



## Publications

[Home](#) > [Publications](#) > [Relationship-first contracting](#)

### Relationship-first contracting

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There is the saying that a good contract does not a good project make. That is probably a little startling, especially for lawyers, but the reality is that beyond the "contract words" it is the parties who must make the contract work.

The traditional method of contracting is to draft for the worst. That is important, but the focus is on the bump at the bottom of the cliff. At that time the remedies may only be "nuclear" and the commercial value of recovery can be questionable.

Contracts are all about relationships. People are always behind the contracts and responsible for the management and delivery of the agreed outcomes. Traditional contracting doesn't elevate or primarily focus on this reality and behavioural dynamic.

Alliance contracting does, with the aim of driving behaviour at a point well before the cliff-face free fall.

An alliance contract will still deal, precisely, with worst case scenarios, but the big stick provisions come after a range of other provisions. These deal with behaviour, services or project management, issue circuit breakers and a thorough exploration of issue resolution before the point of formal determination by an arbitrator or a judge.

It should be also be noted that alliance contracting is different from "partnering" which usually involves traditional type contracts that have an overlay of specific relationship principles.

Alliance contracting is becoming popular in Europe and the United States, mostly in the infrastructure and construction sectors, and is starting to catch on in New Zealand and Australia.

For example, Tranz Rail recently employed alliance contracting techniques for the outsourcing of its infrastructure engineering maintenance services.

An alliance contract was also announced last year for the \$68m design and construction of the Grafton Gully roading project in central Auckland and the Australian Defence Organisation has recently enthusiastically taken up alliance contracting as a pilot model for a variety of contracts, including the acquisition of anti-submarine warfare equipment and upgrading of the ANZAC ships.

#### ALLIANCE PRINCIPLES

The idea is that the alliance principles support and drive the actions of the parties during the project. Alliance principles include concepts such as:

- decisions made on the basis of "best for project";
- responsibilities clearly defined within a "no blame" culture;
- innovation is to be encouraged and provide a key driver to the success of the project;
- the parties to provide reasonable access to all personnel, materials and other resources needed for a successful project; and
- all communications to be open and based on a relationship of trust and honesty.

#### CONTRACTS BEST SUITED TO ALLIANCING

Alliance contracting is best suited to large and complex projects or services provision where:

- the scope of the tasks to be undertaken can not always be defined in specific detail (i.e. there are difficult to define, or changing, work scopes);
- there is a need for innovation and step-change development in elements like technologies, methodologies and processes; and
- the project's budget may require change over a period of time and it would be uneconomic to rely on a fixed price lump sum spread out over the term of the contract that prices in a large number of contingencies.

#### KEY FEATURES OF ALLIANCE CONTRACTING

The key features of most alliance contracts are:

- key performance indicators (KPIs) to measure the contractor's performance;
- a set of alliance principles to guide the parties interaction;
- a cost reimbursable approach, backed by open-book auditing of all costs, overheads and margin;
- an alliance management team at the interface level and an alliance board for "top level" decisions (usually, all decisions to be unanimous); and
- comprehensive dispute resolution provisions which have very limited recourse to the courts and termination ability, for breach of the contract.

Let's briefly look at a couple of these points.

##### Key Performance Indicators

The real reward for contractors lies in their performance, with KPIs being set to monitor and assess the contractor's performance and the "at risk" margin then being allocated accordingly. Putting an element of the contractor's reward at risk depending on its performance ensures that both parties' goals are aligned i.e. achievement of the best results for the best price.

Some examples of KPIs includes:

- meeting the target cost set for each relevant period;

- meeting the scheduled time for completion;
- safety performance; and
- customer satisfaction levels (measured by customer (i.e. owner/operator) satisfaction surveys).

**Dispute Resolution**

Alliance contracting recognises that disputes will occur, but provides for most disputes to be resolved using an informal dispute resolution procedure. This usually consists of first, resolution at the operational level then, if need be, senior management level, followed by the alliance board and then, possibly, mediation.

Resolving disputes at the lower "operational" end of the management spectrum helps to avoid delays and unnecessary cost if at all possible. Arbitration is generally avoided because it is too similar to the court process and can be long and expensive and is, by its nature, adversarial.

Recourse to the courts is often limited to the greatest extent possible. Some alliance contracts provide that recourse to the courts and or termination is only allowed for breaches such as wilful default or insolvency.

**CONCLUSION**

Alliance contracting attempts to address the disadvantages of traditional contracting - namely the creation of adversarial relationships, a lack of trust and open communication and harsh legal contract provisions. Alliance contracting counteracts a tendency for contractors to bid low tender prices which are then "built up" during the term by way of claims or unnecessary variations.

So, an alternative, and increasingly popular approach, to contracting. Sound a bit touchy, feely? Not according to the overseas trends.

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