

RIA REPORT

Title of the Legal Measure: The Construction Development Authority (CDA) Act of Bhutan

Type of Regulatory Measure: Act

Lead Agency: Construction Development Board

Expected Year of Adoption: 2014

Background

1. WHAT ISSUE/PROBLEM IS THE PROPOSAL EXPECTED TO TACKLE?

Background and issues

The Construction Development Board (CDB) was established in 1987 as a representative agency bridging the public and private sectors and to act both as the regulator and promoter of the construction industry and fulfill the overall mission of CDB "promotion of an efficient and quality-based construction industry in Bhutan". The CDB is expected to guide, nurture and develop the construction industry to attain the required quality and ingredients. CDB is currently a department of the MoW&HS and shares regulatory authorities with other arms of the MoW&HS.

Its primary objective includes developing/promoting technical and managerial skill of private sector; administration of institutional capacity and performance of contractors; developing policy guidelines; and provision of essential services. Its role therefore is of bridging organization between public and private sector, serve as a platform for addressing pertinent multi-sectorial issues affecting construction industry, carrying out functions of enabling authority to help construction industry players overcome any obstacles, play the role of facilitator by addressing the current and future needs of the construction industry and to act as a neutral body in contractual disputes resolution between contractors and procuring agencies.

CDB's capacity to fulfil the assigned mandate has always been limited due to a number of reasons, such as not being an independent and unbiased agency, weak legal framework, limited regulatory mandate, limited human resource base, etc. The rapid growth of the construction industry has necessitated that CDB be strengthened sufficiently to cope with the increasing demand of services, to enable to function to its full capacity and monitor the industry for its healthy growth. The need for a strong central agency and clear leadership that has the capacity and authority in the construction sector to play a more proactive and dynamic role towards the overall development of construction industry is of paramount importance for an emerging and vibrant industry such as ours. Despite its mandate it has remained more of a passive organization limiting its functions and enforcement of laws and regulations is not sufficiently supported. Moreover, Private Construction Sector, although being the fastest growing industry, is still in an emerging phase.

It sees strengthening of CDB and transition to Authority as a way to prepare itself to overcome these challenges. This would mean transforming to an independent unbiased agency, putting in place qualified and experienced staff and giving more authority, introduce a detailed and far-reaching regulatory framework, and develop

the legal framework for private sector operations. A well-manned CDB with authority is felt vital to address the challenges through stringent enforcement of regulations and coordinating appropriate promotional activities. Its effort should be geared towards enabling development of contractors to be able to take up quality infrastructure work, create employment opportunities and continuously upgrade their performance to achieve excellence and regional competitiveness.

Analysis: Risk/problem inherent in the initial situation

General Situation

The evolution of the construction sector in Bhutan is part of a constant national development process and therefore has to address changing conditions and requirements. So far, much has been accomplished with recognisable results.

However, as in any other major development process, further reforms are required to achieve improvements and success. Current reform initiatives, which are based on careful and broadly supported situation analysis, show the eagerness of the respective authorities and the public to make changes. Needs and analysis for reforms of the construction sector and with particular reference to CDB are well documented in a number of current documents:

- Peoples Project (PP) Report on “Revitalizing the Construction Industry”,
- 10th Five Year Plan, CDB Plan Components, and
- CDB’s Organisational Development (OD) Plan.

Construction Sector in General

The proposed reforms and development actions are based on analysis of the current major problems affecting the construction sector. In a summary, and as extracted from the PP report, they are identified as follows:

- Very low levels of productivity,
- Poor quality of construction,
- Lack of real competition among contractors,
- Poor skills at both professional and working levels,
- Proliferation of undesirable practices such as fronting and collusion,
- Poor motivation and morale among government engineers,
- Fragmentation of design and construction process,
- Lack of specialization,
- Primitive technology, and
- High cost of construction.

Major measures to tackle these shortcomings are identified in the Peoples Project Report as:

“It is suggested that in order to revitalize the construction industry and address the issues listed above, there is the need to provide interventions in three broad areas:

1. Technology development,
2. Contractors’ capacity/skills development as well as regulation, and
3. Human Resources Development and Management.”

