

Alliances: thumbs up, with care

by DOUG JONES

SOMETIMES it can be hard to work out whether a new way of structuring projects really has something to offer, or whether it's just mutton dressed by the marketing hype as lamb.

But in the area of "relationship contracting", there have been some fairly fundamental shifts in recent years, especially in the growing application in Australia of one particular variant which offers some highly attractive features: project alliances.

As with other forms of "relationship" contracting, project alliancing essentially seeks to replace the adversarial structures inherent in traditional and D&C contracts with "win win" approaches for owners and contractors.

Project alliances started out in the oil and gas industries, spread to the mining industry and have only recently emerged in civil and building construction, where examples include the Northside Storage Tunnel to reduce sewage pollution of Sydney Harbour, bridge and other civil works for the Port of Brisbane motorway and the new National Museum of Australia in Canberra.

In contrast with "partnering", a project alliance agreement seeks to formally align the commercial interests of the parties, primarily through performance-based commercial incentives and an agreed formula for risk/reward sharing. "Partnering" involves only non-binding "gentleman's agreements", typically in parallel with but quite outside still-adversarial project contracts.

In common with "strategic alliancing", a project alliance agreement almost always has a "no disputes" clause, with the parties agreeing that all disputes will be handled by an alliance board, usually bound to make decisions on a unanimous basis. (In an earlier column we pointed out the danger that thoughtless drafting on this can pose to the validity of the contracts as a whole.)

Again in common with other forms of

alliancing, there is almost always has a "no blame" clause, under which the participants may take court or other legal action against each other only if there has been a narrowly defined "wilful" default.

But in contrast with "strategic alliancing", typically enduring for many projects over many years, project alliances are (surprise!) project-specific.

This means not only that there is a specific scope of works right from the start, but that for each new project there is a rigorous selection process.

Because the target cost for the project is arrived at collaboratively towards the end of the selection process, or after the selection is made, the selection criteria focus on "soft dollar" factors rather than a tender price.

In the National Museum project, for example, bidders were asked to provide historical examples of their abilities to fully complete the works, achieve outstanding (rather than just "business as usual") results, provide the necessary resources, comply with the project's program, innovate, meet safety, environmental and workplace requirements and - importantly - understand the requirements of a project alliance and operate accordingly.

Significant benefits

A couple of recent "project alliance" projects, such as the Northside Storage Tunnel in Sydney, have attracted ill-informed allegations of "cost blowouts" - compared, in that case, with a preliminary estimate by the owner before the negotiations and before the design studies were completed, and reflecting some difficult latent ground conditions.

But in fact these projects have demonstrated that project alliancing can produce significant cost savings, while bringing projects to completion on or before time and meeting or exceeding all safety, environmental, workplace and community requirements.

The factors behind this include:

- The contractor's ability to understand the owner's needs right from the outset
 - The owner's ability to use the other participants' skills in defining its own requirements, avoiding wasteful practices
 - Reduced costs associated with parties' defending their contractual positions
 - Creative, collaborative searches for solutions to problems when they arise, and
 - The contractual incentives to strive for outstanding results, rather than merely do the minimum necessary to avoid penalties.
- Project alliance structures also help owners, including public agencies under strong public scrutiny, to rigorously assess contractors' performance on non-cost objectives such as environmental, safety, community and indigenous employment objectives.

Traps for the unwary

So far so good - but there are some important areas where care is needed, to avoid undermining the potential benefits.

The first is how to maintain probity.

When lump sum tender prices are not among the selection criteria and adversarial scrutiny is replaced by collaboration, there needs to be a special effort to avoid any taint of collusion in the selection process or in establishing and assessing the performance-based criteria for remuneration.

Open book accounting is essential, but not always sufficient.

At least with project alliances, unlike "strategic" alliances, there is a competitive process for each project, reducing the chances of an over-cosy relationship between the parties. If the runner up is kept "in the wings" while detailed negotiations with the preferred contender are being concluded, as was done with the Storage Tunnel project in Sydney, a viable alternative can be kept available right up to the time the deal is signed.

Similarly, the probity of cost and other targets agreed between the participants can be assessed through independent verification against industry norms and an analysis of likely tender prices had the project

gone to conventional tender.

Independent verification or assessment is also required for performance evaluations, along with the use of a detailed but comprehensive assessment regime with objectively quantifiable benchmarks.

All this, of course, costs time and money. But without these types of safeguards, an alliance project risks being regarded as "on the nose".

A second area of concern, briefly touched on in an earlier column, is the relative lack of liability of contractors under most "no dispute, no blame" clauses.

In most project alliances, even gross negligence, inefficiency or otherwise defective performance by a contractor is likely to fall short of being a "wilful" default, leaving the owner without any remedy.

(Although these clauses work both ways, the contractors are carrying out most of the work, so the owner is the most vulnerable party.)

Further, under most project alliance agreements the owner pays all the costs actually incurred by the contractors, including the costs of work that has to be done twice because of a design or construction fault. The most that an under-performing contractor is risking is some or all of its profit margin.

In short, the incentive structure alone may not be enough to ensure satisfactory performance.

There is a good argument that a performance-based contractor should still be liable for risks within its own control.

The best protection for the "attitudinal revolution" required for successful project alliancing may often be some good old-fashioned legal certainty about risk allocations.

With sensitivity and care, this can be done in a way which reinforces rather than undermines the "attitudinal revolution", maximising the potential benefits of project alliancing for all participants and the construction industry as a whole.

Doug Jones is a construction partner in the national law firm Clayton Utz.

Mark Ottery has been appointed managing director of Ancon CCL, a Sydney-based supplier of steel rebar, shear-load connectors, wall ties and other consumables used in construction projects throughout Australia. To take up this position, Ottery has returned to Australia after 11 years in the UK, where he has been engaged in technical and strategic management at senior levels for companies serving the construction industry. He aims to encourage Australian contractors to adopt more cost-effective construction solutions proven in Europe.



Mark Ottery

vacancy created by the resignation of Robert Scott. Robinson joined the company as a project engineer in 1978 and progressed through the company as project manager, construction manager, state manager and general manager civil division up to his appointment in 2000 as the company's chief executive officer.

Gutteridge Haskins & Davey (GHD), consultant in management, engineering and environment, has appointed Neil Rowlands to lead its energy segment. Rowlands will be responsible for business and strategy development and the facilitation of strategic alliances. He says, "We



Neil Rowlands

transportation and hydrocarbon processing projects."

GHD has appointed Nick Apostolidis to manage its global markets in water-related engineering projects. Apostolidis will be responsible for business and strategy development and facilitating strategic alliances.



Nick Apostolidis

Hitachi Construction Machinery has opened a new branch at Launceston in Tasmania and has appointed Warren Fisher as sales supervisor in charge of this branch. Ian Wingate as service supervisor and Graeme Huston as parts super-

Malcolm Lewis has been appointed general manager of Bonfiglioli Transmission (Australia), supplier of industrial drives, mechanical power transmissions and motors. Lewis has been the company's national sales manager and he succeeds Harry Bate, who established the first full branch of Bonfiglioli in Australia three years ago and is retiring.



Malcolm Lewis

Tool distributor Enerpac has appointed Peter Sampson as its territory manager for South Australia, Tasmania and Northern Territory. Before joining Enerpac, Sampson worked with J. Blackwood & Son for seven years, and before that with

Directors of construction company