation meeting with NSS, located at Industrial Area, Nairobi. Before the negotiations were held, the Head of Supply Chain at Mizani Ltd. convened an internal meeting to discuss the negotiation strategy. During the internal meeting, one of the staff members of Mizani Ltd., Jambo, insisted that negotiations should only focus on the purchase price of the laundry plant.

Another staff member, Mrembo, insisted that Mizani Ltd. should adopt an aggressive, competitive approach while negotiating with NSS to ensure that they extract maximum value from the supplier. The Director of NSS (the bidder recommended for award) requested that the negotiations should be held at the NSS office. In addition, the Director of NSS requested the Head of Supply Chain at Mizani Ltd. to share with NSS the proposed draft contract for the tender.

- (a) As a supply chain professional:
- (i) Explain whether you would recommend the use of the specifications obtained from the website of NSS in the tendering process for the laundry plant. (7 marks)
  - (ii) Advise on the options that were available in the process of obtaining specifications. (3 marks)
- (b) (i) Citing reasons, comment on whether you support the views held by Jambo. (5 marks)
- (ii) Advise on whether the claims by Mrembo are valid. (5 marks)
- (c) Justify whether or not you would advise the Head of Supply Chain at Mizani Ltd. to accept the proposal by the Director of NSS to hold the negotiations at their offices. (10 marks)
- (d) The Head of Supply Chain at Mizani Ltd. requested for assistance in drafting the contracts that would apply between Mizani Ltd. and NSS.
- Advise the Head of Supply Chain at Mizani Ltd. on the structure of the draft contract. (10 marks)
- (Total: 40 marks)**
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# KISM AND KASNEB

## CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL (CPSP)

### PART I

#### CONTRACT LAW AND NEGOTIATION

TUESDAY: 22 November 2016.

Time Allowed: 3 hours.

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

#### SECTION A

##### QUESTION ONE

- (a) Outline THREE reasons why supply chain management professionals should have working knowledge of commercial law. (3 marks)
  - (b) Citing relevant examples, distinguish between “express terms” and “implied terms” as used in contract law. (4 marks)
  - (c) Negotiation forms an integral part of the procurement process in terms of reaching an acceptable agreement.
    - (i) Identify FOUR stages within the procurement cycle where negotiation applies. (4 marks)
    - (ii) Outline alternative ways of establishing agreements other than through negotiation. (2 marks)
  - (d) Suggest THREE situations when a distributive approach to negotiations may be appropriate for commercial negotiations. (3 marks)
  - (e) Suggest with examples FOUR varieties of non-verbal cues that a skilled negotiator can apply during negotiations. (4 marks)
- (Total: 20 marks)

#### SECTION B

##### QUESTION TWO

- (a) Justify the existence of intellectual property laws. (10 marks)
  - (b) You have been appointed by the Chief Executive Officer of XYZ Company Ltd. to head a negotiation team on behalf of the company.  
Discuss FIVE styles of negotiation you would consider. (10 marks)
- (Total: 20 marks)

##### QUESTION THREE

Kijana Msafi Hotel used a request for quotation (RFQ) to invite Imani Gas Suppliers to quote for supply of a cooker/oven with the capability of cooking using both liquid petroleum gas (LPG) and electricity in accordance with the user departments specifications. Imani Gas Suppliers responded with a quotation indicating that they could supply a cooker/oven capable of using electricity only.

Kijana Msafi Hotel raised a purchase order for the supply of the cooker/oven based on the quotation that was received from Imani Gas Suppliers. Imani Gas Suppliers proceeded to deliver the cooker/oven which was received by the stores department of Kijana Msafi Hotel. The head of procurement and stores at the hotel issued the cooker/oven to the user department, however, it was rejected by the user department since it could only cook using electricity, yet the user department had indicated that they required a cooker/oven that could use both electricity and LPG. The Head of procurement and stores at the hotel contacted Imani Gas Suppliers with the intention of returning the cooker/oven since it did not meet the specifications. However, Imani Gas Suppliers declined to receive the returned cooker/oven.

- (a) Discuss the legal position of Imani Gas Suppliers. (10 marks)
- (b) Propose various ways in which Kijana Msafi Hotel could have prevented the occurrence of the above scenario. (10 marks)

(Total: 20 marks)

## SECTION C

### QUESTION FOUR

Diana and Daisy are mother and daughter respectively, who own a partnership that is in the business of food supply for a wide range of products. Diana is 40 years old while Daisy celebrated her 17<sup>th</sup> birthday at the beginning of this year. Desert Shelter Hotel, a client ordered for 1,000 boxes of apples imported from South Africa, from Diana at Sh.10,000. Diana agreed to supply and promised that the apples would be imported from South Africa. Desert Shelter Hotel also entered into an agreement with Daisy for the supply of 800 kgs of beef in 20 days at Sh.800,000. Daisy agreed to do so within the 20 days.

Diana delivered the 1,000 boxes of apples within a week. However, Desert Shelter Hotel noticed that the apples were of very poor quality and were not imported from South Africa. Diana argued that the money that Desert Shelter Hotel had agreed to pay was too low and no serious business person would accept it as payment for imported apples. Daisy on the other hand changed her mind and informed Desert Shelter Hotel that she would not be supplying the beef since she has more important business to take care of.

