

Relationship and Alliance Contracting by Government

Alliance contracts are a recent form of relationship contracting. It is sometimes argued that alliance contracting is inconsistent with the obligations of government. This note examines some of those arguments.

Problem Areas

Possible areas where problems could arise are:

- evaluation of alliancing capacity/compatibility
- no fixed price before selection
- participation of principal in alliance board/alliance teams/Integrated Process Teams (IPTs).

Each of these is a significant topic in itself and we have space here only to raise them as issues and to consider them very briefly.

Evaluation

Since the changes to the Audit Act and Regulations in 1989, Commonwealth agencies have been free to pursue in their procurement 'value for money' by the most effective means. Accordingly, considerations such as quality, fitness for purpose and capacity to deliver can be considered as well as price. Even so, the focus has generally been very much on the item (or service) to be delivered.

Now, with the advent of alliancing, one of the criteria for selection is a bidder's ability to operate successfully within an alliance relationship. If it is considered that the project demands an alliancing process, then it is reasonable that the bidder's ability to deliver through that process should be the subject of assessment. However, besides making it clear that this ability is a selection criterion, the method of making the assessment must be reasonable and conducted fairly.

Alliance workshops are a usual part of the assessment process and, as these will involve more interaction than normal between principals and bidders, particular care must be taken to ensure fairness. To ensure equality of opportunity and consistency of assessments, considerable preparation is required, including rehearsal, planning of the positions to be taken and training of participants. It is inadvisable to include actual output from the workshops in the evaluation as it will be difficult to distinguish the bidder's input from that of the principal.

No Fixed Price

One of the fundamental elements of an alliance project is that contractor participants will be paid on a cost plus basis. Although their fee will be at risk if key performance indicators (including coming in at or below the target costs) are not met, it is true to say that costs are in fact not fixed. There will therefore be no definite price fixed when the preferred tenderer is chosen. Although this has been criticised, in our opinion it is not necessarily contrary to the requirement to seek best value for money.

The Commonwealth Procurement Guidelines (September 2001) set the test of value for money as whether 'the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle.' The justification for using a cost plus payment method must be tested exhaustively against this, including an assessment of the real advantage a so called 'fixed price' would have in the context of the variations to price likely to be necessary during the particular project if a fixed price were used.

Alliance Board, Alliance Teams and IPTs

The principal normally will be involved with other alliance participants on the Alliance Board, the Alliance Management Team and Integrated Process Teams (IPTs). A number of important issues arise from this involvement. First, it will be necessary to ensure that each representative has the necessary (actual) authority from their respective organisations to do what is required of them. It will also be necessary to state clearly what the limits of that authority are, and to make sure that any financial functions allocated to a contractor comply with the requirements of the *Financial Management and Accountability Act 1997*.

Secondly, there is a risk that the close cooperative relationships on the board and those teams could be regarded as giving rise to a 'fiduciary relationship'. This would introduce considerable problems for government representatives as it would raise questions about whether they could use their position or knowledge to the disadvantage of another alliance participant. That is, there could be a conflict between their obligations as representatives (employees) of the Commonwealth and their personal obligations as members of the board or team. While in principle, a fiduciary relationship could be expressly excluded, there is still the danger that a court would see such a relationship as arising in the particular circumstances or from actions of the parties.

Thirdly, IPTs are increasingly widely used in relationship contracts (that is, not only in those considered to be 'alliance projects'). The difficulty here is in establishing precisely where the dividing line between the responsibilities of the principal and contractors lies. The involvement of a principal's representative in the work of an IPT could well result in the principal being unable (that is, 'estopped') from holding the contractor responsible for the consequences of a joint decision. Even in projects governed by traditional contracts, where there is little involvement of the principal in detailed management of the project, it has often been difficult to establish who was properly responsible for defects, because of some action by the principal. Where the principal is involved in everyday decision making through being represented on IPTs, that difficulty will be magnified. At the very least, it will be important to spell out carefully what the respective responsibilities are and to keep a careful record of the deliberations of IPTs. (There will of course be less need to identify clearly who decided what where the contractor is largely relieved of direct liability for breach of contract, as is the case in many alliance contracts.)

In a typical alliance contract, both parties are taking on unusual liabilities - the principal, for cost overruns and lack of precise specifications and the contractors in respect of their profit (and corporate overhead) being at risk, as well as sharing management of the contract with the principal.

Alliancing is neither suitable nor necessary for many projects and involves considerable expense for the principal both in the selection process and ongoing. These matters merit careful consideration before a decision is made to proceed with alliancing.