

project planning and management series

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The Project Planning and Management Series consists of a set of manuals and associated modules presenting practical approaches, tools and techniques for project planning and management. (See list on back cover). A product of the Government of Jamaica/USAID National Planning Project (1976-1980), the series was developed by the Project Development Resource Team (PDRT) of PAMCO for use in "action-training" workshops and reflects extensive experience in training and project development. All present PDRT members are contributing authors and have worked together in writing, revising and publishing the series. Special credits are due to Dr. Merlyn Kettering for design and development of the series; Dr. Bruce Brooks for writing final versions of many modules; Mrs. Marjorie Humphreys for assuming primary editing and production responsibility and for organizing draft papers into more useful materials; Mr. Lascelles Dixon, head of PDRT since 1979, for designing the cover and improving many of the illustrations; and Mrs. Christine Hinds and Miss Linette Johnson for typing the drafts and final manuscripts. Any comments on the series and its usefulness are welcome.

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MODULE 34

THE JAMAICAN CONSTRUCTION CONTRACT & TENDER PROCEDURE
Lascelles Dixon

A. PREREQUISITES:

Introduction to Contracts

The subject of contracts is a comprehensive one, which makes it impossible to deal in-depth with this subject in this situation. Therefore, only two important aspects are dealt with in this module. The intention here is to introduce the rudimentary principles of the law of contracts and the Jamaican Construction Contract document and tendering procedures.

Since almost all projects are based on contracts, it is important that persons involved in the implementation aspects of projects should have a working understanding of those documents with which they will have to deal from time to time.

Law of Contracts - (Jamaica)

Jamaican laws (in general) originated from and are based upon British Laws, so the Jamaican law of contracts is in essence the British law of contract. Some legal authorities see the law of contract as having originated from the law of property and not as an independent law, a claim supported by Sir William Anson⁽¹⁾ by referring to "Blackstone's Review of the Law of England".

The Law of Contract differs from other laws in that it does not lay down a number of rights and duties under legal laws, but rather consists of a number of limiting principles, subject to which the parties may execute rights and duties for themselves which the law may uphold. The parties in a sense, make the law for themselves provided that they do not infringe some legal prohibition. The law will, upon such consideration, give effect to such decisions.

(1) "Principles of English Law of Contract and of Agency in its Relation Contract", Rt. Hon. Sir William R. Anson, Bart, D.C.L., 22nd edition by A.G. Guest, M.A.

B. DISCUSSION:*The Jamaican Building & Construction Contract Document*

Building and Construction Contracts are both legal and technical documents. Whereas it is more common-place to find that contracts are primarily expressed in written form sufficient to permit satisfactory interpretation and understanding by the parties involved, in the case of building or construction contracts these are not only limited to the actual written words but also include all related drawings and diagrams, materials and performance specifications, and measured bills of quantities and in some instances a list of basic prices for certain materials to be utilised under the contract and any other guarantees or undertakings found necessary to be embodied as part of the overall agreement.

In view of the technical nature of contracts of this type, owners/clients are usually represented by certain technical consultants such as Architects, Engineers and/or Quantity Surveyors. In the case of a building construction contract, the embodiment of the written aspects of the contract (which includes the preliminary items, the measured bills of quantities, the material specifications and the list of basic material prices) is usually prepared by a Quantity Surveyor.

Preliminary Items

This forms part of the written contract document which primarily contains the terms and conditions of the agreement, as well as such other information as -

- 1) the name(s) and address(es) of the owner and would-be contractor;
- 2) description of the project, sufficient to give a description in broad outlines and also for purposes of its identification;
- 3) the date of signing the contract;
- 4) the duration of the contract; and
- 5) the cost of the work.

Standard Forms (JSF)

Other details or articles of agreement, (which are usually quite extensive) tend to be similar for most building and construction contracts and this being the case they are usually contained in the preliminaries of the contract under what has been referred to previously as the Standard Form.

