

CONSTRUCTION MASTERCLASS: CONTRACTS, PROJECT SUCCESS, DISPUTE RESOLUTION AND THE FUTURE

Riyadh – March 5 2024

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CONSTRUCTION MASTERCLASS:

Keynote Speech: The Future & Mega Projects



John Shenton

CIOB & Averda



John Shenton MCIQB

The Future of Mega Projects



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Faisal Ali Rashid

Senior Director – Energy Demand Side Management | The Dubai Supreme Council of Energy, UAE



Andy Shaw

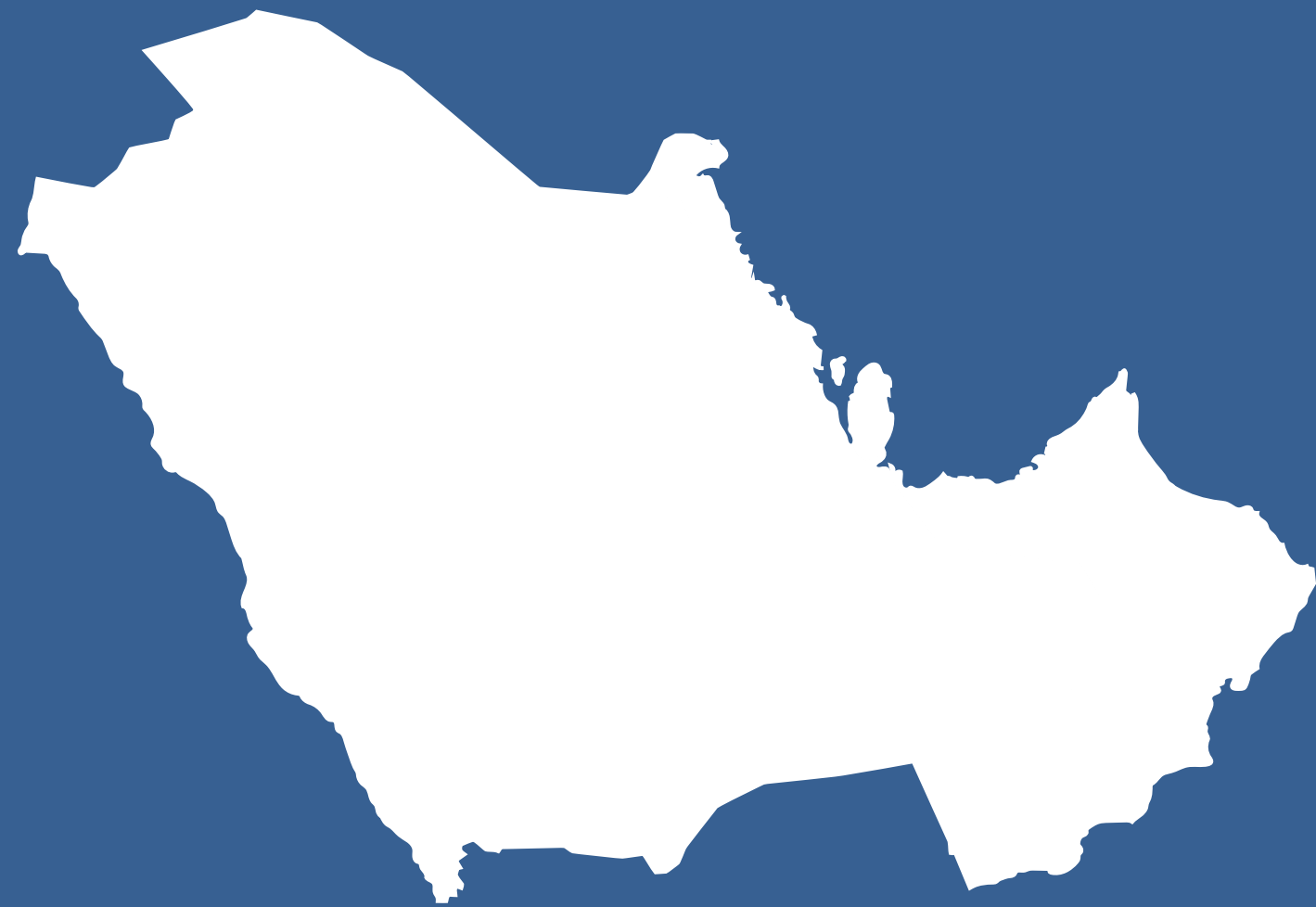
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Dr Bhakti More

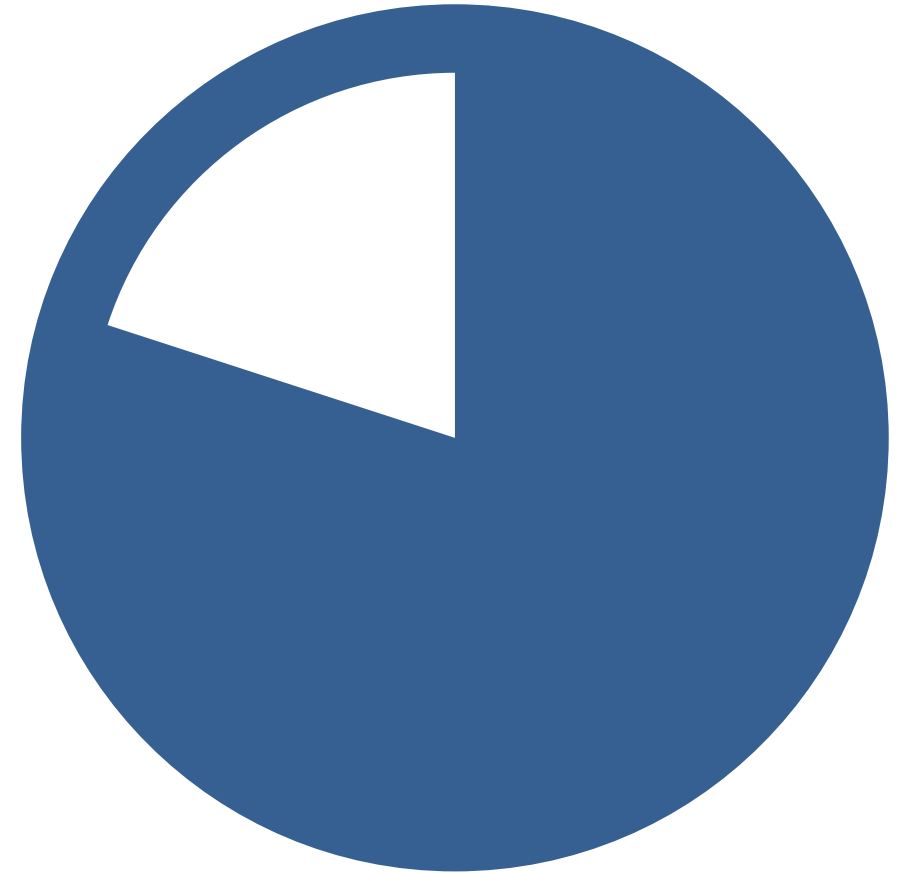
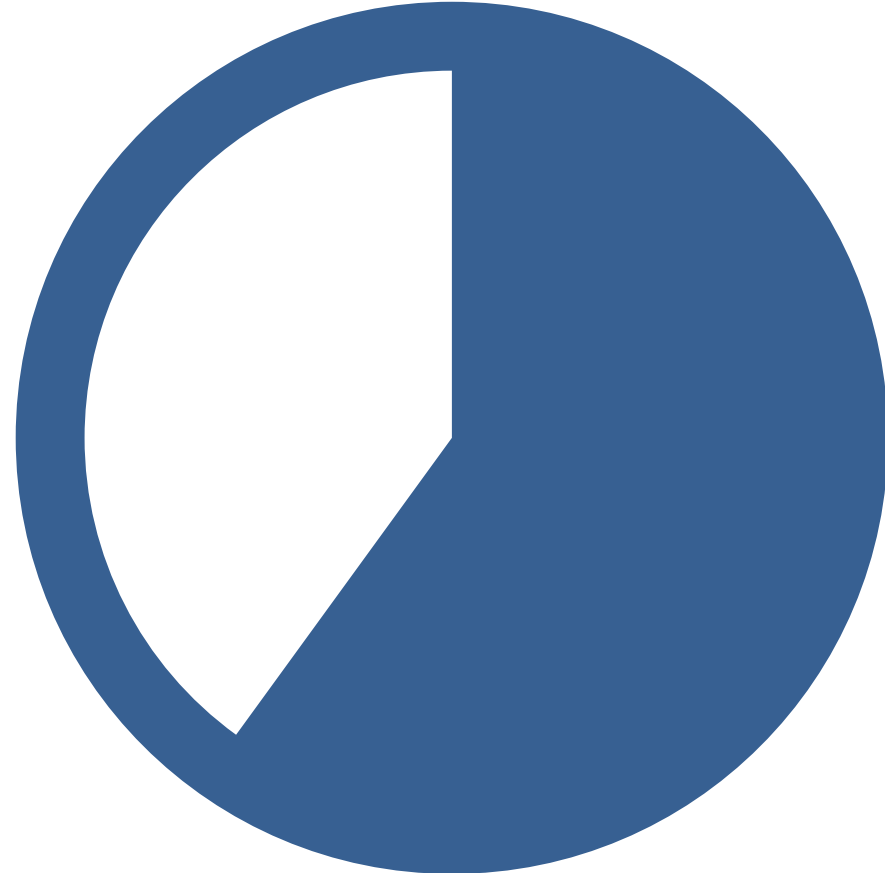
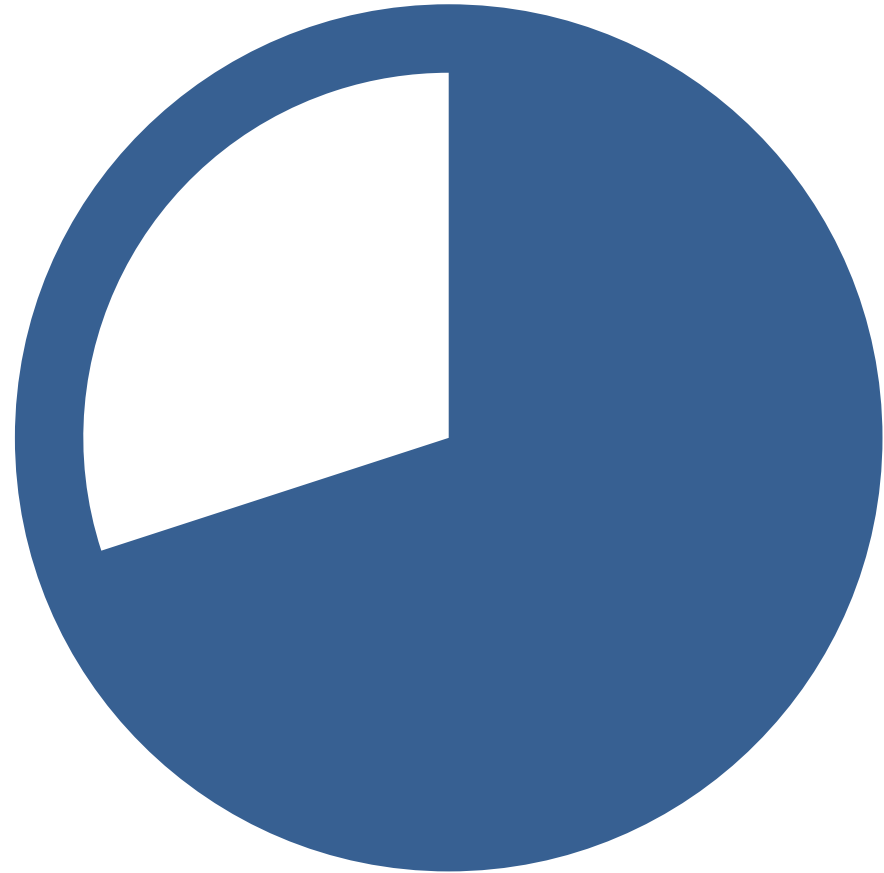
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The GCC



