COLLABORATIVE CONSTRUCTION CONTRACTS:
Opportunities and Challenges for the Energy Sector in Canada

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Agenda

1. Challenges with Traditional Project Delivery Models
2. Current Market Trends
3. Collaborative Contracts
4. Conclusion and Tips for Success
5. Questions / Discussion
1. Challenges with Traditional Project Delivery Models

- Adversarial, Siloed
- Not Always Best Value for Money
- Subcontractor or Supplier Default, Insolvency or Abandonment
- Changes to Cost and Schedule
- Claims on Projects
- Fast-Tracking
- Conflicts of Interest
The construction industry is undergoing significant change due to various factors:

- Global pandemic
- Significant public and private sector demand for contractors and labour
- Increasing scale, scope and complexity of projects
- Supply chain disruption
- Cost escalation for materials, supplies and labour
- Inflation and unpredictable economic conditions
- Increased climatic events (e.g. forest fires, flooding)
- Major projects becoming significant political issues
- Increased Environment, Social and Governance
Some Common Features of Collaborative Contracting*

- Including all parties in the conceptualization of the project – technical and commercial planning
- Identifying, managing and mitigating project risk and uncertainties (e.g. cost and schedule challenges)
- Considering potential design and scope adjustments – constructability/cost
- Leverage expertise, skills and resource across disciplines and contracting parties
- Aiming to align commercial interests
- Pricing transparency and open-book pricing
- Early procurement of subcontractors and suppliers
- No fault and restriction on some or all disputes, subject to certain defined exceptions
- Risk sharing
- Obligation to act in good faith
- Early warning and risk management mechanisms
- Payment arrangements designed to incentivize best-for-project outcomes; pain-share gain-share
- Governance arrangements based on joint/collaborative decision-making
- Off-ramps/broad termination rights for owner and project participants

* Not all features are included or required for collaborative contracting. Certain features may also be present in “traditional” contracting.
3. Types of Collaborative Contracts

**Early Contractor Involvement**

Owner engages contractor on consulting basis to provide constructability and procurement services during design development.

**Progressive Design Build**

Owner engages design-builder before the project requirements/specifications are finalized. During the first phase, the design-builder works with the owner to advance the design, provide cost and schedule estimates, perform procurement services and perform certain early works. The second phase initiates project execution.

**IPD / Alliance Contracts**

All major project participants (such as the owner, the contractor, the architect/engineer and certain key subcontractors/suppliers) enter into a multi-party contract at an early stage of the project. The contract defines how collaborative decision-making and management will work.
In an ECI delivery model, the owner engages a construction manager early in the design process to provide input on cost, schedule and constructability.

Often Construction Manager provides pre-construction services (similar to CM for Services) and then acts as General Contractor during construction phase (similar to DBB).

ECI delivery models have several benefits. For example: (1) pricing & schedule input; (2) value engineering; (3) open-book; (4) defer pricing and schedule commitments.
Progressive Design Build (“PDB”)

- Owner selects a design-builder prior to finalizing functional program and budget.
- Provides opportunity for owner to have more input into the design - Owner and design-builder work together to define project requirements: design, pricing, schedule, and risk (open book & iterative).
- The designer and builder are a combined unit, facilitating cooperation across disciplines.
- Provides design-builder ability to have more information about project and risk before committing to price and schedule for final design and construction.
- The design-builder delivers the project in two “progressive” phases:
  - *Phase 1 includes the preliminary design and preconstruction services;*
  - *Phase 2 includes the final design and construction services.*
  - *Optional: Early Works may be initiated before entering into the Phase 2 Contract if necessary.*
- Can be done in one contract or in two contracts for each phase, key is to create off-ramps.
- Design-builder’s engagement in the entire process invites it to take ownership over the success of the project (e.g. getting to Phase 2 is crucial for profitability).
PDB Phasing Example (Multiple Contract Model)

**Phase 1**
- Design
- Budget
- Schedule
- Phasing
- Tendering

**Phase 1 Contract**
Owner & DB

**Phase 2**
- Construction
- Tendering
- Final Design
- Commissioning
- Warranty

**Early Works**
(e.g. foundations)

**Phase 2 Contract**
Owner & TBD

**Decision Gate**

**Early Works Contract(s)**
Owner & DB (or other) Optional
A multi-stakeholder project team (Owner and “Non-Owner Participants”).

