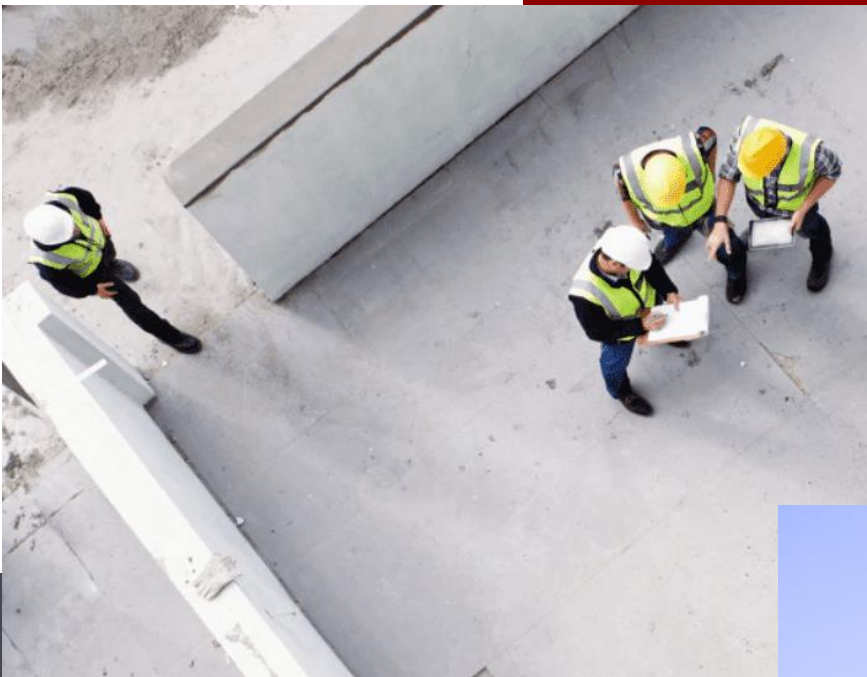


# Working Together, Not Apart: The Future of Collaborative Contracting



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In this Newsletter, we review the scope of collaborative contracting in the context of current supply chain issues and provide comments on the future of alliance-type contracts.

## Introduction

Alliance and Partner Contracting was an attempt to obtain greater trust via better communication between developers, principals, and contractors. It was popular in the latter half of the last decade, given the state's focus on reducing disputes, increasing productivity, and reducing project times. It found its origins in the 1990s "No Dispute" report, a report written by the National Public Works Council (NPWC) and the National Building and Construction Council (NBCC) which exposed the high volumes of contracting-related litigation and the "development of a pervasive adversarial relationship" between those involved in construction projects.<sup>1</sup> This paper highlighted the importance of establishing a new type of project delivery mechanism that facilitated working relationships with those involved in the construction project. This led to the concept of "collaborative" contracting.

### *What are partnering and alliance contracting?*

"Partnering" can be a relationship management system that, although it has no contractual force, runs alongside standard contracts to encourage collaboration and goodwill. Alternatively, alliance contracting refers to arrangements, expressed in contractual form, that aim to manage relationships between principals and contractors, removing the animosity that may be due to disputes. Alliance contracting has long been considered a "highly evolved form of partnering which is enshrined in the contract". Both methods emphasise the need for strong relationships and communication between contractors and principals, especially where the contracts administered relate to high-risk profiles or complex projects (Manley, 2002)<sup>2</sup>. Collaboration in contracts typically involves the inclusion of features either in contractual form or a separate document. These features can include<sup>3</sup>:

- Including a commitment to co-operating and acting in "good faith".
- A waiver of legal rights to commence proceedings where breach, mistakes or negligence has occurred (excluding wilful default).
- Altering payment arrangements to best suit project interests
- Facilitate early contractor involvement and specialist subcontractors in the design process (PWC, 2018).

Recently the discussion has resumed as to whether collaborative contracting, especially partnering and alliancing, should be used more regularly. This has arisen because of increased government expenditure on infrastructure projects. This increase in government expenditure and compelling demand for materials and labour with the private sector has led to an increase in alliance or partnering contracting once more (PWC, 2018).<sup>4</sup>

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<sup>1</sup> Alliancing: Reshaping Infrastructure Delivery in Australia (2008): Ian Briggs:  
<http://www.austlii.edu.au/au/journals/AUMPLawAYbk/2007/18.pdf>

<sup>2</sup> "Partnering and Alliancing on Road Projects in Australia and Internationally" School of Construction Management and Property, Queensland University of Technology, Road and Transport Research Journal:  
<https://eprints.qut.edu.au/7286/1/7286.pdf>

<sup>3</sup> PWC Collaborative Contracting: <https://www.pwc.com.au/legal/assets/collaborative-contracting-mar18.pdf>

<sup>4</sup> PWC Collaborative Contracting: <https://www.pwc.com.au/legal/assets/collaborative-contracting-mar18.pdf>

## A. Advantages of collaborative contracting

The stated advantages of collaborative contracting have been well documented in academic literature. In summary, disputes create an adversarial atmosphere when discussions in relation to disputes arise, leading to the possibility of long, drawn-out litigation processes, which are expensive and highly unproductive. Thus, alliance and partnering collaborations aim to avoid this and encourage unanimous problem-solving.