8

- Bahrain
- Kuwait
- Oman
- Qatar
- KSA
- UAE

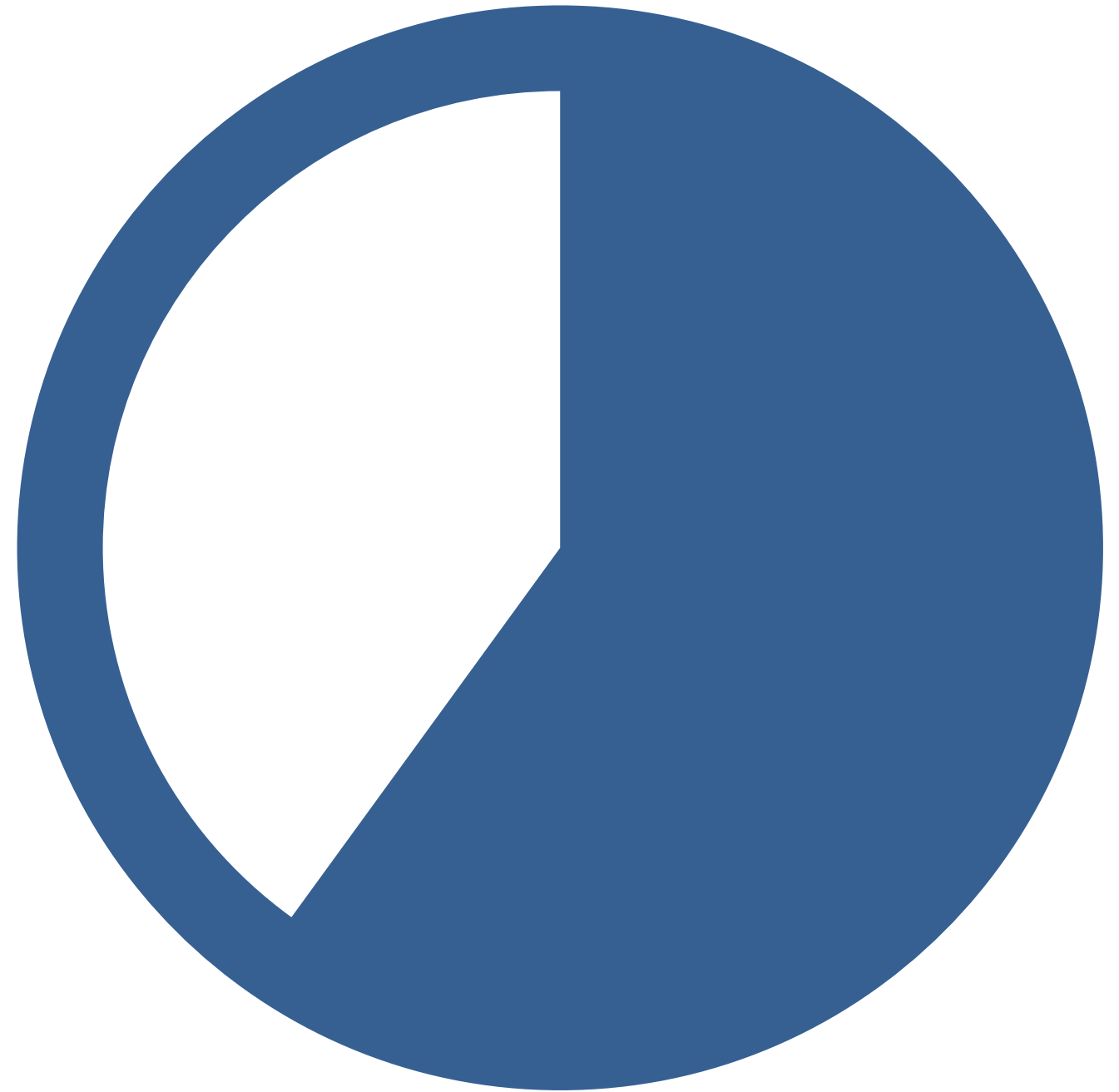


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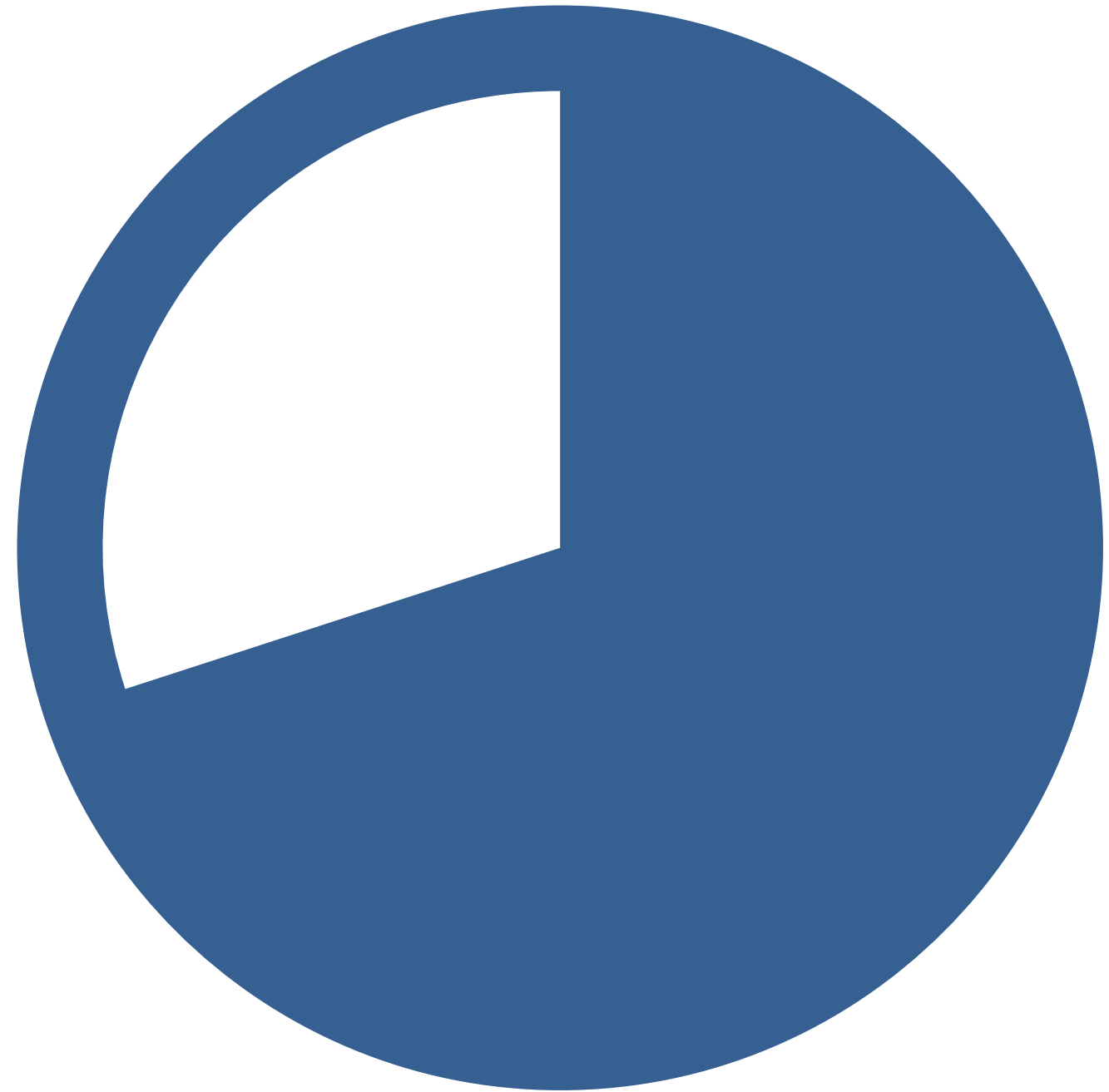


What percentage of the world's population will live in urban areas by 2030?

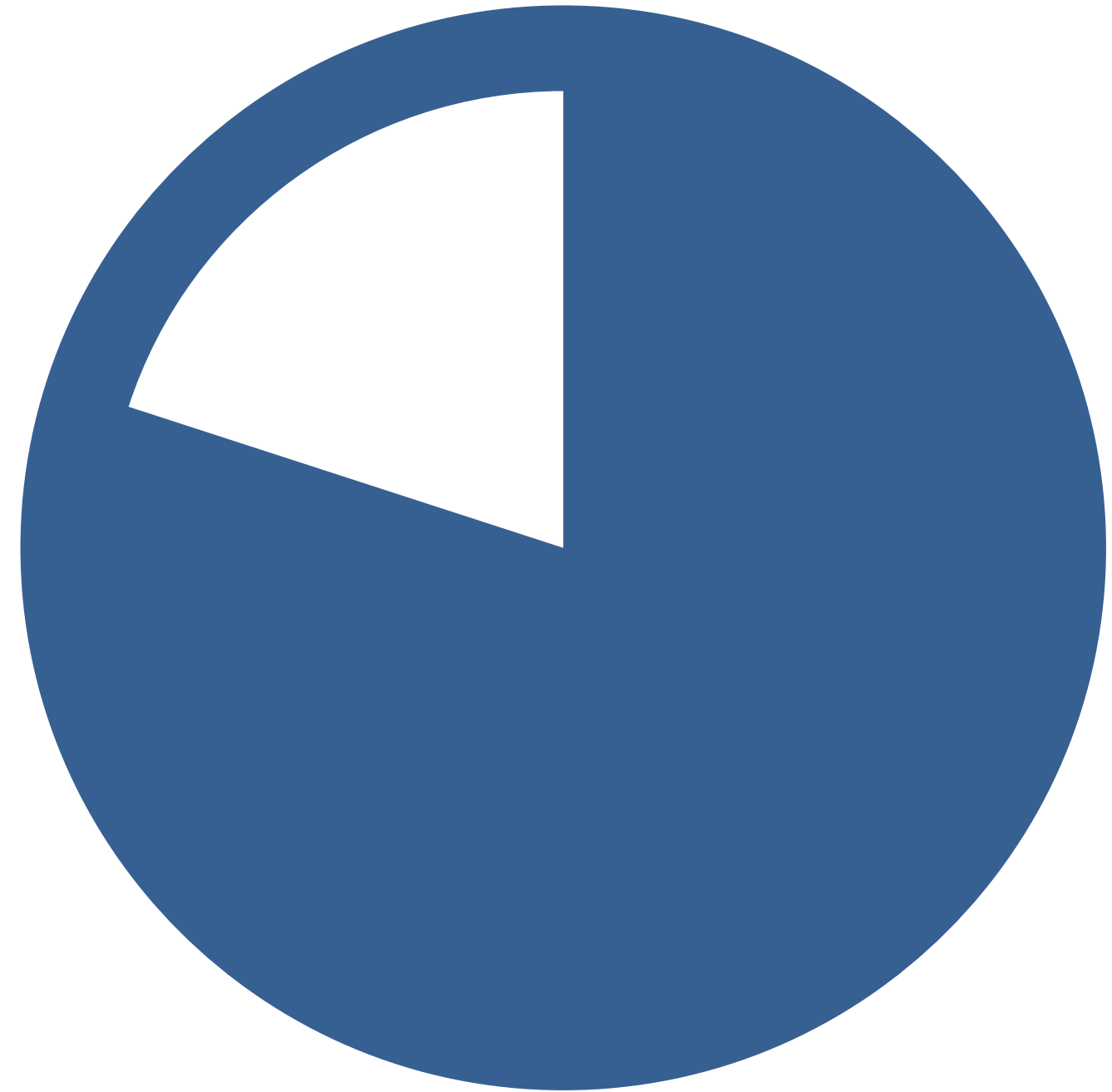
60% of the world's
population will live in
urban areas by 2030