Owner may engage multiple respondent entities to submit their qualifications for consideration.

Alliance usually involves: (a) *Alliance Development Agreement*; and, (b) *Project Alliance Agreement*.

Once selected, non-owner participants enter a contract with the owner to form an alliance. Non-owner participants contract with subcontractors on behalf of the alliance.

These contracts generally include waivers of rights to sue, litigate, or arbitrate against the other party with limited exceptions - intended to prevent finger-pointing and promote collaboration.

Common exclusions to waiver of claims: insolvency and wilful default (which might cover intentional and reckless acts or omissions; failing to pay subcontractors; express breaches like hidden pricing; etc.)

Generally characterized by: (i) risk and opportunity sharing; (ii) commitment to “no disputes”; (iii) best for-project unanimous decision-making processes; (iv) “no fault – no blame” culture; (v) good faith; (vi) transparency expressed as open book documentation and reporting; and (vii) a joint management structure.
Integrated Project Delivery ("IPD")
Integrated Project Delivery (“IPD”)

- Aligns the business interests of all parties through a multi-party contractual arrangement among a minimum of the Owner, Consultant and Contractor (“all for one and one for all”)

- During the project, the IPD parties are paid their actual costs with no (or very little) profit while performing their obligations (overhead is paid).

- IPD creates a risk and reward pool that is distributed depending on pre-determined project benchmarks.

- Generally includes: (i) early involvement of key participants; (ii) shared risk and reward based on project outcome; (iii) joint project control; (iv) reduced liability exposure; and, (v) jointly developed and validated targets.

- IPD includes Five Phases
  - (1) Solicitation; (2) Validation; (3) Design/Procurement; (4) Construction; (5) Warranty

- Waivers of liability and financial transparency among the parties.
Jim Banaszak et al, “Collaborative contracting: Moving from pilot to scale-up” (January 17, 2020)

→ Alliancing Association of Australasia - 2008 report shows 80% of the 30 alliance projects performed on or better than target with regard to time and cost, and only 2 projects performed worse than target in both cost and time;

→ McKinsey & Company - analysis of eight collaborative contract pilots (IPD and Alliance) revealed that these agreements have resulted in a 15% to 20% improvement in cost and schedule performance compared with traditional contracts;

→ Infrastructure Ontario & Infrastructure BC launching an increasing number of major projects through Alliance (and other) Models (e.g. Union Station, Cowichan District Hospital, Vernon Active Living);

→ Other examples: Andrew Drilling Platform Project; New Zealand’s Northern Gateway Toll Road; Autobaan A2 Hooggelen project in the Netherlands... on or under budget.
Challenges with Collaborative Contracts

*Every good intention comes with an unexpected consequence…*

- Agreement to Agree
- Attitude Change
- Procurement Rules Around Collaborative Contracts
- Intellectual Property Rights
- Confidentiality of Commercial Terms
- Collaboration is not Free
- Exclusionary Clauses
- Prompt Payment Legislation and Liens
- Lack of Experience
- Trade Exhaustion
5. Conclusion and Tips for Success

Opportunities

- Proactive, rather than reactive, management of projects
- Reduced disputes, increased engagement by project participants
- Provides off-ramps
- Attracting bidders in a contractor favourable market
- Realizing good value for money and avoiding paying unnecessarily for exorbitant cost contingencies
- Transforming “bet the company” risks into a shared burden among the parties with appropriate limits
- Acquisition of intellectual property, shared innovation, increased creativity to promote profit for all participants in future work
- Achieving on time, on budget project delivery

Tips for Success

- Commit to shifting mentality, aligning goals among project participants, and continuously improving
- Arrange team building sessions focused on defining shared success
- Define, clearly understand what it looks like to abolish the blame game and how disputes will be resolved
- The types of models are not “watertight compartments”. Parties can combine features of collaborative contracts with primarily traditional delivery models
Thank You

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