Contractors' Development and Regulation

The major constraints affecting the development of the about 4000 registered contractors in Bhutan have been identified as summarised under:

- Lack of professionalism among contractors,
- Lack of sense of urgency to develop capacity among contractors,
- Fronting and unhealthy practices in construction industry,
- Quality consciousness not sufficiently developed,
- Poor growth of construction firms under protected environment,
- Technical competence of most contractors limited,
- Shortage of labour in the construction industry,
- Difficulty in accessing to finance and credit facility,
- Legal and regulatory framework not fully developed,
- Lack of strong central agency for construction industry (→ CDB)
- Mechanization and back up services,
- Poor bidding system, and
- Missing or ineffective joint ventures and consortiums.

The PP report identifies the following major measures to be taken:

- Strengthening of CDB/CDA,
- Enabling policies and Legal frame work,
- Introducing preferential treatment system in procurement of works,,
- Restructuring contractors' classification to promote professionalism
- Broader competition in public procurement,
- Training and manpower development, and
- Mechanisation.

Lack of strong central agency

The issue of "lack of a strong central agency for the construction industry" has been comprehensively mentioned and analysed. CDB's mandate and status as that "central agency" was never fully developed, CDB has not been sufficiently empowered and CDB has never reached the required capacity to deliver the required services. The identified major problems with regards to CDB are identified as:

- Poor staffing resulting in capacity shortcomings.
- Not able to perform mandates such as (i) development and promotion of technical and managerial skill within the domestic construction industry, (ii) promotion of private participation in construction activities, (iii) administration of institutional capacity and performance of contractors, and (iv) development of policy guidelines for construction industry.
- Absence of regulatory/legal frame works and appropriate enabling environment to support its actions.
- CDB's institutional set-up under the MoW&HS and therefore resulting dependency: "is an ambiguous situation where the main client for the private construction sector (MoWHS) also controls contractor registration, contractor development issues and sets standards and controls quality of works. Such an arrangement could create scopes for disparity and inconsistencies in implementing the policy & programs of the Ministry in force".

The PP report therefore recommends:

“Despite its mandate it has remained more of a passive organization with limited functions. The study (PP report) felt that most of the impediments confronted, in one way or the other, are associated with CDB’s mandates and its capacity. Consultations with stakeholders have led the study to conclude that its strengthening was crucial in order to create a climate for a more vigorous development in the Construction Industry, carry out its functions effectively as the enabling authority to help Construction Industry players overcome any obstacles and play the role of facilitator by addressing the current and future needs of the Construction Industry.”

Further down the line, the PP report, the OD plan and the 10th FYP proposed the strengthening of CDB to take place in two distinct phases:

Phase I: Strengthening CDB to carry out its functions more effectively

Phase II: De-linking CDB from MoWHS and establishing an independent authority
→ CDA

→ All mentioned development documents clearly state the need for CDB to become an independent authority with a comprehensive mandate to effectively regulate and support the construction sector.

So far, the proposed reforms have received strong support from the MoW&HS as well as from other higher Government Authorities and stakeholders.

Previous initiatives and measures:

The Financial Manual 1988 empowers CDB to formulate its own working procedures for administration of the construction activities. Accordingly CDB Manual has been adopted since its inception. The Manual has been revised in the year 1992, 1997, 2001 and 2007. Despite its effort to revise and put the framework with changing needs, it lack legal framework and remained more of a passive organization limiting to registration function.

The government has taken the lead towards privatisation by setting enabling policies, adapting the regulatory framework, taking initiatives for development of the private sector with various support programs at national level and sector based. These policy & support programmes have fostered growth of the private construction sector. However, CDB has not been sufficiently empowered and has never reached the required capacity to deliver the required services.

Challenges

The **CDB challenges** might only be a hindrance if CDB continuous to function under the current institutional set-up until the transition to an authority has been achieved. Once CDB operates as an independent authority, most of the current limitations could be overcome. For example, the two main stumbling blocks for effective performance have been identified as the weak human resource capacity and the biased role of CDB as a de facto division of the biggest infrastructure client (MoW&HS). It would be rather wishful thinking that these two major hindrances could be overcome as long as CDB continuous to function under the current set-up. Moreover, the CDB lack regulatory/legal frame works and appropriate enabling environment to support its actions. Appropriate laws, rules and acts related to the construction industry are required so as to realign and bring about a fundamental change in bringing professionalism and enforcing quality of construction.

The logic consequence would therefore be to allow the transition to CDA as soon as possible.

2. WHAT IS THE MAIN OBJECTIVE AND ITS INTENDED EFFECTS?

All the previously established objectives of CDB are considered while drafting CDA Bill. The main objective of CDA bill is to:

1. Establish an independent authority with a comprehensive mandates, functions and powers to effectively regulate and support the construction sector, and
2. Provide legal backing for regulating construction sector in the country aligned with other existing legislations.