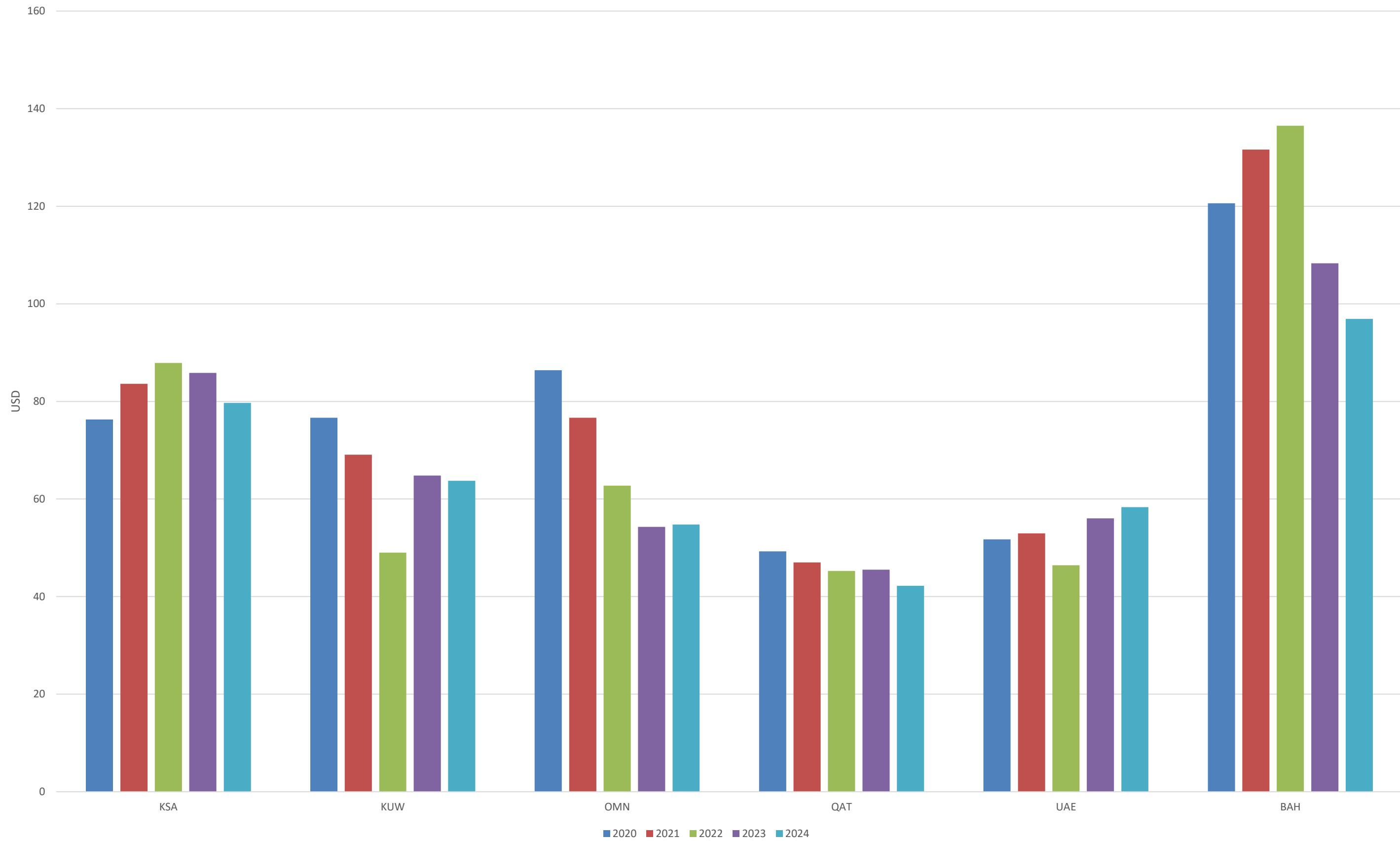
70% of the global
greenhouse gas
emissions are
generated by urban
areas



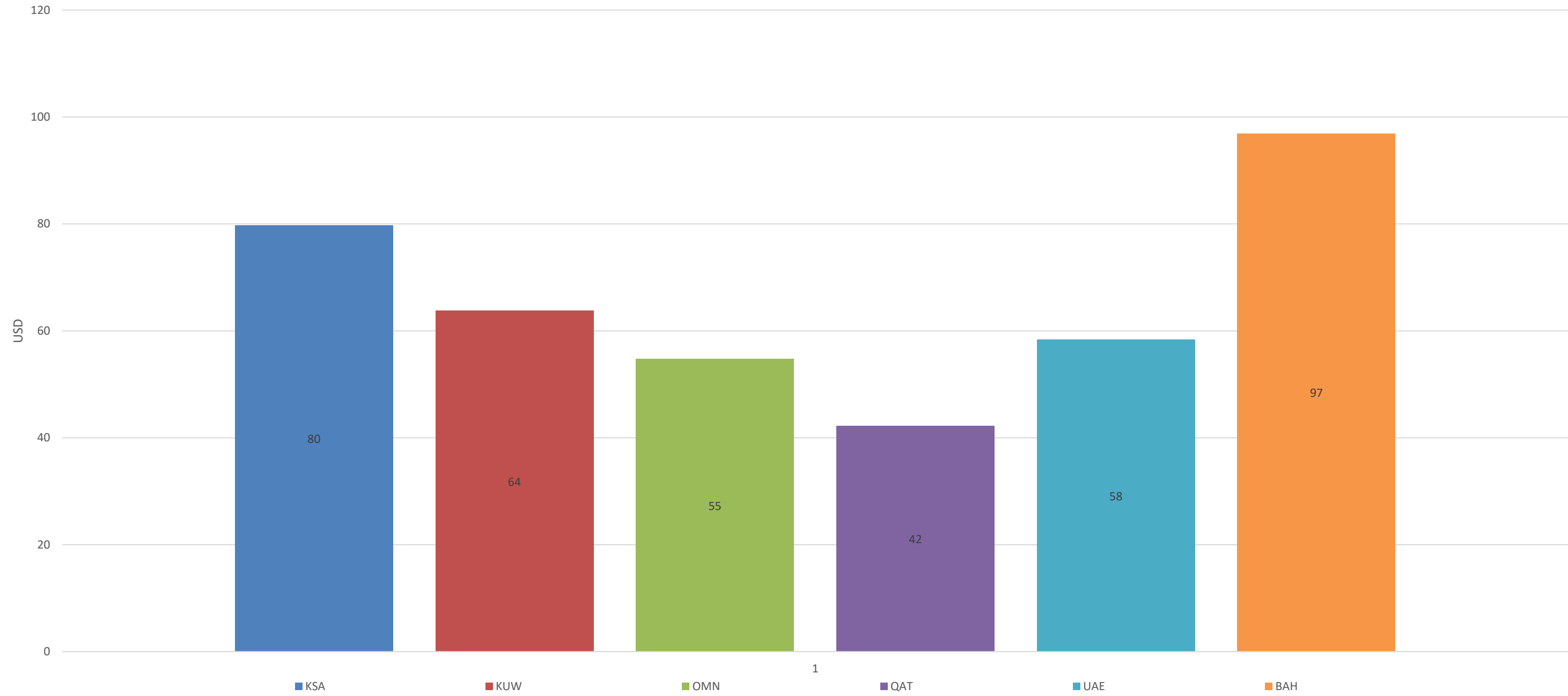
80% of the world's
energy supply is
consumed by urban
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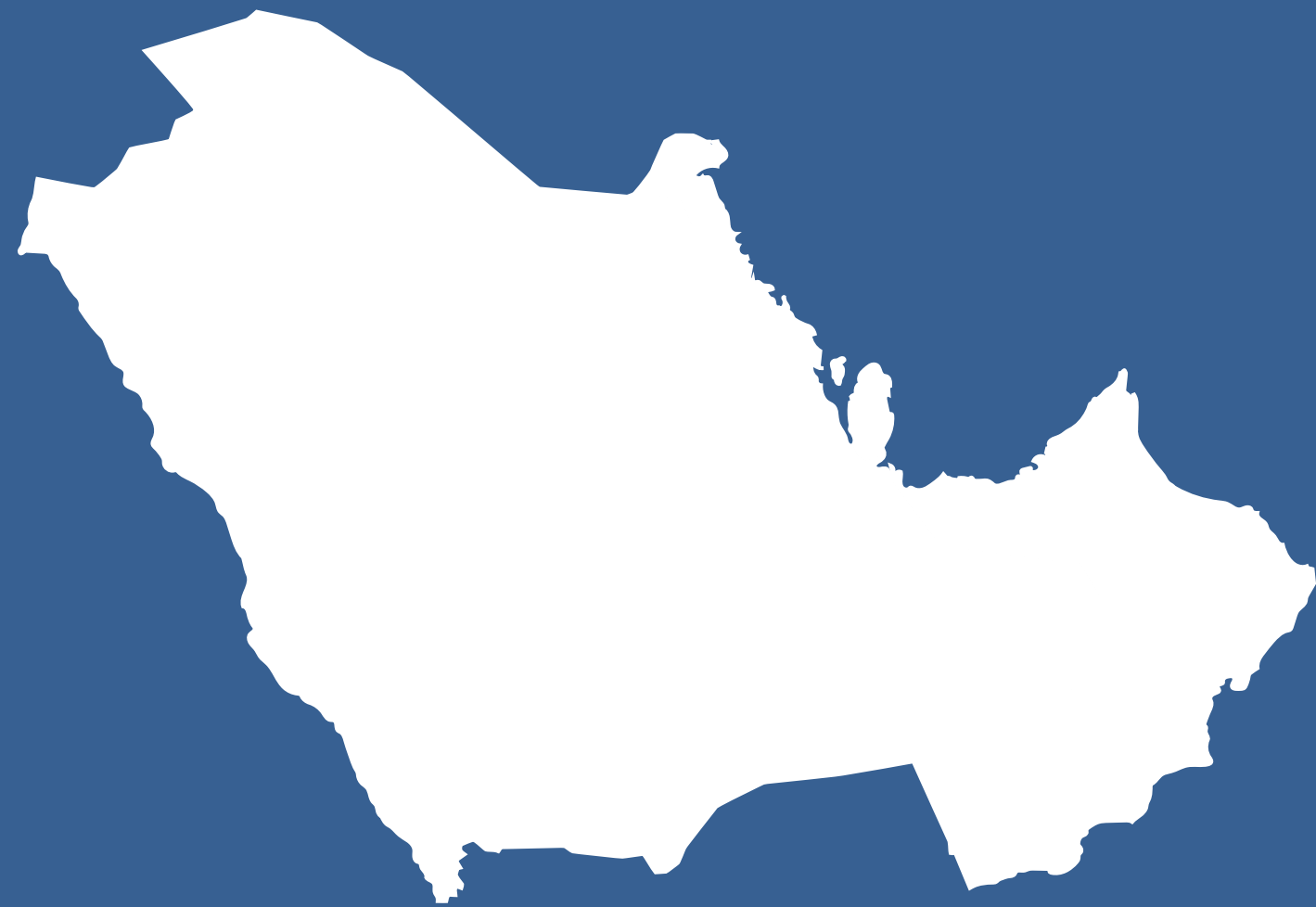
Fiscal Breakeven Price of Oil (2021 to 2024)



