Australian Government
Department of Infrastructure and Regional Development

National Alliance Contracting Guidelines

Guidance Note 6
Early Contractor Involvement and Other Collaborative Procurement Methods

September 2015

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Document Updates

This Guidance Note will be updated from time to time to reflect evolving best practices and lessons learned.

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Note

Governments in each jurisdiction will have their own individual approval processes for capital investment projects, as well as policies (e.g. probity) and legislation that will impact on all capital works delivery. These overarching jurisdictional requirements are precedent to the alliance practices covered in this document.

Acknowledgement

This Guidance Note is based on the guidance note of the same name prepared under the sponsorship of the Inter-Jurisdictional Alliancing Steering Committee with membership from:

- Department of Treasury and Finance, Victoria (Chair)
- Treasury, New South Wales
- Treasury, Queensland
- Department of Treasury and Finance, Western Australia
- Department of Infrastructure and Regional Development, Australian Government

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1 Preamble

Governments[1] seek to achieve a broad range of social, environmental and economic objectives on behalf of the community. This results in an equally broad range of capital and infrastructure projects. There are a number of procurement models which can be applied to government projects on a 'fit-for-purpose' basis. The model should be selected on the basis of careful and knowledgeable analysis of the relevant project characteristics and risks, and in line with government policy.

Key to any of these models is effective collaboration between the Client (government agency or Owner) and the Supplier (industry or Contractor) to enhance outcomes including:

- **Public accountability:** Government conducts exemplary procurement processes and achieves good outcomes;
- **Public interest:** Government contracts for what is needed and reduces the potential for unexpected outcomes;
- **Value-for-money (VfM):** Government buys what is required (scope and quality) at the lowest price with an acceptable risk level; and
- **Efficient and effective market engagement:** Government reduces wastage of industry's time and resources during the procurement process.

With these objectives in mind, there are five key themes which underpin the content of this Guidance Note:

1. Collaboration is an essential feature of any effective commercial relationship between a Client and a Supplier.
2. Effective collaboration does not occur because it is required by the contract but because of the leadership and capability of both participants wishing to achieve a common outcome whilst recognising that each participant has different business objectives.
3. Collaboration is a means to achieving a mutual goal and is not an end in itself.
4. Collaboration is enhanced when the parties have an expectation of an ongoing relationship beyond a single event or project. Best for project decisions are more likely in a repeat relationship than the self-interested decisions in a single transaction.
5. Collaboration is not a substitute for competition, poor planning or inadequate Client capability; nor does effective collaboration require financial incentive or dilution of effective project risk allocation.

This Guidance Note has been prepared to assist public officials ensure VfM outcomes are achieved when using collaborative procurement processes such as Early Contractor Involvement (ECI).

A contract, by itself, does not drive collaboration

"There is no magic in the form of a delivery method fostering or avoiding collaboration. It is all about people behaving like grown-ups."

UK industry executive, October 2012

[1] Unless otherwise stated, the expression 'government' is used to denote all the government entities of Australia, which include the Commonwealth of Australia and all Australian state governments and territories.

2 Introduction

This chapter provides an introduction to this Guidance Note, explaining the research approach underpinning the content and how to use the content.

2.1 Purpose of this Guidance Note

This *Guidance Note N^{o} 6: ECI and Other Collaborative Procurement Models* (the 'Guidance Note') has been prepared to provide consistent and leading practice guidance to public sector agencies on collaborative procurement of infrastructure projects (the project *Owner* or the *Client*).

The Guidance Note has been prepared to provide guidance on:

- When to use collaborative procurement;
- How to best structure ECI and other collaborative models;
- How designers and contractors can add value to a project by their early involvement;
- The benefits and risks of using collaborative procurement; and
- How to Clients and Suppliers can collaborate effectively.

The focus of this Guidance Note is on the activities leading up to the contract award for the construction phase as it is in these activities that collaboration is most commonly used and has the most significant impact on project outcomes. The Guidance Note does not address activities post contract award.

In this Guidance Note, the term collaborative procurement excludes Alliancing (a collaborative procurement and delivery model) which is addressed elsewhere[2].

This Guidance Note addresses infrastructure projects, and does not address building projects due to the significant difference in project characteristics and resulting good procurement practices for each.

This Guidance Note does not address issues related to jurisdictional processes that apply to an approval of a project, or the process for the Client's assessment of procurement strategy options as part of the Business Case. There are other (overarching and general) government policies and Guidance Notes that cover these matters.

2.2 How this Guide was developed

This Guidance Note reflects insights from government and industry which have been gained through conducting workshops and interviews in most jurisdictions over the past few years. Other relevant past published papers include:

[2] *National Alliance Contracting Guidelines,* Department of Infrastructure and Transport, Australian Government, July 2011.

- *In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian public sector*, Department of Treasury and Finance Victoria, Nov 2009; and
- *Towards Agreed Expectations – tender strategies to improve design and construct infrastructure delivery outcomes*, Department of Infrastructure and Transport, Australian Government, June 2012.

The research underpinning this Guidance Note was based on qualitative analysis conducted through in depth interviews and workshops[3] to identify:

- causal factors and practices leading to sub-optimal project delivery outcomes; and
- opportunities for improvement.

The analysis was followed by synthesis of best practices that was tested in workshops and projects. This synthesis relied on:

- the best available evidence;
- the practical experience and requirements of decision makers; and
- the knowledge, understanding, wisdom, and judgement of relevant experts.

This use of examples provides the practitioner with more than the 'why' and 'how'. It outlines successful and proven practices in collaboration, and incorporates insights from recent research[4], an October 2012 study tour of the UK Government and industry procurement practices, and consultation with experienced participants as outlined at Appendix D: *Consultation Process – Insights*. By using examples, the practitioner is provided with knowledge in context that guides them to apply the relevant principles and use their own judgement to make choices and find solutions.

2.3 Who should use this Guidance Note

The Guidance Note will assist practitioners with the practical application of collaboration to successfully procure a project in accordance with Government policies and principles.

Other parties who may find it useful include:

- Government 'investor' agencies;
- Firms that provide professional advisory services to Clients; and
- Contractors or other Suppliers that tender for contracts in the infrastructure sector.

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[3] Over the past 12 months some 60 interviews and workshops with Clients and Suppliers have been conducted on the themes of this Guidance Note. Refer Appendix C: *Consultation Process – Insights*.

[4] a) *In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian public sector*, Department of Treasury and Finance Victoria, Nov 2009.

b) *National Alliance Contracting Guidelines,* Department of Infrastructure and Transport, Australian Government, July 2011.

c) *Towards Agreed Expectations*: *Tender Strategies to improve Design and Construct infrastructure delivery outcomes,* Australian Government, July 2012.

2.4 How to use this Guidance Note

This Guidance Note has been written on the basis that practitioners refer to other general government policies and guidelines applying to procurement planning, infrastructure delivery and government decision making.

It is recognised that there are many variations of collaborative contracting in use across and within jurisdictions. This Guidance Note describes good practices and principles for the common models in use. These practices and principles are also generally applicable to the variations in use.

In some circumstances it may be appropriate to depart from the principles set out in this Guidance Note. Each Client always has the flexibility to determine and recommend processes which are efficient, 'fit-for-purpose' and best suited to achieving VfM outcomes for their specific project.

The Guidance Note has been prepared on the basis that when Clients use collaboration to procure a project, they:

- are familiar with all relevant Acts and their jurisdictional policies and Guidance Notes;
- understand the practical challenges of prevailing market conditions that impact public sector infrastructure projects; and
- will call on specialist professional services providers (such as cost estimators, legal and commercial advisors), sourced either internally or externally, to assist them to deliver the project in accordance with policy, and the Guidance Note.

2.5 Relationship with the Alliancing Policy and related Guidance Notes

This Guidance Note is one of a suite of related National Alliance Contracting documents[5] that are specific to alliancing and other forms of collaborative procurement for infrastructure as outlined below:

- The Policy Principles – which sets out the minimum (mandated) requirements for all forms of collaborative procurement (including Alliancing, Early Contractor Involvement, Early Tenderer Involvement and Managing Contractor);
- The National Alliance Contracting Guidelines including;
  - Guidance Notes No 1-5;
  - This Guidance Note No 6 – which provides guidance on the use of forms of collaboration and collaborative procurement other than alliance contracting; and
- All relevant general (non-alliance specific) government policies and guidelines that have been approved in each jurisdiction, such as those relating to probity, tendering processes, Business Case development, procurement and cost management.

[5] Published on the Australia Government Department of Infrastructure and Transport website: www.infrastructure.gov.au

2.6 Updates to the Guidance Note

Updates to this Guidance Note will be published from time to time on the Department of Infrastructure and Regional Development website <*https://www.infrastructure.gov.au*>

2.7 Structure of this Guidance Note

The remainder of this Guidance Note is structured as follows:

- Chapter 3: Demystifying collaboration;
- Chapter 4: Selecting a collaborative procurement model;
- Chapter 5: Early Contractor Involvement model;
- Chapter 6: Early Tenderer Involvement model;
- Chapter 7: Managing Contractor model;
- Chapter 8: Less common collaborative procurement practices;
- Chapter 9: Making collaboration work;
- Chapter 10: Collaboration in the Construction Phase;
- Appendix A: Default ECI Case Study;
- Appendix B: Alternative ECI Case Study;
- Appendix C: Example projects; and
- Appendix D: Consultation Process – Insights.

3 Demystifying collaboration

This chapter provides a discussion of the reasons for collaboration, foundations of effective collaboration, and typical forms of collaboration.

3.1 What is collaboration?

In the contracting context, collaboration occurs when two or more participants work together to achieve a common outcome whilst recognising that each party has different business objectives.

In the procurement of a project, collaboration can range from good 'commonly used' practices (such as question and answer sessions, workshops and formal review and feedback sessions) within traditional procurement processes through to specific collaborative procurement models. Mature Clients and Suppliers view collaboration as a normal activity in achieving project outcomes.

Collaboration does not, of itself, require the Client to take a risk sharing position or provide financial incentive to achieve the required project outcomes. Additional reward should only be provided in the rare circumstances when exceptional outcomes resulting from collaboration are required.

Although tender conditions may 'hard-wire' collaboration (e.g. alliance contracting), if the foundations of effective collaboration have not been established, collaboration may not occur at all, and if it does, the benefit of any collaborative activities will not be optimised. These foundations are discussed further in the following sections and depicted in Figure 2: Principles of effective collaboration.

"Incentives and bonuses do not change contractor behaviour. Clients manufacture incentives and bonuses to [make them] feel more comfortable that they can influence delivery. If we are providing a client our top people with the aim of producing a top quality project for a fair price, then I don't know why clients need to offer incentives or bonuses to get a great outcome."

UK industry executive, October 2012

3.2 Collaboration success framework

Three key areas for effective collaboration in procuring major infrastructure form a collaboration success framework:

1. **WHY:** Why do Suppliers and Clients collaborate?
2. **WHAT:** What form can collaboration take?
3. **HOW:** How can collaboration be most effective?

Each of these key areas is explored in more detail in the following sections.

3.2.1 Why do Suppliers and Clients collaborate?

Suppliers and Clients will choose to collaborate to:

- Achieve a more efficient and effective tender preparation process including reducing the bidding resources required;

- Improve long term relationships between the Client and Supplier to achieve better overall outcomes;
- Assess the degree of leadership alignment and quality of collaboration between the parties during the selection process;
- Reduce any expectation gap at contract award;
- For the Supplier, improve the project outcomes and predictability of profit; and
- For the Client, improve the fit-for-purpose and value-for-money outcomes.

3.2.2 What form can collaboration take?

Regardless of the procurement model, mature Suppliers and mature Clients will collaborate effectively to achieve their desired outcome. Depending on the project characteristics, the form of collaboration may take one of the three detailed below:

Collaboration Form1: 'Interrogation'[6]

The purpose of this form of collaboration is to achieve a best in market tender response through sharing information and knowledge.

This is an open and honest sharing of information and knowledge which resides or is available only to the Client. This form of collaboration provides all tender participants with an opportunity to validate understanding of the tender requirements of the Client. The sharing or 'cross-fertilisation' of ideas and knowledge with the other is to 'collaborate' to achieve a common outcome; the outcome being an effective tender response and in turn a 'successful project', which normally has a different meaning to each participant, but is one that enhances each organisation's reputation.

In this form of collaboration Tenderers comprehensively and robustly scrutinise the Client's documented tender requirements and are provided an opportunity to have interactive question and answer sessions (ie conduct an 'interrogation') so that Tenderers understand what is required of them and any unique project characteristics. This benefits both participants by improving the competitive position for the Tenderer and delivering a better project outcome for the Client.

Examples of this form of collaboration include the use of collaboration during the tender process for a traditional contract such as Design and Construct (see *Towards Agreed Expectations – tender strategies to improve design and construct infrastructure delivery outcomes*, Department of Infrastructure and Transport, Australian Government, June 2012).

Collaboration Form 2: 'Interrogation and interaction'

The purpose of this form of collaboration is to achieve a best in market tender response through sharing information, knowledge and intellectual capital.

In addition to sharing information and knowledge (*Form 1*), the Client may, in a formal and structured manner, make available its 'Client' knowledge and understanding of its infrastructure network and operations to the Tenderers to assist them to develop their tender responses.

[6] Interrogation is defined for the purposes of this Guidance Note as '*to question formally, openly and systematically to gather information and understanding of the tender documentation to fully understand the Client's requirements and where gaps might exist that need to be addressed or closed off by the Client'*.

Typically this form of collaboration involves the Client interacting with the Tenderers to test fit-for-purpose project ideas and that the proposed solution at least meets past best practices. This testing enables each Tenderer to be confident they are submitting an offer in compliance with tender requirements and capable of acceptance by the Client.

Generally this takes the form of interactive question and answer sessions or structured presentation, review and feedback sessions, as well as both participants working together to develop project elements which may include the design, construction method and program. In such cases, project planning benefits from the Client's insider knowledge and experience being made available to all Tenderers.

Examples include the use of collaboration during an Early Contractor Involvement tender process (see Chapter 5 of this Guidance Note).

Reducing the expectation gap

At contract execution, an expectation gap can arise between what the Client expects to obtain and what the Supplier expects to provide, leading to buyer regret, supplier regret and a poor outcome. Such situations can lead to behaviours from both parties characterised as 'adversarial' as they seek to commercially address the gap in expectations.

Effective collaboration during the tender phase can reduce this expectation gap.

Towards Agreed Expectations – tender strategies to improve design and construct infrastructure delivery outcomes, Department of Infrastructure and Transport, Australian Government, June 2012

Collaboration Form 3: 'Interrogation, testing and risk sharing'

This form of collaboration is unique to alliance contracting and is out of scope for this Guidance Note, however it is addressed extensively by other documentation of the *National Alliance Contracting Policy and Guidelines*, Department of Infrastructure and Transport, Australian Government, July 2011. (In this form of collaboration, the Client makes a careful decision to share risks and take a commercial position outside the usual principle of 'risk is allocated to the party best able to manage it'. The Supplier and Client form an integrated team to deliver the project.)

3.2.3 How can collaboration be most effective?

Collaboration is most effective when:

- It is undertaken by repeat Clients and repeat Suppliers;
- Collaboration objectives are clear and understood;
- The tender process is effective, efficient and has integrity;
- Participants apply the appropriate capability;
- Leaders establish appropriate behaviours;
- Each participant's drivers are understood by all; and
- The tender conditions enable effective collaboration.

These areas are discussed in the following sections.

1. Repeat Clients and repeat Suppliers

In government procurement of infrastructure projects, the (often unmentioned but powerful) foundation of collaboration is long term, ongoing and repeat relationships between Clients and Suppliers.

Depending on the circumstances, in any collaboration where one participant stands to benefit over the other the tension this creates can reduce the effectiveness of collaboration. This is particularly the case in a one-off situation, where each participant will tend to make decisions that maximise the benefit to their own organisation. However when there is the potential for future attractive transactions, the participants will tend to make decisions that result in improved project outcomes, sometimes to their short term individual disadvantage.

In the procurement of major infrastructure projects, Government is a large, attractive, repeat buyer and has the opportunity to use this position to its advantage by requiring effective collaboration in the procurement process. Both Clients and Tenderers who have the potential for future transactions will be motivated to collaborate because if they do not:

- for the Client, they will attract undesirable price premiums as the Tenderers evaluate the past performance of the Client compared with others when pricing new work; and
- for the Tenderer, they will be less competitive as the Client evaluates the Tenderer's past performance compared with others.

This potential for a repeat relationship can result in a shift from a transactional self-centred relationship to a strategic value-based relationship, where positive dealings are highly significant to both Client and Supplier success and the motivation to achieve effective collaboration is optimised, as illustrated in Figure 1[7]:

[7] Figure 1 has been adapted from Good Practice Guidelines: Developing a State Purchase Contract Business Case, Department of Treasury and Finance (Victoria), 2006; and Government of Queensland, Queensland Purchasing, Department of Public Works, *Developing Supply Strategies*, Brisbane, 2005.

Figure 1: The positioning of Clients in market relationships

High Value Contract	**Development Potential** **"Opportunity to sell".** While not seeing the organisation as one of its key Clients, the Supplier does see significant value in winning and/or growing the business and will work to this end. Supplier will negotiate and offer good deals.	**Strategic Relationship Opportunity** **"The Client is a key to our growth and future".** Suppliers will work very hard to gain and/or retain the organisation's business and look to build strong relationships with the organisation. Supplier will be willing to give its best deal.
Low Value Contract	**Nuisance** **"The Client is a pest".** Supplier indifferent to the organisation as a Client and gives low attention to winning its business. Supplier is not interested in negotiating on service or price.	**Exploitable Opportunity** **"The Client is part of our bread and butter base".** The Supplier is interested and will readily accept the business from the organisation, but generally on its terms, with little room for negotiation.
	Low Potential for repeat relationship	**High Potential for repeat relationship**

Being a good Client and a good Supplier in long term, repeat relationships

A good Client and a good Supplier help each other to become better. In a long term, repeat relationship, both the Client and Supplier benefit by collaborating to improve. The Client will become better at engaging with Suppliers and describing what it wants. The Supplier will become better at engaging with Clients and responding to what the Client wants. Both will help each other become more efficient and effective Clients and Suppliers.

In particular, Clients should not need to rely on financial incentives to get high performance from Suppliers where this potential exists.

2. Collaboration objectives are clear and understood

In planning the collaborative element of a procurement the Client will identify the specific objectives they (and Tenderers) wish to achieve through collaboration. The approach will differ depending on the form of collaboration required for procurement success.

3. The tender process is effective, efficient and has integrity

The tender process must have the following characteristics:

- A clearly defined process, rules and mechanisms for collaborating, and assurance of a 'level playing field' for all Tenderers;
- Clear communication of requirements through both interactions and documentation;
- Adequate timelines that enable considered analysis, orderly decision making processes and the cost effective use of people and other resources during the tender;
- Integrity and a mutual respect of both individual and corporate objectives of the Client and the Supplier;
- Recognition of the value of the Client/Supplier relationship in both the current procurement and future opportunities; and
- Compliance with government's process integrity requirements (see Section 8, Guidance Note 5, *Developing the Target Outturn Cost in Alliance Contracting*).