#### Required:

- (a) Explain FOUR rules of consideration and advise Desert Shelter Hotel as to their legal position in respect of the adequacy of their consideration to Diana or lack thereof. (10 marks)
- (b) Advise Desert Shelter Hotel on:
  - (i) Their legal position in respect of their contract with Daisy. (4 marks)
  - (ii) THREE alternative methods of dispute resolution that may be applied in resolving the impasse with Daisy. (6 marks)
- (c) Propose areas in the agreement that Desert Shelter Hotel should negotiate with Diana to avoid future conflicts. (10 marks)
- (d) In view of the problems that arose in the agreements between Desert Shelter Hotel, Diana and Daisy, the hotel will in future, hold negotiations at their premises before entering into any contractual relationship.

Explain FIVE advantages that Desert Shelter Hotel would enjoy as a result of selecting their premises as the venue for negotiations. (10 marks)

(Total: 40 marks)

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# KISM AND KASNEB

## CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL (CPSP)

### PART I

#### CONTRACT LAW AND NEGOTIATION

#### PILOT PAPER

September 2015.

Time Allowed: 3 hours.

Answer ALL questions. Marks allocated to each question are shown at the end of the question.

#### SECTION A

##### QUESTION ONE

- (a) Explain FOUR ways in which terms may be 'implied' in a contract. (4 marks)
- (b) Describe the types of flaws that may vitiate a contract. (4 marks)
- (c) Outline the content of a "force majeure" clause in a contract. (4 marks)
- (d) Highlight the advantages of using model form contracts. (4 marks)
- (e) State the advantages of arbitration as a dispute resolution mechanism. (4 marks)

(Total: 20 marks)

#### SECTION B

##### QUESTION TWO

- (a) The initial contract sum for long-term infrastructure projects is in many cases "a rough estimate". That may have little bearing on the actual final cost of a project.

Explain the procurement related contractual safeguards that you would put in place to improve the accuracy of the initial cost estimate in relation to the final project cost. (10 marks)

- (b) You have been appointed to lead a government delegation to negotiate with an international company. The negotiation is about financing and contractual issues for a proposed major hydroelectric dam project following an open international tendering exercise in which the company was the best ranked bidder.
  - (i) Identify the factors that would affect your negotiating position (5 marks)
  - (ii) Explain the desirable procedure for such negotiations. (5 marks)

(Total: 20 marks)

##### QUESTION THREE

During a negotiation meeting, Tough Automobile Kenya Ltd., a supplier which provided an international NGO with servicing of motor vehicles offered a price and payment terms that were on offer which read "Today's only, you take it or leave the deal." The international NGO explained that further discussion was needed because the prices were above its budget and payment terms were outside the organisation's financial policy. The Chief Executive of Tough Automobile Kenya Ltd. listened and repeated the ultimatum. The manager of the NGO in charge of the project ended the meeting to avoid an impasse.

##### Required:

- (a) Explain how effective listening skills could improve Tough Automobile Kenya Ltd.'s contribution to negotiation. (10 marks)
- (b) Explain the approach of dealing with deadlock negotiation. (10 marks)

(Total: 20 marks)

## SECTION C

### QUESTION FOUR

(a) Read the case below and answer the questions that follow:

The Ministry of Roads and Infrastructure is planning a major road building project to improve accessibility in the north eastern region of the country.

The project will be funded through budget allocation from the National Treasury. The Ministry uses open international tendering procedure in the hope of securing the participation of major international road construction firms. In fact, three such firms (from Belgium, South Africa and China) request for the bidding documents indicating their intention to submit competitive bids to the Ministry on timely basis. In the interest of time the Ministry goes through a very limited pre-qualification procedure and does not schedule a pre-bid conference.

After bids are submitted and evaluated, the contract award is made to the Belgium firm, Tropical Construction. After receiving the mobilisation advance (20% of contract price), Tropical Construction fails to move construction equipment to the country or otherwise take positive steps to perform the contract. The performance security submitted to cover the advance payment turns out to be uncollectible issuance by non-existent financial institution, Sunshine Securities of the Bahamas. In short, Tropical Construction has defrauded the Ministry and the project is now a year behind schedule and millions of shillings are highly likely to be lost.

After investigations it is discovered that Tropical Construction has experience in constructing roads in other countries. However, in the recent past, most of its projects have experienced difficulties to complete because of financial challenges and indeed one had been terminated by another government because of default.

The Ministry of Roads and Infrastructure is determined to conduct another round of bidding. It intends to hold a pre-bid conference before prequalification procedure to identify another international construction firm with assurance of capability and integrity. The Ministry has also hired a law firm to bring legal action against Tropical Construction. It has also circulated information to other ministries about Tropical Construction's fraud and urged them not to consider Tropical Construction for future work.

#### Required:

- (a) Explain how conducting a proper pre-qualification procedure could have prevented the fraud by Tropical Construction against the Ministry. (10 marks)
- (b) Discuss FIVE contracting issues that could be addressed in a pre-bid conference to enhance contract performance. (10 marks)
- (c) Explain FIVE measures that the Ministry could have taken to protect its interests once the fraud was discovered. (10 marks)
- (d) Discuss FIVE limitations of using litigation as a dispute resolution mechanism as used by the Ministry. (10 marks)

(Total: 40 marks)

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