

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for
the In-House Legal Community

Session 4 - Early contractor involvement: increased use to minimise risk and maximise project objectives

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Friday, 4 March 2022

Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today

1. Introduction

- Early contractor involvement [ECI] is not new
- Australian Government has been doing it since 1992 – the release of ‘old Yella’ – the Defence Managing Contractor
- But, two-phase ECI – with an initial design phase followed by a subsequent construction phase on a fixed time/fixed price basis - is!
- And, why? Because various Australian Government agencies have realised the significant benefits to project risk mitigation, value management, programming, innovation and the like
- This paper reflects the ECI models we have developed to date

2. Outline

- ECIHC – Overarching Intent
- ECI Objectives
- ECI Input – “ECI Design Error Input” and “ECI Innovation Input”
- Design Review Process
- Designer - Key Obligations
- ECI Endorsement Notices
- Additional Construction Issues

3. ECIHC – Overarching Intent

- Not intended to be complex or an entirely new delivery model
- Intended to augment BAU design and construction delivery obligations through ECI in design
- Two-phase delivery – “Design Phase” and “Construction Phase”
- Overall intent – ECI is best for project and to the benefit of ALL parties
- Apart from the delivery agency, consider the designer's and contractor's perspectives (significant proactive risk reduction)

3. ECIHC – Overarching Intent (cont.)

- Successful ECI delivery requires strong collaboration, but this does not equal passive agreement – positive conflict theory
- Consistent with a broader industry shift to earlier engagement and collaborative contracting
- ECI is scalable – can be ECI “heavy” or ECI “lite” – the contract can and should be tailored to the risk profile of each project

4. ECI Objectives

- The project contractors' (designer and contractor) 'paramount obligation' - to maximise the extent to which "ECI Input" is incorporated in the design (subject to contract compliance and contrary direction)
- In particular, project contractors will be seeking to maximise the "ECI Objectives" in getting to "Construction Phase Agreement":
 - design and construction is buildable, fit for purpose and free from defects;
 - optimal management of all project risks including risk reduction studies;
 - programming, staging and sequencing to minimise disruption to operations and achieve completion within the shortest period possible; and
 - design and construction within available budget (as a minimum) and so as to maximise value for money.
- These ECI Objectives are the "glue" that bind the project parties (but in a 'best endeavours' not strict 'black letter' sense)

5. ECI Input – ECI Design Error Input and ECI Innovation Input

- **ECI Design Error Input** – Contractor input into the design to rectify any “ECI Design Error”, being a “Design Error” that:
 - causes an issue relating to the contractor’s activities;
 - causes a lack of compliance of the works with a statutory requirement or the contract;
 - requires rework or additional work; and
 - a prudent, competent and experienced contractor would have foreseen as involving additional work or changes to the works
- **Compensable Design Error** - “Design Error” that is not an “ECI Design Error” (implications in “Construction Phase” to be discussed)
- **ECI Innovation Input** – Contractor input into the design to maximise the achievement of the ECI Objectives, including cost planning and programming recommendations

6. Proposed Design Review Process

- Level of detail depends on whether ECI “heavy” or ECI “lite”
- The contact administrator (PMCA) will provide the contractor with the design in accordance with a master milestone program
- During the Design Phase, the designer’s program should take precedence (as the designer is the “lead”), so the contractor’s program should dovetail with the former

6. Proposed Design Review Process (cont.)

- The contractor will then undertake a design review for ECI Design Errors and ECI Innovation Input
- Design Review for ECI Design Errors: will include both providing PMCA/designer with all ECI Design Error Input as well as detailed advice as to actions required to rectify ECI Design Errors
- Design Review for ECI Innovation Input:
 - provide PMCA/designer with ECI Innovation Input; and
 - review, discuss and agree all ECI Innovation Input with PMCA (subject to PMCA's final say failing agreement)

7. Designer Key Obligations

- ‘Paramount obligation’: develop and finalise the design so as to maximise the incorporation of ECI Input
- Fully and promptly review all ECI Input and promptly give PMCA written notice of acceptance, rejection (with detailed reasons) or an alternative proposal
- Issue that notice to the contractor (subject to any amendments of the notice directed by PMCA)