4. Participants apply the appropriate capability

Both the Client and the Supplier must provide suitable resources with the following attributes:

- Appropriate levels of skill and experience to be able to contribute to the collaboration objectives and respond to enquiries in a timely and authoritative manner;
- Authority to make timely decisions to allow the collaborative process to progress smoothly;
- Adequate time to spend on this specific collaborative activity;
- Continuity of personnel from the tender to construction phase; and
- Management style suited to collaborative activities.

5. Leaders establish appropriate behaviours

Tender outcomes are enhanced when the leaders of both the Client and Supplier organisations and teams demonstrate aligned behaviours and actions consistent with effective collaboration.

While individuals from both participants will reflect the culture of their own organisation and their personal style, the influence on these individuals of an aligned approach by their respective leaders can result in highly effective collaboration. Conversely, misalignment by the leaders results in mediocre collaboration.

Tender outcomes are enhanced when this effective coalition[8] is established between the Client and the Supplier. In addition to providing the right individuals with appropriate authority delegated by the leaders, it is important that the senior leaders of both the Client and Supplier recognise the significant influence they can have on the outcomes of the collaborative process through their behaviour. Establishing a culture of authentic mutual respect is a key aspect of the leadership role.

[8] The expression 'coalition' is used here to denote the temporary coming together of diverse participants, with different commercial drivers and business objectives, to work with mutual respect and openness in accordance with an arrangement (sometimes formal contractual) to deliver a common and agreed outcome.

6. Each participant's drivers understood by all

The establishment of an effective coalition is dependent on establishing a clear understanding by all participants of the other participant's key drivers and objectives. In any commercial arrangement, the Supplier's primary objective is to achieve a sustainable profit for its shareholders. The Client's objective is to deliver the project objectives and requirements agreed with the Investor (normally set out in the Business Case) at a fair price.

7. Tender conditions enable appropriate collaboration

The tender conditions should enable collaboration to take place as planned. The Client's Probity Plan should ensure the procurement strategy and plans provide the appropriate rigour and integrity. Probity requirements should not be viewed as an inhibitor to collaboration but as an enabler to allow effective collaboration to readily take place.

4 Selecting a collaborative procurement model

This chapter provides a description of the most common models of collaborative procurement in use, and outlines the advantages and disadvantages of each for practitioners to consider when selecting the appropriate model for their project.

When a Client determines that collaboration is required to procure a project, there are a number of models to choose from. The Client will select the model most suited to the challenges of the particular project including the specific project risks and suitable allocation of those risks.

4.1 Why use a collaborative procurement model?

Collaboration is a normal and expected part of any successful commercial relationship between the Client and the Supplier. However, it is sometimes necessary to use very specific commercial arrangements to allow the right collaboration to occur at the right time by the right parties. Collaborative procurement models have evolved to address the most common circumstances in which this specific type of collaboration is required.

A Client will select a collaborative procurement model when the project requires specific collaboration beyond that achieved through traditional models. The most common reasons for choosing to use a collaborative procurement model include:

- The project is unique and/or complex and is enhanced by the early involvement of Suppliers to assist in design and delivery innovation, and construction methodology; and
- The Client has unique knowledge about the project which can only be shared effectively with the Suppliers through a collaborative procurement model.

The use of a collaborative procurement model to address these circumstances allows the highest quality tenders to be prepared by the Suppliers and the lowest expectation gap between the Client and Supplier at contract award.

The most commonly used collaborative procurement models are outlined in the following sections. Alliancing is addressed in the overarching Guideline.

4.2 Collaborative procurement models

In addition to 'commonly used' collaboration in traditional contracting (see *Towards Agreed Expectations – tender strategies to improve design and construct infrastructure delivery outcomes,* Department of Infrastructure and Transport, Australian Government, June 2012), there are three collaborative procurement models in common use by Australian public sector agencies[9]:

1. Early Contractor Involvement (ECI)
2. Early Tenderer Involvement (ETI)

[9] Alliancing is not in the scope of this document and is addressed in the National Alliance Contracting Policy and Guidelines, Department of Infrastructure and Transport, Australian Government, July 2011.

3. Managing Contractor (not generally used to deliver infrastructure projects)

Practitioners have tailored these models to fit the unique characteristics of their project, resulting in many variations in use across all jurisdictions, including the use of a mix of models within one contract. Where practitioners identify a need that is not met by the models documented in this Guidance Note, they should consider the advantages, disadvantages and principles documented and apply their own judgement in tailoring a model to suit their project.

The practitioner must be cautious when moving away from tried and proven models, as the use of untested practices, applied in isolation from the original contracting context and dynamic may have unintended consequences. This should be done by exception only, and requires mature and experienced analysis to ensure that there are net benefits in the approach.

4.3 Typical collaborative procurement phases

In each of the three common collaborative procurement models, they generally have three key phases:

1. Expression of Interest (EOI) Phase (generally capability is used to shortlist)
2. Request for Proposal (RFP) Phase (detailed outline plans, rates and fees etc. used to select for the ECI/ETI phase)
3. Collaborative ECI/ETI phase with the Suppliers as they analyse the project requirements and prepare their tender responses

In Chapters 5, 6 and 7 the most common models are described along with an overview of any other common variations in use in each of the jurisdictions.

Cautionary Note:

The benefit of introducing new variations to proven models must clearly outweigh the costs to both Clients and Tenderers.

Whilst each project has its unique features requiring specific treatment, existing proven models should only be varied if absolutely necessary. The use of variants can confuse Tenderers, increase legal costs and increase the risk of process failure and poor project outcomes. The case for varying the proven models should be clearly made in the procurement strategy and business case.

4.3.1 Key differences between the three models of collaboration

The following table outlines the key differences between the three models of ECI, ETI and Managing Contractor. The basis for selecting any one model or model variant for a specific project relies on the Client understanding the challenges and risks of that project.

Model feature	ECI	ETI	Managing Contractor*
Project phase by model	EOI, RFP and ECI Phase	EOI, RFP and ETI Phase	EOI, RFP and D&C Phase
Project characteristics suited to the model	• Complex • High Risk • Project risks or design elements best understood by Client • Some design unknowns • Benefit from Client's 'insider knowledge' • Price certainty is paramount • Time is restricted • Scarcity of available resources • Opportunity for innovation • Risk of not obtaining competitive tenders using other procurement models	• Complex • Client has mature design • Benefit from value engineering / innovation	• Complex program of works over years • Can be broken into work packages such as site and forward works • Project risks or design elements can be best understood and managed during delivery • Scarcity of Client project management resources • Client cannot provide tender documentation with clarity on scope, risks and other constraints
Design maturity pre-tender	Mature / Limited	Mature	Mature
Project elements requiring collaboration	• Design • Construction Method • Program • Risk Allocation	• No Design • Construction Method • Program • Risk Allocation	• Design • Construction Method • Program • Risk Allocation
Procurement resource impacts	Senior Client resources required to collaborate	Senior Client resources required to collaborate	Senior Client resources required to collaborate
Selection criteria[10]	EOI and ECI Phase: • Capability • Experience • Personnel • Systems • Direct Cost Rates • Indirect Cost Rates • Program • Company Financials • Fixed fee	EOI and ETI Phase: • Capability • Experience • Personnel • Systems • Direct Cost Rates • Indirect Cost Rates • Program • Company Financials • Fixed fee	EOI and RFP Phase: • Capability • Experience • Personnel • Systems • Direct Cost Rates • Indirect Cost Rates D&C Phase: • Above plus Programme; Lump Sum Management Fee; Risk Allocation; Scope Changes
Payment for Collaboration Phase	Fixed fee (suggested 50% of estimated costs)	Fixed fee (suggested 50% of estimated costs)	Fixed fee (suggested 50% of estimated costs) or Schedule of Rates
Form of Construction Phase contract	• Risk allocated, lump sum	• Risk allocated, lump sum •	• Lump sum with Management Fee • Actual reimbursable costs to sub-contractors • Generally a Guaranteed Maximum Price (GMP)
Risk allocation for Construction Phase	N/A	N/A	Supplier generally takes some delivery risk warranting quality and completion date

* The table shows the most common features of the Managing Contractor model, however there are many variants in use.

Each of these models is discussed in more detail in the following Chapters.

[10] Margins are not a useful selection criteria alone as effective competition is not about getting the lowest price through squeezing reasonable supplier profit or margins but through better design solutions, construction methods, high- capability team members, etc. Simple squeezing of profit and/or margins is seen to be counterproductive to optimising actual cost outcomes.

5 Early Contractor Involvement (ECI)

The Early Contractor Involvement (ECI) model is a collaborative procurement contract to develop a tender for the Construction Phase of a project.

There are many variants of the ECI model in use by agencies across Australia. This Guidance Note presents two major examples of the model:

1. The default ECI model incorporating price competition (see Figure 2); and
2. The alternative ECI model incorporating non-price competition (and for which an exemption is required under the National Alliance Contracting Policy) (see Figure 3)

The default model involves a competitive ECI Phase; however in exceptional circumstances there may be justification to conduct a non-competitive ECI Phase (the alternative ECI model)[11]. These options are described below.

In the default ECI model there are three Phases:

1. Expression of Interest (EOI);
2. Request for Proposal (RFP); and
3. Early Contractor Involvement (ECI) or Tender Phase.

The EOI Phase can be open or select, with Suppliers invited to submit an EOI. This EOI is evaluated on the basis of non-price indicators such as capability, experience, financial capacity, personnel, and systems. The evaluation of this EOI is typically conducted as a desk top evaluation, resulting in a shortlist of Suppliers to be invited to submit a Proposal through the RFP process.

The RFP Phase is shortlisted to ideally no more than three tenderers[12]. This Phase is generally more interactive than the EOI Phase with each tenderer submitting a Proposal to participate in the ECI Phase and evaluated on their schedule of rates and programme.

In the ECI Phase (or Tender Phase), two Suppliers are engaged under a services agreement ('ECI agreement') to work collaboratively with the Client and Designers in parallel to deliver upfront project development work and prepare a risk adjusted price for the Construction Phase to be delivered as a lump sum contract. The Suppliers each work with the Client to develop their own design, a detailed project plan, programme and commercial proposal for the construction phase. Case Study A provides a detailed example of this approach.

The competition between the two Suppliers in this stage prior to contract award drives early innovation capture and a robust tender price.

[11] NOTE: To satisfy government procurement requirements, the ECI Phase should always involve at least two Suppliers and a 'single' ECI Phase should be the exception, and only used where exemption has been sought and approved under the National Alliance Policy Statement. Competition underpins the achievement of VfM outcomes and is a requirement of government procurement processes. The default model is based on the best practice of a shortlist of two Suppliers competing in parallel in the ECI Phase as this creates optimum effective competitive tension.

[12] Generally a shortlist of two tenderers is desirable however if there is a new entrant to the market, the shortlist should be expanded to allow the new entrant to participate to optimise competition and contestability. It is important to ensure that the shortlisting process is not an inadvertent barrier to new entrants.

In exceptional cases, and when approvals as required under the National Alliance Contracting Policy Statement have been obtained, the alternative ECI model (or a 'single' ECI process) may be used[13].This involves the use of a single Supplier in the ECI process (or Tender Phase), resulting in a lump sum traditional contract being executed. This non-competitive ECI process may potentially be acceptable when there is, for example, a scarcity of unique skills in the industry (i.e. there is only a sole Supplier in the market) or there are compelling governments objectives that can be best met by this approach. In such cases the Client must engage independent project reviewers and estimators to verify the scope of works and costing offered by the Supplier in the non-competitive process. The Albany Health Campus (Appendix B) is an example of the appropriate use of a non-competitive ECI process that resulted in good outcomes.

A premium in the range of 5-10% is likely to be paid by the Client when a non-competitive process is used[14].

[13] The *National Alliance Contracting Policy and Guidelines* do not support 'price competition' focussed on the Supplier's margins. This is counter-productive to effective competition and may encourage gaming. The Supplier's margins are normally set at Board level and not readily changed at the project level, moreover, the lowest price for the Client is likely to be achieved by having the best project solution (e.g. scope of works, design, construction method, programme scheduling etc.) the subject of the competitive tender.

[14] *In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian Public Sector*

Figure 2: ECI - Default Model

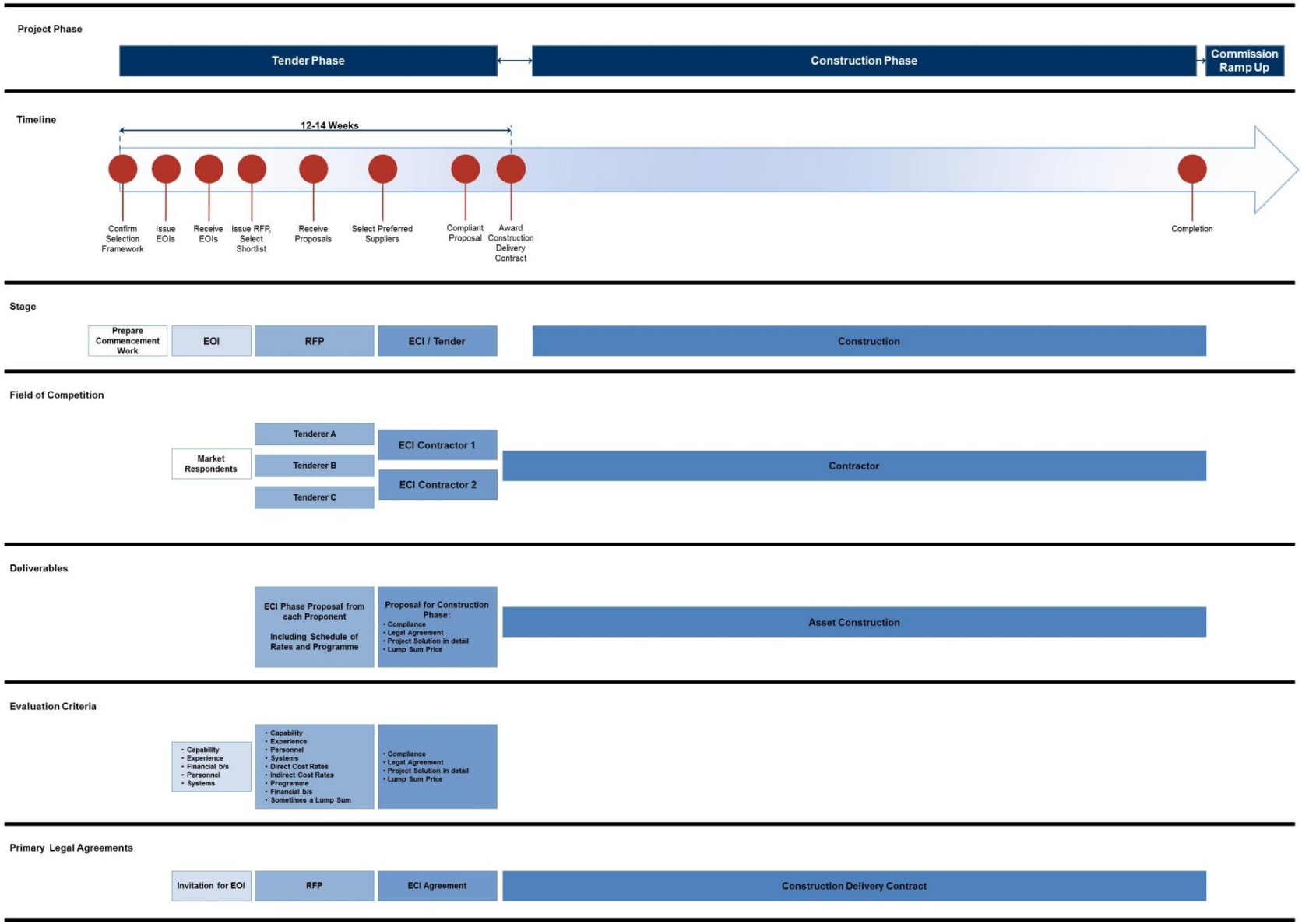
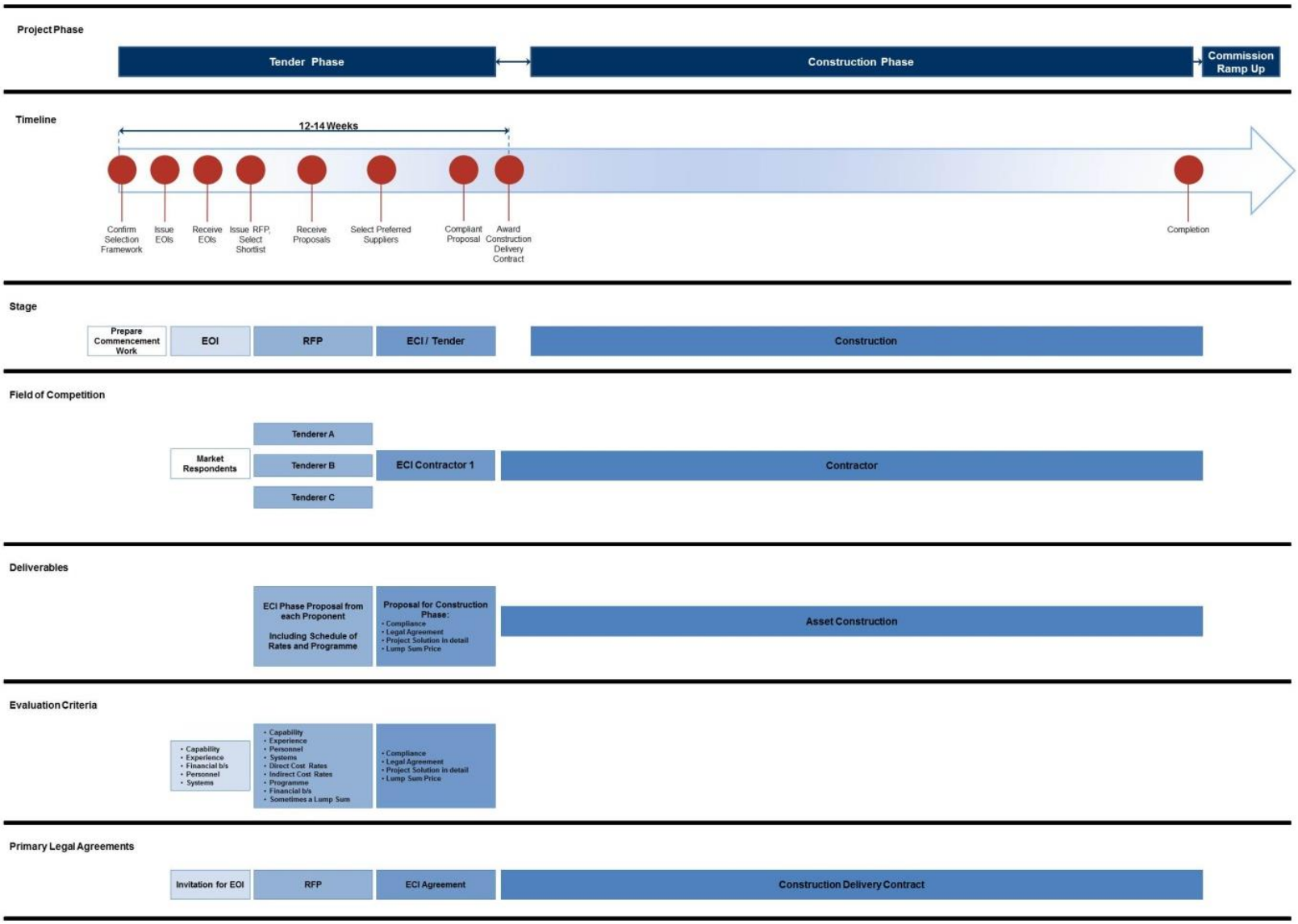


Figure 3: ECI - Alternative Model



Payment for the ECI phase (or Tender Phase) is typically based on a fixed fee negotiated as part of the ECI agreement. Generally this fee should not exceed 50% of the estimated costs incurred by the Suppliers for participating in the Collaborative Phase.