The intended effect is to establish an independent authority with a comprehensive mandates, functions and powers to effectively regulate and support construction sector in the country.

3. WHAT MAIN OBJECTIVE IS THE PROPOSAL EXPECTED TO REACH?

The following four options are considered:

1. Option 1: Do Nothing
2. Option 2: Review CDB manual.
3. Option 3: Non-regulatory Measures
4. Option 5: Introduce CDA Bill

4. WHAT ARE THE MAIN OPTIONS AVAILABLE TO REACH THE OBJECTIVES?

Option 1: Do Nothing

This section considers the options for addressing the problems with the existing CDB manual. This would be suitable where CDB prefers to remain a passive agency focusing on registration only. The existing regulatory system does not have provisions providing legal backing in regulating the construction industry as mandated. The mandates and the functions will never be achieved and there will be no growth of construction sector in the country.

Option 2: Review CDB manual.

The CDB has already undertaken a review of the CDB manual which was introduced since its inception. However, the manual in place does not provide legal backing while regulating construction industry in the country.

To ensure achieving the roles and mandates, it is imperative to have a legal instrument in place with a comprehensive mandate to effectively regulate and support the construction sector. Reviewing of CDB manual, however, will not address the fundamental problem faced for regulating construction industry.

Option 3: Non-Regulatory Measures

It is very difficult to regulate construction industry without regulatory or legal framework. The agency will have no backing for any legal or regulatory actions taken while exercising its duties. The solution to the problem will therefore need to be found in regulatory and legal reform, rather than non-regulatory measures.

Option 4: Introduce CDA Bill

The introduction of CDA Bill would allow the legislation to be in place in a way that is consistent with addressing the problem for regulating construction sector in the country. The purpose of CDA Bill would be to establish an independent authority with a comprehensive mandates, functions and powers to effectively regulate and support the construction sector, and provide legal backing for regulating construction sector in the country aligned with other existing legislations.

Advantages of CDA

The key benefits accruing from an independent CDA may be summarised in the following comparison with CDB's status:

CDB (current status)	CDA (anticipated status)
Government controlled agency under the MoWHS, being the largest construction sector client. Therefore perceived by the private sector and other line ministries as biased.	<i>Independent agency that represents all partners equally and impartial.</i>
Limited regulatory authority and enforcing powers.	<i>Empowered by Act to regulate and enforce (CDA Act).</i>
Limited scope of functions with little control over needs of the construction sector.	<i>Comprehensive scope of functions that are required to adequately servicing and supporting the entire construction sector.</i>
Limited promotional capacity for construction sector. CDB has little resources at hand to actually provide support and development services to the sector partners.	<i>CDA has a potential to provide effective and comprehensive promotional services to the entire sector, e.g. training, information and advisory services, R&D, etc.</i>
Insufficient human resource capacity due to limiting civil service regulations and resources.	<i>Human resource capacity (number, expertise) development and remuneration as per actual needs and market. Much more flexibility in acquiring and developing the required capacity.</i>

5. WHAT ARE THE IMPACTS-POSITIVE AND NEGATIVE

Costs of Introducing CDA

CDB in place lack legal/Regulatory framework whereas everything are in place. Therefore, there will be no cost involved while transition to CDA rather than cost involved in publishing and drafting Rules and Regulations.

Since, CDB is currently under MoWHS, CDB have to report to HRD, AFD and ADM of the Ministry. The complete manpower need to be pulled in wherein it includes HRD, ADM and AFD.

Benefits:

1. Autonomous agency, representing all partners,
2. Has authority to regulate and enforce,
3. Comprehensive and representative scope of functions for entire construction industry,
4. Independent and need oriented management,
5. Potential sector promotional capacity training, information, advisory services, R&D, etc.
6. HR strength, development and remuneration as per needs and market,
7. Equal support and collaboration from all ministries,
8. Promoting the construction industry
9. Ensure economy, efficiency, accountability and transparency in construction contracting and its implementation
10. Provide "industry support" by *assisting* the private sector within the construction industry to implement fair competition through policy reforms to ensure economy, efficiency and transparency in the industry
11. Promote "technology development" by *encouraging* and *facilitating* the effective use of best practices, appropriate techniques of the construction, professionalism and quality supplies and materials and continuously reviewing the contracting procedure and practices and updating documentation etc, including bidding documents
12. Promote "manpower development" by *identifying* necessary construction skills and *assisting* and, where appropriate, *coordinating* the creation and improvement of skills training and certification programmes for the personnel involved and active in the construction activities of the industry.
13. Promote quality assurance in the construction industry through awareness and training programs,
14. Creating more employment opportunities by means of private sector development, and
15. Publication of construction relevant documents.

