EARLY CONTRACTOR INVOLVEMENT

A Client Practice Note by Eugenie Lip, Director and Head of KPK Contracts Support Group

INTRODUCTION

“…developers should look into adopting procurement models which facilitate early contractor involvement (or ECI in short) in the design process, so as to reap productivity benefits.”

– Opening address by Minister for National Development at the BCA-REDAS Construction and Property Prospects 2011 Seminar

“Construction productivity” – keywords which have taken centre stage and more recently, connote particular focus across the construction supply chain. What started upstream requiring designers to provide more buildable designs has now been extended to construction methods and processes at the site with the introduction of the new Constructability Score for projects with applications for planning permissions submitted on or after 15 July 2011. A detailed discussion of the new Constructability Score can be found in the May 2011 issue of KPK Research Digest Client Practice Note.

Poignantly, no efforts have been spared to explore creative solutions and identify best practice contracting methods to enhance productivity at all fronts and imbue efficiency-centric design and construction processes. Early Contractor Involvement is one such innovative approach on project delivery which can help to underpin and drive home the productivity message. This paper examines the characteristics of Early Contractor Involvement and discusses the essential practice issues when considering the suitability of such contracting style for a project.

OVERVIEW OF EARLY CONTRACTOR INVOLVEMENT

Whatever the preferred route, be it a conventional designer-led method or design-build where design is combined with construction, there are certain key phases that a project undergoes to reach handover and completion albeit the sequence, risk allocation and responsibility may vary. The commonality in such arrangements is that the Contractor is typically brought in only upon execution of the contract and when physical construction starts on site. But must it be so? Can the Contractor be involved earlier and invited to participate in design development?

Early Contractor Involvement (or ECI) engages the Contractor during the initial phases of the project to work with the Client and his consultants. It is suited for projects with challenging programme constraints and where active participation of the Contractor is essential to contribute to the design process and on buildability and sequencing. Such contract strategy provides for overlapping of design and construction which potentially translates to a faster start on site. The Contractor’s input at the early stage can often be of benefit in avoiding construction difficulties often emanating at design and design-construction interfaces.

Whether the selected procurement method is the conventional scheme (with or without contractor-designed portions) or design-build, an ECI arrangement based on relationship-style contracting can be adapted to suit either approach. ECI promotes participation of the Contractor (selected through a competitive first-stage bid) in the early stages of the project to contribute to design evolution and development.

The early involvement of the Contractor with the project consultants in a collaborative team environment encourages innovations upfront and identifies potential risk outcomes as early as possible, thus enabling more accurate and sensible pricing before work is authorised to start on site.

In addition, ECI promotes better integration between design and construction processes, facilitates value engineering (where uneconomical and unaffordable designs can be reviewed, modified or eliminated) and offers cost effective design solutions especially on labour-efficient construction methods, prefabricated construction technologies and preassembled components and systems to improve productivity and achieve the minimum Constructability Score.

Through ECI, the Contractor can work as part of and alongside the project consultants to contribute to the designs, detailed programming and early placement of specialist works, systems and materials with long lead-in delivery times.

**EARLY CONTRACTOR INVOLVEMENT DRIVERS**

Successful ECI requires an understanding and appreciation of the characteristic framework which underpins such contracting structure. The key features and drivers in a properly structured ECI approach are illustrated below.

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**REQUEST FOR PROPOSAL**

- **Stage 1**
  - Contractor competes on basis of:
    - Track records
    - Indicative price
    - Overheads and profit
    - Outline programme
  - Appoint Contractor

**PRE-CONSTRUCTION PHASE**

- **Stage 2**
  - Client and Contractor negotiate to:
    - Continually develop design and proposals for contractor-designed portions (if any)
    - Procure tenders for major sub-contract packages
    - Agree contract terms and main contract form
    - Establish exit fallback strategy (if no agreement reached)
  - Secure Lump-sum Contract Sum

**CONSTRUCTION**

- **Award**
  - Agree final design and programme
  - Award contract
  - Work starts on site
  - Appoint sub-contractors
  - Novate specialist contracts to Contractor

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**Early Contractor Involvement Drivers**

Pre-qualified bidders tender on the basis of a partially-developed (but sufficiently representative) design concept and the key requirements. It is unwise to start too early when the representative design is still not firm. Hence, the design concept must be completed to a point where the tendering contractors in competition can realistically respond with an outline programme, indicative price, overheads and profit.

A design which is inadequately defined does not add value to the ECI arrangement as the tenderers will simply include risk allowances for uncertainties and the potentiality for scope changes and design variances.

The Client makes a qualitative assessment to select the preferred Contractor for further negotiation ahead of completion of the design based on a set of predetermined criteria such as the tenderers’ track records (in terms of experience, capability and resources), financial performance and on their respective indicative price, overheads, profit and the proposed outline programme. Specialist work packages requiring substantial input from the professional team should be called early and appointed directly by the Client for later novation to the selected Contractor.