The ECI agreement is a fee for service arrangement for the ECI Phase only. It clearly describes the services and deliverables to be provided by the Supplier. It is tailored to the project requirements and will align the commercial interests of the Supplier with the Client to achieve the appropriate collaboration and outcome.

In the exceptional circumstance that the Client cannot reach an acceptable commercial arrangement with an ECI Phase Supplier at the completion of the ECI Phase, the Client may terminate the ECI agreement and seek offers from other Suppliers. Generally this would indicate a poor ECI process had been conducted. In this exceptional circumstance, the Client will determine the appropriate approach (e.g. Design & Construct, Construct Only) depending on the level of design completed in the ECI Phase, whether they choose to complete the design before going to market and any other project and market characteristics.

Variations in use of the ECI model

In each jurisdiction and sometimes even within jurisdictions, the ECI model has evolved to suit specific project types and economic circumstances. The primary features are presented (without commentary) in the following table, and more detail on each can be found in relevant jurisdictional policy and guides.

ECI model	Key features (summarised)
VIC	The Victorian State Government does not provide specific guidance on ECI models as this model is not used extensively.
WA	*WA Infrastructure Procurement Options Guide*, Centre for Excellence and Innovation in Infrastructure Delivery, Government of Western Australia ▪ A 2 stage model that combines the principles of alliancing and D&C. ▪ In Stage 1, a single Supplier works with the Client to develop the design, including innovative techniques, a detailed project plan with realistic timeframes, and a Risk Adjusted Price (RAP) for the Construction Phase of the project. This work is conducted under a Service Agreement. ▪ There is no assumption that the RAP will be a 'cost plus' amount. ▪ If the RAP cannot be agreed, the Client can terminate the relationship with the ECI Phase Supplier and place project delivery out to public tender. ▪ If the RAP is agreed, the Supplier delivers the Works under the D&C style contract.
NT	Northern Territory Government Procurement System for Construction, *Procurement Practice Guide, Procurement method selection* ▪ The Construction Phase is undertaken with the risk transfer arrangement (typically a D&C contract) overlain by a collaborative/partnering approach which seeks to capitalise on the relationships and collaborative behaviours developed during the ECI phase. ▪ A competitive ECI process may also be used where 2 or more contractors are engaged during the ECI Phase to undertake the project development work in parallel and prepare a price for the delivery phase. The Client selects the Contractor for the delivery phase in a similar manner to a traditional D&C arrangement, assessing the proposed project solutions and the tendered prices.

ECI model	Key features (summarised)
Qld	*MPRDS Volume 1 - Selection of Delivery Options; and Standard Contract Provisions Roads, Volume 6 Early Contractor Involvement (ECI) Contract Introduction*, Queensland Department of Main Roads *Procurement Guidance Series –Alliance Contracts*, Queensland Government Chief Procurement Office ▪ A two stage 'negotiated Design & Construct contract, or sometimes a negotiated Construct Only contract. ▪ **A single contract covers the two Stages** with initial financial approval sought for Stage 1 and if the Stage 2 offer is accepted a 'Deed of Variation' is submitted to fund the Construction Phase. The contract has partnering principles built into it. ▪ **Stage 1**: A preferred Supplier is selected on the basis of non-price selection criteria and some input cost related criteria. Once selected as the preferred Supplier, the tendered rates are assessed. The Contractor works under a service agreement and develops, in partnership with the Designer and Principal, the design to a point it can be accurately priced. This interactive Stage allows quick exploration of options and decision making and concludes with the Contractor submitting a Stage 2 offer. This Stage may also include a proposal for Early Works. ▪ A competitive process may also be used where 2 or more Suppliers are engaged during Stage1 to undertake the project development work in parallel and prepare a price for the Construction Phase. The Client selects the Supplier for the Construction Phase in a similar manner to a traditional D&C arrangement, assessing the proposed project solutions and the tendered prices. ▪ In Stage 1 Detailed Planning and Preliminary Design are carried out as Daywork. Payment for Stage 1 is on an open-book basis, using the rates (subject to an Independent Estimator, probity and financial audits) contained in the tender. ▪ **Stage 2**: The Supplier makes an offer either as a Risk Adjusted Price (RAP) or a Risk Adjusted Maximum Price (RAMP) for the agreed risk allocation and design. The Client has the right to terminate the contract should agreement not be reached and can then tender works as 'construct-only'. This Stage is similar to a D&C contract where the Supplier is responsible for design and construction. Depending on the agreed risk profile, payment can be through a combination of lump sum, schedule of rates, Daywork components or a guaranteed maximum price. The Client takes responsibility for the contract administration and surveillance. Early Works may be delivered prior to the Stage 2 offer being accepted or the Stage 2 'Deed of Variation' being executed. ▪ If the offer for Stage 2 is not accepted, the design is completed so that tender documents can be developed and the works advertised as a construct-only contract where the Stage 1 Supplier is not invited to tender. ▪ The Contractor may be paid a bonus if the total contract price submitted as part of the Stage 2 Offer is less than the Works Budget. The bonus is calculated as a predetermined percentage of that difference. ▪ In Stage 2 the Supplier is paid the RAP or RAMP for the documentation and construction of the Works. The method of payment for the RAP can be lump sum, a schedule of rates with provisional sums or a combination of both. There is a possibility of a RAMP with savings shared on components of the Stage 2 documentation and construction of the works. This is done by including a schedule to the General Conditions of Contract provisions that only comes into effect when the parties agree. Work subject to a RAMP is performed as Daywork on an open-book basis. The Contractor is paid its actual costs (based on agreed rates) plus an agreed amount for profit and overheads, similar to works under the Day works provisions of construct-only contracts.

Advantages and disadvantages of the ECI model

The advantages to the Client and Supplier of the Early Contractor Involvement (ECI) model are:

Topic	ECI Model characteristics
Advantages	▪ Scope and risks issues are resolved during design development through collaboration between Client and Supplier. This ensures project objectives and interface requirements are clear to the Supplier through early collaboration between the Supplier and Client in design development allowing effective risk transfer. (*Note that poor or absent project planning is not a good reason to use collaboration*.) ▪ Early collaboration between the Client (with its 'insider' knowledge) and the Supplier enables innovation and construction efficiencies in a uniquely challenging design development. ▪ Opportunity to understand project drivers and what constitutes a successful outcome ▪ Promotes a better understanding by the parties involved in the broader project risks and how to manage these for mutual benefit ▪ May allow early procurement of long lead time items (materials and equipment) ▪ Allows better identification and understanding of risks during the ECI Phase leading to a more effective allocation of risks during the Delivery Phase ▪ Unlike traditional forms such as D&C the risk adjusted price is not agreed until all risks can be assessed in greater detail ▪ Minimises waste of resources from industry during the tendering stage ▪ Uses full team potential
Disadvantages	▪ Involvement of Client senior staff in early stages for longer periods ▪ Contractors' Designers may disregard or redesign elements undertaken by the Client's Designers leading to an overall increase in design development works, however, this could be mitigated through effective collaboration ▪ Potential need to involve independent cost estimators to prevent higher 'uncontested' prices building up the risk adjusted price (RAP) if a non-competitive process is used ▪ The two phase contractual process can be complex as the two contracts (i.e. the ECI agreement and the Design and Construction Contract) are substantially different in nature

6 Early Tenderer Involvement (ETI)

The Early Tenderer Involvement (ETI) model is a collaborative procurement contract to develop a tender for the Construction Phase of a project.

There are many variants of the ETI model in use by agencies across Australia. This Guidance Note presents the most common example of the model (see Figure 4).

The key difference between the ETI model and the ECI model is that the Client retains the Designer and the Tenderer has no design responsibility. The Client's design is at a much more mature state and does not require the same degree of design development as in the ECI model.

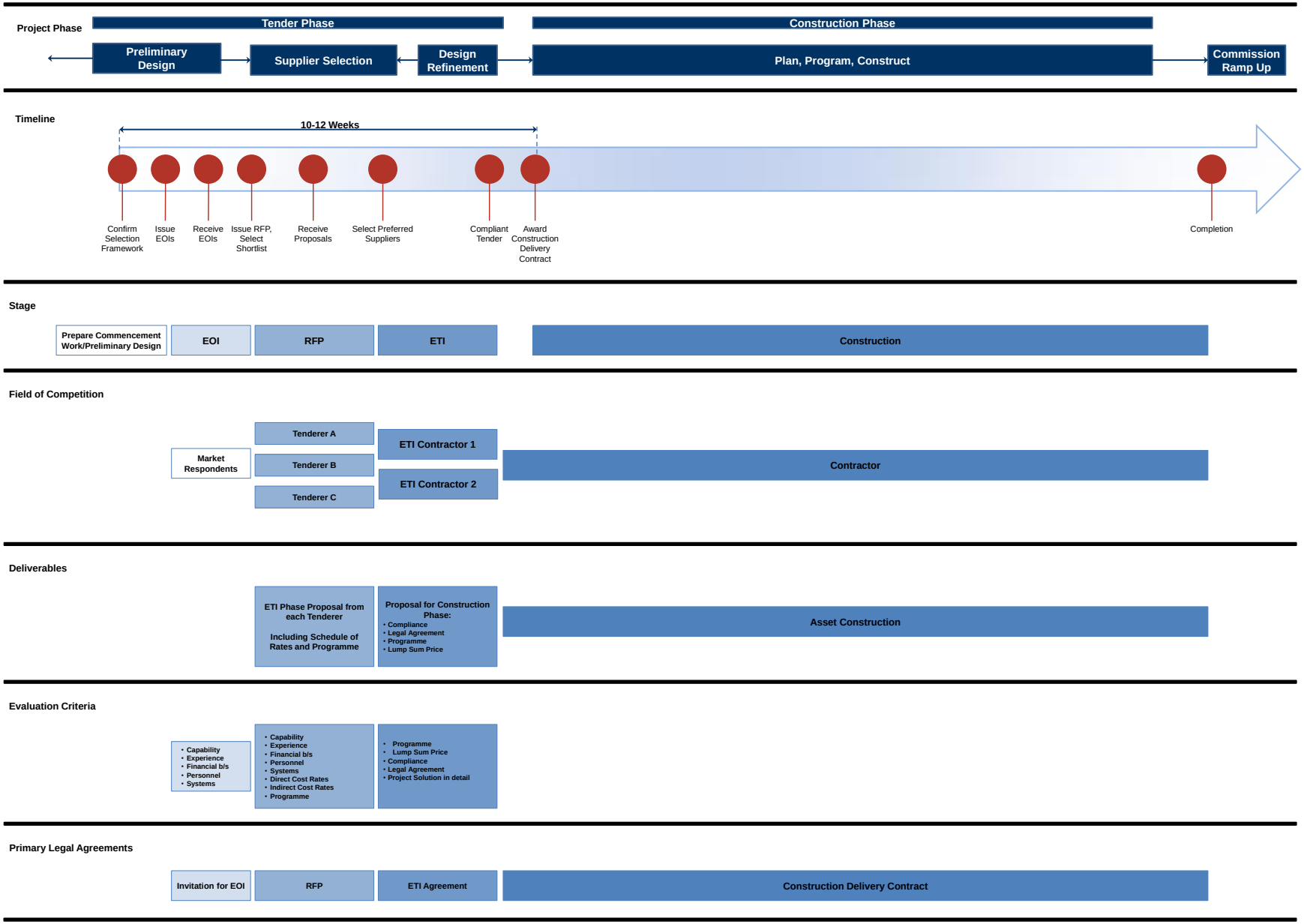
Two competing Suppliers participate in value engineering and refinement of a Client's design. Often the Supplier will appoint its own sub-design consultants to provide assurance or alternatives.

Ideally, payment for the ETI phase is based on a fixed fee negotiated as part of the ETI agreement. Generally this fee should not exceed 50% of the estimated costs incurred by the Suppliers.

The ETI agreement is a fee for service arrangement for the ETI Phase only. It clearly describes the services and deliverables to be provided by the Supplier. It is tailored to the project requirements and will align the commercial interests of both parties to achieve the appropriate collaboration and outcome.

In the circumstance that the Client cannot reach an acceptable commercial arrangement at the completion of the ETI Phase, the Client may choose to terminate the ETI agreement and seek offers from other Suppliers. Generally this would indicate a poor ETI process had been conducted. A successful ETI process results in a lump sum traditional contract being executed

Figure 4: ETI – Default model



Advantages and disadvantages of the ETI model

The advantages and disadvantages of the Early Tenderer Involvement (ETI) model are:

Topic	ETI Model characteristics
Advantages	▪ Early collaboration between the Client and the Supplier enables innovation and construction efficiencies in a uniquely challenging design development
Disadvantages	▪ Involvement of Client senior staff in early stages for longer periods ▪ Potential need to involve independent cost estimators to prevent higher 'uncontested' prices building up the risk adjusted price (RAP) if a non-competitive process is used ▪ The two phase contractual process can be complex as the two contracts (i.e. the ETI agreement and the Construction Contract) are substantially different in nature

7 Managing Contractor

There are many variants of the Managing Contractor model in use by agencies across Australia. The Managing Contractor model is more often than not used for building projects, rather than for infrastructure projects, however it has been included in this Guidance Note for completeness. The principles highlighted in this Chapter may be appropriate for building projects and the practitioner should apply their judgement as to the applicability in each case.

Typically this model involves the Client engaging a Supplier (Managing Contractor) through a competitive tendering process to manage the development of design, coordinate production of construction documentation and manage construction works on its behalf. For this work, the Supplier is paid actual sub-contractor costs and the tendered Management Fee which can either be a lump sum or a percentage of actual costs. Both design and construction elements are competitively tendered.

This Guidance Note presents two examples of the model that feature good practices relevant to infrastructure projects in order to illustrate the principles that may be applicable in the many other variants in use if used to deliver infrastructure projects:

1. The default Managing Contractor model (see Figure 5)
2. The alternative Managing Contractor model where a Planning Phase is used to establish further detail on the Plans and associated fees prior to award of the delivery contract (see Figure 6)

In the Managing Contractor model (both default and alternative) the Client:

- manages the project definition and scope, and may engage the Designer directly;
- collaborates with the Managing Contractor on the development of the project delivery structure and associated project management elements;
- provides input into the design development and has opportunity to influence the design and construction processes; and
- may engage the sub-contractors directly (where contracts are procured and entered into by the Managing Contractor as the Client's agent), however generally sub-contractors are engaged by the Managing Contractor.

The Supplier (the appointed 'Managing Contractor'):

- performs a management and coordination role;
- assumes design coordination including design development and documentation process risks and manages the design process to ensure adherence to the agreed program;
- may engage the Designer directly;
- manages and coordinates all aspects of the cost planning process and assumes cost risk for the Construction Phase, generally through a guaranteed maximum price for the works;
- collaborates with the Client on the development of the project delivery structure and associated project management elements e.g. management of consultants

- warrants that the construction will be in accordance with the design intent and is responsible for the planning and implementation of quality assurance covering all of the works undertaken by the sub-contractors, suppliers and consultants;
- warrants the suitability and completeness of the Subcontract Construction Documentation and for ensuring that it is consistent with the developed design;
- is generally precluded from self-performing construction and design work; and
- executes, supervises and administers sub-contracts.

Figure 5 Managing Contractor - Default Model

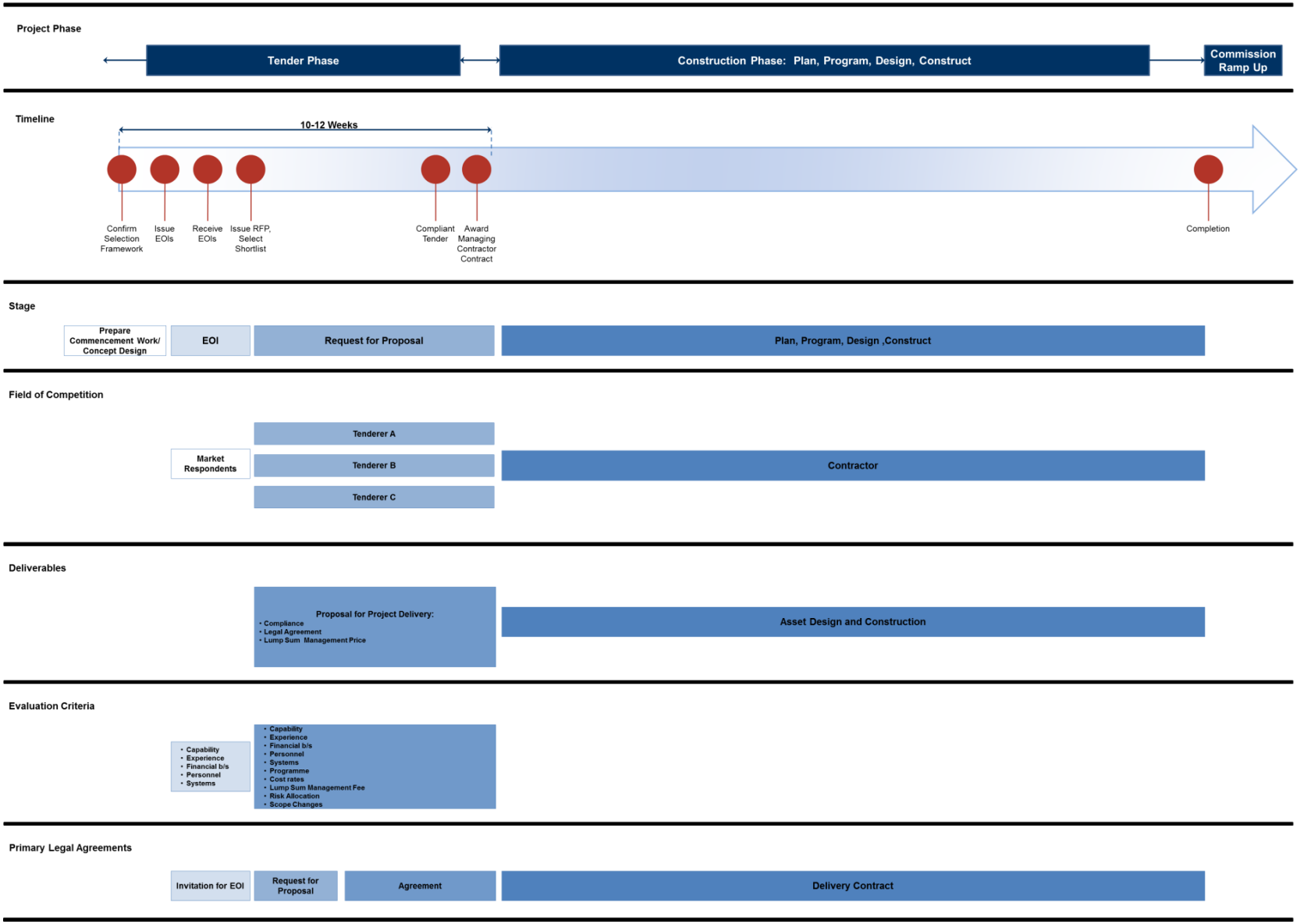
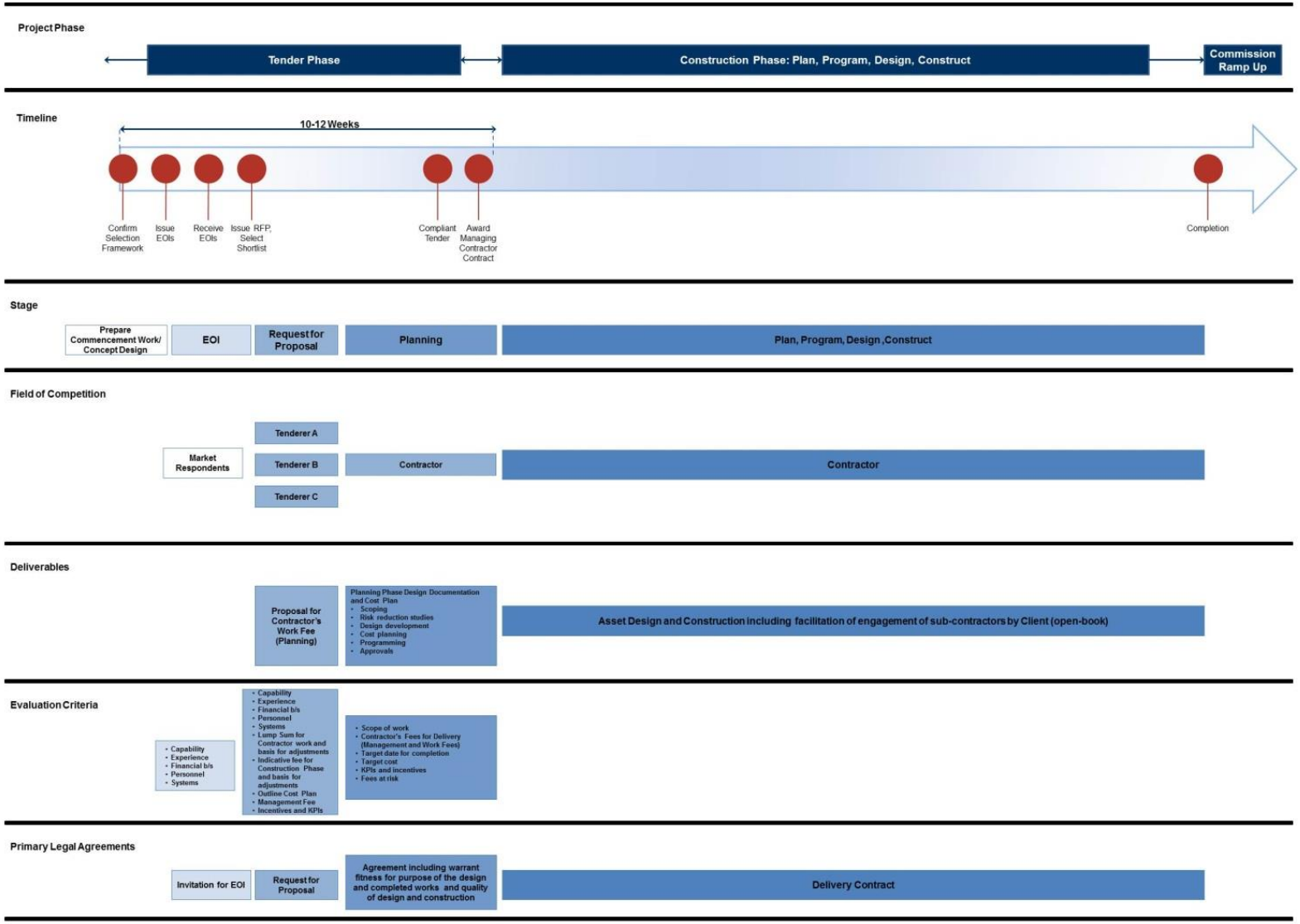


