

COLLABORATIVE CONTRACTING IN CANADA: COMING IN FOR A LANDING?

Procurement approaches for large complex infrastructure projects need to be refreshed and updated from time to time, and this has particularly been the case for design-build projects in large-scale public infrastructure. Canada is, arguably, going through such a renovation process right now. **Will Buckby**, Partner at law firm *Beale & Co and ****Andrés Durán**, a lawyer in Toronto, Ontario, join together to discuss.

Several jurisdictions in Canada have started to move away from the P3 contract model for certain types of design-build projects to models that encourage public and private sector collaboration, risk-sharing, and operating under shared project objectives, instead of contract models that rely on transferring significant risk to one party and that tend to end up with expensive and distracting disputes when issues arise on a project and after completion. [“Let’s Do This Together – Collaborative Contracting.”](#)

The alliance contract is one form of collaborative contract that has been used successfully in

several countries and has now emerged in Canada. Other forms of collaborative contract forms exist in Canada such as the CCDC’s IPD (Integrated Project Delivery) contract which has been around for some time. However, there are relatively few alliance contract and other similar projects in Canada. Many in the industry are wondering whether this model will truly take hold throughout Canada, when, and in what form. The advantages of the model are many, but stakeholders need to be careful when changes are made to traditional alliance contract terms that can undermine the principles and mechanisms in the model that

incent collaboration and a proper sharing of risk.

EVOLUTION OF DESIGN BUILD PROJECTS, AND A DESIRE FOR ALTERNATIVES.

Throughout the history of design-build, owners, contractors, engineers, and other critical stakeholders have used different contractual models. This is an evolutionary process and public and private sector stakeholders have reacted to challenges that have emerged as contract models are stress tested on live projects. Design-build as a general procurement approach has significant advantages

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particularly when the owner seeks a relatively efficient process from early project planning to completion. It is also well suited to large complex projects where the direct relationship between the contractor and designer(s) can be advantageous to a project.

The P3 model was popular in Canada for large infrastructure projects for some time but has been strained in the recent past, particularly for large complex brownfield projects with too many unknowns at the time of project bid. P3s are increasingly seen as unsuitable for particularly complex projects such as transit projects in large urban environments, and generally on projects that incorporate complex new technology. Bidding with 30% design (among other issues) is now generally seen as starting a project with too many unknowns, and therefore too much risk, for the fixed price, date certain structure of a P3. Several important players in Canada have said that they will no longer bid to fixed price, turnkey design-build P3 projects if the scale and character of the project makes the risk too great.

Proper risk identification and collaboration between all stakeholders is critical to the success of a design-build project. So, the Canadian market is generally looking for other

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contract approaches that will help all stakeholders better manage risk and cost, and help foster better collaboration and reduce disputes through the life of a project.

THE ALLIANCE CONTRACT STRUCTURE

There are different collaborative contract forms. Alliance is one of the more common archetypes. The basic premise is that all key parties work together to define and manage the project: owner, lead designer, lead engineer, construction contractor, and (in some cases) key subcontractors and subconsultants, and key suppliers. All parties are part of the project and are all in it together, such that project risks and their associated impacts and costs are shared.

The Ottawa Light Rail Transit Commission in 2022 stated that “the alliance model incentivizes a team-based approach, reducing the chance of an adversarial dynamic developing between the public procurer and the private-sector partners in the face of project challenges”. [Final report of OLRT Public Inquiry | Ottawa Light Rail Transit Commission \(gov.on.ca\)](#)

Infrastructure British Columbia states that an alliance contract “is a true collaborative contract”. “The Alliance model is typically associated with complex infrastructure projects where the project scope is difficult to define fully, risks cannot be adequately defined or measured, or the cost of transferring risk to the contractor is too high. Additionally, this model may be chosen for projects with tight timeframes,

where the owner is able to provide value through involvement in the delivery and implementation of the project or in the case of challenging stakeholder issues that need to be managed.”

Infrastructure BC has created its own alliance document templates. [Alliance - Infrastructure BC](#)

There have been more alliance projects in Canada in recent years, such as the Union Station project in Toronto, and the Cowichan Hospital project in British Columbia. However, it is still relatively uncommon, and no consistent contract form has emerged.

Key features of an alliance contract are:

1. Collaborative decision-making through an integrated project governance structure.

Joint governance committees such as an Alliance Management Team (AMT) and higher-level Alliance Leadership Team (ALT) include representatives from the owner, construction contractor, lead architects and engineers, and other major stakeholders as relevant to the project, each having a meaningful governance role. The parties are encouraged to work together to proactively manage risks, find solutions collectively, and take responsibility for achieving what is best for project, and maybe most importantly working from a shared definition of what is “best for project”.