Fiscal Breakeven Price of Oil (2024)

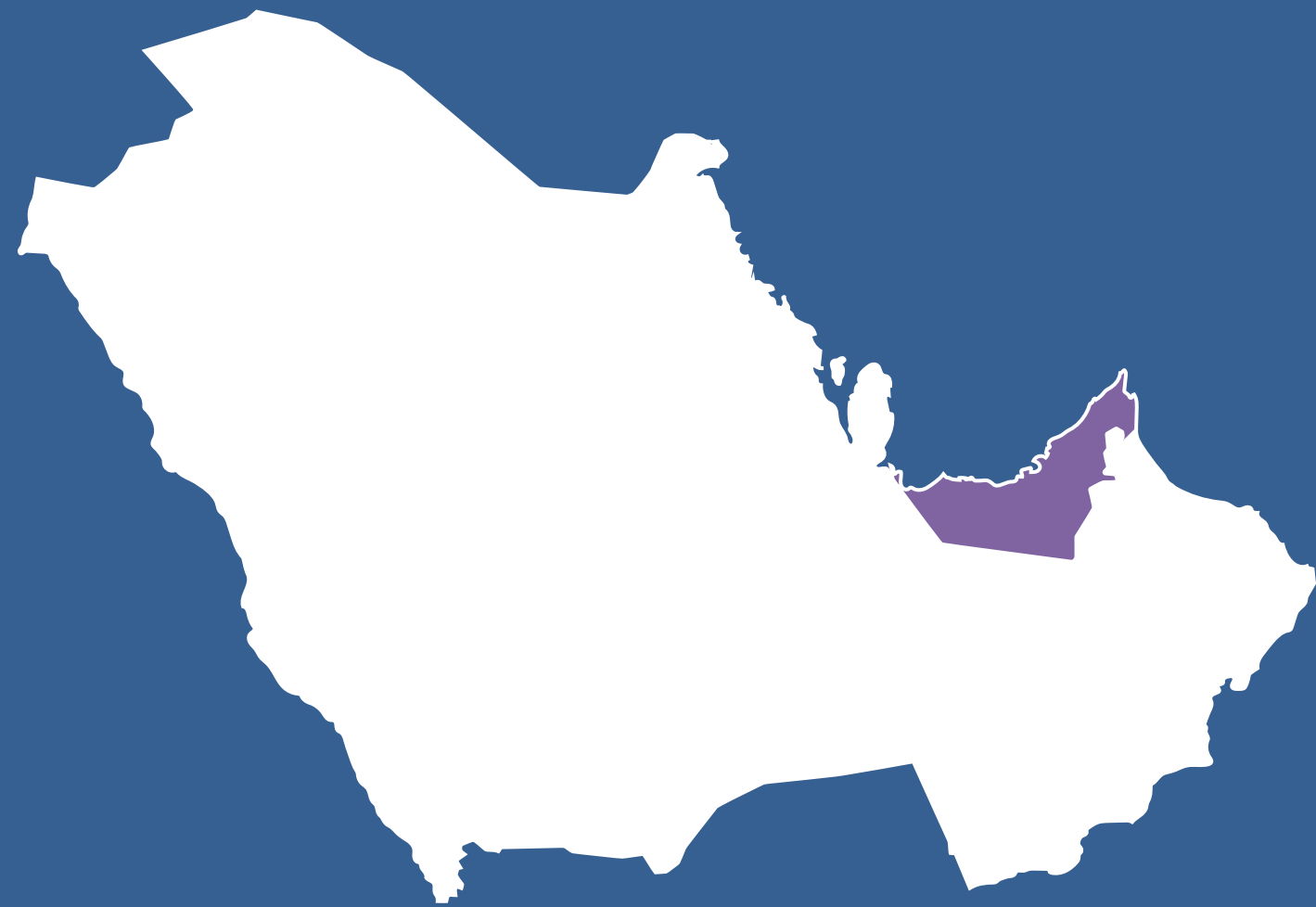


Oil and Gas Infrastructure



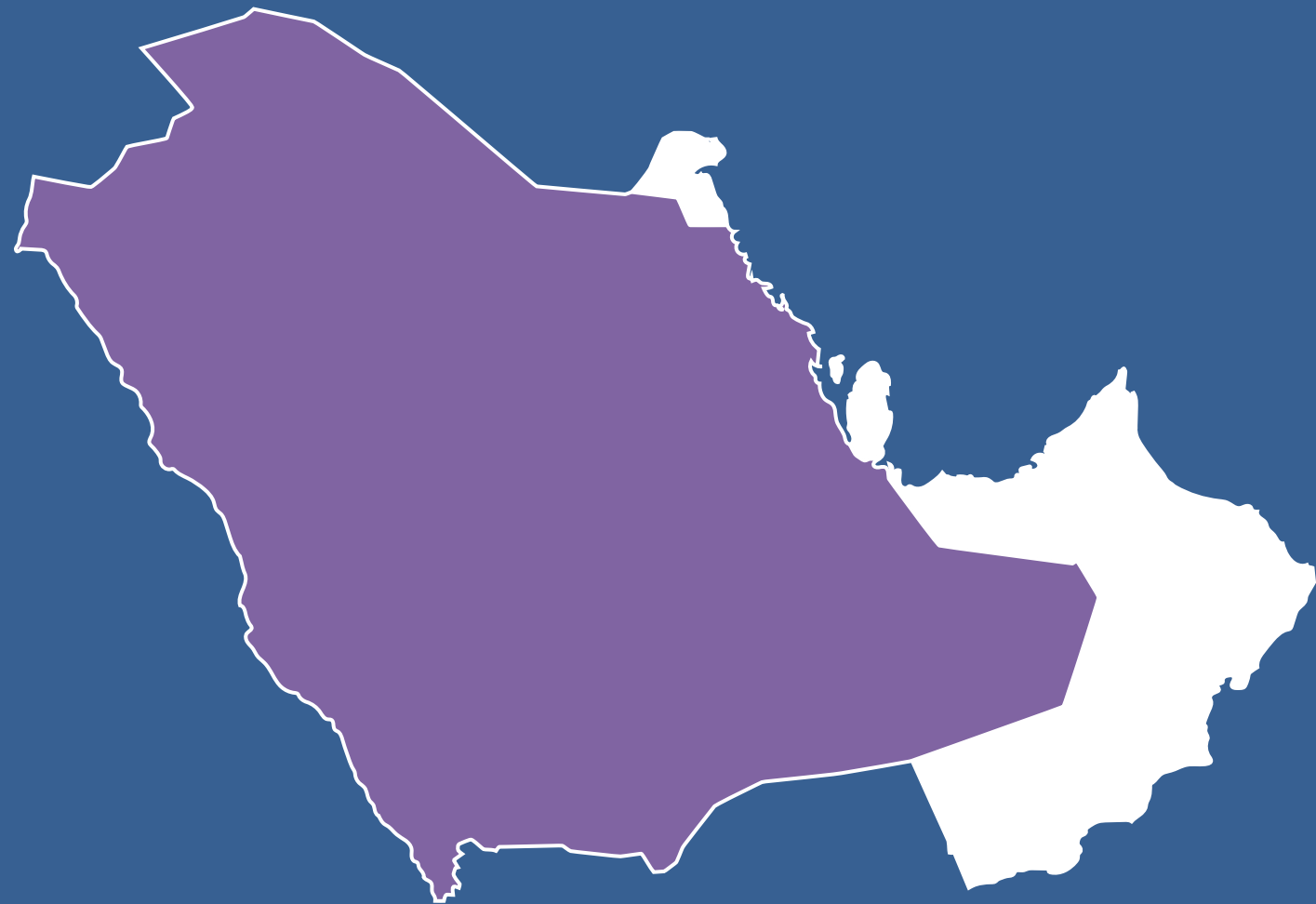
- BAPCO
- KNPC
- OQ
- QatarEnergy
- Aramco
- ADNOC