Figure 6: Managing Contractor - Alternative Model



The selection for the RFP or Planning Phase is based on a combination of price and non-price criteria including capability, experience, personnel, systems, direct and indirect cost rates, and margins. For the Construction Phase selection is based on the same criteria with the addition of programme, lump sum management fee, risk allocation and treatment of scope changes.

In both the default and alternative models, the Managing Contractor payment for the Collaboration Phase generally comprises a straight fee for service using a schedule of rates.

In both models, the Managing Contractor payment for the Planning Phase (alternative model) and Construction Phase generally comprises:

- A fixed lump sum management fee which represents the Managing Contractor's off-site overheads and profit and on-site overheads to be undertaken or provide by the Managing Contractor;
- Actual Reimbursable Costs – all amounts properly and actually incurred and payable by the Managing Contractor to subcontractors. There is no Managing Contractor's mark-up or profit or handling fee included as part of the Actual Reimbursable Costs; and
- Incentive payments may be made for achieving cost and schedule targets, although these should only be used in circumstances where exceptional performance is required to meet project objectives, and should not be applied to 'commonly used' requirements.

Variations in use of the Managing Contractor model

In each jurisdiction, and sometimes even within jurisdictions, the Managing Contractor model has evolved to suit specific project types and economic circumstances. The primary features are presented (without commentary) in the following table, and more detail on each can be found in relevant jurisdictional policy and guides. These models are all good models with the differences being driven by project characteristics including the risk transfer strategy, price impact and other commercial decisions.

Managing Contractor model	Key features (summarised)
WA / Qld / Vic / NT	*WA Infrastructure Procurement Options Guide*, Centre for Excellence and Innovation in Infrastructure Delivery, Government of Western Australia *MPRDS Volume 1 - Selection of Delivery Options; and Standard Contract Provisions Roads, Volume 6 Early Contractor Involvement (ECI) Contract Introduction*, Queensland Department of Main Roads *Better Purchasing Guide* ,Queensland Department of Public Works *Procurement Guidance Series – Alliance Contracts*, Queensland Government Chief Procurement Office NT Government Procurement System for Construction, *Procurement Practice Guide, Procurement method selection* *Investment Lifecycle Guidelines Supplementary Guidance #1. Procurement Strategy Guideline*, Gateway Unit of the Victorian Department of Treasury and Finance July 2007 ▪ Appointment of a head contractor (the Managing Contractor) who engages sub-contractors to deliver the works, and sometimes is responsible for paying them (depending on the risk allocation, payment and incentive structure most appropriate) ▪ Selection based on a combination of price and non-price criteria ▪ Managing Contractor engaged early in the process to manage the scope definition, some or all of the design documentation and construction of the works ▪ Managing Contractor is responsible for preliminaries (eg crane hire, site sheds etc), general project requirements (security, insurances etc) and project management (eg scheduling, coordinating, liaising) ▪ Managing Contractor prepares the trade packages and conducts tenders, selecting sub-contractors in close collaboration with the Client ▪ Managing Contractor administers these sub-contracts and accepts some delivery risk ▪ Managing Contractor warrants quality of the whole of the works and warrants the completion of the works by the date for Practical Completion ▪ The Client and the Managing Contractor negotiate a fixed lump sum management fee for the Construction Phase ▪ Managing Contractor sometimes performs elements of the design and/or construction and is paid for that in addition to the management fee ▪ Managing Contractor may receive incentive payments for achieving cost and schedule targets and other key parameters

Managing Contractor model	Key features (summarised)
Australian Department of Defence	Department of Defence – *Managing Contractor Contract (MCC-1.2003) Contract manual Volume 1* A 3 stage process is conducted in which: ▪ An RFP Phase calls for tenders and selection based on the Contractor's Work Fee (Planning) a lump sum for any work that the Contractor performs itself and not through subcontractors; the basis for any adjustments to the lump sum; indicative Management Fee for the Delivery Phase; indicative Contractor's Work Fee for Delivery Phase; outline Cost Plan; the basis for any adjustments to the Contractor's Work Fee (Delivery) and the Management Fee (Delivery) and a detailed outline of the incentives and KPIs proposed for the Delivery Phase ▪ A Planning Phase to undertake scoping, risk reduction studies, design development, cost planning, and programming and approvals. The Contractor prepares planning phase design documentation and a cost plan; assists the Client to achieve project milestones and obtain Government approvals; performs other planning activities. The Contractor is paid a lump sum management fee and is reimbursed for the cost of its subcontractors. The Contractor may propose an element of fees they will put at risk based on performance. The target date for completion, target cost, scope of work, Contractor's fees for Delivery Phase, KPIs and incentives (if any) are all agreed before the end of the Planning Phase. The Client may elect not to proceed with the Managing Contractor to the Delivery Phase if it is not satisfied with performance of the Managing Contractor. If the Client elects not to proceed, then it can proceed with a third party and use all project documents and request a novation of the Managing Contractor's sub-contractors ▪ The Management Fee and Contractor's Fee (Delivery) as tendered are both negotiated prior to the completion of the Planning Phase, adjusted to reflect any scope changes. Incentives are also considered having regard to the performance of the Contractor during the Planning Phase. ▪ During the Delivery Phase the Contractor completes any remaining design, and delivers the Works. It engages with sub-contractors for design and construction on a competitive basis. This is all done on a fully open book basis in close consultation with the Client, who decides which subcontractor is used. The Managing Contractor is paid a Management Fee and a Work Fee (Delivery) for their work, as opposed to the work delivered by the sub-contractors as reimbursable work. Fees are generally only adjusted if there is a variation to the scope of the project or the Client delays the project. ▪ The Managing Contractor is only entitled to an incentive payment when the project is completed for less than the target cost; the agreed target date is met or other KPIs as agreed. ▪ The Managing Contractor warrants fitness for purpose of the design and the completed works and remains fully responsible to the Client for the quality of the design and construction.

Advantages and disadvantages of the Managing Contractor model

The advantages and disadvantages of the Managing Contractor model include:

Topic	Managing Contractor Model characteristics
Advantages	▪ The early engagement of the Managing Contractor's capability in developing the design allows constructability issues and whole of life considerations to be addressed early at the time when the Client can best influence the design and construction processes ▪ Early collaboration between the Client and the Managing Contractor enables efficiencies in the planning and delivery of the project or capital program ▪ The Client brings insider knowledge, stakeholder interactions, technical skills etc to complement Supplier skills and it is necessary for the parties to collaborate to achieve optimal project outcomes ▪ The overall project duration may be reduced through the Contractor's ability to engage trade contractors and commence some construction works during design development ▪ Provides the Client with more control and input into the design and retains a higher degree of control over the management of the project than a D&C contract ▪ Managing Contractor can advise the design team on construction/building issues during the design development process which facilitates integrated planning of construction and operations ▪ Allows early involvement of all project participants and stakeholders ▪ Reduces the Client's involvement and resources (including need for extensive project management capability, although it will need senior project management capability to manage the Managing Contractor) ▪ Design documentation and development risks are transferred to the Managing Contractor ▪ The Client and the Managing Contractor are able to collaborate to develop the project requirements and resolve issues through the design and construction phases of the project ▪ Often has mechanisms for resolving issues and sharing benefits ▪ Encourages good relationships between all parties (including trade contractors) to achieve a win-win solution, potentially minimising claims and disputes ▪ Provides flexibility to deal with risk
Disadvantages	▪ Difficulty setting cost targets with limited design details

8 Less common collaborative procurement practices

The research undertaken for the development of this Guidance Note identified a great number of variations to the models outlined in the preceding sections. These include:

- *Suppliers are involved in developing the Business Case as part of the Collaborative or ECI/ETI Phase.*

This is poor practice as government procurement principles require a clear separation between Business Case development, and setting out the government service priority, benefits, costs and risks of the investment proposal, and procurement activities. The engagement of potential suppliers in this development process is problematic. Certainly procurement should not commence until the Business Case has been approved for funding. If industry expertise is required to develop elements of the Business Case (e.g. costing capital project components), this should be conducted as a separate exercise to any eventual procurement of an approved project. It should be very clear to the Suppliers that in assisting in the development of the Business Case, yet to be approved, and that this would preclude them from bidding for development or delivery of that project (including any ECI/ETI stage) to avoid any conflict of interest or risk moral hazards.

- *Use of a 'Target Outturn Cost' (TOC) and pain/gainshare incentive structure for the Construction Phase*.

For ECI and ETI processes, this is not appropriate as these processes should lead to a traditional lump sum contract for the Construction Phase. For Managing Contractor models, there may be times where a guaranteed maximum price approach and pain/gainshare incentive structure is appropriate. Guidance for the selection and development of such an approach and associated pain/gainshare structures is provided in the *National Alliance Contracting Policy and Guidelines*, Department of Infrastructure and Transport, Australian Government, July 2011.

- *Use of Target Budget with flexible scope*

Provision of a budget to the Suppliers who then each collaborate with the Client to develop a project proposal that delivers the 'mandatory' items and a 'wish list' for the Client to select from within that budget amount. The Client selects its preferred wish list items and adds them to the mandatory requirements to provide the final project scope against which the Suppliers both bid. This process is not good practice as the business case should clearly state the minimum project requirements to deliver the service need and the process should extract from the market the minimum cost to deliver that need and nothing more.

- *A third Supplier is invited to bid for the Construction Phase*.

This is generally only undertaken if the performance of the existing Suppliers is deemed unacceptable.

- *The ECI Phase Suppliers are not permitted to bid for the Construction Phase*.

  This is generally poor practice as the motivation for contributing high quality resources and intellectual capital to the ECI Phase is to win the Construction Phase work. If the ECI Phase Suppliers are prohibited from bidding for the Construction Phase work it is likely the input in the ECI Phase will not achieve optimum outcomes. Additionally, there is significant benefit in some key team members continuing from the ECI Phase to the Construction Phase as they understand how the project proposal was developed and carrying this through to Construction Phase assists in ongoing collaborative behaviours, reduced disputes and timely decision making.

The best result of an effective ECI or ETI model is always a lump sum contract. This means that the process has been successful in addressing and closing the issues and uncertainties in project scope and in dimensioning project risks that lead to the use of ECI and ETI in the first place.

Appendices A - C provide case studies and project examples to highlight the variations in collaborative procurement in use by Australian industry and governments.

9 Making collaboration work

This chapter provides guidance on how to make collaboration work during procurement including how to design an appropriate process, how to establish an effective coalition, and common misconceptions about collaboration in procurement.

9.1 Designing the procurement process

Infrastructure projects present challenges that must be considered on a case-by-case basis. The collaborative elements of the procurement process should be tailored to the project characteristics, considering the various elements laid out in the success framework (refer Chapter 3) including:

- The purpose of collaboration (Why);
- The form of collaboration (What); and
- How the collaboration will be undertaken (How).

The procurement process should be clearly described and communicated to the tenderers in the tender documentation. This includes describing the collaborative processes and the proposed commercial framework.

As outlined in Chapter 4, a collaborative procurement process generally involves the following key Phases:

1. Expression of Interest (EOI) Phase (generally capability is used to shortlist)
2. Request for Proposal (RFP) Phase (detailed outline plans, rates and fees etc used to select for the ECI/ETI phase)
3. ECI/ETI (collaborative) Phase with the Suppliers as they analyse the project requirements and prepare their tender responses

The following sections provide an overview of the good and poor practices in each of these phases that were identified through the research. These practices apply to all collaborative procurement models, including the three most common models addressed in this Guide. These sections have been informed by the research and the report *Towards Agreed Expectations – tender strategies to improve design and construct infrastructure delivery outcomes*, Department of Infrastructure and Transport, Australian Government, June 2012.

9.1.1 Expression of Interest (EOI) Phase

In the Expression of Interest (EOI) Phase, the Client seeks to identify Suppliers with appropriate capability and interest in the Collaboration and Construction Phases. The Client does this by engaging the market effectively, ensuring contestability is optimised and that the information gathered allows selection of the Suppliers most suited to the project requirements.

Ref	Good practices	Poor practices
1	Client provides (best effort) information on the project and the project challenges and the broad commercial framework and contracting model that will apply. (This information should allow the Suppliers to determine whether they have the corporate interest and capability to respond and the 'right fit' resources and capabilities require to participate in the tender process and then in the project delivery.)	Client provides little or poor draft documentation, lack of clarity of end to end procurement process so that potential Suppliers are unclear of what experience and capability is required to succeed. Client elects to use a collaborative procurement model to because they have a low level of knowledge about the project. Unless the Client seeks advisors to complement their own knowledge they will not be able to collaborate effectively with the Supplier and are unlikely to achieve a value for money outcome.
2	Client provides a brief containing the service and project objectives, providing a context to the project in regards to community priority and outcomes in terms of service enabling and improved network capabilities	Project brief highly specified rather than outcome focussed, providing limited opportunities for Suppliers to differentiate themselves from other Suppliers.
3	Client provides clarity about the full procurement process to be followed and the tender selection criteria that will be applied to the EOI and the Collaboration Phase. The potential respondents understand the call on their time and money to participate in the tender process.	Lack of clarity about the tender process and the nature of the steps and effort required to participate in the process. The potential respondents are unclear on the nature and size of their possible investment in this tender process.

The Expressions of Interest from Suppliers is assessed in this step to reduce the field to (ideally) two Suppliers who will then be invited to participate in the Tender Phase (ECI Phase/ETI Phase).

A shortlist of two should be achieved with selection generally based on non-price criteria. A longer shortlist will not achieve optimum outcomes.

9.1.2 ECI/ETI Phase

It is at the Collaboration (or ECI/ETI) Phase that the Tenderers collaborate with the Client to develop elements of the project solution and dimension the risks to the point that a compliant tender response with a risk allocated price can be offered to the Client. It is through this collaboration that the Client and Tenderer come to a common understanding of the appropriate risks to be transferred under a traditional (lump sum) contract and ensures that inappropriate risks are not transferred (i.e. risks that can't be dimensioned and therefore priced for the tender). This way the 'expectation gap' at contract execution is effectively eliminated.

These collaborative activities can include design, value engineering, constructability reviews, programming, risk and contingency assessments etc.

Ref	Good practices	Poor practices
1	The two shortlisted Tenderers compete in the collaborative stage	Non-competitive i.e. sole Supplier or too many Suppliers
2	Payment based on a fixed fee of no more than 50% of estimated costs of Tenderer	Uncapped fee
3	Clear right by Client to not award Construction Phase contract to either party	No clear break point, limiting contract award to Suppliers participating in Collaboration Phase only, regardless of performance
4	Early works contracted separately to avoid capture during the tender process	Early works awarded to the shortlisted supplier (Sole or more)
5	If non-competitive, Independent Estimator should be used to assure VfM	Sole Supplier and no Independent Estimator resulting in no ability to demonstrate VfM or protect the public interest
6	Collaboration used as a means to achieve a clear commercial objective or clarity on project risk allocation; it is not an objective in itself	Collaboration is used to develop an immature project definition and scope
7	Clearly defined process and timeline, well managed	Not meeting milestones and conducting an overly lengthy design development process resulting in high costs to Client and Supplier; and tying up key Supplier team members for unacceptable periods of time
8	Clearly stated Collaboration/ECI/ETI Phase agreement (generally a services agreement) and Construction Phase agreement (generally a D&C contract). The D&C contract is completely stand-alone from the tender phase, giving certainty of price and program for the construction period	Lack of clarity between Collaboration Phase and Construction Phase with inappropriate use of commercial frameworks such as pain/gainshare in Construction Phase Caution should be applied if the contract is novated from the ECI/ETI Phase to Construction Phase, with a clear transition between the two very different commercial frameworks required
9	Risk allocation and commercial framework developed to suit project and delivery model selected e.g. D&C, Construct Only	Use of incentives or bonus payments for achievement of key performance milestones (which are expected, commonly used and priced in the tender response). Soft provisions such as payment of bonus if tender price submitted is less than Client budget
10	Unless collaboration is key to project delivery, evaluation is of Collaboration Phase deliverables, not collaboration itself	Collaboration positioned as the means not the end and used as the primary selection criterion
11	Appropriate access to design team and the Client's relevant representatives with appropriate capabilities and decision making authority	Lack of appropriate access to Design team and Client representatives with appropriate decision making authority
12	Teams capable of contributing commercial and technical skills collaborate on design development and cost build-up	Teams have poor commercial and technical capability and cannot collaborate effectively. Use of 'collaboration' to develop immature design and overcome poor planning issues rather than requiring collaboration
13	Teams have authority to make timely decisions	Teams do not have authority to make timely decisions
14	Design developed to a point where Supplier can submit a lump sum price	Immature design leading to significant variations, disputes, excessive risk allowance or incentives to achieve commonly used performance
15	Key Client team members (e.g. Contract Manager) involved in Collaboration Phase continue through to Construction Phase	No continuity of key Client team members resulting in poor value from collaboration and increased likelihood of misunderstandings and disputes

9.2 General process features

9.2.1 Timelines

Collaboration will require the involvement of senior management from both the Client and Supplier organisations. In the Collaboration phase, the Supplier is prepared to commit these senior resources when they have a high probability of winning the construction contract. However, the Supplier will be unwilling to commit these senior resources if the process takes too long and the opportunity cost of committing those senior resources outweighs the potential benefits of participating. Even when reimbursement is paid for the cost of those individuals it is generally much lower than the opportunity cost to the Supplier.