Such standard forms could either be nationally or internationally acceptable. The Jamaican Standard Form of building contract is one which has been derived by agreement between all the construction-related professional groups as expressed through the Joint Consultative Council. Such a standard form may be obtained through the Jamaica Society of Architects and may be embodied in any construction contract of a totally local nature without modification. The articles (under which there are a number of sub-heads) are usually embodied under a standard form which includes the following:

- Definition and Interpretation
- Consultants/Representatives (Architect, Engineer, Quantity Surveyor)
- Assignment and sub-letting
- Extent of Contract
- Contract Documents (taking into account language(s))
- General Obligations (including such items as Performance Bond)
- Labour
- Materials and workmanship
- Commencement time and delays
- Maintenance and defects
- Alterations, Additions and Omissions
- Plant, Temporary Works and Materials
- Measurement
- Provisional and Principal Cost Sums
- Certificate and Payments
- Remedies and Powers
- Special Risks (including indemnity)
- Frustration
- Settlement of Disputes
- Notices
- Default of Employer

- General Conditions

There are certain situations however, in which modifications may be required to the JSF. This is usually the case in which foreign funded projects are concerned, in which case certain items may have to be introduced or deleted to meet the requirements of the relative international funding agency.

In addition to the JSF, there is also available, international standard forms which may become useful in the preparation of contracts for which international tenders may be required or where joint venture relationships may exist between construction firms, such standard forms are usually comprehensive enough to accommodate local requirements. It is not unlikely however, that certain modifications or additions may have to be made to those standard forms as may be required by such external funding agencies as the USAID. These modifications are usually extensions of loan policies which have to be included as part of all contracts as a condition prior to a final agreement by such an agency before final agreement may be achieved between all the parties concerned.

Bills of Quantities

This is that part of the contract which quantifies the labour and materials to be used in the project under contract. Here in Jamaica (where the Quantity Surveyor is a professional in his own right, and where the pricing of contract preparation and administration is similar to that of the British system) the actual measurement of labour and materials is carried out by the Quantity Surveyor. The amount of labour and material identified in this part of the contract is priced by the prospective contractor during the tendering stage by the application of unit prices, most of which will be reflected in the list of basic prices.

It should be mentioned here, that items appearing under the preliminary section of the contract are also subject to pricing but not necessarily through the application of unit prices.

List of Basic Prices

Lists of Basic Prices are usually embodied as part of the contract in order to make it possible to calculate price fluctuations during the actual execution of the contract, in such cases where there is a provision for fluctuation in price of materials and labour. Contracts which allow for labour and material price increases are more often the norm. There are, however, contracts in which a fixed price has been agreed. These are known as Fixed-Price-Lump Sum Contracts. In these contracts adjustment to the agreed contract price will only be accommodated following such considerations as revised requirements not provided for in the terms of the original contract. Due care must be taken in the composition of such contracts, first of all to adequately quantify all aspects

of the work to be embodied under the contract and also to define additional requirements and compensation for same.

Tendering

The procedure through which qualified firms and individuals may compete (confidentially in writing) as prospective contractors in relation to a particular project is referred to as tendering. There are established guidelines which set out the procedures to be followed in the actual process of tendering. The established procedure followed in Jamaica is that established by the Royal Institute of British Architects (RIBA).

There are basically two systems of tendering -

a. Open Tendering

In this case the project would be published and any contractor who considers himself qualified would be free to put in a bid on the project. Although such advertisement is usually qualified by a statement which says that the contract would not necessarily be awarded to the lowest or any tenderer, it is normal to award the contract to the lowest tenderer. There are certain circumstances (such as arithmetic or other errors) which could prevent the contract being awarded to the lowest bidder.

b. Selective Tendering

In this type of tendering, certain firms, which in the opinion of the owner or his representative, possess the necessary experience, expertise and resource to ably carry out the work satisfactorily, would be invited to tender. Alternatively, firms which may have been selected by virtue of pre-qualification (they having satisfied the relevant parties as to their capability, experience and resources) would be allowed to tender on the project.

The rules for selective tendering as established under the RIBA Code are included in APPENDIX 34.1.

Communication

The necessary communication leading up to the award of tender must seek to include relative and adequate information in order to avoid misunderstandings and time wasting. Such correspondence may include -

1. Preliminary Enquiry for Invitation to Tender (APPENDIX 34.2)
2. Formal Invitation to Tender (APPENDIX 34.3)
3. Form of Tender (APPENDIX 34.4)

C. *PURPOSE:*

The purpose of this module is to acquaint project management with the terms appearing in contracts and the forms in which project contracts appear, especially in relation to construction and tendering procedures on projects.