Oil and Gas Infrastructure - ADNOC



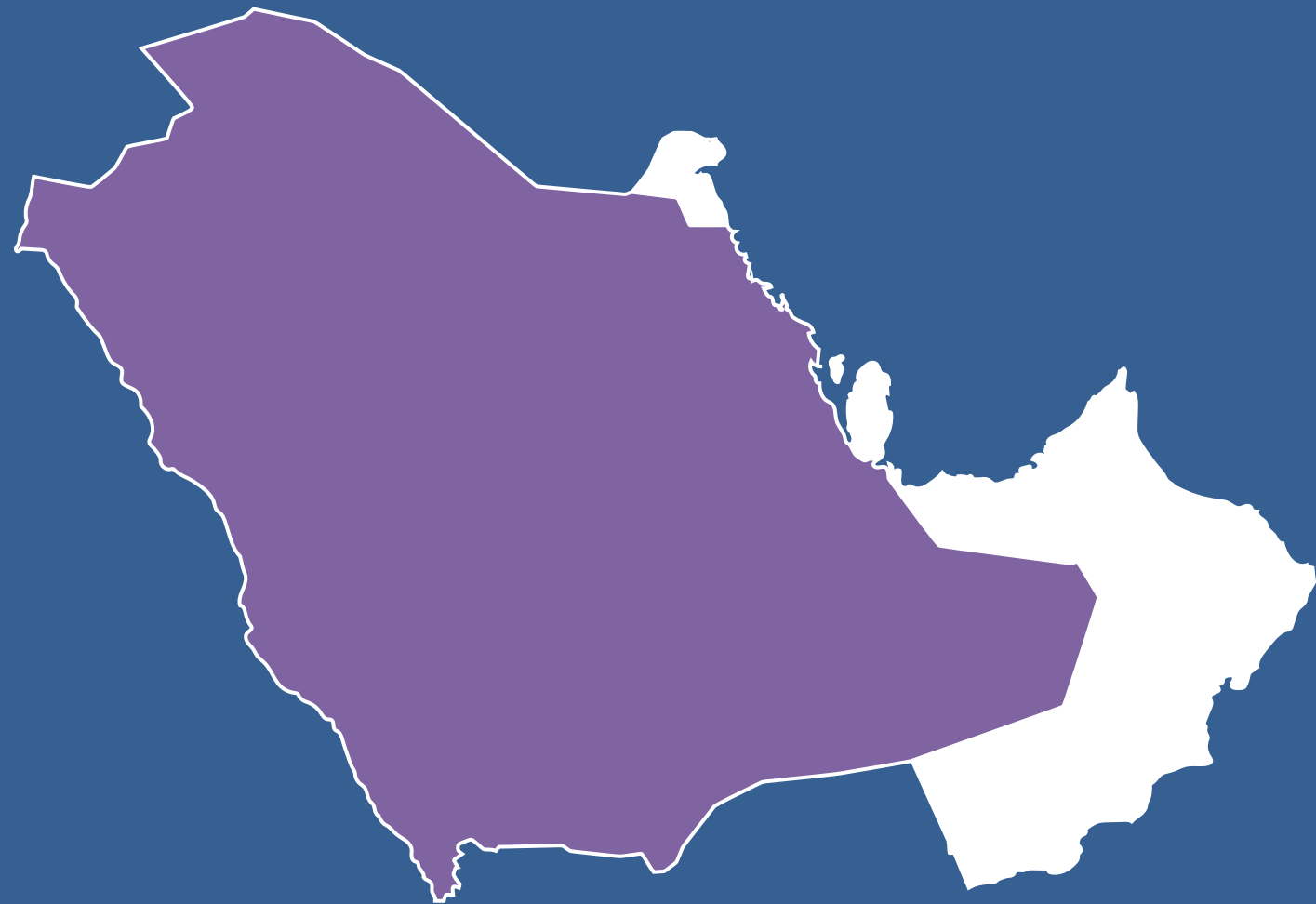
ADNOC plans to invest \$150 billion over the coming four years in expansion of oil and gas infrastructure

Oil and Gas Infrastructure - Aramco



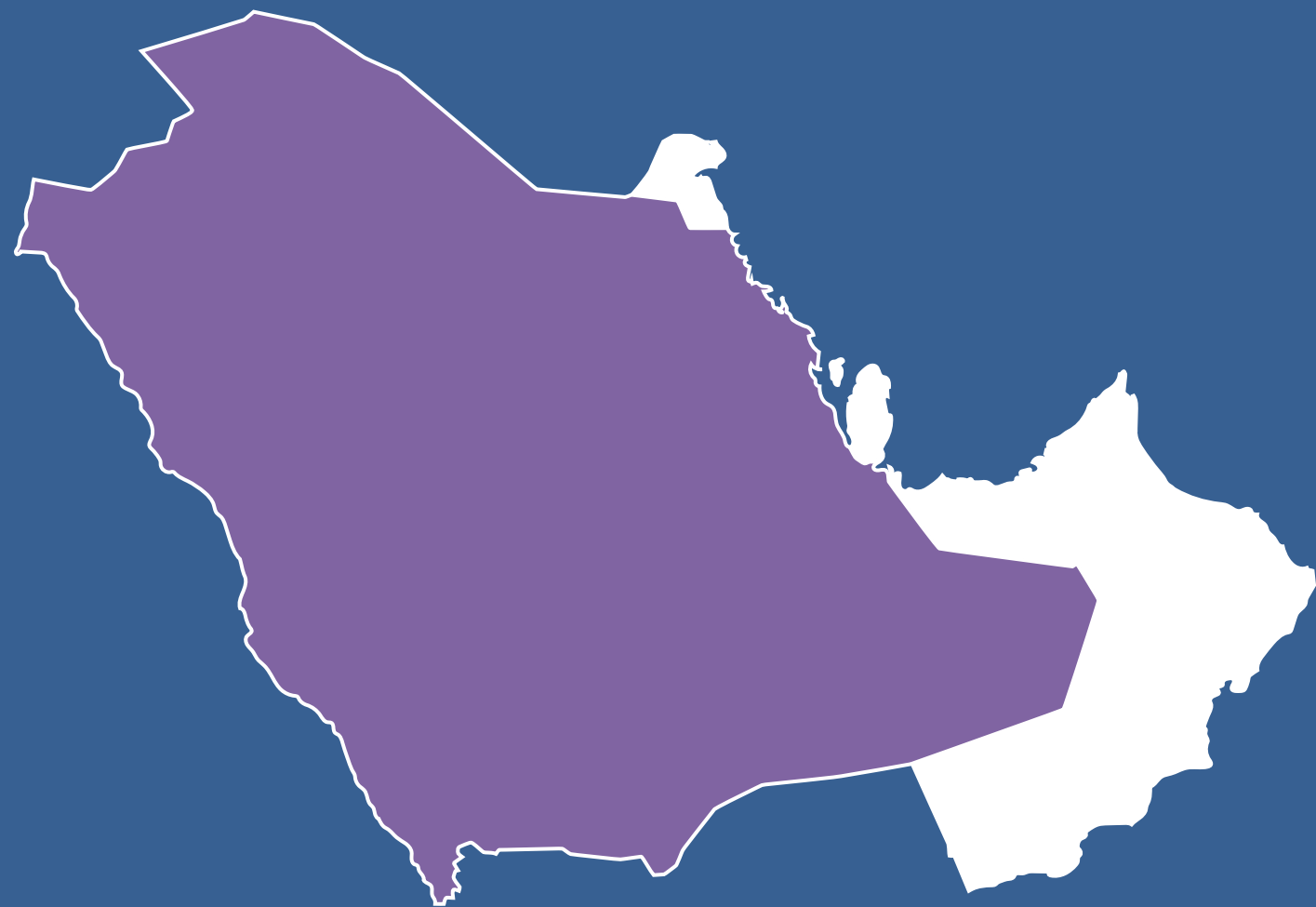
Aramco plans to procure 90 major projects up to 2025

Oil and Gas Infrastructure - Hydrogen



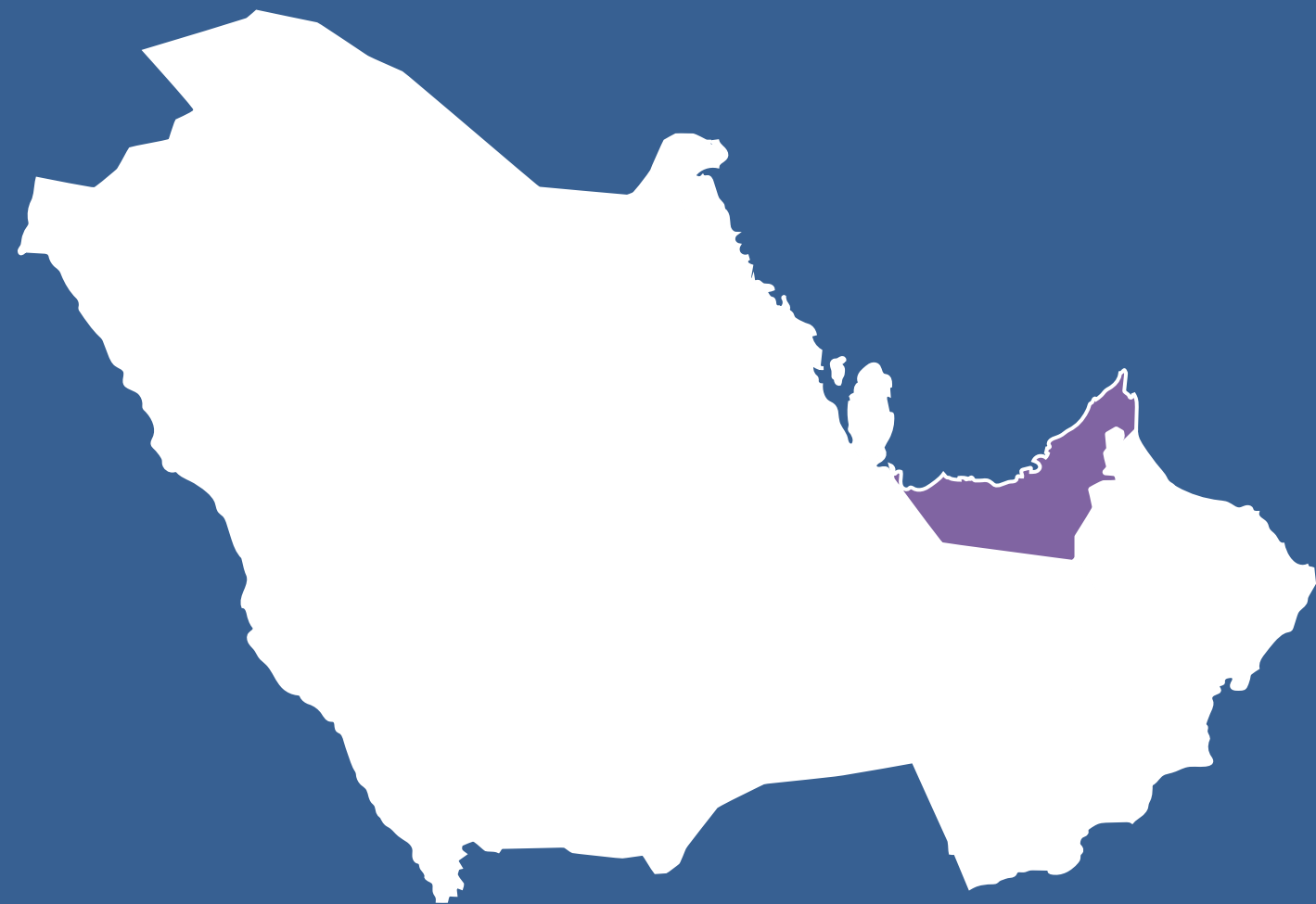
Aramco made the world's first commercial shipment of blue hydrogen in November 2022

Oil and Gas Infrastructure – CCS



The Aramco CCS Hub Jubail is scheduled for completion in 2027 and will capture and sequester 9 million tonnes of carbon dioxide emissions per year

Oil and Gas Infrastructure – Solar



ADNOC opened the largest single-site solar plant in the world in November 2023

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Transport Infrastructure



- Etihad Rail
- Saudi Landbridge
- King Salman Airport
- Jeddah Airport Expansion
- Riyadh Metro

