



# Government participation evolves as alliance contracting hits the mainstream

The growing national appetite for infrastructure is driving an evolution in government procurement, to the point where alliance contracting is starting to achieve mainstream approval. With many of the historical perceived impediments to government participation in major alliancing projects being effectively resolved through the use of sophisticated and analytical approaches, many more projects are likely to be delivered through the alliance methodology.

## Development of infrastructure procurement

The recent state government budget season heralded a very substantial national infrastructure

program stretching over the next decade, with projected year-on-year expenditure growth in excess of five per cent.

An increased appetite for infrastructure procurement is not the only factor that will shake the industry and influence procurement methodologies over the next few years.

Government procurement is evolving from a merely mechanical act into an integral tool for achieving many of the government's strategic objectives.

The construction and engineering industry continues to strive to free itself from the historical shackles of inefficiency, lack of productivity and disputation, while the sustained attack on builder's margins continues to strain industry profitability.

As these factors start to coalesce, the challenge will be to use procurement methodologies to look after the interests of all of stakeholders (principals, contractors and the community) and deliver the considerable infrastructure needed over the next decade. It is on this landscape that alliance contracting is now evolving into the mainstream of available procurement methodologies.

## Alliancing hits the mainstream

The continuing evolution of alliance contracting has crystallised some interesting discussion points including:

- whether competitive alliances are desirable or not
- whether it is necessary to share all risks, or could some risks be specifically allocated

- whether an alliance facilitator is truly independent or an instrument of the principal, 'putting the alliance in place'
- the extent to which margins should be pruned as part of developing the target outturn cost, and the point where the risks of driving down profitability for a 'business as usual' project become too great
- whether alliance and PPP methodologies can be woven into a single hybrid methodology
- the circumstances in which the public sector encounters insurmountable obstacles in embracing alliancing.

The arrival of alliance contracting into the mainstream, and its availability to public sector procurement authorities, is reflected by the Victorian Department of Treasury and Finance's recent publication of a *Practitioner's Guide on Project Alliancing*. This invaluable collection of current thinking on alliance contracting is a strong starting point for anyone wanting to become familiar with this delivery methodology.

## Perceived impediments to government participation

The perceived inability of government representatives to have sufficient authority to make the appropriate decisions in a timely manner has often been cited as a fatal impediment to government participation in alliance projects.

It was usually assumed that private sector representatives had greater authority and were more willing to use it than their public sector counterparts.

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## Alliance contracting hits the mainstream *continued*

However, participants experienced in alliance projects involving the public sector generally report that it is the private sector representatives that have more difficulty with authority issues and the management of their head office organisations than their public sector counterparts.

The similarities between an alliance delivery methodology and a cost-plus methodology was thought to be another barrier, and it was assumed that demonstrating value for money under the alliance methodology would also be difficult.

The development of audit and accounting techniques to support alliance contracting – prior to the establishment of the target outturn cost and during the delivery phase – together with a more sophisticated approach to value-for-money analysis, have gone a long way to dispelling any lingering concerns.

Indeed, the combination of sophisticated tools and a more analytical approach (as evidenced by the gateway review programs being implemented for major projects) has probably led to a more thorough and credible value for money analysis for the alliance delivery methodology than there ever was for traditional delivery methodologies.

Recently, both the Victorian Treasurer and the New South Wales Public Accounts Committee have recognised a legitimate role for alliance contracting in public sector procurement. Both are enthusiastically supporting the consideration of project alliancing for large projects. A likely outcome is that many more projects will be delivered through the alliance methodology.

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# Reciprocal enforcement: danger for the unwary

The recent agreement between the Hong Kong and Mainland China governments to introduce reciprocal enforcement of judgments in each others' courts has potentially far-reaching consequences for anyone having assets or doing business in Hong Kong and China.

Reciprocal enforcement will strengthen Hong Kong's position as a regional centre for dispute resolution and will ultimately assist in the integration of Hong Kong and Mainland systems. But, potential dangers are lurking for the unwary.

### What is it?

The agreement is called 'An Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters by Courts of the Mainland and of the Hong Kong Special Administrative Region (HKSAR) under a Choice of Court Agreements between Parties Concerned' (Arrangement). It will become operational only when the relevant legislative procedures have been completed and the Mainland gives effect to the Arrangement.

### What is different?

Before the Arrangement, Hong Kong judgments were not enforceable in the Mainland courts at all. A Mainland judgment could not be enforced in Hong Kong without commencing a fresh action under the common law.

Previously, judgments of foreign courts or arbitration tribunals could be enforced in the Mainland in accordance with international agreements such as the New York Convention. This ceased to apply to Hong Kong after 1997 when it was no longer regarded as a foreign country.

In Hong Kong foreign judgments are enforced under the Foreign Judgments (Reciprocal Enforcement) Ordinance, which operates by a

simple registration system. The Ordinance designates those countries whose judgments are recognised. A similar system will apply to future Mainland judgments in Hong Kong.

### What is the scope of the Arrangement?

#### *Money judgments for liquidated sums*

The Arrangement applies only to money judgments on commercial contract disputes where the parties agree in writing that a Mainland/or HKSAR court will be the exclusive forum for resolving disputes.

So, if a commercial contract states that Hong Kong is the exclusive venue for dispute resolution, a judgment in the Hong Kong court will be enforceable through the Mainland courts. Conversely, a judgment from a Mainland court will also be enforceable by way of the Arrangement through the Hong Kong court.

The term 'money judgment' will apply only to liquidated sums. A judgment for unspecified damages could not be enforced, nor could equitable judgments for injunctions or specific performance.

#### *Commercial contracts*

The Arrangement will apply only to commercial contracts, which excludes other legal matters such as employment, tort claims, family law, or insolvency issues. However, the Arrangement could apply to these types of matters too if the parties specifically elect to do so.

#### *Court levels*

The Arrangement will apply to judgments of courts of a specified level. In Hong Kong it will be the District Court and above.

On the Mainland, potentially include a huge number of courts are covered by the Arrangement. They include the Higher or Intermediate