D. *USE:*

The project management will find the information in this module useful for gaining greater understanding of:

1. terms used in contracts;
2. the form of Jamaican construction and tendering contracts; and
3. the procedures for selective tendering of contracts.

E. *DEFINITIONS:*

Law of Contract - That branch of law which determines the circumstances in which a promise shall be legally binding on the person making it. (SEE PREVIOUS REFERENCE)

Promise - A declaration or assurance made to another person stating that a certain state of affairs exists, or that the maker will do or refrain from, some specific act, and confers on the other a right to claim the fulfilment of such declaration or assurance.

Obligation - A duty on the promiser to fulfil his promise.

Existence of a Contract

In the establishment of a contract, two basic conditions must be fulfilled.

- a) There must be at least two parties, one a promiser and the other a promisee (or an offer on one part and an acceptance on the other).
- b) There must be mutual agreement between the two parties where the promise, or the offer, and acceptance is concerned. A promise which has not been accepted is without legal effect, for it is by his acceptance that the promisee signifies his expectations that the promise will be fulfilled.

Acceptance of an Offer

Acceptance means in general, communicated acceptance. It must be something more than a mere mental assent; it must be by word or conduct.

An offer is not effective until it is communicated to the person receiving it - the offeree. The acceptance must also normally be communicated to the person who made the offer - the offeror.

Some offers (as in the case of an offer of a reward to the finder of a lost object) termed general, can only be considered as having been accepted when a specific person has accepted the offer through performance. The person must have found the lost object and returned same to the offeror.

Rejection - An offer will be held to have terminated since it has been rejected by the offeree.

Contract under Seal (DEED)

A contract under seal is called a Deed.

A contract under seal derives its validity neither from the fact of agreement, nor from the conditions which may exist for the promise of either party, but solely from the form in which it is expressed.(1)

A deed must be in writing or printed on paper or parchment. Law of Property Act 1925, Section 73 - A person executing a deed must either sign or make his mark. Sealing alone is not sufficient.

Statutes sometimes make it necessary for the validity of an instrument to employ the form of a deed; e.g., the conveyance of an estate in land must normally be made under seal in accordance with the provisions of the Law of Property Act, 1925.

Common Law requires a seal only in the case of a gratuitous promise or contract in which there is no consideration for the promise made on the one side and accepted on the other.

(1) Anson's Principles of English Law of Contract, p.65 Ch.iii, para.2).

Sir William Anson stated in his abovementioned book -

"Thus one of the most common uses today of a sealed instrument (outside conveyances of land) is that of a sealed covenant for a seven year gratuitous payment to some charity, whereby the charity is enabled to claim the income tax paid by the Donor in addition to the covenanted sum.... agreements are frequently made under seal in circumstances in which there is no legal obligation to employ that form".

Simple Contracts

The term "Simple Contract" should be regarded as a classification of a particular type of contract and should not be construed as meaning that contracts of this type are simple in nature and should be treated as such.

Simple contracts depend upon the presence of condition for their validity. This type of contract is also often called "parole contracts", in that they can be entered into by word-of-mouth.

In certain exceptional cases, the law requires writing, sometimes as a condition of validity of the parole contract itself, but sometimes only as evidence without which it cannot be enforced.

A contract for the repayment of money lent by a money lender is not applicable unless a note in writing, containing all the terms of the contract has been signed by the borrower (Anson's Principles of English Law - p. 68 para. i).

Whereas some contracts may only consist of a single promise or undertaking on both sides, in most cases the contract is composed of a number of contractual terms (sometimes referred to as the conditions or the terms of the contract.)

In many situations certain terms may be applicable to different contracts without change of content. Such terms may be contained in what is commonly referred to as "Standard Forms".

The embodiment of Standard Forms into certain technical contracts (such as may be related to building construction or civil engineering works) has become common practice in many parts of the world including Jamaica. Before describing Standard Forms however, it is important that there be an introduction to Jamaican Building Contract Documents. (These may be obtained from the Jamaican Society of Architects.