Power Infrastructure



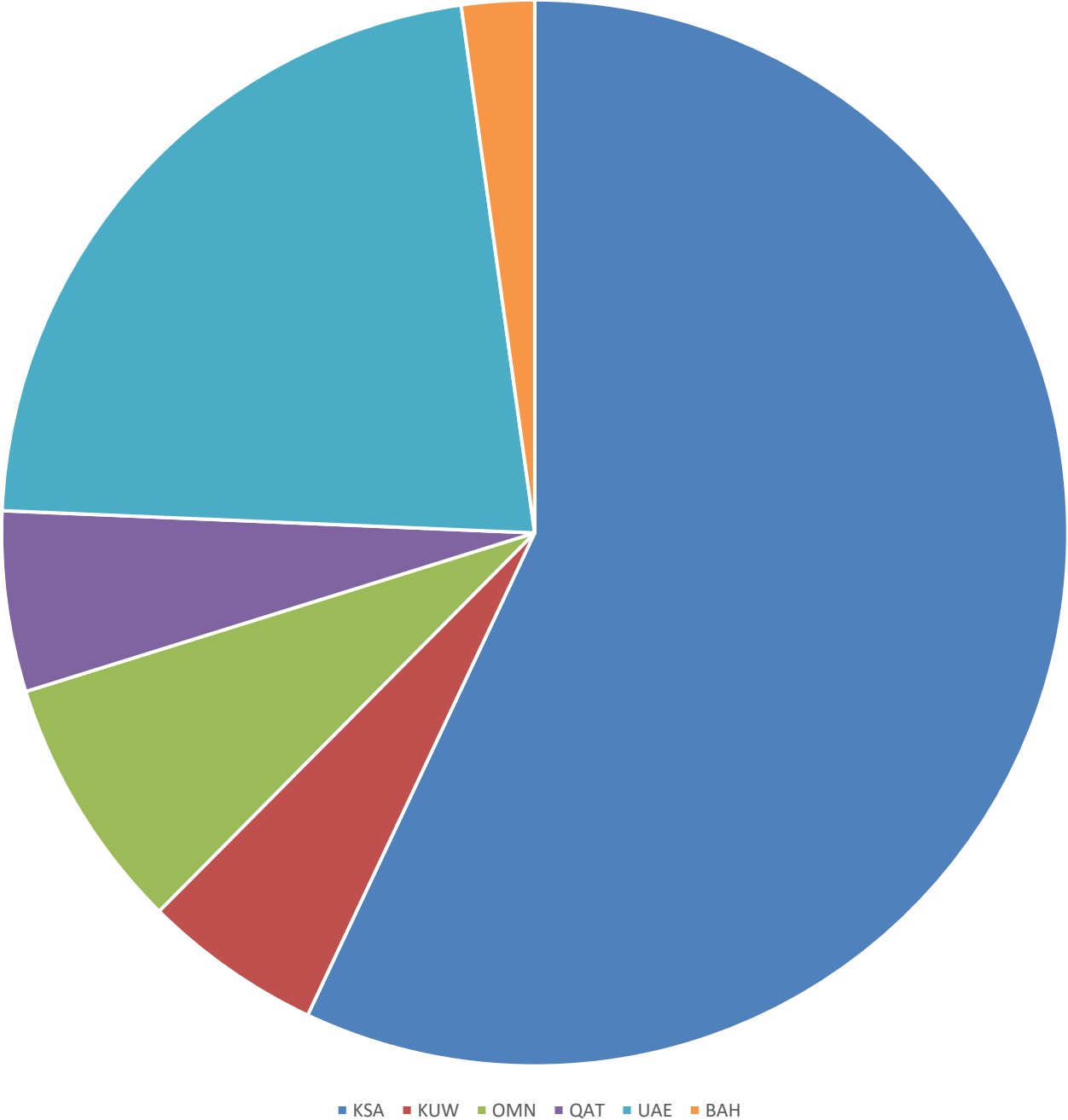
- Barakah 1 and 2
- Overhead lines
- Substations
- HVDC
- Al Kharsaa

Real Estate



- Kingdom Tower
- Saudi National Housing Plan
- One Zaabeel
- Royal Atlantis
- Winn RAK

USD 2.7 Trillion in Known, Planned, and Unawarded GCC Projects



Saudi Gigaproject Program



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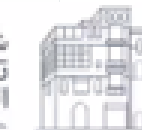
روشيد



القديية
Qiddiya



رؤى المدينة القابضة
Ruo Al Madinah Holding



The Red Sea Development – Phase 0



Mega project under development in the west of the Kingdom of Saudi Arabia on a development area of 28,000Km²

The Red Sea Development – Phase 1



The design, build, operate, and transfer of The Red Sea Project's utilities infrastructure relies entirely on renewable energy for power generation, water production, wastewater treatment and district cooling.

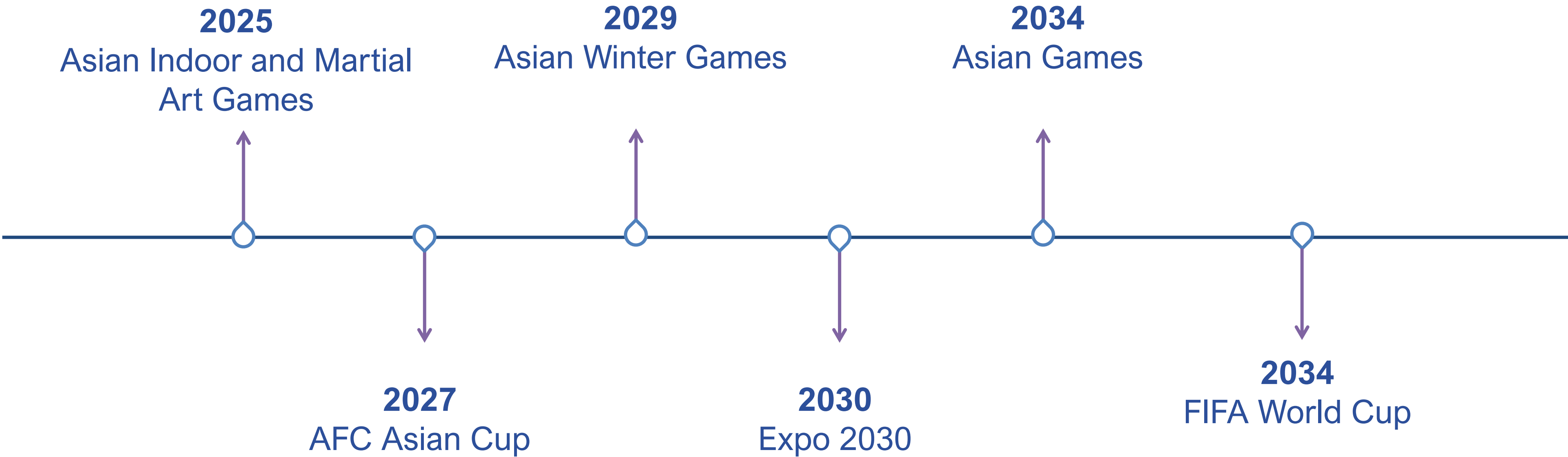
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Skills



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Experts

McKinsey
Sustainability

Scaling High-Integrity Carbon Management

Scaling High-Integrity Carbon Management

Sustainability



A worker in an orange high-visibility jacket and yellow hard hat stands with hands on hips, looking at a large pile of waste in a recycling facility. The worker is positioned in the center of the frame, facing away from the camera. The background shows a large industrial facility with a conveyor belt and a large pile of waste. The text "ConTech" is overlaid in the center of the image.

ConTech



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CONSTRUCTION MASTERCLASS:

The Future of Construction Law in KSA



**Nesreen Osman
& Mark Raymont**

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The Future of Construction Law in KSA

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DISPUTES WEEK

MARK RAYMONT, PARTNER, PINSENT MASONS
NESREEN OSMAN, PARTNER PINSENT MASONS

5 March 2024

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business with law at the core

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Agenda – The Future of Construction Law in KSA

- Introduction
- New CTL - Provisions of General Application relevant to Construction Projects
- New CTL – Specific Construction Contracting Provisions
- Questions?



Pinsent Masons overview



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Our Middle East locations



Key

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-  Alsabhan & Alajaji Pinsent Masons LLC
-  Representative office

An aerial view of a city, likely Dubai, seen through the glass panels of a large, modern dome structure. The city below is densely packed with buildings and roads, set against a clear blue sky. The dome's structure is composed of a grid of dark metal beams and glass panels, creating a geometric pattern over the city.

Construction Projects and the New Civil Code

02

New Civil Transactions Law

- Came into effect on 16 December 2023 (the **Effective Date**)
- General intention - to provide a more modern and comprehensive legal framework for commercial transactions
- Expected to help Construction activities in a number of ways, including:
 - **Legal Clarity:** Anticipated to improve legal certainty in business dealings and dispute resolution;
 - **Simplification of rights:** Making it easier for construction businesses to (i) enter into contracts by providing a more clear and concise definition of contracts, and (ii) understand their rights and obligations under those contracts.
 - **Protection of rights:** Stronger protections for the rights of construction businesses, such as the right to property and the right to freedom of contract.

Scope of Application in Construction Context

- Hierarchy of application:
 1. Provisions of the Civil Code,
 2. The “general rules” (described by some as “*Sharia-inspired legal maxims*” - 41), and
 3. The relevant provisions of the Islamic Sharia that are “most appropriate” will apply.
- Article 1 goes on to add that “[t]he application of the provisions of this Law shall be without prejudice to the special statutory provisions”, which are understood to be other specialised laws.
- In this respect, the existing Government Tenders and Procurement Law (GTPL) will likely fall under the scope of Article 1, and should therefore take precedence over the Civil Code in cases relating to government procurement.



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An aerial view of a city, likely Riyadh, Saudi Arabia, seen through a large, dark metal and glass dome structure. The city below is densely packed with buildings, and a prominent skyscraper with a distinctive archway is visible in the center. The sky is a clear, pale blue.

Provisions of General Application
for Construction Projects

03

Overview and Mandatory Provisions

- Position in relation to many of key concepts such as good faith, exceptional unforeseen circumstances and abuse of rights are now codified and reflect the laws in other Middle East jurisdictions (UAE, Qatar etc)
- Similarly, cannot contract out of mandatory provisions
- Examples in KSA (and UAE) context:
 - obligation to act in good faith
 - exceptional unforeseen circumstances of a general character
 - adjustment of pre-agreed compensation clauses (e.g. delay or performance liquidated damages clauses)
 - non-limitation of contractual liability in the event of fraud or gross error
 - non-limitation of tortious liability
 - statute of limitations



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Good faith (1)

- Good faith = good intentions
- Sharia principle of Ihsan (good faith, justice and honesty)
- **Article 95(1)**: *“The contract shall be executed in accordance with its terms and in a manner consistent with the requirements of good faith”*.
- Similar to UAE and Qatar Civil Codes
- Contrast to many common law jurisdictions – incorporation of an express obligation to act in good faith
- Remains to be seen whether:
 - Extends to requiring contract administrator to act in good faith
 - Whether it will apply post-contract

Good faith (2)

- The requirement of good faith extends to the negotiation leading up to a contract; not just its performance.
- **Article 41(1):** *“If a contract is negotiated, the parties to the negotiation shall not be obliged to conclude such a contract, however, a person who negotiates or terminates the negotiation in bad faith shall be liable for the damage suffered by the other party...”*
- **Article 41(2):** *“It is considered bad faith not to be serious while negotiating, or deliberately neglecting to make a material statement affecting the contract.”*

Abuse of Rights

- Not only must a party exercise its rights in good faith, it must also not abuse its rights.
- Article 29 of the Civil Code provides that “*no right may be exercised wrongfully*”.
- It goes on to list specific examples of when this may be the case, including:
 - if a right is exercised only to cause harm to others;
 - if the benefit generated from exercising the right is completely disproportionate to the harm it causes to others; and
 - if the right is exercised for an unlawful purpose or in an unlawful manner.
- Therefore it is key that, even when carrying out a contractual right, a party does not abuse that right and always considers (i) the purpose behind the exercise of that right, and (ii) the harm likely to be suffered as a consequence.