Clients should ensure that the process is conducted as efficiently as possible to minimise the draw on both Client and Supplier resources. In particular it is important for both parties that the agreed timetables are met, so that senior management can plan the use of their senior experienced resources.

Where a Client does not achieve this, and gains a reputation for poor procurement practices, they will be viewed as a 'bad' Client by industry, and attract a premium in future procurements.

9.2.2 Knowledge flow

The Client should ensure that it is clear how project information generated through collaboration will be captured and managed. The Client must also ensure that any commercially confidential knowledge they have of one Supplier such as cost or unique intellectual property is protected in the competitive process. An effective coalition between the Client and the Supplier will only be achieved if there is trust between the parties that their corporate information is protected.

9.2.3 Governance

Governance is the process for directing and managing activities, a system for holding people accountable and controlling their activities, and for the effective assignment of specific and overall accountability for deliverables. It is a set of policies, principles, rules and supporting practices put in place to run a procurement exercise.

The importance of good governance as a critical success factor in procuring major infrastructure projects is widely acknowledged. Similarly, a lack of sound project governance is well recognised as a major contributor to poor procurement outcomes.

Collaborative procurement contracts (during the Tender and/or Construction Phases) have some unique features and complexities which require specific attention by the Client, as detailed below:

- All individuals require an in-depth knowledge in relation to the agreement underpinning the collaborative element and the project objectives and deliverables;
- Clear, unambiguous lines of accountability and responsibility for outcomes between the Client and the Investor or Government (this can never be delegated or shared with the collaborating Tenderer);
- Clear decision making process aligned to the collaboration required and the ECI/ETI agreement;

- Scope changes made in accordance with the ECI/ETI agreement, which will require Client approval;
- Incentive payments are only provided in exceptional cases and then for outstanding performance, not achievement of commonly used performance standards, and these achievements are aligned to the Business Case project objectives; and
- There is absolute clarity regarding the governance arrangements for the Collaboration (ECI/ETI) Phase (usually a Service Agreement arrangement) and the different arrangements for the Construction Phase (usually a D&C arrangement).

9.3 Roles and resources

9.3.1 The Client as Client

The Client acts in the following two distinct roles during collaboration:

- The 'Client as Client': the Client 'outside of collaboration' is ultimately responsible for delivering the service outcome to the government as set out in the Business Case. The Client is representing the public interest. The Client may be the Minister, the departmental head, the agency's CEO or the Board; and
- The 'Client as Collaborator': the Client may act as collaborator through the participants who have been delegated responsibilities to collaborate with the Supplier.

These two roles should ideally be undertaken by separate individual/teams however with limited Client resources this is not always possible. In some instances, it may be necessary to have some individuals acting in both capacities. In this situation the individual needs to be careful in undertaking their roles and responsibilities, which should be detailed in a governance plan. The emotional engagement or investment in the relationship should not obscure the Client's focus on the public interest and the establishment of an effective and positive commercial relationship between a Client and a Supplier.

Accountability to the government for delivering the investment outcomes identified in the Business Case rests with the Client and cannot be delegated to third parties.

9.3.2 Client resources

The Client's resources should have an appropriate level of knowledge and authority to undertake their roles. This may require training or additional support provided if they do not the requisite experience in participating in a Supplier collaboration.

A capable Client will aspire to understand its Suppliers as well as the Suppliers understand it (including the Suppliers' operating environment, cost structures etc).

9.4 Commercial considerations

9.4.1 Cost of bidding and reimbursement

The scope of service and breadth of risk to be considered by the Tenderers in developing their project solution and cost estimate can be significantly greater than in non-collaborative procurement of Traditional Contracts. This means that the Tenderers may incur higher costs, including requirement of a much greater input from their senior management due to the need for more active participation in the collaborative activities.

Where jurisdictional policies allow and where deemed appropriate a proportion of each Supplier's costs to participate may be reimbursed because:

- The tendering costs incurred and senior management effort required by Tenderers are higher than the costs and effort required for traditional contracts;
- The unsuccessful Tenderers may have developed innovative solutions that can be reasonably claimed by the Client as their intellectual property (if payment has been made); and
- Contestability policy objectives of government will be enhanced by reducing barriers to market entry.

With a shortlist of two, and a 50% probability of winning the Construction Phase, a fair 'proportion' of tendering costs to be reimbursed is 50% of the Suppliers likely costs during the Tender Phase. These costs can be estimated by the Client and noted in the EOI / RFP documents as a lump sum payment. However, any reimbursement should be conditional on the Tenderers satisfactorily submitting a compliant Tender, and on the transfer of all intellectual property rights to the Client relating to the project design and delivery solution that is created during the tendering phase.

9.4.2 Incentives

The use of incentive payments should be the exception rather than the rule. The Client's performance requirements should be documented in the project scope and specifications; and priced accordingly in the tender responses.

Incentive payments should be used in rare and exceptional cases where the client wishes to seek a specific outcome but cannot reasonably specify it as a normal deliverable in tender requirements due to their extraordinary nature.

Incentives should not be used to encourage the Supplier to perform their contractual obligations. Clients can use an incentive regime that reflects their specific requirements without providing financial incentives. Alternatively, they can seek the Tenderers to put a proportion of their fee at risk, eg a % of their margin.

The use of incentives and rewards to target delivery of contractual obligations or outcomes that can be specified in the project scope is a marker of an inefficient or ineffective Client/Supplier contractual relationship, and may well indicate a 'troubled' relationship.

For repeat Clients dealing with repeat Suppliers, the use of financial incentives in normal circumstances is generally counterproductive and may distort the bidding process. The potential for future opportunities is a strong enough motivator for good performance in its own right.

9.4.3 Maximise value for money through use of competition

***Effective* competition is good for collaboration**

Although collaboration requires an effective relationship between the Client and the Supplier, it is not a substitute for competition.

Competition enhances the collaborative process by motivating each Supplier to put their best resources into the task to develop their best possible offer.

Competition is most effectively used where two Suppliers have a high probability of winning the Design and Construction Phase work and will provide their best possible proposal. The focus is on an innovative solution, not on cutting the Suppliers' corporate margins.

It is understood and accepted that for any publicly-listed company, the key corporate objective is to grow its business responsibly, ethically and sustainably through winning as much profitable work as possible. In order to do this, the Suppliers will need to differentiate themselves from competitors so that the Client selects them over and above others, to perform the work. This drive to differentiate should result in the Suppliers being motivated to propose innovative project solutions that are 'better' than their competitors' proposals.

This link between competition and innovation is fundamental to ensuring that the Client is able to optimise the project's VfM outcomes. Building effective competition into the selection process means there is more incentive and opportunity for Suppliers to differentiate themselves and showcase their capabilities and capacities to deliver the project. In addition the Suppliers will be incentivised to provide innovative solutions that put them ahead of their competitors.

A selection process which optimises the opportunity for innovation and differentiation between the Suppliers should result in better VfM outcomes for the Client. It allows the Suppliers to prepare and submit the best proposal they can. As part of a properly structured selection process, competition is an important mechanism by which both the Client and the Suppliers can align and achieve their respective project and corporate objectives.

9.5 Common misuse of collaborative procurement contracts

As previously discussed, collaboration is fundamental to the success of any commercial transaction between a Client and Supplier regardless of the form of procurement or delivery contract. In comparison to traditional contracts with collaboration, collaborative procurement contracts are generally more resource intensive for both the Client and Supplier and should only be used where there is clear benefit to the Client in engaging in a level of collaboration beyond 'commonly used' good practices and traditional contracts.

Common misuse of collaborative procurement contracts is detailed in the following table:

Misconception on appropriate use of collaborative procurement	Comment
Need to start construction quickly	Only relevant if it is through collaboration in the design and constructability that an earlier construction start can be achieved. Collaboration is not a replacement for good project definition, design and planning.
Project design not developed sufficiently to take a traditional approach due to Client resource constraints	Lack of Client capability, resource or time to develop project definition and scope does not warrant collaborative procurement unless there is an urgent public benefit in collaboration. Collaboration requires capable Client team members to participate to get benefit from collaboration and generally requires more time, not less, than traditional contracts.
Required to avoid negative behaviours that are adversarial and litigious	It is the creation of an expectation gap at contract execution, between what the Client expects to obtain and what the Supplier expects to provide, that can lead to behaviours from both parties characterised as 'adversarial'. An expectation gap can arise from poor or absent project planning, inappropriate transfer of project risks and uncertainties rather than the contract model. Expectation gaps, and resulting adversarial behaviour can exist when using any contract model.

"A client that doesn't know what to buy but wants a lump sum for it – is setting up a bad contractual relationship."

UK Contractor, October 2012

10 Collaboration in the Construction Phase

This chapter provides guidance on the importance of collaboration during the Construction Phase and how to achieve this.

Whilst this Guidance Note focusses on Collaborative Procurement approaches leading up to Contract Award, it is important to recognise that collaboration is also an important success factor in the Construction Phase. Regardless of the procurement method, collaboration in the Construction Phase is essential to achieve good project outcomes.

When a collaborative procurement method has been used, it is beneficial to ensure the collaborative relationship and benefits flow through to the Construction Phase. However, in traditional forms of project delivery such as Design & Construct, collaboration is also an important foundation for achieving expected project outcomes. It is normal business practice that good Suppliers and good Clients will collaborate to achieve the project outcomes agreed at contract award.

Features of effective collaboration in the Construction Phase include:

- The Supplier should be motivated to collaborate in order to do a good job and win the next job, not to receive additional incentives;
- The Client should be motivated to collaborate to attract the best Suppliers, not use incentives as a substitute for good project leadership;
- The extent and form of collaboration is appropriate to the project characteristics and the resulting form of contract – the approach must be tailored for each project;
- The collaborative culture is not about 'getting along' or an easy ride but holding each party to account to perform as promised and to work together to resolve issues as they arise; and
- It is important when moving from a collaborative procurement method to a traditional form of contract for the Construction Phase that the commercial arrangements are clear and that there is no confusion about the conditions under which collaboration is taking place. This can include clarity regarding accountability, delegations, and risk allocation.

This topic is explored in more detail in *Towards Agreed Expectations – tender strategies to improve design and construct infrastructure delivery outcomes*, Department of Infrastructure and Transport, Australian Government, June 2012.

Appendix A

Default ECI Model Case Study (Expansion of the M100 Corridor)

Table of Contents

1 Background

This case study has been developed through combining good practices from selected actual projects.

1.1 Service Improvement

The M100 corridor is one of Metropolis's key transport corridors. It not only provides a vital transport function within Metropolis but also forms a key part of the link between major cities. The M100 corridor also connects the economic centres of Metropolis's CBD, Metropolis Airport and Port.

The need to expand the M100 corridor was identified as a high priority in the Metropolis Master Plan. The M100 corridor, carrying freight, commercial and passenger traffic is currently one of the most congested routes in Metropolis.

It is expected that population and economic growth in Metropolis will continue to place pressure on the capacity and performance of the M100 corridor. This includes:

- Land release which is expected to accommodate approximately 200,000 new homes in the next 30 years, in greenfield areas;
- Making available some 1,500 hectares of employment lands for industrial and commercial use; and
- An expansion of the M100 corridor (which includes the M100 Northern Motorway and the M100 Link Motorway) would result in approximately $8.75 billion in travel time savings over a 30 year period.

The expansion objectives are to:

- Reduce congestion in the M100 corridor and improve reliability and travel times;
- Provide relief to existing congestion on parallel routes;
- Support forecasted growth and improve access between population, commercial and economic precincts;
- Increase capacity between key destinations such as inner Metropolis, Port and Metropolis Airport;
- Improve communications between road users and the motorway traffic controllers Improve safety and provide early warning alerts for drivers on the motorway and arterial networks by providing additional variable message signs; and
- Improve incident response times with the installation of a new CCTV system.

The M100 corridor consists of two main sections:

- Section 1: the M100 Northern Motorway (– a 35 kilometre tolled road with generally two lanes in each direction; and
- Section 2: the M100 Link Freeway – a 15 kilometre road connecting the M100Northern Motorway with a major arterial road.

1.2 Delivery

The Client is responsible for the operation, maintenance and repair of the M100 Motorway.

1.3 Funding

The $650 million widening project is funded by the Government.

2 Project Information

2.1 Location and Site

The scope of the M100 Motorway Widening project includes:

- Widen the existing motorway from two to three lanes in each direction;
- Widen the existing motorway by line marking modifications from two to three lanes; and
- Upgrade five bridge underpasses along the motorway.

3 Procurement Strategy

3.1 Options Appraisal

The approach adopted involved an ECI procurement process for the following reasons:

- The concept design and price for the project could be developed collaboratively with the Client and Contractor; and
- Risk for the supplier and contractor could be clearly identified, allocated and ultimately transferred.

The ECI process would allow the delivery contract to be based on a design & construct form of contract (D&C) with most risk transferred to the contractor. This risk profile was necessary to obtain investor approval for the project on terms acceptable to the Client.

3.2 Planning Approval

It was agreed with the government during development of the project procurement strategy that the Client would be responsible for the development and submission of the planning approval in accordance with the project timeframes.

3.3 Justification

The primary reasons for selection of an ECI procurement route is summarised below.

Risk Transfer and Finance

The government required certainty around the risk that would be retained by the Client on the motorway. Using an ECI process leading to a D&C allowed most risk to be transferred to the Contractor. Remaining risk could be insured by the Client at reasonable cost.

Program and Scope Uncertainty

The use of an ECI process allowed the program and scope to be developed collaboratively in parallel with the preparation of the commercial terms. Managing these activities concurrently allowed time to be saved during development of the project.

Efficiency

The ECI process is efficient as the concept design and construction planning documentation prepared during the ECI phase can be used directly during delivery.

Interface with stakeholders

The ECI process allowed for the Client and the contractor to work collaboratively with stakeholders, especially with regards to the information required to be exchanged in support of the Planning Approval process.

Value for Money

The ECI process of developing the design, construction plan and estimate involves processes to ensure and justify that the project represents value for money to Government.

Innovation

Having early contractor input during the early phases of the project allows for innovative and cost efficient design and construction solutions to be adopted.

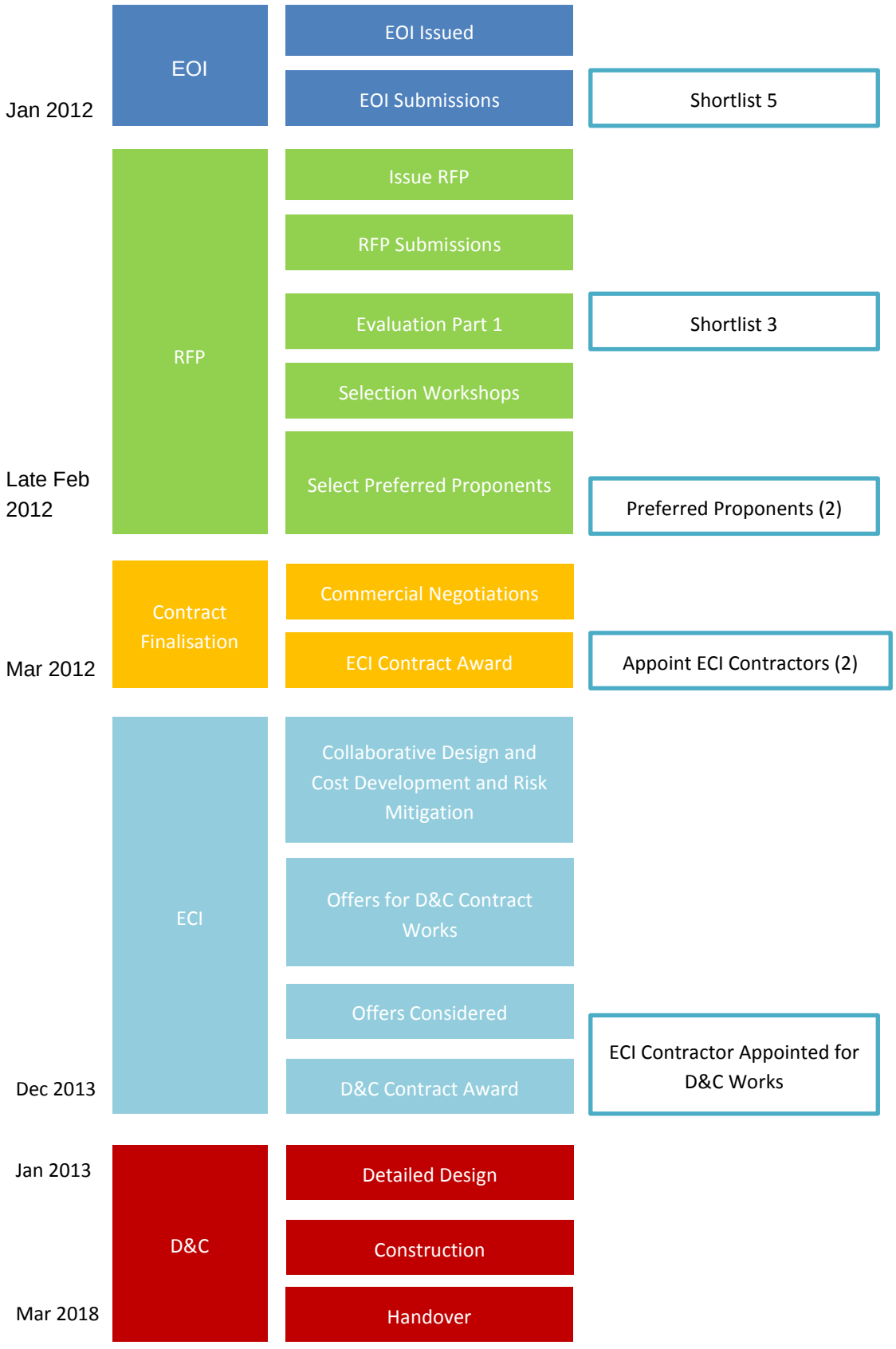
4 Procurement Process

4.1 Overview

Selection of the ECI Contractor followed a two part selection process – a call for Expressions of Interest, followed by issue of a Request for Proposals to selected parties. At the conclusion of the Request for Proposals stage two respondents for the ECI Contractor were selected.

