The “I” In Collaborative Contracting

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iNITIATION

On 31 May 2017, Mr Lawrence Wong (the Minister for National Development) announced during a joint conference organised by the Board of Architects and the Association of Consulting Engineers of Singapore that the government is looking forward to promoting more collaborative contracting models, and is initiating plans to pilot some of the collaborative contracting models in public sector projects. Hopefully, this will also encourage private sector developers to take the cue and adopt some of these best practices.

In Mr Wong’s speech, he quoted 2 examples. The first example was in Hong Kong where project owners worked collaboratively with contractors in implementing the New Engineering Contract (“NEC”). His second example was the Integrated Project Delivery (“IPD”) in America, whereby from day one of the project, all parties come together to conceptualise the project, and seek to reduce errors and wastages, and minimise redesign problems. All team members were bound contractually to share risks and rewards based on achievement of agreed goals.

As a precursor to the implementation of collaborative contracting models, the government has already embarked on promoting some of these best practices such as getting more public sector agencies to implement Early Contractor Involvement (“ECI”), by adopting some of the best practices that can be found in the various standard forms of contract which promote partnering such as NEC or IPD, and by fine-tuning operational and co-ordination aspects of Building Information Modelling (“BIM”) so as to further promote BIM and any other form of collaborative tools and platforms.

iNTENT

At its most basic, collaboration may be defined as ***"the act of working with another or others on a joint project, or something created by working jointly with another or others"***, an aphorism that would help in encouraging the concept of good faith and facilitate contract administration in a spirit of mutual trust and co-operation. Notwithstanding this definition, the challenge in implementing collaborative contracting will be in the definition or meaning of “collaboration” itself. Whilst this article does not intend to dwell on this aspect further, the key features of collaborative contracting can be grounded in some basic principles, which have been identified as follow:

- Encouragement for collaborative working
- Encouragement for dispute avoidance or dispute prevention, and early dispute resolution
- Provisions for dealing with timely resolution of variation and extension of time claims

IMPLEMENTATION

The above basic principles of collaborative contracting can be adopted in any of the standard forms of contract in Singapore as these basic principles can be enunciated in the following forms, and without changing the essence of the conditions of contract.

- As option modules in addition to the existing option modules for the Public Sector Standard Conditions of Contract ("PSSCOC").
- As appendices to the REDAS Design and Build Conditions of Contract ("REDAS"). As it is, Appendix 9 to the REDAS contract is an option module by itself whereby the Employer may provide the Architectural Design instead of the whole Works being entirely designed and built by the Contractor.
- As optional clauses in addition to the existing optional clauses for the Singapore Institute of Architects Articles and Conditions of Building Contract ("S.I.A.").

The following are the key principles of collaborative contracting that can be readily adopted for application in any of the standard forms of contract in Singapore.

- **Collaboration Pledge** is an undertaking by all team members in a project to act in good faith, in a spirit of mutual respect, trust, co-operation and fairness towards each other. The collaboration pledge will be the forefront document that will encapsulate all key principles of collaborative contracting that will be adopted for a particular project.

  This pledge will be agreed and signed upon by all team members from inception of the project and will allow new team members to be admitted into the pledge progressively whilst the project progresses in accordance with procurement timeline.

  The key objective of the collaboration pledge is to align all team members on the same foothold so that all team members work in the same direction or ***what's best for the project*** in terms of design, execution and completion of a project, and build a coherent team by participating in trainings, workshops and bonding activities.

  The other objectives of the collaboration pledge will be measured against performance indicators with the intention of driving all team members towards realising beneficial outcomes to clients such as reducing construction period, improved buildability and constructability, right first time with zero defects or reduce timeline for settlement of final account. The adoption of collaborative tools and platforms such as BIM, Electronic Document Management System such as ACONEX or using Enterprise Resource Planning software are also some of the objectives that can be included in the collaboration pledge.

- **Early Contractor Involvement ("ECI")** has found its footing in procurement for public and private sector projects in Singapore, especially in the last few years. It has been said that ECI promotes partnering in a tendering environment, and collaborative contracting is a platform that can extend co-operation already made during pre-contract stages into post-contract stages. It is undisputed that ECI can bring benefits to a project in terms of tapping contractors' expertise in the areas of buildability, constructability, construction scheduling and planning, alternative design proposals, value management, value engineering, and incorporation of latest construction technologies or methods.

  Prior to kick-starting ECI process, it is recommended to have a pre-qualification ("PQ") exercise to select the most suitable contractors to tender for the project. Once the PQ exercise has ended, the ECI exercise can begin. It has been suggested that three (3) to four (4) tenderers are chosen at the initial stages of the ECI exercise. This later can be reduced to two (2) tenderers towards the final stages of the ECI exercise. This is to avoid unnecessary wastage of resources and to avoid increased cost of tendering.