Exceptional Unforeseen Circumstances

- **Article 97** deals with unforeseen events of exceptional circumstances of a general character, allowing the court to reduce the burdensome obligation in the absence of agreement. It states:
 1. In the event of **exceptional circumstances** of a **general character** which **could not have been foreseen** at the time of entering into the contract and as a result of which the performance of the contractual obligation becomes **burdensome** for the debtor such as to threaten him with **exorbitant loss**; he may – without any **unjustified delay** - **call the other party for negotiation**.
 2. The request for negotiation shall not entitle the debtor to refrain from performing the obligation.
 3. **If no agreement** is reached within a reasonable period, the **court may**, according to the circumstances and after weighing the interests of both parties, **reduce the burdensome obligation to a reasonable level**.
 4. Any agreement to the contrary of the provisions of this Article shall be void.
- Cf Force Majeure provisions (non-mandatory)

Liquidated Damages (1)

- **Article 178** allows parties to insert a pre-determination of damages in their contracts, providing the obligation is not pecuniary.

*“The contracting parties may **determine in advance** the amount of compensation by stipulating it in the contract or in a subsequent agreement; unless the object of the obligation is an amount of money, and the entitlement to compensation does not require serving a formal notice.”*

Liquidated Damages (2)

- **Article 179** also grants the Saudi Courts the ability to adjust pre-determined damages to reflect the loss suffered but it may now only increase the damages in cases of fraud or gross error on the part of the debtor.
 1. “The contractual compensation shall not be due if the debtor proves that the creditor did not suffer any damage.
 2. The court may reduce the compensation at the request of the debtor if he proves that the compensation agreed upon was overestimated or that part of the original obligation was performed.
 3. The court may, at the request of the creditor, raise this compensation to an amount equivalent to the damage if he proves that the damage exceeds the amount of the contractual compensation as a result of fraud or a gross error on the part of the debtor
 4. Any agreement to the contrary of the provisions of this Article shall be void.”

Liquidated Damages (3)

- **Article 180** states that *“If the compensation is not determined in the contract or under a statutory provision, the court shall assess it in accordance with the provisions of Articles (136), (137), (138) and (139) of this Law. If, however, the obligation stems from the contract, the debtor who has not committed fraud or a gross error shall only be liable to compensate for the damage that **would normally have been expected at the time of entering into the contract.**”*



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Interest

- The Civil Code does not deal with 'interest' as such. However, Article 385 provides that, with respect to loans, any term at the time of contract or delayed fulfilment that includes an increase in the repayment of the loan is void.
- This is consistent with the position of the Hanbali school of Islamic Law which disallows the recovery of interest.
- Interest is treated as usury (riba), which is strictly prohibited in any form as a matter of Saudi public order. Consequently, Saudi courts will not award interest, irrespective of any agreement to the contrary or applicable foreign law provisions.
- Unlike some other jurisdictions in the ME which do recognise interest.

Limitation of liability

- **Article 173** allows parties to limit or exclude liability but, similar to other civil law jurisdictions, not in the event of fraud or gross error.
 1. *It may be agreed to exempt the debtor from compensation for the damage arising from the non-performance of his contractual obligation or from the delay therein, unless it is due to fraud or to a gross error on his part.*
 2. *It may not be agreed to exempt from liability resulting from a tort.*

Loss of Profit

- The Civil Code now expressly allows compensation for:
 - Loss of profits ([Article 137](#))
 - Moral damages ([Article 138](#)). Applicable to natural persons; includes psychological or emotional harm resulting from infringing upon or harming a person's body, freedom, honour, reputation, or social status.
- 'Mandatory' insofar as they stem from harmful (tortious) acts, or in cases of fraud or gross error with respect to contractual obligations, as it is not possible to exclude or limit liability for moral damages and/or loss of profit.
- These provisions appear under the Acts Causing Harm section of the Civil Code and may also apply to contractual agreements, as is the case under the UAE Civil Code.
- Not surprising – Sharia did not prevent the recovery of these losses – all that was required was for the loss to be an actual and direct loss.

A construction site at sunset. A large crane is on the left. In the center, a large building with a complex, curved metal framework is under construction. The sky is blue with scattered yellow and orange clouds. In the foreground, there are several cars parked behind a barrier.

Construction Contracting Provisions

04

Civil Code – For Contractors

- There is a construction section (similar to UAE Civil Code) **Articles 461 - 478:**
 - Contractor’s Responsibilities
 - Employer’s responsibilities
 - Subcontracting
 - Termination
- There are some differences that we have noted
 - Interest – Saudi continues not to allow interest
 - Liquidated damages – can decrease damages but only increase in case of fraud or gross error
 - Decennial liability – this is not included in the Civil Code, although it is in the Building Regulations which came into effect in 2022 and apply to all building and construction works.

Contractor's Responsibilities (1)

- Outlined in Articles 463 – 467
- Including:
 - complete the work in accordance with the Contract and within the period agreed. If no condition or period agreed – comply with accepted principles and reasonable time
 - supply of materials in line with specified requirements if requested by the employer
 - if employer provides materials, the contractor is expected to take reasonable care of them (the “*care of the usual person*”) and return any excess
 - being accountable for machinery and tool expenses unless otherwise agreed upon.

Contractor's Responsibilities (2)

- If the contractor was performing the work in breach of the contract, the employer has the right to ask for corrections within a reasonable time. If the breach is not remedied within this period, the employer can either assign another contractor to complete or correct the work, charging the first contractor, or request the contract's termination.
- The employer can terminate the contract immediately if correcting the breach is impossible, or if the contractor's delays prevent them from finishing within the agreed time frame.
- Unlike other jurisdictions, Civil Code does not recognize the contractors' right to impose a lien on the works until they receive their due payments.

Employer's Rights and Responsibilities (1)

- Articles 468 to 472
- Including:
 - accepting completed works from the contractor and paying the agreed wage upon taking over the works.
 - if the employer refuses without reason to take over the works and the works is lost or damaged, the contractor will not be liable to compensate the employer.
 - if the work has multiple parts or unit pricing, the employer is responsible to pay for completed, significant portions after inspection and acceptance.

Employer's Rights and Responsibilities (2)

- **Article 470** grants the employer the right to withhold payment from the contractor if the contractor failed to notify the employer about the need to exceed the estimated value of the works specified in the Bill of Quantities during the execution process
- **Article 471** in relation to lump sum contracts, empowers the employer to refrain from paying any additional amount beyond the agreed sum to the contractor, even if there are increases in material prices, worker wages, or other related expenses (no escalation).
- Also, if any variation or addition is made to the design, the contractor may not demand any increase in remuneration unless it is due to the employer's mistake or is with his permission, and an agreement has been reached with the contractor regarding the increase.
- Exceptional unforeseen circumstances – court may restore balance of contract including EOT, increase / decrease remunerations or terminate

Subcontracting

- Contractor has the right to delegate work, wholly or partially, to another contractor, except when statutory provisions, the agreement, or the work's nature dictate otherwise, or if the contractor's personal characteristics are relevant to the work's nature ([Articles 473](#)).
- Contractor continues to remain responsible toward employer.
- Subcontractor is not permitted to seek recourse against the employer for payments owed by the main contractor, unless there has been an assignment made to the subcontractor against the employer ([Article 474](#)).

Termination

Articles 475 to 478

- Contract ends with completion of the work.
- Termination: A party may excuse themselves from performance in an emergency that relates to their ability to complete performance of the contract. They may request its termination, provided that they compensate the other party for resultant damages.
- If a contractor initiates the work and is subsequently unable to complete it due to causes outside of their control, they are entitled to payment for the value of the completed work, in addition to the amounts spent for incomplete works in proportion to the resulting benefit of the employer.
- See also Article 110 – termination due to impossibility

Saudi Building Regulations – Decennial Liability (1)

- This is not included in the Civil Code, although it is in the Building Regulations which apply to all building and construction works.

“The Supervising designer who supervising the implementation of the construction and the contractor shall be jointly responsible for compensating the owner for ten years – from the date of issuance of the occupancy certificate – for the total or partial demolition of the buildings they constructed or the facilities they built and for every hidden defect that threatens the durability and safety of the building.”

- The Building Regulations, which came into effect in 2022, apply to all building and construction works in both public and private sectors.

Saudi Building Regulations – Decennial Liability (2)

- If KSA Courts follow other jurisdictions
 - Strict liability (no fault concept) – no need to establish negligence on part of the contractor or engineer, just the fact of total or partial collapse or the existence of a defect threatening the safety or stability of the building.
 - While the overall liability is 10 years from handover (taking over), must notify within 3 years of discovering the total / partial collapse or defect threatening safety or stability of the works.
 - Defences:
 - force majeure
 - failure due to an external cause such as, for example, the actions of the employer or a third party in relation to the building after handover.
 - Principle does not apply to subcontractors – remember to include an express indemnity for decennial liability in the subcontract.

Conclusions (1)

- Starting point in Saudi (and many Middle East jurisdictions) is that the contract is the law of the parties and it will be enforced.
- Important to understand and abide by the terms of the contract:
 - engineer / Employer will seek to enforce strict terms of the contract during the works
 - unlikely to recognise claims designed to circumvent strict terms (esp. notice) leading to entrenched disputes at the end.
- Civil Code concepts such as good faith, abuse of rights and doctrine of change in circumstances do have an important role in other civil code jurisdictions and will likely do the same in KSA:
 - more flexibility in the application of contractual provisions – can be used in support of settlement strategy to make employer perceive a risk in the event of formal proceedings.
 - where strict compliance with the contract has not been possible, opens other routes to compensation.

Conclusions (2)

- Caution is advised when trying to exclude or limit liability.
- It is very likely, although not definite, that a limitation of liability (such as LDs) will be upheld under Article 178, and Article 179 (adjustment of LDs) should be borne in mind.
- You cannot exclude liability for:
 - fraud/gross error/serious fault;
 - harmful (tortious) acts; and
 - statutory duties.