The preferred respondents were then engaged as the ECI Contractors to develop the project design, estimate and program in collaboration with the Client. This culminated in submission of two compliant fixed price lump sum proposals for constructing the works using a D&C Contract.

A summary of the overall process is shown in the following diagram.



4.2 Expressions of Interest

The Expressions of Interest (EOI) process was conducted over a 3 week period. EOIs were requested from the 10 prequalified contractors. Eight submissions were received and subsequently evaluated on the basis of:

- experience in the last 5 years in providing ECI services or participating in alliances;
- experience in the last 5 years in the design and construction of major road projects in the urban environment which included the upgrade of existing infrastructure;
- current and potential projects and ability to deliver the ECI services within the Supplier's projected workload; and
- financial capacity.

The EOI evaluation resulted in five Respondents being shortlisted and invited to respond to the Request for Proposals.

4.3 Request for Proposal

The RFP process for the project was completed in three stages as follows:

Stage 1 - Written Proposal: The first stage of the process involved requiring the Proponents to provide a written response (the Proposal) that addressed the mandatory requirements and comparative criteria in the RFP. At the end of stage 1, three of the Proponents were shortlisted and invited to participate in stage 2 of the process (Shortlisted Proponents).

Stage 2 – Workshops: Following stage 1 the Shortlisted Proponents were required to participate in workshops which were designed to give the Selection Panel the opportunity to meet with key nominated team members to enable the Selection Panel to better assess the Proponents against each of the comparative criteria, leading to selection of the Preferred Proponents.

Stage 3 – Finalisation: Following Stage 2, the Client undertook discussions with the two Preferred Proponents to reach final agreement on the ECI Agreement.

4.3.1 Contract Models

The ECI contract model was based on previous motorway ECI contracts. The D&C contract model was adopted based on the standard form provided by the Government, which had been successfully implemented on other projects.

Proponents were requested to state any proposed departures from these preferred contract models within their RFP submissions.

4.3.2 Fees and Pricing

Respondents were requested to submit the following financial information relating to their services: [ensure alignment]

- Lump Sum ECI Fee (did not exceed 50% of the estimated costs incurred by the contractors participating in the ECI phase);
- Hourly rates for ECI variations;
- D&C Margin (%); and
- Defined D&C unit rates (for use in developing the D&C lump sum).

4.3.3 Scope of the ECI Services

The ECI agreement provided the scope of the services to be delivered during the ECI Phase and included:

- Management and governance for the ECI phase;
- Design development;
- D&C Contract development; and
- D&C Price development.

The deliverables from the Scope of the Services essentially included all the component parts required to execute a D&C Contract.

4.3.4 Comparative Evaluation Criteria

The comparative evaluation criteria used in Stage 1 of the RFP process were selected based on a split of 65% for non-price related criteria and 35% value for money. The allocation was based on ensuring that the Contractor selected would have the experience and capability to deliver the services, whilst maintaining value for money.

Details of the specific selection criteria as follows:

Weighted Criteria	Weighting
Capacity, Availability and Delivery Strategy: Proponents were required to demonstrate to the Client that they and their key Providers (including designers and subcontractors) had adequate and appropriate managerial, technical and resource capacity and experience, currently available to deliver the ECI Services and would be capable of carrying out the D&C activities.	5%
Key Personnel and Team: Proponents were required to provide an outline of their proposed team structure for the ECI Services and briefly describe the personnel nominated for key positions and why they are best suited for this particular Project. In particular, Proponents provided details of their previous experience in projects of a similar nature and in relationship-based contracting and their personal attributes that make them suitable for this style of project delivery. Proponents were also required to provide details of its proposed representatives to participate in the ECI Management Team and corporate commitments to satisfy the Client that those representatives will be, and remain, available throughout the ECI Services.	25%
Corporate Focus and Involvement in Project: Proponents were required to detail the commitments that its corporate head office will make to the Project including nominated ECI Leadership Team members, CV's, their role in the corporations and their ability to make things happen in a difficult, resource-constrained environment.	5%
Capability to Manage Risk and Capitalise on Opportunity: Proponents were required to provide an outline approach to project risk (and opportunities), including details of the Proponent's ability to actively manage the risk so that the project's objectives are met or exceeded. Project risks may include risks that are traditionally the responsibility of owners.	15%
Anticipated Construction Methodology: Proponents were required to provide an anticipated construction methodology and timing, including: - possible traffic management strategies and construction staging (civils, noise and OMCS) for each carriageway; - potential processes and methodology to identify and protect structures at risk during construction; and - potential processes and methodologies for protecting and / or adjusting existing utility services and minimising disruptions.	15%
Value for Money: Proponents were required provide a strategy and commitments that they can fulfil, to satisfy the Client and the stakeholders, that their solutions will offer value for money.	35%

4.3.5 Workshops and Selection of Preferred Proponents

Stage 2 of the RFP involved the Client's participants working with the three Shortlisted Proponents in parallel until the Preferred Proponents could be chosen. Evaluation of Shortlisted Proponents involved the following:

- Work sessions;
- Output documents from the work sessions;
- Financial submissions and audits; and
- Information or discussions specifically requested by the Client's Selection Panel.

The Selection Panel was required through the process to form a unanimous view of who the Preferred Proponents were before finalising the selection.

4.3.6 Scope of Works and Technical Criteria

The three shortlisted proponents were issued with the Draft Scope of Works and Technical Criteria (SWTC) to be included in the D&C Contract. The SWTC detailed the technical requirements for the motorway widening, including standards and guidelines to construct to and specifications for construction items, plant and equipment etc.

Included within the SWTC was the Concept Design.

4.4 Appointment and Current Status

Ace Contractors Pty Ltd and Acme Contractors Pty Ltd were appointed as the ECI Contractors to provide the ECI Services to develop the D&C Lump Sum Offer for the project.

The initial M100 Motorway Widening Proposal was submitted to the Government, containing an early Concept Design and an initial D&C Price.

An Updated M100 Motorway Widening Proposal was submitted to the Government, including the ECI Phase Concept Design and a final D&C Price for the project. The recommended contractor was appointed as the D&C contractor. The Planning Approval for the project was received on 9th November 2011.

5 Success Factors

5.1 Value for money

A key focus for the Client during the ECI Phase had been to ensure that the project proposals based on the D&C Lump Sum price offered demonstrable value for money. This was necessary ensure compliance with the Government's procurement requirements.

To ensure that value for money was achieved and could be demonstrated a Value for Money Plan (VfM Plan) was established at the commencement of the ECI Phase. The VfM Plan included a

Value for Money Statement that defined the meaning of value for money on the project and outlined the key steps that would be undertaken during the definition, design and construction of the works.

The success of this process was demonstrated during the ECI Phase through the constant attention that was provided to ensuring value for money was optimised by both contractors. The contractors offered many solutions that reduced the cost of the project while providing an equivalent quality outcome for the project. These included a combination of design solutions, materials and construction methodologies.

5.2 Commercial Framework

The primary commercial objective for the Client was to transfer as much risk as possible into the D&C Contract at reasonable cost. This transfer was necessary to provide the certainty required to obtain finance for the project at a reasonable cost in the market.

The use of the two stages of commercial and contractual terms facilitated this risk transfer as it allowed a different risk profile during the collaborative ECI stage, to the 'hard dollar' D&C stage. These different commercial and contractual terms were encapsulated into the ECI Agreement and the D&C Contract.

The focus during the ECI Phase was to utilise the skills and experience of the contracting teams, in competition, to define the project and design to the right level and then use the D&C contract to deliver it without significant changes or variations. Additionally, as part of the tender evaluation, the contractor was measured on the involvement of key staff through both the ECI (particularly) and D&C stages. This meant that the knowledge and understanding of the project wasn't lost and there was some consistency but that the different commercial conditions would be adhered to.

5.2.1 ECI Commercial Principles

The contractors were responsible for delivering the ECI Services to a lump sum cost and a fixed timeframe during the ECI Phase. Other key commercial principles included:

- warranting the final design deliverables to satisfy all laws and that it was fit for the intended purpose;
- ensuring an open book approach to the commercial negotiations;
- providing appropriate indemnities and insurance for the ECI Services;
- variations priced on a schedule of rates basis; and
- incorporating agreed benchmarked rates into the D&C Lump Sum Price.

This put the onus on the ECI Contractors to ensure that while the design was collaboratively developed, they were ultimately responsible for final design, and the documentation that was taken forward into the D&C contract.

5.2.2 D&C Commercial Principles

The D&C contract was a stand-alone contract between the Client and the successful Contractor. The key commercial principles that were included in the D&C contract package included:

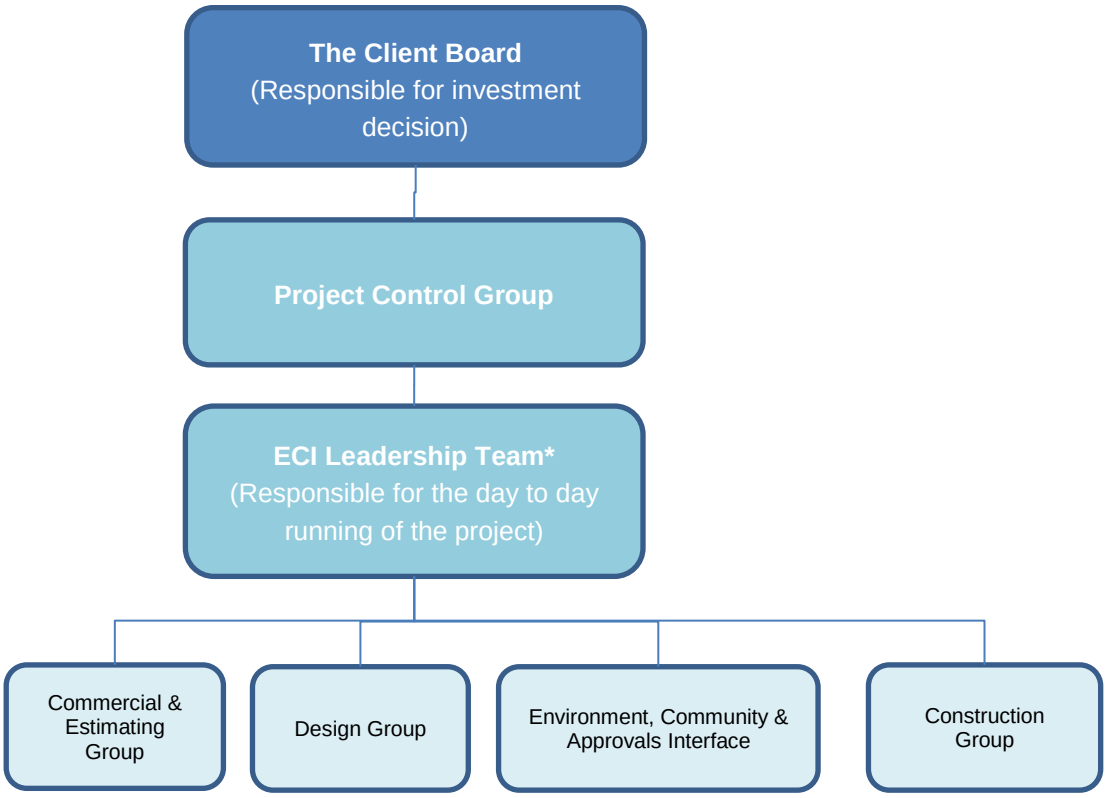
- fixed lump sum price with interim progress payments;
- the completion dates are fixed and liquidated damages apply;
- obligations under the head contract in relation to the design and construction of the motorway are passed down to the contractor;
- claims that arise through a breach of the head contract could be claimed directly by the contractor through a pass through mechanism;
- the contractor is responsible for managing and maintaining the motorway within the extent of the works;
- existing traffic capacity on the motorway are maintained during construction;
- the design and construction of the works are fit for its intended purpose;
- most design and construction risk transferred to the contractor, with the exception of transient contamination and the condition of existing structures that were not part of the scope; and
- project specific professional indemnity insurances are required to be provided by the contractor.

The Client was guaranteed access to the motorway during the works to allow inspection and review of the works.

5.3 Governance

From the earliest point in the procurement process, project governance was implemented to ensure that appropriate project governance would be established to meet the Client requirements. This set the controls and process which would be used through all stages of the procurement and delivery stages of the project.

A Project Control Group was formed which comprised the key project personnel from the Client and the Contractor. The PCG reported separately to the Client Board and to Contractor Management.



*During the ECI phase, this team would be replicated for each shortlisted contractor.

The structure worked effectively to ensure that all parties were informed and able to effectively participate in decision making on the project.

5.4 Communication

Within the ECI Leadership Team and project groups, a significant success factor was the proactive and collaborative culture. Both the Client team and the ECI Contractors understood that successful delivery in the timeframe to the desired quality could only be achieved by developing a certain level of trust in the capability and motives of each other.

The contractors worked with the Client to ensure the project could be delivered within the lowest budget possible, with their motivations aligned by competition between the ECI contractors, and a desire to ensure the project would be accepted by the government and move into delivery.

5.5 Skills and Experience

The structure combining the contractor and client resulted in a project team with the appropriate skills and experience. The Client team had a good understanding of the ECI process and had worked with contractors previously ensuring a proactive approach at solving issues and working with the contractors.

This was helped by the ECI Contractors appointing teams with significant experience on the type of works at hand. The experience of the ECI Contractors' team carried the credibility of the project.

The skills and experience of the designer were also key to this success by ensuring that technical issues were resolved efficiently.

5.6 Design Constraints

Design issues were a significant factor during the ECI Phase, especially as the project involved an upgrade of legacy infrastructure that was not built to current standards. A working group was formed to review the design and develop specific technical requirements that were appropriate for the project. The group was managed by the Client and involved both the ECI Contractors and other key stakeholders.

The group worked collaboratively[15] to develop a project specific Scope of Works and Technical Criteria document that could be accepted by all parties in the final form of the contract. The group ensured that the technical requirements were appropriate to deliver a best value for money solution on the project, allowing some legacy standards to be maintained where appropriate. The process undertaken involved agreeing general principles for the project and then working through the issues in detail to ensure that appropriate allowance could be made within the technical documentation.

[15] In relation to the management of potential probity issues, a Probity Management Plan was developed. This Plan was developed by the appointed Probity Adviser and followed the general guidelines in Section 6.3 of *Towards Agreed Expectations – Tender strategies to improve D&C infrastructure outcomes,* Victorian Department of Treasury and Finance, 2011 (www.dtf.vic.gov.au/project-alliancing).

Appendix B

Alternative ECI Case Study (Albany Health Campus)

Appendix B is provided by the kind agreement of the Western Australia Department of Treasury and Finance. The case study is provided to assist agencies in developing their own procurement strategy for their specific project. The Case Study provides a detailed example of an alternative ECI process.

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1 Background

1.1 Service Improvement

The Country Health Services Review (2003) and the Reid Report (2004) proposed a regional network of health services and facilities for Western Australia (WA). Successive governments committed to the re-building of WA's health system and, as the State's largest regional health campus, a key aspect of this was the redevelopment of the Albany Health Campus (AHC).

Completion of the AHC redevelopment works by the end of 2012 was made an election commitment.

1.2 Delivery

In February 2009, the Western Australia State Government adopted a suite of initiatives called the 'Works Reform' program to improve the delivery of non-residential building projects and building management practice.

Under this model, a newly formed Department of Trade and Finance (DTF) is responsible for:

- 'Strategic Projects' through a discreet business unit; and
- 'Works' through the Building Management and Works business unit.

To meet the election commitment, the Minister for Works appointed DTF Strategic Projects as the contracting entity for delivery (the 'State' in the context of this document) and the Minister for Health appointed WA Country Health Service as the operator of the completed facility.

1.3 Funding

Funding for the project was provided by the State Government, the Royalties for Regions program and the Commonwealth Government.

The budget for the State to deliver the new facilities including all preparation, procurement and construction work was $170m.

2 Project Information

2.1 Location and Site

Albany is 400 km south east of Perth in the Great Southern Region (total population of 60,000) and has a population of 34,000. The existing Albany Hospital was largely developed in the 1960's and sits on a sprawling Crown land site north east of the city centre.

The existing facilities presented significant physical limitations with original engineering services in need of replacement and did not allow for new models of service to be provided in line with recognised industry best practice.

2.2 Project Requirement

A series of fundamental service improvements were identified by the Health Service through a 'ground up' approach which considered the changing demographics of the region and taking in to account best practice and aspirational aims for the service at Albany. This was undertaken by external consultants and included a wide range of user groups and service providers. The need to improve the services drove identification of what facilities would be required in order to deliver change.

The following were identified as the facilities which were required to meet the service improvement need:

- 104 Inpatient Beds (Hospice Beds not replaced);
- 32 Day Places;
- theatres;
- 1 endoscopy room;
- 1 procedure room;
- New Emergency Department with 19 treatment places;
- Birthing Rooms;
- Mental Health Facility;
- Gross Hospital Area in the order of 20,000m2; and
- Car parking at grade.

These requirements formed the constraints on the development and the parameters within which the project would be delivered.

It was however recognised that within this wider project definition and scope, the detailed requirements would evolve from this initial assessment, particularly from the influence of the following:

- potential Commonwealth funding;
- possible private sector involvement in some clinical and non-clinical support services; and
- other stakeholder and user input.

Consequently, the State was conscious that managing the involvement and expectations of the user groups was fundamental to the success of the project.

A lack of alternative service facilities in the region meant that upgrade of the service delivery capacity would have to be implemented while maintaining operation of the existing hospital services.

3 Procurement Strategy

3.1 Options Appraisal

A procurement options analysis was completed by Ernst & Young in May 2009 which noted that:

- the project was unsuitable for delivery using the PPP delivery route;
- publically funded capital investment would be the optimum route;
- the program and design development meant that an Early Contractor Involvement (ECI) delivery method or Managing Contractor contract would be most viable'; and
- that market testing should be undertaken for both clinical and non-clinical service provision.

To supplement this advice and confirm the appropriate procurement and contract strategy, DTF undertook a focussed risk-based procurement selection process which recommended that the work was procured using the ECI model and delivered using a lump sum design and construct (D&C) contract.

3.2 Justification

The primary reasons for selection of an ECI procurement route can be summarised below.

- **Program Constraint**
  The Government commitment to complete construction by the end of 2012 meant that a fast track procurement process was required in order to allow construction to commence by early 2011.
- **Scope Uncertainty**
  There was a significant risk of scope change during the design development process given Commonwealth funding requirements, large and complex user group structure and involvement of private sector service delivery organisations.
- **Site Management and Innovation**
  Having early Supplier input on a sprawling and operational hospital site would reduce the inevitable construction impact and allow for innovation in the design development and construction methodology.
- **Risk Profile**
  The number of undefined risks related to design development would have reverted to 'conventional' construction risks and an inaccurate risk management strategy.

The use of a lump sum D&C contract provided the State with the required risk allocation and cost certainty given that the ECI phase would be used to define construction requirements. The Procurement Plan was approved in December 2009.

3.3 Program

A challenging but achievable program was set to meet the development constraints and targets. The following milestones are set out below.