The first-stage concludes with the appointment of the preferred Contractor and the execution of an agreement to clarify relationships between the parties and record the pre-construction services to be performed by the Contractor.
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<tr>
<th>2nd Stage</th>
<th>Pre-Construction [ DESIGN DEVELOPMENT ]</th>
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<td>Early Contractor Involvement Drivers</td>
<td>The appointed Contractor negotiates with the Client and works in conjunction with the project consultants on the following:</td>
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<td>▪ Continual and shared development of the final design and specifications;</td>
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<td>▪ Where necessary, submission of design proposals for any contractor-designed portions (eg structural works and mechanical and electrical services) in response to the Client’s design intent and requirements;</td>
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<td>▪ Jointly procure competitive tenders for and select major sub-contractors; and</td>
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<td>▪ Agree terms and conditions and parameters of the contractual framework and the form of main contract.</td>
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<td>In addition to price negotiation and design development, other value-drivers to be considered by the Client with the project consultants and the Contractor include innovative opportunities and solutions, value engineering, buildability, risk identification and allocation and detailed programming certainty.</td>
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<td>The Client (in conjunction with his consultants and the Contractor) manages, contributes to and participates in the shortlisting, tender documentation review and the subsequent tender opening and evaluation of the offers received and in the selection process of the sub-contractors.</td>
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<td>The second-stage is concluded with the agreement of a lump-sum contract sum and a timetable for construction activities to start.</td>
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<th>Award</th>
<th>[ CONSTRUCTION ]</th>
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<td>Following agreement of the second-stage price, the Client works with the Contractor to establish the final design and programme culminating in the formal award to authorise a start on site.</td>
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<td>Once the contract has been executed, the contracts of the specialist contractors who have prior contractual relationships with the Client can be novated to the Contractor.</td>
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WHY EARLY CONTRACTOR INVOLVEMENT?

Is there a case to encourage more use of ECI in a time where productivity consciousness is uppermost in the industry agenda? In a typical procurement structure, parties from different disciplines and different backgrounds come together at various stages of the project delivery cycle without regard to whether they have the right chemistry to get along with each other. Some are invited at an early stage, some after construction starts and some too late (usually the Contractor and his sub-contractors who are actually doing the construction) to make any contributions to design, buildability, project risk identification and programming.

ECI can achieve significant benefits for all parties if it is properly structured and approached correctly and with the right attitude. Whilst it requires everyone to subscribe to the arrangement, it is not a miracle cure for post contract adversarial relationships, poor quality and performance, cost overruns and delays which can still occur.

A successful ECI relationship is founded on these key themes: mutual trust, cooperation and openness, commitment from senior management of both parties to make ECI work, an agreed problem-solving approach during second-stage negotiations to obtain best value and not adopt entrenched bargaining positions to cloud relationships, win-win objectives which optimise the parties’ respective inputs to deliver time and cost efficiencies and achieve productivity gains, continuous measurable improvements and opportunities for innovation in design and construction and teamworking across contractual boundaries. For an ECI model to succeed, all parties must have a genuine ethos to work together to achieve better value and efficiency outcomes in design and construction.

ECI suits projects which dictate a quick start and there is a need to appoint a Contractor ahead to contribute to the design process, programming and sequencing, and where the Client would like to be more involved in sub-contractor
selection and procurement. The level of design in the project must be sufficiently firm and detailed for the Contractor to respond sensibly and realistically with his outline programme and indicative price at the first-stage tender. It avoids disagreement difficulties to close the second-stage when scope and design changes fester because of incomplete and ambiguous first-stage information.

PRACTICE WATCHPOINTS

As there is no guarantee of a successful outcome at the end of the second-stage or in the event the incumbent Contractor is unable or unwilling to agree a mutually acceptable lump sum price and he walks away, the Client must retain a ‘get-out’ route or an exit fallback strategy to withdraw which can be activated at any time if negotiations falter. The existence of an option of reversion to a full single-stage competitive re-tender or a fresh first-stage tender without affecting significantly the overall completion time and incurring implausible costs must be made known to the Contractor. However, the Client should consider whether to allow the Contractor a second chance to participate in the re-tender or submit a fresh tender since he has already been given an opportunity to put in his best price.

The overall implementation programme must allow some float time for the possibility of an unsuccessful negotiation towards the end of the second-stage and the Client must recognise that delays can inevitably occur if the Contractor fails to agree a contract sum.

The Client must have cognisance that at the second-stage, there is a loss of competition and renegotiating any offer is somewhat limited. At this stage, the Contractor has considerable leverage and it is important for the Client and his professional team to be well-resourced and have the capability to maintain a robust negotiating and bargaining position to agree a realistic, sensible and competitive lump sum price.

Extensive involvement and input of the Client and the project team are expected in the tender management and procurement of the major sub-contractors and the parties must be prepared to commit the time and resources to do so.

There is also a negotiation premium to be expected in the second-stage price due to limited competitive pressures albeit this can be controlled and mitigated through incentivisation with the use of gain-sharing and pain-sharing mechanisms in a guaranteed maximum price or target cost arrangement and by carefully structured reversion rights.

CONCLUSION

Exploring project delivery options against a backdrop of time, cost, performance and contract interfacing issues and recommending an appropriate method to achieve a completed project that fulfils the Client’s objectives is the hallmark of a successful procurement strategy.

In deciding on the ‘best-fit’ approach and whether an ECI project delivery structure is appropriate, regard must be had to the level of design information available for competitive first-stage bids, programme limitations and the need to bring forward the start date. The choice of an appropriate contracting strategy is a fundamentally important decision as it is not only crucial to the success of the project but also affects the contract form, particularly of the documentation to be produced and the roles and risk outcomes of each party and the professional team.