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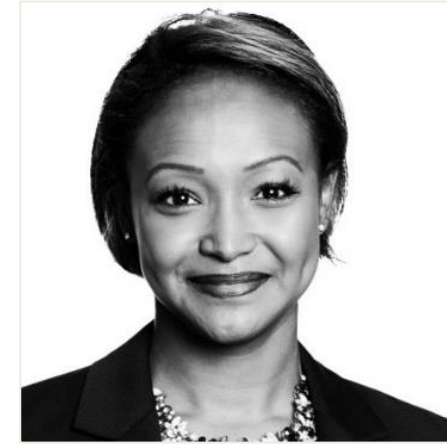
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Paul Gibbons

Decipher

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Networking Break

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Lunch and Networking Break

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Bill Bordill

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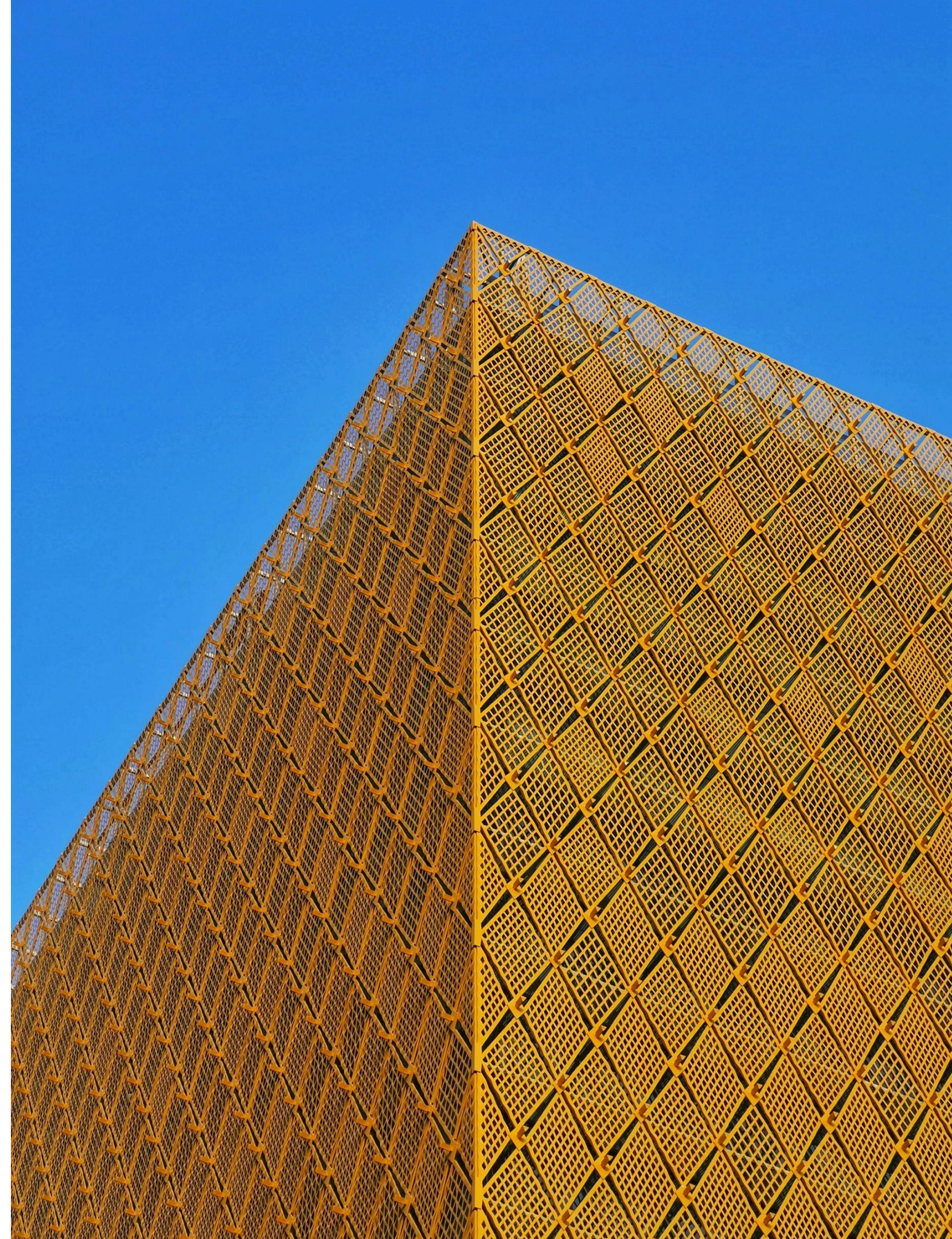


Variations

**How to successfully manage change
on construction projects**

Bill Bordill

FRICS, FCI Arb, FCI InstCES, MCIOB, MAE, QDR(ED), APAEWE, NECReg



CONTENTS

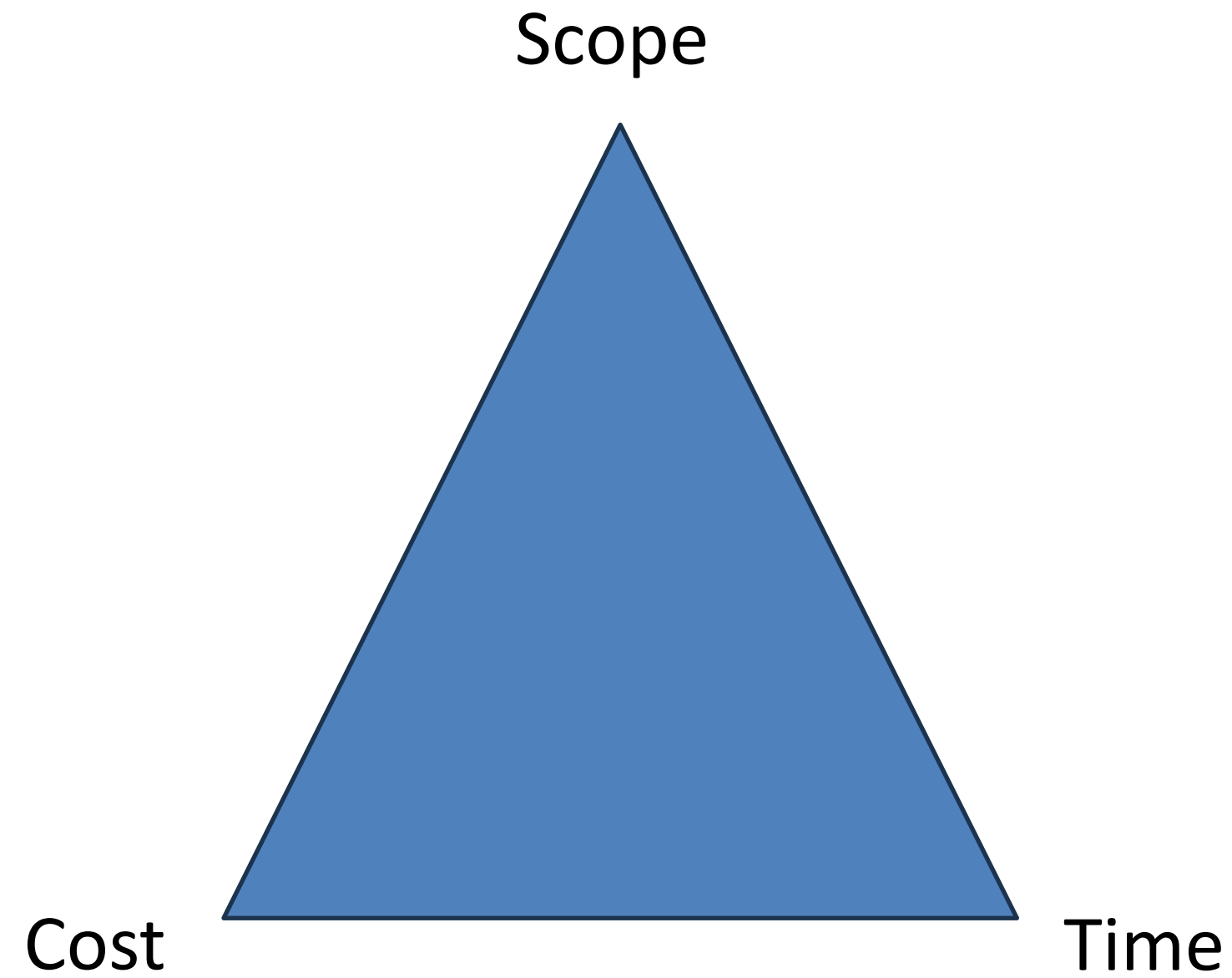
1. What is a Variation?
2. Why do we need Variation provisions?
3. Examples of typical Variations
4. The problem
5. The solution
6. Top tips to take away

WHAT IS A VARIATION?

- Let's start with the basics
- Under the contract
- What is a contract
- Essential ingredients of a contract

WHAT IS A VARIATION? (Cont'd)

The Project Management Triangle



WHAT IS A VARIATION? (Cont'd)



WHY DO WE NEED VARIATION PROVISIONS?

- Employer has flexibility to make changes
- Changes to meet unforeseen circumstances
- Effectiveness of the original contract is preserved
- Mechanism to compensate the contractor

EXAMPLES OF TYPICAL VARIATIONS

- Change to specification
- Change to quantities
- Change to sequence or timing
- Change to site work/management procedures

EXAMPLES OF TYPICAL VARIATIONS (Cont'd)

- Instruction to expend Provisional Sums
- Discrepancy between contract documents
- Omission of work
- Addition of work

EXAMPLES OF TYPICAL VARIATIONS (Cont'd)

- Change in statutory/legislative requirements
- Unforeseen ground conditions
- Changes to the quality or characteristic of the work
- Changes to loads, positions and/or dimensions

THE PROBLEM

- Poor project administration
- Lack of contractual knowledge
- Lack of clarity
- Time bars
- Oral instructions

THE SOLUTION

- Four ways to do things :

Wrong thing, wrong.

X

Right thing, wrong.

X

Wrong thing, right.

-

Right thing, right.

✓

THE SOLUTION (Cont'd)

- Understand the contract
- Administer the contract properly
- Provide and seek clarity
- Don't accept oral variations

TOP TIPS TO TAKE AWAY

- Read the contract - regularly
- Apply the contract - always
- Use technology to identify change
- Issue early warning notices - even if not obliged to
- Comply with instruction now - argue later
- Records, records, records!

Thank you

Presented by Bill Bordill

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The Great Delay Debate



Vivek Kapoor

39 Essex Chambers

Alastair Farr

FTI

Khalid Yousri

Diales

Natalia Barroso

FTI

Why are there so many different methods of analysis?

Classification of Delay Analysis Methods



SCL Protocol 2nd Edition - Classification	Impacted As-Planned	Time Impact Analysis	Time Slice Windows Analysis	As Planned vs As-Built Windows Analysis	Retrospective Longest Path	Collapsed As Built (As-Built But For)
Method	Additive		Analytical		Subtractive	
Analysis Type	Cause & Effect		Effect & Cause		Cause & Effect	
Critical Path	Prospective	Contemporaneous		Retrospective		
Identification of the Event (Cause)	Prospective		Retrospective			
Identification of the Critical Delay (Effect)	Prospective			Retrospective		

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