Outcome if the proposal is not adopted

- This Secretariat's function will continue to limit to registration aspects only and cannot take its expanded role.
- Will not be able to achieve CDB's goals and objectives thereby not achieving the vision and mission of CDA;
- Lack of "industry support" to *assist* the private sector within the construction industry to develop and expand its market and to implement fair competition through policy reforms to ensure economy, efficiency and transparency in the industry

- Lack of promotion of "technology development" to *encourage* and *facilitate* the effective use of best practices, appropriate techniques of the construction, professionalism and quality supplies and materials;
- 11 FYP activities would be hampered;
- Poor services to the contractors and the procuring agencies with regard to disseminating information, registration etc.
- Lack of professionalism among contractors/construction industry;
- Fronting/collusion and other malpractice in construction industry;
- Contractors will not develop quality consciousness;
- Technical /management competence/bidding system of most contractors would continue to be limited;
- Plans for developing appropriate policies/legal and regulatory framework for construction industry will be impacted;
- There will continue to a lack of strong central agency for construction industry;

6. PREFERRED OPTION

The preferred option has the following components:

1. Establish CDA as an independent authority with a comprehensive mandates, functions and powers to effectively regulate and support the construction sector.
2. Put in place mandates and provide legal backing/framework for regulating construction sector in the country.
3. Address most of the issues/problems in the construction sector.

Based on the 4 options, "introduce CDA Bill" is proposed to decision-makers as the preferred option.

7. OTHER IMPACTS

Social impact

The construction industry plays an indispensable role in the Bhutanese economy in providing the physical infrastructure which is fundamental to the country's development.

The proposed Bill will facilitate and assist the contractors and construction professionals for development of technology and manpower and to promote integrity, ethics and best practices in the construction industry to produce and deliver quality construction works and services.

The Bill will also harmonize private and the public sector for betterment of construction sector, enhance healthy and competitive growth, provide a platform for speedy and efficient means for resolving contractual disputes and advisory services for pertinent issues faced by the construction sector, promote localization of manpower in construction sector, ensure safety in construction sector, promote public-private

partnership for construction industry development and ensure fair and equal access regarding award of contracts as well as fair treatment in the execution of contracts

Economic impact

The construction sector development strategy that promotes stability, fosters economic growth and international competitiveness, creates sustainable employment and addresses imbalances as it generates new construction sector capacity.

The proposed Bill will facilitate and support the establishment of construction firms, professionals and property developers to execute projects within and outside the country. The Act will also take into account localization/employment of manpower and provide the livelihood sustenance of our rural communities by providing job in the construction industry.

The CDA's role is that of a bridging organisation between the private and the public sectors; assisting contractors/consultants in undertaking a more expansive part in the industry while also helping government to obtain an increased return on its investment.

Environmental impact

The proposed Bill will take into account the promotion of environment friendly techniques in the implementation of construction works.

8. STAKEHOLDER CONSULTATION

The CDA Bill has been drafted since the end 2010 through local Consultant and stakeholders were consulted while drafting the Bill. Following stakeholders were consulted during drafting and after first draft in place:

Date	Consultations	
9 th Nov. 2010 to 10 th Feb. 2011	Series of In-house meeting and incorporated the comments/feedbacks received.	Incorporated all the comments/feedbacks received.
9 Feb. 2011	Presented first draft to all stakeholders (representative's from 10 ministries, OAG, ACC, RAA, BSB) including representatives from contractor and to all the Departments under MoWHS.	Incorporated comments/feedbacks received.
7 th March 2011	Presentation to the Lawyers from different agencies.	For legal brush up. Incorporated comments/feedbacks.
31 st May 2011	Presentation to the CDB Board(56 th Board meeting). Representatives from BIA and consultants was represent.	Incorporation comments received. Instructed to submit the bill to OAG for review.
19 th July 2011	Final Bill was send to all the Board members for further comments and review.	Reviewed
12 th Sept. 2011	Submitted the Draft Bill to OAG for review after according approval from Board.	Reviewed