Further, collaborative contracting increases productivity, and quality and reduces project time. This is the strongest advantage of alliance and/or partnering contracting, as many proponents of this model cite its commercial success.<sup>5</sup>

An example in NSW is the use of alliance contracting by the Rail Access Corporation in the maintenance and construction of railway infrastructure. They have cited that this method has facilitated an “easier achievement of best practice benchmarks”, “lower contract administration costs”, and “avoidance of the high-cost premium normally associated with the out-sourcing of risks”.<sup>6</sup>

Indeed, Multiple government projects have now adopted this form of contracting, such as the Rozelle Interchange (WestConnex 3B), Parramatta Light Rail and various highways in NSW. Hence, with the explosion in demand for construction work, it is likely that this model will be heavily utilised once more.

## Disadvantages

However, others in the construction industry have also pointed out weaknesses in the framework. They point to the ramifications of a “no blame” framework, the Unbankability of projects, the availability of owner staff to participate in the alliance and the difficulty of establishing “value for money.”<sup>7</sup>

Perhaps the biggest weakness stems from the obligation of good faith. The Granny smith case is a hallmark of poor contractor behaviour.

## B. Labour shortage and COVID-19-related costs

The big issue affecting the construction industry is the physical nature of the work performed, meaning that a lot of the workforce (both domestic and migrant) cannot work remotely and must attend the Jobsite. At the peak of COVID-19, limiting the number of staff allowed on-site at a given time. Because of this decrease in labour, there has been a decrease in productivity and progress timelines and deadlines for Practical Completion are now harder to meet than ever. According to survey responses, it was noted that productivity decreased by 40% in some instances due to the social-distance requirements.<sup>8</sup>

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<sup>5</sup> Alliancing: Reshaping Infrastructure Delivery in Australia, Ian Briggs.

<sup>6</sup> Clayton Uts: “Alliance Contracts: A Glimpse of the future”:  
<http://classic.austlii.edu.au/au/journals/AUConstrLawNlr/1998/63.html>

<sup>7</sup> Alliancing: Reshaping Infrastructure Delivery in Australia, Ian Briggs.

<sup>8</sup> Turner & Townsend: <https://www.turnerandtowntsend.com/en/perspectives/covid-19-and-the-impact-on-australian-construction-projects/>

Another issue affecting the construction industry is the shortage of skilled workers.<sup>9</sup> This has always been an issue but has been brought to the forefront by the pandemic. In looking at the public domain, it is estimated that over the next 15 years, the public infrastructure industry could lose up to 40% of its potential workforce. This is due to a variety of factors including the earlier age or retirement (seen especially among project management professionals) and excessive workloads/long hours. Other factors include female under-representation limiting workforce growth, lack of educational courses (allowing youth to enter the industry) and reliance on migrant workers.

Among labour shortages, other unexpected costs have also arisen. Costs associated with increasing hygiene practices (including providing equipment) and setting up additional offices to monitor and implement COVID-19 safety plans have had to come out of the pocket of contractors. Delay claims and litigation-related costs also increased during this period because project schedules were increasingly running over time.<sup>10</sup>

### C. How has COVID-19 affected the Construction industry?

COVID-19 also has reported an impact in increasing the price of imported building materials and parts, expounded by the scarcity of supply for these products. This in conjunction with the weakening, of the Australian dollar has resulted in increases of approximately 15–20% for goods imported overseas in some instances.

At present, another huge impact is causing uncertainty and creating the "reference" for all industry participants to the so-called supply chain supply side issues.

They are not just compliance items from government procurement guidelines and heavy transport chain of responsibility legislation, but the pricing of project costs permits tendering. An example is a project to commence in 9–12-month time: how can you lock in prices for steel of sophisticated items imported into Australia such as mechanical plants?

### D. The environment compels the use of collaborative contracting

The given rise of infrastructure and construction demand from NSW, there has been a discussion amongst those in the industry to revisit collaborative contracting. This has been partly instigated by a ten-point plan launched by the NSW government in 2018, aimed to "foster partnership and collaboration."<sup>11</sup> The suggestions in this plan mark the state endorsement of alliance contracting as they include: "a move away from reliance on fixed price, lump sum procurement methods," "expedited engagement processes like an Early Contractor Involvement Deed," and "partnership-based approaches to risk allocation."

A highly suggested model amongst critics is the "Integrated Project Delivery" (IPD) model, utilised in the United States. This model replaces the fixed price element in conventional contracting models with a performance-based method of remuneration that is aimed to

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<sup>9</sup> Infrastructure Australia: <https://infrastructuremagazine.com.au/sites/default/files/2021-10/infrastructure%20workforce%20and%20skills%20supply%20report%20211013.pdf>

<sup>10</sup> Turner & Townsend, above.

<sup>11</sup> NSW 10-point commitment plan: <https://www.infrastructure.nsw.gov.au/media/2579/10-point-commitment-to-the-construction-industry-final-002.pdf>

align with the parties' commercial interests. The approach to remuneration and risk allocation has been divided into three components: direct costs (costs incurred by non-owner participants when performing the works), fees (to cover profit and contribution to overheads) and gain share/pain share (risk allocation device), which all work together to determine the remuneration owed to each participant in the Project.<sup>12</sup>

It also adopts the "no blame, no disputes" policy and encourages collaboration between those involved in the Project through the formation of "integrated project teams." Another feature of IPD is the mechanism of "unanimous agreement," which is required for all decisions related to the Project, where all those in the integrated project team must agree.

Another model worthy of note is the "ECI" (early contractor involvement model). Given the pressures and uncertainties identified above combined with the greater sophistication of project deliveries, an ECI framework allows all parties to work collaboratively to certify project cost and returns and look at greater flexibility as to the products and systems incorporated into any building or infrastructure.

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<sup>12</sup> PWC (2008).