APPENDIX 34.1

THE ROYAL INSTITUTE OF BRITISH ARCHITECTS (RIBA)

Procedure for Selective Tendering

FORWARD

This Code has been prepared for all who commission building work, whether they be private clients or public authorities. It is, of course, for the building owner to decide the method of tendering, but the National Joint Consultative Committee and the Ministry of Public Building and Works firmly believe that selective tendering will normally be found the most efficient method of obtaining tenders from contractors. Nothing in this Code should be taken to suggest that the building owner is obliged to accept the lowest or any tender, although if the procedure advocated in this Code is followed, the successful tenderer will normally be the one offering the lowest price.

INTRODUCTION

The Code takes into account the relevant recommendations of the Report "The Placing and Management of Contracts for Building and Civil Engineering Work" (The Banwell Report), and of the "Action in the Banwell Report" of the Economic Development Committee for Building. The general principles of the Code are fully supported by the Ministry of Public Building and Works.

In order that its detailed recommendations may be most widely applicable, this Code assumes, in the contract which will follow the tendering, the use of standard forms of building contract. This assumption in no way precludes the use of the Code where other forms of contract are employed, though minor details may require some modification.

The contractor's tender is the price for which he offers to carry out and complete, in accordance with the conditions of contract, the work shown on the drawings and described in the bill(s) of quantities, and this tender can be withdrawn at any time before its acceptance. Good tendering procedure demands that the contractor's tendered document should not be altered without justification. Difficulties have arisen when an examination of the priced bill(s) revealed errors or a discrepancy between these prices and the tender figure. This Code lays down, in Section 9, alternative methods of dealing with this situation before the contractor's offer is accepted. The first alternative does not permit the correction of errors in priced bill(s) of quantities; the second does.

The choice must be made before contractors are invited to tender.

It should be a condition of tender that obvious errors in pricing or significant errors in arithmetic discovered before the acceptance of the contractor's tender should be dealt with in accordance with one of the alternatives in Section 9 of this Code.

THE LIST OF TENDERERS

Once it has been decided that a contractor is to be selected by competitive tender, a shortlist of possible tenderers should, normally, be drawn up in accordance with the following scale.

SIZE OF CONTRACT	MAXIMUM NUMBER OF TENDERERS
Up to \$10,000	5
\$10,000 - \$100,000	6
\$100,000 - \$1 Million	8
\$1 Million +	6

It should be appreciated that the cost of tendering is a considerable element in the cost of building; the larger the tender lists become, the greater will be the cost of abortive tendering, and this must be reflected in building prices. When the list has been settled, one or two names should be appended in order that they may replace any firms on the list that do not accept the invitation.

The shortlist may be prepared from:

- a. the building owner's approved list of contractors;
- b. an ad-hoc list of contractors of established skill, integrity, responsibility and proven competence for work of the character and size contemplated.

Guidance on the compilation of the approved list is contained in the Banwell Report, Chapter 4. Approved lists should be reviewed periodically to exclude firms whose performance has been unsatisfactory, and to allow the introduction of suitable additional firms.

The objective of selection is to make a list of firms, any one of which could be entrusted with the job: if this is achieved, then the final choice of contractor will be simply - the firm offering the lowest tender. Only the most exceptional cases demand departure from this general recommendation.

PRELIMINARY ENQUIRY FOR INVITATION TO TENDER

In order that contractors may be able to decide whether they will tender and to anticipate demands on their tendering staff, each firm should be sent a preliminary invitation to tender. SEE APPENDIX 34.2 for suggested "Form of Preliminary Enquiry for Invitation to Tender".

THE TENDER DOCUMENTS

After the latest date for the acceptance of the invitation, the final shortlist of tenderers will be selected. On the day stated in the preliminary invitation, all tender documents should be despatched to the tenderers. SEE APPENDIX 34.3 for suggested "Formal Invitation to Tender"; APPENDIX 34.4 for suggested "Form of Tender".

TIME FOR TENDERING

The time allows for the preparation of tenders should be determined in relation to the size of the job. Four weeks should normally be allowed; major projects, or smaller works without quantities, may require a longer period. The tender period must be sufficient to enable the tenderer to obtain competitive estimates for the supply of materials, and for the execution of works that it is intended to sub-let. The limit of the time for submissions should be specified as an hour of a day and should be chosen to allow as short a time as possible to elapse before the opening of tenders. Tenders received after time should be returned to the sender promptly and should not be admitted to the competition.