7. Designer Key Obligations (cont.)

- If the response in the designer's notice is not agreed by the contractor, or not otherwise resolved by PMCA, the designer must work with the contractor to use **best endeavours to ensure** (in the case of all but final design) or **ensure** (in the case of final design) that the issue is resolved before non-rejection by PMCA of the relevant design, subject to PMCA's final say
- Duty on the project contractors to act reasonably having regard to their "paramount obligation"
- Maintain detailed records of ECI Input proposed by the contractor and agreed or determined resolutions of all ECI Input
- Notify PMCA within a reasonable time of the details of all disagreements between project contractors as to ECI Input

7. Designer Key Obligations (cont.)

- Provide the interim and final ECI endorsement notices as described below prior to non-rejection of design
- Convene all meetings and provide all required documents etc. for the resolution of all ECI Input
- During the Design Phase, the project contractors' obligations are output-based rather than input-based and the scope of the services is subject to fluctuation
- In essence, the designer is the “lead” project contractor during the Design Phase

8. ECI Endorsement Notices

- Before achievement of each design milestone, the project contractors will be required to provide:
 - an “interim ECI endorsement notice” confirming that all ECI Input has been resolved to the satisfaction of the project contractors, **except to the extent expressly set out in the notice**; and
 - for the design for the final milestone, a “final ECI endorsement notice” stating that all ECI Input has been resolved to the satisfaction of the project contractors

9. Additional Construction Issues - Outline

- Additional Contractor Design Phase obligations
- Co-ordination during Design Phase
- Construction Phase Agreement
- Overview of Construction Phase

9.1. Additional Contractor Design Phase Obligations

- Structure of 'indicative' contract price – at time of tender
- Optimising program and cost plan
- Finalising date[s] for completion and contract price
- Risk reduction
- Refinement of project plans
- Other ECI deliverables – sustainability, local industry, etc

9.2. Co-ordination during Design Phase

- The project contractors both have fundamental and mutual obligations to coordinate with each other and program their activities accordingly during the Design Phase
- The ECI endorsement process enables outstanding issues to be flagged in interim notices but requires resolution of those issues by the final notice
- The PMCA will be the “umpire” between the project contractors during the Design Phase

9.2. Co-ordination during Design Phase (cont.)

- However, the success of the Design Phase and the achievement of Construction Phase Agreement depend on maximum collaboration between the project contractors
- Otherwise, any disputes during the Design Phase between each project contractor and the delivery agency will be dealt with under the usual disputes provisions of the relevant project contract (say, expert determination/arbitration)
- If ECI “heavy”, consider use of an “ECI Integration Framework” to drive further collaboration, which could include a “PRISM” – a proactive risk and issue settlement model

9.3. Construction Phase Agreement

- The Construction Phase will only proceed if Construction Phase Agreement is achieved by the contractor.
- Construction Phase Agreement occurs if:
 - the designer has completed the final design documentation;
 - the project parties have provided a “final ECI endorsement notice”;
 - final cost plan, project plans and program have been approved (at the delivery agency’s absolute discretion);
 - the lump sum contract price has been agreed by the delivery agency; and
 - “Regulatory Approval” has been achieved

9.4 Overview of Construction Phase

- Not pure “D&C”, so no fitness for purpose wrap, but...
- Construction in accordance with design and statutory requirements
- Workmanship and materials – fit for purpose
- Responsibility for Design Errors (other than Compensable Design Errors) – note the changed nature of RFI
- “Latent Conditions” – risk reduction changes the scope of this
- Role of “GMP” as to trade costs and “as let trade cost schedule” – transparency and potential share of savings
- Potential for innovation in packaging – self-performed work, etc

10. Closing Remarks

- Exciting evolution of project delivery models available to the Australian Government
- Reflects an optimal hybrid of managing contractor and head contractor delivery
- Entirely flexible model – can be tailored to the full spectrum of projects
- I strongly counsel that ECI now be in your “project delivery model arsenal” at the inception phase of your next project

Questions?

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