The ECI process begins with presentation by consultants to the tenderers. This is followed by issuance of the 1st tranche of Advance Information Packages ("AIP") to the tenderers. The AIP would contain essential and relevant information for the tenderers to work on. The content would be customised to cater for different project needs. The more information is provided, the clearer the tenderers are and the more they will be able to contribute in the ECI process.

This will be followed by clarifications from the tenderers, its subsequent replies by the consultants and the corresponding submissions by the tenderers. There would also be presentations by the tenderers and dialogue sessions with the employer and the consultants. During these presentations, all parties will inter-alia discuss, exchange any observations and answer any queries which may arise. The consultants will then review the tenderers' submissions before issuing a 2nd and 3rd tranche of the AIP, and followed by the same processes succeeding the issuance of the 1st tranche of the AIP.

At the end of exercise for the 3rd tranche of the AIP, the customary tender period shall begin by issuance of a final set of tender documents which is a consolidated set of all 3 tranches of the AIP after considering all clarifications, replies and responses from all parties and finally the eventual tender submission by the tenderers. This results in a shorter tender period with little or no tender queries expected after tender opening stage. It also provides more certainty on tender requirements and in addressing all issues holistically but with the individual tenderers holding their special "ace-cards" close to their chest.

- **Early Warning Regime** is a mechanism for any team member to warn other team members if there are matters which may impact timely completion or increase cost or affects performance of the project. Broadly speaking, these matters will include not only construction issues but matters related to design, safety, environment, cost & contract and even third party interface issues. For example, contractors may raise ***early warnings*** due to pending issuance of drawings or discrepancies in between the contract documents or if the contractors encounter adverse physical conditions. On the other hand, employers or consultants may raise early warnings due to progress of works which are not in accordance with the programme or non-conformance of quality standards or safety related issues.

  The contractor enters all early warnings in an ***early warning register*** and update it for circulation on a regular basis. The register shall contain all requisite details such as the date of notification, description and consequences of the early warnings and proposed mitigating measures. It is in the spirit of mutual trust and co-operation that team members not only highlight the problem, but suggest various ways that early warnings can be avoided or alternatively reduce the potential impact of early warnings.

  The early warning register will then be used as a basis for discussions during ***early warning meetings*** by all relevant team members who will meet at regular intervals or as required. The team members will then consider the proposed mitigating measures, seek solutions based on ***what's best for the project***, decide on actions that shall be taken and who in accordance with the contract shall take them. Early warnings which have been avoided or have passed shall be removed from the early warning register. During early warning meetings, all team members adopt a "no-blame culture" as a sign of mutual respect for other team members.

  Early warning meetings are also used to drive early resolutions of time and cost claims by providing resolute time frames for notification, substantiation, verification and assessment of such claims in accordance with the provisions of the contract. For avoidance of doubt and using PSSCOC as an example, the methods of valuation of variations shall still be in accordance with Clause 20 and assessments of extension of time claims shall still be in accordance with Clause 14 of the said contract. The impetus here is to resolve time and cost claims in a timely manner without waiting till the tail-end of the project so that the final account can be finalised within a shorter time-frame upon completion of the works. Only then, it can

be said that the team members have collaborated and acted in the spirit of mutual trust and cooperation.

All pertinent documentations and/or substantiations shall be made available for all early warning meetings. This may include as to how early warnings have impact on the programme, the actual and/or estimated cost to be incurred and the likelihood or severity of those early warnings happening. In order to drive early resolutions of time and cost claims, the early warning register must be supported by status reports for requests for information ("RFI"), confirmation of verbal instructions ("CVI"), pending and approved instructions; and registers for variation orders and extensions of time. There will be great motivation for any team member to raise early warnings as soon as possible with the aim of maximising the time available to consider early warnings in a collaborative way and thereby increasing the likelihood of finding the best solution.

- **Key Performance Indicators ("KPI")** is intended to provide means to measure, state how it is to be measured, the target that is to be achieved, and the incentive to contractors if it is achieved and/or the consequence if it is not achieved. The KPIs are stated in a Schedule of Key Performance Indicators ("Schedule"). Throughout the entire duration of the project, the contractor reports to the employer and the consultants his performance against each of the KPIs at intervals stated in the Schedule. If the performance report states that a KPI will not achieve the target stated in the Schedule, the contractor submits to the employer and the consultants his proposals for improving performance. This will enable team members to work together to ensure the targets are met whenever possible. The contractors are rewarded according to the incentives stated in the Schedule if the target stated for a KPI is improved upon or achieved, and/or conversely if the target stated is not achieved.

  One of the more common KPIs in Singapore is the Bonus and Discount Scheme for Construction Quality Assessment System ("CONQUAS") whereby contractors are paid a bonus for each point scored above the upper threshold score. Conversely, the contractors will give a discount for each point scored below the lower threshold score. Other forms of incentives albeit not so common are for Quality Mark for Good Workmanship Certificate Scheme ("QM") and BCA Awards for Construction Excellence.