An operating clause in a recent alliance contract in Canada provides that the parties agree

that “all decisions will be made on a best for project basis”, “we all win, or we all lose, based on project outcomes”, “win-lose outcomes are not acceptable”, and “we will develop and foster a culture of trust, collaboration and innovation”.

2. Target cost, not fixed price.

Alliance parties work together at the early stages of the project procurement to come to an estimate of the total project cost, the “target cost”. The costs are assessed, and then shown to the client throughout the project on an open book basis. This transparency is intended, in part, to foster trust and allow the joint governance committee to make collective assessments about the health of a project as it progresses as actual costs are monitored and compared to the target costs. The target cost may be adjusted to reflect changes to project scope, unforeseen issues and challenges that emerge, or any other factor impacting what was targeted.

3. Win together, lose together.

The compensation model in an alliance contract incorporates pain-share / gain-share mechanisms to ensure the parties share in the risks and rewards of the project. The private sector parties will share in costs that exceed the target costs up to the amount of their respective overhead and profit, and the client takes all the risk of cost overruns that exceed the target cost after that.

4. No blame culture. The parties waive their rights to engage in formal adversarial disputes processes (such as litigation), except for cases of “Wilful Default” or liabilities triggered by extreme circumstances, such as insolvency, or deliberate wrongdoing. The private sector parties’ liabilities for cost overruns above their overhead and profit are limited to circumstances of Wilful Default, and even then with a limit of liability sized to each parties’ proportional scope of the project. This mechanism is important to help incentivize the parties to collaborate when issues arise on a project, and is intended to reduce or even eliminate protracted disputes and litigation.

IS THE CONTRACT ACTUALLY AN ALLIANCE CONTRACT?

Those signing up to an alliance contract should be careful that tweaks or new features added into an alliance contract adapted by a particular client do not undermine the principles that make up the structure. As is typically the case when new types of contracts are introduced in a market, local contract norms and habits can sneak in and create something entirely new without it being obvious, or even intentional at times. This can happen as a result of specific contract preferences, or a desire to ultimately retain a risk structure that reflects what the client is used to. The fine print in the language is important.

“ The first question when looking at the procurement documents in an alliance project should be, is the contract actually an alliance contract... ”

Deviations in contract language to watch out for when comparing a specific contract to a pure alliance contract include:

- A disproportionate amount of power for one party’s representatives on an ALT or AMT relative to the other parties’ representatives.
- The inclusion of concepts in a definition of Wilful Default that should not be there, such as breaching obligations for meeting project specifications (which should be subject to the pain/gain compensation regime).
- No limits of liability, or limits of liability that are disproportionately high relative a parties’ scope of work. Architects, engineers, and others with a smaller scope in the total project should be particularly careful to ensure that the contract language does not expose these parties to the same level of financial risk as the participants with a larger scope.
- Definitions of overhead and profit that expose participants to more cost risk than should be the case for the expected risk / reward in an alliance project.

The first question when looking at the procurement documents in an alliance project should be, is the contract actually an alliance contract or is it a hybrid, or is it something else entirely that is simply called an “alliance” contract?

COLLABORATIVE APPROACHES TO PROJECT DEVELOPMENT MORE BROADLY

There is clearly more emphasis in Canada on collaborative approaches to project development even when the final contract is not one of the collaborative contract forms. Project participants are making great strides to change adversarial behaviours and embrace and encourage a more collaborative approach to project delivery. BIM and other project collaboration tools have assisted in this journey.

Progressive procurement is a collaborative approach to project procurement that is becoming increasingly common in certain jurisdictions in Canada. A progressive procurement can result in the execution of an

alliance contract, or another form of contract such as a design-build fixed price, or even a P3 form of contract. In a progressive procurement private sector participants compete to be a project development partner to the client, and then the selected parties go through a lengthy project development stage where the parties work together with the client to develop project parameters such as design parameters, scope, risks and a refined budget. These processes should improve transparency and help all parties land on an aligned understanding of project risk and how it should be managed (and by whom). The private sector partner team will then execute the relevant agreement if successful during the development phase.

The key point is that there is broad acknowledgement in the market that defining risk collectively and collaboratively helps to give all participants to a project a better chance at having a successful project.

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CONCLUSION

There are some alliance and similar contract projects in Canada, and certainly more now than 5 years ago. However, it has not taken hold in the same way as the P3 model did at its peak. What will the Canadian approach to alliance contracts look like if/when it settles? Or will it always differ in material ways from project to project depending on the owner. Given the increased calls for more collaboration and balanced sharing of risks the time seems ripe for a significant push for a base standard alliance form and approach across the country, or in one or two jurisdictions that have a large pipeline of projects.



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