Action / Stage	Date
EOI Released	January 2010
EOI Returned	February 201
Short List Announced	March 2010
RFP Released	April 2010
Stage 1: ECI Contract Award	June 2010
Stage 2: D&C Contract Award	December 2010
Construction Commencement	January 2011
Construction Completion	December 2012
Handover	March 2013

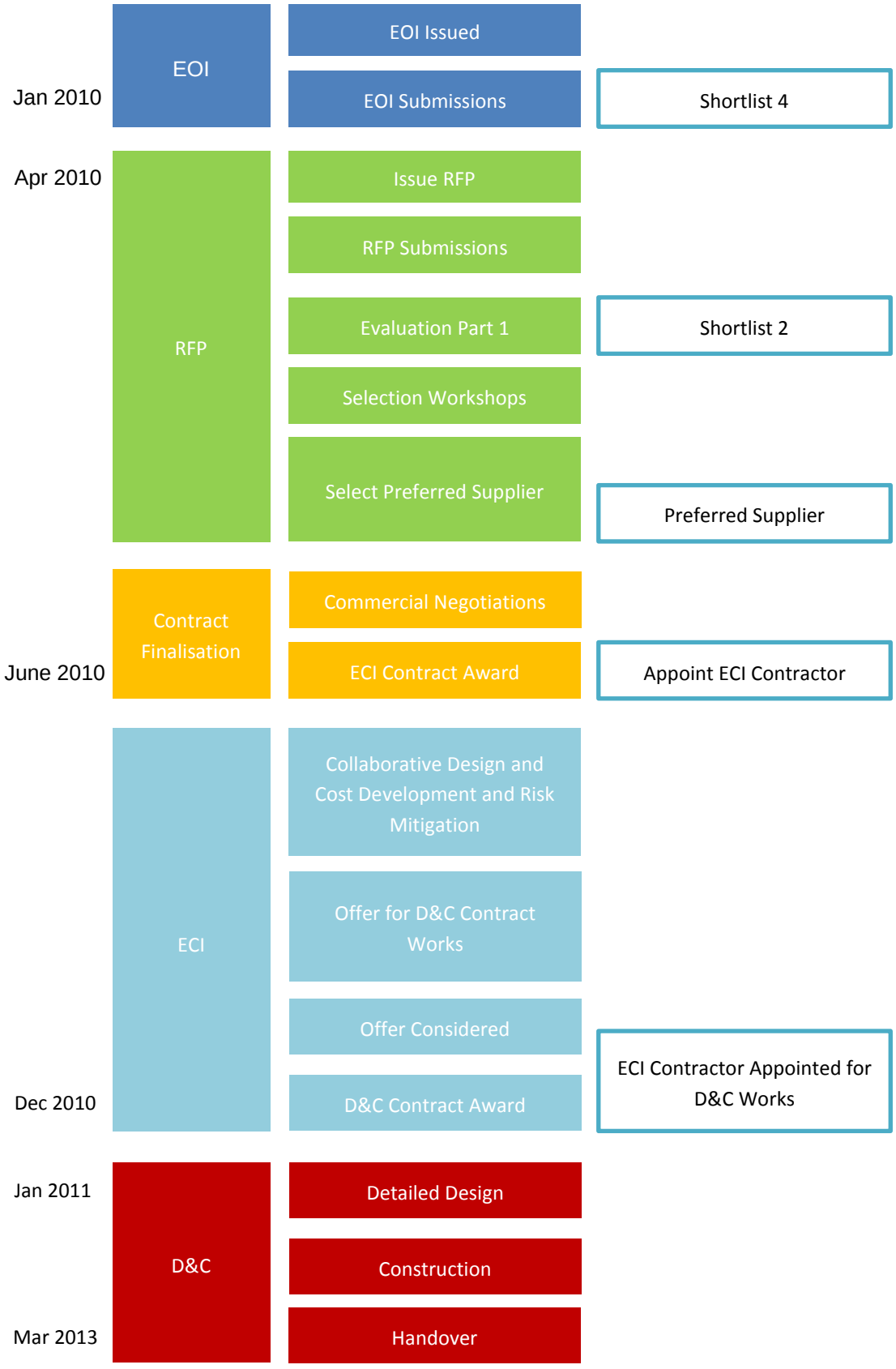
4 Procurement Process

4.1 Overview

Selection of the ECI Supplier followed a two part selection process with Expressions of Interest being used to shortlist respondents who would respond to a Request for Proposals. This resulted in selection of a preferred ECI Supplier.

The ECI Supplier was then engaged to develop the project scope and designs in collaboration with the State. This resulted in submission of a successful lump sum proposal for constructing the works using a D&C Contract.

A summary of the process is shown in the following diagram.


Jan 2010
EOI
EOI Issued
EOI Submissions
Shortlist 4
Apr 2010
RFP
Issue RFP
RFP Submissions
Evaluation Part 1
Shortlist 2
Selection Workshops
Select Preferred Supplier
Preferred Supplier
June 2010
Contract Finalisation
Commercial Negotiations
ECI Contract Award
Appoint ECI Contractor
ECI
Collaborative Design and Cost Development and Risk Mitigation
Offer for D&C Contract Works
Offer Considered
ECI Contractor Appointed for D&C Works
Dec 2010
D&C Contract Award
Jan 2011
D&C
Detailed Design
Construction
Mar 2013
Handover

4.2 Expressions of Interest

Expressions of interest submitted by the market were evaluated using:

Threshold Criteria (Pass/Fail)

- EOI Compliance;
- Financial capacity; and
- Accreditation (safety, quality and environment).

Qualitative Criteria (Weighted Scores)

- Capability (organisation and key resources);
- Project experience (including the ECI process);
- Management capability; and
- Capacity and availability.

The EOI evaluation resulted in four Respondents being shortlisted and invited to respond to the Request for Proposals.

4.3 Request for Proposals

The shortlisted Respondents were invited to respond to Requests for Proposals and were provided with supplementary information to support the development of their bids. This included a Functional Brief and the State's preferred Stage 1 ECI Deed and Stage 2 D&C Deed.

4.3.1 Functional Brief

The Functional Brief was developed in conjunction with the users and service providers and set the project parameters for meeting the service need (generally as described in 2.2 Project Requirements). This included a functional description of each aspect of the development and a schedule of areas.

4.3.2 Contract Models

The State utilised ECI and D&C contract models that had been successfully implemented across its portfolio of developments and amended these to suit the specifics of this project. These reflected the lessons learned and outcomes on successfully managed projects. Suppliers were requested to state any proposed departures from these preferred contract models within their RFP submissions.

4.3.3 Fees and Pricing

Respondents were requested to submit the following financial information relating to their services:

- Lump Sum ECI Fee;
- Hourly rates for ECI variations;
- Early Works Margin (%);
- D&C Margin (%); and
- Defined D&C Preliminaries (lump sum).

4.3.4 Evaluation Criteria

Evaluation criteria were selected which generally had a split of 40% relating to the capacity, capability and local ability to deliver services and 60% relating to the proposed methodology and strategy for the ECI and D&C stages of the project. This allocation gave the State comfort that they would be appointing a suitably experienced Supplier who would deliver the specific services within the geographic region.

Weighted Criteria	Weighting
EOI Ranking Confirmation of validity of EOI information, update and additional information Ranking from EOI Qualitative criteria	20%
Buy Local The extent to which the Respondent satisfies the State's 'Buy Local Policy'	20%
ECI Delivery Strategy Detailed description of the Respondent's strategy for delivering the ECI Services	40%
D&C Delivery Strategy Outline description of the Respondent's strategy for delivering the D&C Services	20%

4.3.5 Evaluation and Preferred Supplier Selection

Evaluation of the proposals was undertaken in two stages. Firstly, the proposals were assessed against the evaluation criteria and two Respondents shortlisted to proceed with further detailed evaluation.

The two shortlisted respondents were invited to present a summary of their proposals and participate in a clarification workshop with key members of the State's project team. This was designed to gain a better understanding of their proposals and confidence in the respondent's ability to deliver the required scope of service.

This final stage of evaluation resulted in the selection of a Preferred Supplier. A series of commercial negotiations followed with the conclusion being agreement of the ECI Deed and outline terms for the D&C Deed. There were no opportunities to negotiate the any of the tendered financial aspects of the proposal as these were bid in the competitive stage with tension from the other three Respondents driving the best prices for the State.

4.3.6 Technical Brief

The Preferred Supplier was issued with Performance requirements for the technical aspects of the hospital including:

- Specifications and standards including finishes, specific plant and equipment;
- Standards and guidelines to design and construct to; and
- Disclosed to the successful Supplier as the basis for the ECI collaborative design development.

4.4 Appointment and Current Status

In July 2012 John Holland Pty Ltd was appointed to provide ECI services to develop the project design and offer a lump sum price for the construction of the AHC could be offered to the State. This offer was in accordance with the State's budget.

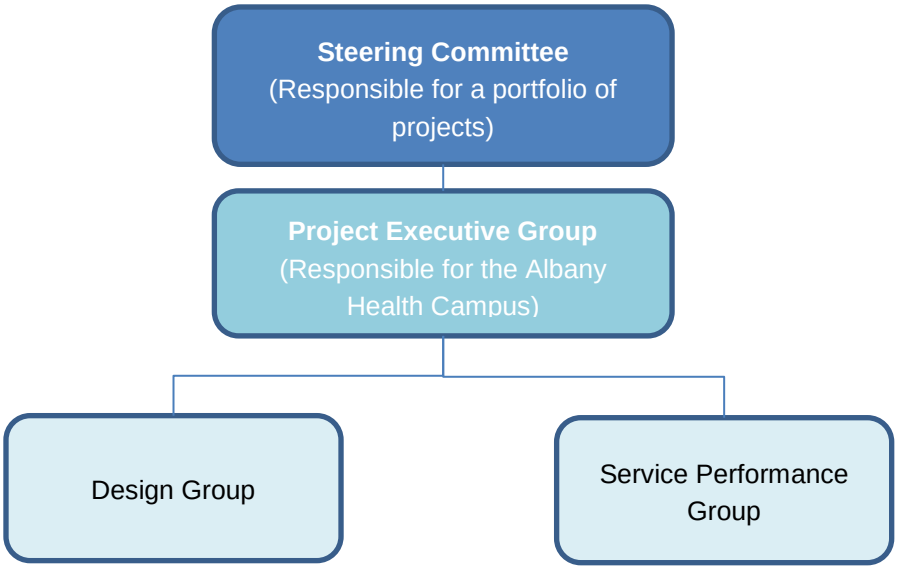
Master planning and schematic designs were completed between July and November 2010 with the State Government accepting the resulting offer for construction in December 2010.

The construction phase is due for completion on program and to meet the election commitment of works complete by December 2012.

5 Successful Factors

5.1 Governance

From the earliest point in the development process, a detailed governance plan was implemented which complemented the State's wider governance requirements. This set the controls and process which would be used through all stages of the procurement and delivery stages of the project. A Project Executive Group was formed which comprised the key project personnel from the State's Steering Committee team and representatives involved in the State's wider portfolio of projects. They reported to the Steering Committee.



This governance structure resulted in the Steering Committee, being responsible for a portfolio of projects, would always have a thorough understanding of the project, including its financial status

and risk profile, and be able to better manage their portfolio. It encouraged a ‘no surprises’ culture which helped to realistically and practically manage changes on the project and support effective risk management.

A crucial part of this was clear and consistent reporting. A standard reporting template was developed for the project which mirrored the requirements of the Steering Committee. This allowed for easy comparison between reporting periods and helped issues to be tracked and resolved before they became significant. This format was subsequently implemented across all the Steering Committee’s project to provide a consistent approach and easy comparison of relevant risks etc.

5.2 Communication

The greatest success factor was the proactive and collaborative culture developed by the project team. Both the State delivery team and the Supplier understood that successful delivery in the timeframe to the desired quality could only be achieved by developing a certain level of trust in the capability and motives of each other.

An open approach to problem solving during the ECI phase where the skills and experience of the Supplier were utilised helped both parties develop a design that met the State’s requirements and was deliverable on the constrained site.

Weekly meetings were held between the key decision makers from each party (approximately three from the State and five from the Supplier) which were used to raise early issues and take swift and decisive actions to prevent problems developing. This had the added benefit of removing multiple review and decision processes as those who were able to make decisions had the opportunity to make them in a focussed and open environment. This did not eliminate all issues, but it did establish a forum for issues to be resolved while taking into account an array of factors and motives.

5.3 Skills and Experience

Achieving good project outcomes was supported by having a project team with the appropriate skills and experience. The State team understood the ECI process and the change in culture and mentality it required and were prepared to work with the Supplier to solve issues rather than fall back to the more common default adversarial approach that often arises in traditional contracting.

This was helped by the Supplier appointing a team who were experienced in the health sector, so understood the constraints on Clients and the service delivery pressures communicated by users, and were able to bring recent ECI experience and skills.

Because the Supplier understood that the State were focussed on achieving a successful outcome through working together, they provided valuable advice through the design development in order that solutions were reached that benefited both parties. Understanding that the State were working to a defined budget based on the scope of work and mutually beneficial commercial constraints meant that the Supplier was not looking to always increase the scope or drive down quality to increase their margins. The result was that there were minimal, and generally insignificant variations, through the construction phase (approximately 1% of the contract value).

5.4 Design Constraints

The complexity and constantly changing nature of health service provision meant that there was a risk that involvement of user groups could have protracted the design process and led to a significant number of changes both through design development and into construction.

This was avoided by communicating with the users who would be involved in the design process, educating them on how it worked and what level of involvement they would be expected to provide. This meant that users were enthusiastic about the project and able to play a valuable role in defining the design within the boundaries as they understood the reasons for the constraints and the implications of not resolving design issues promptly.

5.5 Commercial Framework

Given that there were two contracts used to deliver the project; one for the ECI stage and one for the D&C stage, the State made a conscious effort to prevent the collaborative ECI mentality being carried over to the ‘hard dollar’ D&C stage.

The focus during the ECI stage was to utilise the skills and experience of the contracting team to define the project and design to the right level and then use the D&C contract to deliver it without significant changes or variations. As part of the tender evaluation, the Supplier was measured on the involvement of key staff through both the ECI and D&C stages. This meant that the knowledge and understanding of the project wasn’t lost and there was some consistency but that the different commercial conditions would be adhered to.

5.5.1 ECI Commercial Principles

The Supplier was responsible for warranting the final design deliverables to satisfy all laws and that it was fit for the purpose of constructing a health campus which met the project objectives. This put the onus on the Supplier to ensure that while the design was collaboratively developed they were ultimately responsible for final design. They had to achieve this within a fixed timeframe and were paid a lump sum to encourage efficiency. They were paid an hourly rate for variations during this period which allowed the State to assess the cost implications of changes.

Importantly, there was a provision for early works to be undertaken by the Supplier in advance of them securing the contract for the D&C stage. They recognised that to meet the construction period constraints they would have to undertake some early construction works to facilitate transfer of services and patients once construction commenced on site. This had the added benefit of demonstrating their commitment to providing an appropriately priced offer for the D&C contract works and provided an extra level of confidence to the State that the Supplier could deliver the services. Early works were paid with a margin tendered during the competitive RFP phase and the State could assess if it was beneficial to undertake the works in line with the risk profile of the project.

[Note (Early works): This Guidance Note supports that as a general rule early works are contracted separately from the preferred tenderer to avoid capture during the tender process. Even when conducting a high quality tender process, the client can expect to pay a premium for non-price competitive practices compared to price competitive practices.]

To further maintain control over the performance of the Supplier team, the State approved certain categories of sub-contractors. This included design consultants or sub-consultants with fees in excess of $100k.

5.5.2 D&C Commercial Principles

The D&C contract was developed to be completely stand-alone from the ECI works. This split the State's project development and delivery risks and guaranteed a certainty of price and program for the construction period. It did however mean that while the majority of design development was undertaken during the ECI phase, the user groups involved in developing the detailed design had to be educated to understand the constraints that they were working under and that any significant changes they were proposing would have to go through the strict governance and approval process established at the start of the project. Again, the State had the opportunity to approve certain categories of sub-contractors, primarily those with fees over $100k.

The Supplier was incentivised to meet the contract program through inclusion of liquidated damages of $45,000 per day. There were some, limited, entitlements for extension of time claims including State breach of obligations, industrial action affecting the project and caused by the State or a variation or change to law or Policy.

The Supplier was paid a lump sum for the services based on a percentage complete basis. This allowed the State to measure progress and cash flow on the project and helped to highlight any areas of concern in not meeting the program.

The State was entitled to carry out works prior to practical completion and have priority access for thirty consecutive days immediately prior to practical completion. This was designed to support the complex transition of services that the State would be undertaking.

Appendix C

Example projects

Appendix C is provided to illustrate to readers the range of collaborative models being used in Australia. These examples are not intended to evidence best practice, but typical practices, and for this reason are not identified.

ECI Example Project 1

Project Type: Road

Project Value: $60M (D&C Cost)

Selection of Early Contractor Involvement Process: an ECI was selected as the method of procurement for this project as:

- Client and many potential Suppliers were familiar with this procurement process;
- there was **detailed technical documentation** available (standards, scope etc);
- Client wished to consider a number of **alternative design options** with preferred Suppliers;
- A reference design and estimate were completed by the Client and available;
- Client had a **fixed budget**, **mandatory scope** and a '**wish-list'** of items in addition to its prioritised scope; and
- Competitive tension was maintained, promoting innovation and keen pricing.

Information available included a number of detailed reports on geotech, topographical, environmental, traffic and community surveys and other information.

ECI Phase – EOI: Six Suppliers (typically contractor/designer consortium) were invited to participate on the basis of experience.

ECI Phase – RFP (1): Each Supplier was requested to complete an EOI Submission based on general project information available, to enable the Client to evaluate Suppliers' experience in the relevant design and construction of similar projects. From the six submissions issued, the Client shortlisted to two Suppliers.

ECI Phase – RFP (2): The 2 Suppliers continued into a four-month Development Period, in which conforming and alternative designs were further progressed to allow a more informed offer to be tabled (submitted designs typically being at about 15% complete). Collaboration between the Suppliers and the Client occurred through:

- the use of a Client designer embedded with each Supplier's design team to ensure the design was consistent with Client expectations and standards and that available options were efficiently investigated or discarded;
- weekly design meetings, held between Client and each Supplier to ensure design options were appropriate and that any issues raised were quickly addressed. Other (joint) meetings were held periodically to brief Suppliers that information had become available;
- the RFI Process including provision of further information to enable Suppliers to reduce their risk allowance and gain more certainty of design; and
- meetings with Client specialists to further clarify acceptability to Client of particular design elements (as requested).

An update presentation was made by each Supplier to the Client half way through the development period to understand progress and to rationalise the scope to avoid wasted design effort on items that would not achieve the budget. On completion of this Development Period, tenders were submitted which included an estimate of costs, design to date, risk register and allocation, program, draft contract document, commercial model, construction methodology and options information. These two tenders were evaluated in line with the evaluation criteria (price and non-price items) by the Client specialists and/or consultants. The overall assessment was confirmed by a Selection

Panel comprising three Client staff and one independent member. From this evaluation, a preferred Supplier was selected.

Following the selection of a preferred Supplier, negotiations were held over 4 months, confirming the allocation of risk and dealing with issues such as omitted items, resulting in a fixed price D&C contract being executed.