  Nevertheless, not all KPIs are based on incentives. For example, some contractors impose penalties on their subcontractors, for violations or infringements of workplace's safety, health and environment rules on site. Another example is where an institution of higher learning imposes penalties on contractors for failing to respond and/or rectify specified defective and/or maintenance works within a specified period.

  Alternatively, some KPIs are used squarely to measure performance of contractors for employers' feedback and satisfaction rating or to compare against national statistics without having any incentives or disincentives. In the former scenario, some employers demanded that final accounts are finalised within a specified period from completion of works. In the latter scenario, some employers strived for zero fatality with the aim of reducing the workplace fatality rate set upon by the Workplace Safety and Health Council.

- **Dispute Avoidance and Early Dispute Resolution** are means of avoiding claims from turning into disputes or resolving these claims as early as possible without leaving these claims and/or disputes till the tail-end of the project or referring these disputes to be decided by tribunal, whether in arbitration or in litigation. Apart from arbitration and litigation, there are other alternative forms of dispute resolution such as adjudication. Any of these forms of dispute resolution are still considered formal with strict statutory provisions and procedural laws to be followed and hence may not reflect the spirit of mutual trust and co-operation in collaborative contracts.

In collaborative contracts, the more appropriate approach towards resolving any disputes is through negotiation or mediation-like techniques. This approach will assimilate aptly in either PSSCOC, REDAS or S.I.A. as any of the standard forms of contract mentioned allows for both parties by mutual agreement to refer any disputes to mediation before referring the same to arbitration. For the avoidance of doubt, none of the mentioned standard forms of contract make it a condition precedent for the parties to refer the disputes to mediation before referring the same to arbitration. As such, both parties still reserve their rights to refer any disputes to arbitration without referring the same to mediation.

Henceforth, parties may by mutual agreement agree to refer any disputes to other forms of mediation like techniques which are more suitable for collaborative contracts such as the two approaches suggested in the paragraphs below.

The first approach is establishing a ***steering committee*** which comprises senior representatives of the employer, the contractor and the key consultants. The steering committee meets at regular intervals or as required to ensure that the project continues to be executed in a spirit of mutual trust and co-operation, monitor status of variations or other claims, and mediate in the event of disagreement between the parties at site level.

Both parties may, by mutual agreement refer any disputes to the steering committee subject to the current provisions in the conditions of contract. For example, under PSSCOC, both parties may only refer the dispute to the steering committee after referring the same to the Superintending Officer ("S.O"). Only if any of the party is dissatisfied with the decision of the S.O that the party may refer the dispute to the Steering Committee.

Each party submits to the other a brief statement of case together with supporting evidence. The steering committee convenes as required and adopt the appropriate procedures to resolve the dispute. The procedures could be based on negotiation, mediation or the like. The steering committee will then produce a list of issues agreed and not agreed, and the parties put into effect the issues agreed.

Apart from the steering committee, another approach that can be adopted in resolving any claims and/or disputes in collaborative contracts is to refer such claims and/or disputes to a third party such as an ***independent expert*** who is an expert in the subject matter of the claims and/or disputes. The subject matter could be in terms of time, cost or quality. The independent expert is to be mutually agreed and jointly appointed by the differing parties or can be nominated by an appointing authority named in the contract. The parties appoint the independent expert using a standard term of agreement which includes the terms of appointment, remuneration, replacement and termination of the independent expert. Both parties shall make available all information, access to site and appropriate facilities as the independent expert may require. The independent expert shall then give his/her determination in writing and with grounds of his/her decision.

Whilst both of the above approaches are not totally novel, perhaps it is time to bring any of these approaches under the framework of a local standard form of contract. The aim here is to avoid claims from turning into disputes and resolving claims as early as possible without leaving these claims till the tail-end of the project or referring these disputes to be decided in arbitration or litigation by adopting approaches that suit collaborative contracting such as those techniques used in negotiation or mediation.

iN-TEAM

There is an old saying that ***"There's no I in Team"***. This saying means that it is not wise to work alone but rather together with others in order to achieve agreed goals. This saying is especially true in collaborative contracting whereby all team members work together in a collaborative environment from inception and until completion of a project. Collaborative contracting requires a paradigm shift in the way employers, contractors, subcontractors and consultants collaborate during pre-contract and post-contract stages. It requires a change of mind-set in all team members so that the notion of ***"mutual trust and co-operation"*** can be upheld at all times.

At **THREESIXTY CONTRACT ADVISORY**, we are market leaders in providing advice on collaborative contracting. We are well-placed to assist our clients by sharing our knowledge and experience in formulating collaborative contracting for application in Singapore. Collaboration pledge, early contractor involvement, early warning regime, dispute avoidance and early dispute resolution are some of the broad spectrums of collaborative contracting we can offer to our clients and which would ultimately benefit our clients in terms of expeditiously completing the project on time, within budget and to the required quality.