If bill(s) of quantities are issued to tenderers in sections, the time for tendering should be calculated from the date of issue of the last section.

Tenders should be submitted in accordance with the instructions suggested in APPENDIX 34.3

SUBMISSION OF PRICED BILL(S) OF QUANTITIES

The lowest tenderer should be expected to submit his priced bill(s) of quantities as soon as possible, but in any case within four working days of being asked to do so.

OPENING TENDERS & NOTIFYING RESULTS

Each tenderer will wish to know promptly whether or not his offer is being considered. This information is obviously important to a successful tenderer. It is equally important to an unsuccessful tenderer to know that his tender is not being considered, as it may encourage him to tender more keenly for other work.

In order to avoid keeping tenderers waiting, upon the opening of tenders, all but the lowest three should be informed immediately that their tenders have been unsuccessful. The lowest tenderer should be told that his offer is under consideration and be asked to submit his priced bill(s) of quantities, if these have not already been supplied. The two next lowest should be informed that their tenders were not the most favourable received but that they will be approached again if it is decided to give further consideration to their offers. This precaution will serve the building owner's interests in the event of the lowest tenderer withdrawing his offer, or if for any other reason, his tender is not accepted. Tenderers whose offers have not been rejected should, of course, be informed at once when a decision to accept a tender has been taken.

Once the contract has been let, each tenderer, including the successful one, should be supplied with a list of the firms who tendered (in alphabetical order) and a list of the tender prices (in ascending order of value).

EXAMINATION AND CORRECTION OF THE PRICED BILL(S)

The examination of the priced bill(s) of quantities supporting the tender under consideration should be made by the quantity surveyor who should treat the document as confidential: on no account should any details of the tenderer's pricing be disclosed to any person other than the architect, except with the expressed permission of the tenderer.

The object of examining tenders is to detect the possible computation errors. Section 2.3. If the quantity surveyor finds such errors he should report them to the architect who, in conjunction with the building owner will determine the action to be taken under whichever is appropriate of the alternatives set out below and referred to in the Formal Invitation to Tender and the Form of Tender. (SEE APPENDICES 34.3 and 34.4)

Alternative 1

The tenderer should be given details of such errors and afforded an opportunity of confirming or withdrawing his offer. If the tenderer withdraws, the priced bill(s) of the second lowest should be examined.

Alternative 2

The tenderer should be given an opportunity of confirming his offer or of amending it to correct genuine errors. Should he elect to amend his offer and the revised tender is no longer the lowest, the offer of the firm now the lowest in the competition should be examined.

Under alternative method 1, an endorsement should be added to the priced bill(s) indicating that all rates or prices (excluding preliminary items, contingencies, prime cost and provisional sums) inserted therein by the tenderer are to be considered as reduced or increased in the same proportion as the corrected total of priced items exceeds or falls short of the

original total of such items. This endorsement should be signed by both parties to the contract.

If, under alternative method 2, the tenderer elects not to amend his offer, an endorsement will be required as in Section 9.3. If the tenderer does amend his tender figure, and possibly certain of the rates in his bill(s), he should either be allowed access to his original tender to insert the correct details and to initial them, or be required to confirm the alterations in a letter. If in the latter case his revised tender is eventually accepted, the letter should be conjoined with the acceptance and the amended tender figure and rates in it submitted for those in the original tender.

When a tender is found to be free of error, or the tenderer is prepared to stand by his tender in spite of an error, or a tender on amendment is still the lowest, this will be recommended to the building owner for acceptance.

NEGOTIATED REDUCTION OF TENDER

Should the tender under consideration exceed the building owner's budget, the recommended procedure is for a price to be negotiated with this tenderer on the basis of an amended design and/or specification prepared by the architect.

If these negotiations are not successful, negotiations should proceed with the next lowest tenderer on the same lines.

If these negotiations fail, new tenders should be called for, using redrafted documents that coincide with the amended design and/or specification.

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APPENDIX 34.2

PRELIMINARY ENQUIRY FOR INVITATION TO TENDER

Dear Sirs:

Heading

I am/We are authorised to prepare a preliminary list of tenderers for the construction of the works described below.