Outcomes: Key outcomes or lessons learned from the above include:

- An ECI process is a good choice when you have:
- repeated contracts (e.g. Client letting similar contracts on regular basis);
- standard documentation;
- adequate personnel to provide embedded designers;
- clearly defined scope (including reference design and estimate); and
- require design options/choices and hence scope for innovation (to drive costs down so that items from the “wish list” could be funded).

This Client felt that if it is a straight forward project with little scope for design innovation, the ECI could be replaced by a Construct-Only contract.

The ECI process was looked on favourably by Suppliers - they have a 50/50 chance of winning, and were partially reimbursed for their tender costs. They also get to work with the Client on the risk allocation. Criticism has been made in this project of how long it takes to contract award (the assessment and negotiation time). This can make it difficult for Suppliers to keep their proposed team together.

Commentary:

Best practice would be that the Client had determined the total requirement of its project scope to meet the service objectives of its organisation and Government. Generally, directing funds to a ‘wish list’ of project items may not satisfy the ‘opportunity cost of capital’ criterion normally applied to investment decision making across a portfolio of service objectives.

ECI Example Project 2

Project: Rail

Project Value: $400M

Selection of ECI Process: Following internal Client Procurement Strategy Workshops, ECI was selected as:

- the Client was not in a position to fully document the challenges of project design and delivery, and felt that collaboration with Supplier would add the appropriate expertise and perspective to optimise resolution of design and delivery issues;
- the need to accommodate existing rail operations requirements in design and construct methodology was necessary and Supplier input was seen as essential (ECI process seen to allow the Client to understand and ensure operating requirements were adequately addressed and allow development and flexibility in scope, thereby also increasing knowledge transfer to its personnel);
- the Client sought transparency in pricing, including indirect costs and margins, to allow them to formalise scope and to meet funding approval requirements; and
- it permitted the Client to maintain influence and/or control during design process.

ECI Phase – EOI: Four ECI Suppliers were invited by the Client to participate in the ECI process, chosen based on their capability and capacity to deliver the project works. Two Suppliers were shortlisted.

ECI Phase 1: Collaboration between the Client and two Suppliers within the RFP development period included conducting numerous workshops for development of the concept scope beyond the reference design including pricing and schedule. At the conclusion of the RFP development period, each Supplier provided offers which were evaluated by the Client according to price, risk, indirect & margins and capability. Following this evaluation, a single preferred Supplier was chosen.

ECI Phase 2: Following selection of a preferred Supplier, negotiation of remaining issues and queries were conducted to allow a Works Agreement to be put in place. A project development contract was awarded. During the project development phase, the Supplier worked with the Client and other stakeholders to establish detailed scope, associated standards and a reference design for the works. The Supplier also considered the opportunities and benefits associated with the proposed early works.

Outcomes: Key outcomes or lessons learned from the above include:

- the Client's lack of knowledge resulted in delays to the ECI process;
- The cost of running an ECI process can be higher than running other procurement processes; and
- The Client cost of the ECI procurement was high.

Commentary:

Best practice would be that the Client had expended appropriate capability, effort and resourcing to investigate and plan the project definition and scope. Whilst it is appropriate to collaborate with Suppliers where they have the required expertise and perspective to optimise resolution of design and delivery issues, it is not appropriate to undertake collaboration to cover off poor or absent planning by the Client.

ECI Example Project 3

Project: Road

Project Value: $400M

Selection of ECI Process: The Client elected to use an ECI procurement process to collaborate with Suppliers during design development and to clearly identify, allocate and ultimately transfer risk to the Supplier on an appropriate and cost effective basis.

ECI Process – EOI: The Client conducted a 10 week EOI process. The EOI selection criteria were:

- experience in the last 5 years in providing ECI services or participating in alliances;
- experience in the last 5 years in the design and construction of major road projects in the urban environment which included the upgrade of existing infrastructure;
- current and potential projects and ability to deliver the ECI services within the Supplier's projected workload; and
- financial capacity.

The EOI process resulted in the selection of four Suppliers.

ECI Process – RFP (1): The RFP process lasted 12 weeks. The four proposals were evaluated by the Client based on proposed program, price, VfM and capability to carry out the works. From this, the two best performed Suppliers were shortlisted for the second development phase.

ECI Process – RFP (2): Collaboration between the Client and the two shortlisted Suppliers through workshops, activity sessions and Client personnel embedded with Supplier design teams occurred during the second development phase. At its conclusion, the two shortlisted Suppliers submitted revised offers which were evaluated based on Supplier capability and value for money and the best performed Supplier was selected as the preferred.

ECI Process – RFP (3): Following selection of a preferred Supplier, negotiation of any remaining issues or queries conducted to allow a Works Agreement to be put in place included agreed indirect costs, margins on indirect & direct costs and was consistent with a D&C Contract.

Outcomes: Key outcomes or lessons learned from the above include:

- Client satisfied with process and felt Value for Money was delivered; and
- The collaboration through the ECI process was viewed to provide certainty on price, a clear outline of risks and the Client reducing the amount of risk they retained.

Commentary:

Best practice would be that the Client shortlisted no more than 3 Suppliers and preferably only two as a higher number of shortlisted Suppliers does not generally result in the best in market tender from the participating Suppliers as the probability of them achieving any return on their investment is diminished by a 'long' short list.

ETI Example Project 1

Project: Dam Construction

Project Value: $1.1B

Selection of ETI Process: The Client chose a collaborative procurement process as they sought a relationship-based contract that had been competitively bid where both parties understood the basis of the risk allocation and the project's commercial terms. The client drivers in selecting a ETI procurement were:

- Value for money;
- Allocation of risk;
- Design innovation;
- Relationship building;
- Negotiated position on construction;
- Agreement on responsibility for approvals; and
- Informed bids.

ETI Stage 1 Process – Open Request for Proposal (RFP)

Invitations were issued to the market requesting proposals be submitted for

- Commitment to, and delivery of, value for money in context of this Project and price certainty;
- Experience and track record;
- Key Personnel including the Project Management Team and proposed management systems.
- Safety track record and approach for this Project;
- Community, Environment, Industry and Stakeholder interaction; and
- Departures to the proposed contract terms.

There was no submission or evaluation of cost elements in this Stage 1 RFP. Two preferred Suppliers were selected and invited to proceed to Stage 2 Preferred Tenderer Selection.

ETI Stage 2 Process – Preferred Tenderer Selection

The second part of the ETI process involved the clarification and progression of the commercial and legal framework, the identification and allocation of construction risk, identification of KPIs, reviewing and verifying the design and developing technical issues and engineering solutions to areas such as diversions strategies, approvals, detailed program and planning for construction within dry seasons.

Collaboration was largely conducted through a comprehensive series of workshops with Tenderers on topics that would help clarify the scope of the project, specific requirements and approach to delivering services. Topics addressed were:

- Project Briefing and Relationship;
- Open book and construction methodology;
- Scope of Works Clarification;
- Value Engineering, Fabrication and Constructability Review;

- Construction Risk, Project Risk Review;
- Pricing Review and Confirmation of Scope;
- Risk Allocation and Risk Review, Risk Adjusted Pricing;
- Risk Allocation Review and Variation Risk Benchmarking;
- Legal and commercial discussions; and
- Finalising pricing and all other remaining commercial issues.

The workshops were designed to support Tenderers prepare well-constructed and accurately priced Tenders that reflected the specific needs of the project and Client. Following the program of workshops, Tenderers were issued a Stage 2 Request for Tender (RFT) and evaluated against the following criteria:

- Price;
- Attendance by appropriate personnel in workshops, site visits and off-line meetings;
- Relationship affinity as evidenced in workshops, site visits and off-line meetings;
- Willingness to put ideas forward for discussion, creativity and responsiveness in workshops, site visits and off-line meetings;
- Alignment with commercial terms of Preferred Tenderer Deed and Stage 2 Contract; and
- Quality of Stage Two Offer documents submitted.

The client and Preferred Tenderer then entered into a Preferred Tender Agreement to undertake a risk minimisation phase. The purpose of this stage was to allow both parties further flexibility in finalising designs and confirming appropriate construction methodologies.

Outcomes: lessons learned from the above include:

- Clients must be realistic about the timeframes and effort involved;
- Use of a facilitator to guide parties through the ETI process can be very beneficial;
- Update documents along the way and issue ‘Reliance Material’ with the RFT;
- Maintain competitive tension including contract negotiations with both tenderers before selecting the preferred tenderer;
- Encourage and ensure open dialog to refine design and outcomes; and
- Build relationships early and ensure compliance with agreed protocols.

Commentary:

Client may have considered some price criteria in the first shortlisting.

Managing Contractor Example Project 1

Project Type: Program of Housing Development

Project Value: <$1Bn

Selection of Managing Contractor Procurement: the investment of significant funds across a large number of projects (individual houses and small developments) to a very tight program posed difficulties for the client in selecting the most appropriate delivery route. While a number of options were considered, procuring a Managing Contractor at an early stage in the project allowed for:

- value engineering, procurement and economies of scale to be achieved through appointment of sophisticated contractors and delivering large packages of work;
- the design and budget responsibility to transferred to the Managing Contractor at an early stage;
- an accelerated design development process; and
- management of sub-contractor delivery teams across a variety of locations by one skilled and experienced organisation.

This procurement model also allowed for delivery to a Guaranteed Maximum Price (GMP) with individuals projects being delivered for lump sum contracts and gainshare benefits across the portfolio of projects.

Procurement Phase – RFP: Suppliers, typically Tier 1 contractors and contractor/designer consortiums were invited to participate on the basis of experience.

Suppliers were issued with indicative budgets for typical housing projects and a supporting client brief and scope of work. Each Supplier was requested to provide delivery methodology information and fees for preliminaries, supervision and program management.

Two Suppliers were selected and invited to proceed.

Procurement Phase – Exclusive Negotiation: The preferred Suppliers were invited to work with the client to develop a Guaranteed Scope of Work and GMP. The preferred suppliers were evaluated based on their proposed delivery methodologies and on the financial aspects (all open-book except lump sum items) of their submission including:

- Fixed Project Management Fee to take design to GMP stage;
- P&S – Fixed lump Sum;
- Design – Fixed Lump Sum;
- Margin/ Fee – Fixed Lump Sum; and
- Trade Costs – Budget initially, then converting to capped Guaranteed Maximum Price with agreed 70:30 share of savings.

The Managing Contractor which presented the best opportunity for success and best value for money was selected.

Outcomes: Key outcomes or lessons learned from the above include:

- While involving Suppliers at an early point was beneficial, it was important to retain as much competitive tension as possible prior to selecting the Supplier;
- In selecting the Supplier, the Client must consider their ability and track record of delivering multiple projects in parallel and include their capability and depth of resources; and
- Savings from the Supplier bettering the initial estimate cost of project is not realised until all projects had been delivered.

Commentary:

The use of gainshare as an incentive was used because of a critically short timeframe which was ‘extraordinary’ and required extraordinary effort by the Managing Contractor.

Appendix D

Consultation Process – Insights

These are notes of comments and insights from participants in workshops and in interviews. The comments made refer to both best practices and to poor practices.

Industry (Suppliers) workshops and interviews conducted during 2012

Why use collaborative procurements?

Observations on poor practices

- ECI is a way of helping agencies develop a project for an affordable cost
- ECI is a way of developing a business case and making go/no go decisions
- ECI is to help bail out projects gone bad in the development phase
- Clients use ECI to obtain free or cheap intellectual property
- Clients use ECI to compensate for resource deficiencies in project development
- In practice, clients are seen too often to select ECIs for projects that have a 'go/no go problem'
- ECI is being used to have 'D&C' contractors act as a cheap consultants
- Many ECIs are not very 'E' and ECI is being used to solve the Client's problem
- ECI was developed to speed up processes and get to the specifications required ASAP without the client doing the planning
- Clients are not always clear about their real reasons for doing an ECI
- Private Clients use ECIs for cheap professional services and research and risk management
- The horse called 'self-interest' will always win irrespective of the procurement methodology
- Collaboration is over-rated
- For a Supplier, ECI can be attractive if there is a reduction in competition
- Locking up the constructors' high performers in a prolonged bidding process means significant opportunities foregone
- If bidders don't think they will win, they will send in the 'non-players'
- The Contractor's A team is directed to high risk lump sum contracts, not to alliances or single sourced ECIs
- The open-book approach can be just a transparent costing of an inefficient project offer

Observations on good practices

- Collaboration is a state of mind
- Collaboration is not about the contract but it is about achieving better outcomes
- D&C contractors interpret the bid documentation, on the other hand in ECIs the Client/constructor spend a long time talking about what the Client actually wants resulting in better outcomes
- Clients use the collaborative phase to explore more options than would be possible under a D&C model. They use the collaborative phase to pick the best option
- Contractors participate in ECI because they get a better understanding of the project risk profile and improve their opportunity to turn a better profit
- Contractors have used collaboration in many fixed dollar contracts and also in ETI contracts

Features

- It used to be that D&C had 2.5% risk component, now its 10%. ECI etc has taken contractors from taking a portfolio risk position to a project specific view adding more and more risks (up to 300+) with the cost component going up from 2.5% to 10%
- I can't understand why a Client goes through an ECI process and doesn't end up with a lump sum contract
- You want ECI to take you to a lump sum contract with transfer of risk. If you can't achieve this, share risks that you can influence or risks that none can influence
- Clients leverage the contractor's concern that excluded risks will be over priced in the risk adjustment process to negotiate favourable risk transfer
- The difference between ECI and 'D&C with collaboration' is:
  - Embedding people and moving quickly
  - The number of options being generated is greater in ECI as a way of reducing project costs

Success factors

- Clarity of the tender selection criteria is important
- If the client is not clear on tender selection criteria and what is important; then the contractor will give more and more information making it more resource intensive and increasing costs of bidding
- Has anyone closed the loop of ensuring the offer of bidders during tender of ECI actually sticks to the project end?
- For a constructor – the risk of an ECI is 'knowing' what the rules are
- Contractors love 'short and sweet'
- Clients are more likely to achieve their objectives when they have clearly defined the process and have clearly defined what they want
- 2 short listed will have a better result for government because the market will go harder
- The Clients are using competition against us!
- Clients should appropriately value and reward non-price input contributed by contractors
- Clients should ensure the project is viable before engaging industry
- Clients must achieve deadlines
- Don't stop collaborating at award, explore mechanisms for continuing to collaborate in delivery

Capability

- The client does need strong capability otherwise all lose
- Designers (consultant engineers) no longer have the expertise of *what* to design (more on the *how* to design). "Many designers have not visited a site."

Bid Costs

- Cost of bidding – D&C 1.5%; ECI 1.75%
- Bid costs – unconscionable to take many bidders through an expensive process, 3 bids costing $5m each is a waste
- The cost to participate is not reasonable – Clients are receiving excellent value from the fees that they pay Suppliers compared to the cost of a D&C contract
- Set reasonable and realistic participation fees

Project Budgets

- A constructor would be shot if they presented a P50 to a General Manager – how could it be acceptable to have a 50% chance to lose money? 1 in 6 projects don't make budget
- The government generally is not good at developing project budgets
- Agency approach to risk is different to the market who don't rely on Monte Carlo. Constructors rely on experience. Agencies must rely on experts from the market for project budget certainty
- Government needs credibility when releasing project budgets. Everyone (constructors) are doing six months pre-work and if the agency re-scopes the project before it gets to market if eats into the 'bid budget'
- Constructors will try and persuade agency that bells and whistles are necessary if they think that there is money left on the table

Why use collaborative procurements?

Observations on poor practices

- ECI is being used where we have a fixed budget from Government. ECI is a way of maximising the scope/functionality for a fixed price or target price.
- Client provided Suppliers with a core scope of works and secondary shopping list of scope of works and requested to fit as much scope as possible into a fixed budget.
- ECI is being used to help the agency define the project ("we don't always know what we want") and cost the deliverable to the government's target price.
- The agency is able to fiddle with the design during the ECI process
- Developing a project brief for an ECI is harder than a D&C
- The scope is flexible **not** the price
- My agency has done 5 ECIs to date, using 5 different commercial frameworks
- Three projects/organisations all used different ECI methodologies
- ECI means different things in different States/agencies
- ECI is **effectively** a "negotiated tender" with fee reimbursement

Observations on good practices

- ECI enables negotiation on differing risk. ECI leads to two proposals with
  - scope solution
  - risk allocation
  - price (within target)
  - and agency selects the best
- Our ECI gave certainty on:
  - Cost
  - Time (i.e. asap)
  - Control over design
- The cost of tender in an ECI is cheaper than in a D&C (contrary to the industry view).
- ECI allows us to vary the scope, maximising the value of the assets created whilst not exceeding approved budgets. This is difficult to achieve in a D&C project where the scope is fixed
- ECI allows us to refine the scope more efficiently than under a D&C contract
- ECI provides us with more transparency of the price and associated contingencies than D&C
- Industry likes participating in ECI to:
- reduce level of competition
- reduce the potential for errors in pricing the project
- gain a better understanding of client's needs

- achieve continuous feedback during proposal development to reduce expectation gaps and ensure they provide a solution the client wants
- The participants have used Early Tender Involvement (ETI). This consisted of developing the designs in-house and engaging a panel of constructors to provide constructability input. These processes were also used to refine risk assignment and negotiate terms and conditions. The objective is to receive unconditional bids from Suppliers and reduce approval time frames
- Clients have used collaboration in most other forms of fixed lump sum contracts

Features

- Clients have run multiple independent in-house evaluation teams during the collaborative phase. Running one core team with a couple of dedicated people embedded in each team is becoming more commonplace
- In some instances Suppliers are provided the flexibility to propose different commercial frameworks and conditions of contract
- There was an additional cost to clients in undertaking an ECI both in internal evaluation costs and the fees paid to Suppliers. The view of the participants was that they generally achieved good value for money on this additional expenditure

Success Factors

- ECI does take time for senior experienced people to be involved
- Old and crusty people is a key success factor
- ECI works best for Big, Repeat Clients – those that aren't will struggle
- ECI needs more senior representatives and this will allow for more effective decision-making **AND** decision making in real time. Need authoritative key senior people for both sides
- Use a prequalified panel of contractors to assist in shortlisting for projects
- Ensure the evaluation panel members have the appropriate blend of experience. Selection of tender evaluation panel members is an important element of success. Multifaceted experience is important. Panel members are expected to have a blend of commercial, technical, construction and industry experience to add value to the selection process. The panel can be required to compare bids with different technical and commercial solutions.
- Ensure the tender evaluation panel member's independence is maintained. The extent and type of interaction the panel members have with the Suppliers is important. They need enough exposure to understand the bid but no so much that they compromise there independence
- Ensure the client team is appropriately resources and skilled to undertake the process
- Client participation and active engagement is essential for achieving desired outcomes
- The client team must clearly define the roles and responsibilities of their team
- Ensure members of the team have appropriate levels of authority and ability to make decisions particularly embedded team members within Supplier's teams
- Design of the transaction process is important to successful outcomes
- The general rule of thumb is that ECI is suitable for projects in excess of $100m although it has been used for projects as low as $60m in value. This is determined after considering the cost benefits outcome and optimising the use of internal staff

Bid Costs

- Only the successful Supplier got reimbursement of costs – not the un-successful
- Participants are paid a fee, but not at full cost recovery, to participate in the process and have the right to submit a bid on a short list of two of three Suppliers. The client retains the IP for any input provided.

Project Budget

- Treasury believes that it is not a good practice to define your project using a budget number. We should be able to describe what we want without needing to disclose the project budget. The project budget should not be a key descriptor.

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