11 th January 2012	Presentation to the OAG for review after according approval from Hon'ble Chairman.	Reviewed
26 th March 2012	The final draft has been submitted to Hon'ble Lyonpo and Hon'ble Secretary for kind perusal.	Endorsed by Hon'ble Lyonpo and Secretary.
30 June 2012	Presented Bill to the CDB Board (58 th Board meeting).	Endorsed by the Board.
17 th May 2012	Presented to the Hon'ble Secretary, Heads of Departments/Division of MoWHS for further review.	Incorporated comments/feedbacks.
12 th -29 th June 2012	Translated to Dzongkha through local consultant.	Translated and represent to Ministry for review.
29-30 th June 2013	Reviewed the Dzongkha version (in-house).	Reviewed.
19 th March 2013	Presented to the Board for review	Reviewed
20-30 th June 2013 (every morning)	In-house revision	Revised.

9. MONITORING AND EVALUATION

CDA will be an autonomous agency governed by an independent board of representatives from the main stakeholders and is meant to operate independently and de-linked from MoWHS. The legal status has to be regulated by a specific Act (CDA Act) approved by the Parliament.

A governing board, consisting of representatives from the main partners, heads the organisational structure. The organisation has to be kept flexible in the sense that it should be able to make adjustments on the basis of service needs.

Phases

The phases for transition from CDB to a fully autonomous authority (CDA) are:

Phase 1; Decision to go ahead

The Government makes the decision to change CDB to CDA, eventually enacted by a specific CDA Act. During this phase the current CDB staff will already make preliminary preparations in terms of coordinating with important partners as well as dealing with pertinent follow-up issues. At the same time development partners should be addressed to initiate potential support arrangements for the transition phase.

**Phase 2;
Preparation and
Transition**

CDB de-links from MoWHS but continues to operate as an independent government agency, takes over functions and resources from MoWHS, develops the required facilities (offices, equipment and laboratories) and carries out all preparations for a fully functional CDA.

The benefits of this arrangement are that CDB/CDA already functions without organisational links to MoWHS and is therefore perceived as a relatively independent government body. It will also be possible to already enhance the capacity in terms of scope of functions and be in a position to carry out the preparatory activities in a protected environment (as a government body).

**Phase 3;
CDA Operations**

After all preparations have been carried out, the CDA Bill has been approved, and the required resources in terms of office facilities, equipment and transport have been provided, CDA moves ahead towards full independency and autonomy.

The accruing benefits of this ultimate step have been elaborated in above.

Important milestones and activities to be carried out as preparation for a full autonomous CDA are:

Sl.#	Activities	Actions/Remarks
1	RGoB decision to go ahead	<i>Already approved</i>
2	Drafting of ToR, clarifying legal requirement and status of CDA, drafting CDA Act	<i>drafted</i>
3	Defining detailed CDA service requirement	<i>Identified and defined in the Bill</i>
4	Developing organisational structure and identifying detailed resource requirement.	<i>Will be done once the Act is being enacted.</i>
5	Drafting long-term operational plan-	<i>Already in place-These will be planned in the CDA Phase Operation Plan (e.g. 11th five year plan to coincide with the RGoB FYP) and further adjusted and detailed in the CDA Annual Operation Plan.</i>
6	Developing CDA business plan	<i>Already in place (for review and improvement)</i>
7	Preparing outline for a CDA planning, management and monitoring system	<i>already in place (for review and improvement)</i>
8	CDA is established and operational as an independent authority	

Once CDA is established and operational, CDA will be in a position to provide most of the planned services and should be able to manage those issues that are essential in

terms of regulation and control (e.g. registration, quality control, procurement, etc). Close cooperation with other partners will be required, e.g. provision of training might not be carried out by CDA itself but by qualified training providers.

The most important conditions for CDA to be in place are:

- Enabling framework in terms of policies and legal acts must be in place and enforced;
- Commitment from the Government to transfer all related authorities to CDA must be ensured;
- Equal/balanced representation of the main parties in all decision-making bodies must be ensured;
- Adequate financing of CDA must be guaranteed;
- Liberalised construction sector with less restricting regulations, procedures and conditions but improved enforcement, e.g. less conditional registration and classification system, prequalification for single contracts, market oriented rates, monopoly prevention, performance based qualification, etc.
- Foreign firms operating in Bhutan to contribute increasingly and effectively to the development of the national construction sector, e.g. conditional financial contributions, increased joint venture or sub-contracting arrangements, attachment of young Bhutanese professionals, etc.
- For the CDA staff competitive remuneration, effective personnel management and a comprehensive HRD scheme are essential for good performance.