Will you please indicate whether you wish to be invited to submit a tender for these works. Your acceptance will imply your agreement to submit a wholly bona fide tender in accordance with the principles laid down in the "Code of Procedure for Selective Tendering, 1969", and not to divulge your tender price to any person or body before the time for submission of tenders. Once the contract has been let, I/we undertake to supply all tenderers with a list of firms who tendered, and lists of the tender prices.

You are requested to reply by.....Your inability to accept will in no way prejudice your opportunities for tendering for further work under my/our direction, neither will your inclusion in the preliminary list at this time guarantee that you will subsequently receive a formal invitation to tender for these works.

Yours faithfully.....

Information in relation to items listed overleaf should accompany this letter.

Information to be included in the Foregoing letter.

- a. Job.....
- b. Building owner.....
- c. Architect.....
- d. Quantity surveyor.....
- e. Consultants with supervisory duties.....
- f. Location of site.....(site plan enclosed)
- g. General description of works.....
- h. Approximate cost range \$.....to \$.....
- i. Form of Contract.....Clause 22(j) of the RIBA Conditions of Contract will/will not apply. Clause 31 A/B will apply.
- j. Anticipated date for possession.....
- k. Period for completion of works.....
- l. Approximate date for dispatch of all tender documents.....
- m. Tender period.....weeks.

APPENDIX 34.3

FORMAL INVITATION TO TENDER

Dear Sirs:

Heading

Following your acceptance of the invitation to tender for the above, I/we now have pleasure in enclosing the following:

- a. two copies of the bill(s) of quantities;
- b. general arrangement drawings indicating the general character and shape and disposition of the works;
- c. two copies of the form of tender;
- d. an addressed envelope for the return of the tender, and instructions relating thereto.

Will you please note:

1. Construction drawings and details may be inspected at....;
2. the site may be inspected by arrangement with the owner/architect;
3. tendering procedure will be in accordance with the principles of the Code of Procedure for Selective Tendering 1969.
4. examination and correction of priced bill(s) (Section 9 of the Code). Alternative 1/Alternative 2 will apply.

The completed form of tender is to be sealed in the endorsed envelope provided and delivered or sent by post to reach.....not later than..... hours on.....the.....day of.....19....

Will you please acknowledge receipt of this letter and enclosures and confirm that you are able to submit a tender in accordance with these instructions.

Yours faithfully.

Architect/Quantity Surveyor....

APPENDIX 34.4

FORM OF TENDER

Tender for.....(description of works)

To.....(Building owner)

Sir(s):

I/We, having read the conditions of contract and bill(s) of quantities delivered to me/us and having examined the drawings referred to therein, do hereby offer to execute and complete the whole of the works described for the sum of\$.....and within.....weeks from date of possession and I/we undertake in the event of your acceptance, to execute with you a form of contract embodying all the conditions and terms contained in this offer.

I/We agree that should obvious errors in pricing or errors in arithmetic be discovered before acceptance of this offer in the priced bill(s) of quantities submitted by me/us, these errors be corrected in accordance with Alternative 1/ Alternative 2 contained in Section 9 of the Code of Procedure for Selective Tendering 1969.

This tender remains open for consideration for.....weeks.

Dated this.....day of.....19....

Name.....

Address.....

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MANUAL - P Project Planning
MANUAL - M Project Management
MANUAL - PF Pioneer Farm Implementation Planning

MODULES

1. Defining Project Objectives (Objective Trees)
2. The Logical Framework
3. Work Breakdown Structure
4. Activity Description Sheets
5. Project Organization
6. Linear Responsibility Charts
7. Project Scheduling - Bar Charts
8. Bar Charting for Project Control/Scheduling
9. Project Scheduling - Network Analysis
10. Milestones Description Charts
11. Resource Planning & Budgeting
12. The Role of PAMCO
13. Project Technology Analysis
14. Demand Analysis
15. Market Strategy Analysis
16. Project Area Analysis
17. Project Costs & Benefits
18. Project Profile
19. Financial Analysis
20. Cash Flow Analysis
21. Discounting
22. Net Present Worth Analysis
23. Cost-Benefit Analysis
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45. Organizing and Conducting Conference Meetings
46. Withdrawal of and Accounting for Loan Funds in the Financing of Projects