

AIS Academy

SO, DO WE NEED TO COLLABORATE?

Commentary Note on Collaborative Contracting

Client Practice Note

September 2023

Introduction

Maintain good relations within the neighbourhood in order to prevent quarrels and lawsuits – this was one of the Sacred Edicts decreed by Emperor K'ang-Hsi of China in 1670 and read aloud twice a month in every village and town of the empire by the emperor's subjects.

Quite understandably, we have moved on considerably in building relationships. We now have charters, partnering workshops, team-building events and collaborative working in getting on with our project team members.

The term collaborative contracting has more recently entered the plethora of new phrases in the vocabulary of the built environment and is becoming a buzzword garnering more importance than ever in our sector. Can collaboration build and foster successful contracting relationships and a meeting of minds? Are we bold enough (and ready) to proceed with performance of the contract based on a handshake and binding collaborative practices that are contractually enforceable within an atmosphere of mutual trust and cooperation?

So, what is collaborative contracting, and do we need it? This paper examines the key core drivers and impetus for collaboration and also discusses the critical success factors, potential benefits and challenges, and the possible approaches and some watchpoints flowing from collaboration principles in standard contract forms and bespoke agreements.

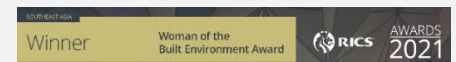


Eugenie Lip
Executive Director

Contracts Advisory and Support Group
AIS Academy

Winner

Woman of the Built Environment Award
RICS Awards 2021 Southeast Asia



Fong Siew Hui
Senior Director

Contracts Advisory and Support Group
AIS Academy

Collaboration – What is It?

The concept of working collaboratively has been with the construction industry for many years and much has been written, advocated and well-publicised.

Collaboration, or nuances of it, has evolved over time and taken various forms and labels such as partnering, alliancing, teaming, benefit-sharing and frameworks, each with their distinctive hallmarks and characteristics.

Collaborative contracting has sometimes been described as partnering remodelled – “a structured management approach to facilitate teamworking across contractual boundaries”. It is a means for parties to deliver and work together towards focused project goals and continuous improvement by conducting themselves in a spirit of mutual cooperation, trust, honesty and openness.

So, Why Collaborate?

In a traditional procurement model, parties from different disciplines and different backgrounds are often brought together at various stages in an ad hoc arrangement to work on a project without regard to whether they have the right chemistry to get along with each other or are in tune working together with cooperation, trust and respect. The consequence of this is what all of us have become so familiar with –

- Conflict and inertia to resolve disputes.
- Blame culture driven by entrenched positions.
- Them-and-us syndrome with low mutual trust and respect.
- Little cooperation and sharing of expertise.
- Misaligned commercial interests with no motivation to do more for better outcomes.

- Poor communication, silo thinking, fragmented working, and so on.

The impetus for collaborative practices within the construction industry is greater in more recent times than ever as projects become increasingly complex and dynamic with concurrent and competing multi-stakeholders’ interests and priorities.

Interestingly, in a recent survey² of over 950 participants comprising clients, consultants, contractors and advisers in the United Kingdom, respondents who have adopted collaborative techniques were asked about their views on such form of working. A majority (63%) of the respondents agreed that collaborative relationships “reduce the number of disputes that arise” and “improve the delivery of the client’s objectives” (61%).

Collaboration is about people. No matter how good procedures and practices are, it has been proven from experience that the people taking part make the real difference. Without a doubt, it is the team-working, sharing of tasks, problems and successes which all contribute to meaningful success stories.

Unique relationships and a collaborative momentum are developed by maintaining regular dialogue with and between all participating project team members. The effectiveness of collaborative working and interaction is greatly enhanced where vision-driven leadership is strong, purposeful and decisive.

The importance of choosing the right people for the project – people with the right attitudes, real interest and commitment to trust and cooperation and who understand the culture and philosophy to deliver a successful project – is well-rehearsed, documented and delivering tangible results. These are attributes which are fundamental to how parties can work together and in no doubt, help build the true sense of collaboration and teamwork.

Critical Success Factors

Despite the best craftsmanship in producing contracts which embrace collaborative principles, it must be remembered that successful collaboration is not about simply signing a contract or what each term means or does not mean but about the parties themselves – their conduct, attitudes, willingness, behaviour and commitment, and this must start at senior client level permeating down through the whole organisation.

Additionally, a total team buy-in must underpin collaborative working. Decision-makers from the client, consultant professionals, contractors and subcontractors across the whole supply chain have to subscribe to the ethos of working collaboratively to detect and resolve issues affecting the project promptly and not allow them to fester.

Clear articulation of the vision to deliver the project together and the potential incentives and rewards by senior executive management are catalysts to engender positivity in collaborative governance and can bring out the best in people while mitigating the pitfalls commonly associated with traditional and adversarial contracting models.

Risk apportionment is an essential component for successful collaborative delivery as it helps the team have visibility of its impact and the probability of occurrence. It is important to clearly identify those risks at the outset in a register for allocation to the party best able to manage, control and mitigate them. Risks to be shared and those that are to be borne by the individual team member should also be clarified and described in the register.

Periodical reviews of the risk register as the project progresses ensure prompt action is taken to drive mitigation of the identified risk items.

Parties can be made to work collaboratively with one another. However, it requires a paradigm shift in thinking from the conventional roles

¹ Construction Industry Board, Partnering in the Team, Thomas Telford, 1997 at 1.

² Royal Institute of British Architects, RIBA Construction Contracts and Law Report 2022.

and adversarial styles to one of “we are all in this together” mindset. Old habits of working in a polarised setting under a cloak of collaboration need to be “unlearned” as they pose obstacles and undermine mutual trust and cooperation which are the basic tenets of successful relationship-centric contracting.

Advocates of collaborative arrangements propound that what is required for parties to get on well with each other is an enduring spirit of mutual cooperation, trust, openness and fairness. It is human-to-human relationships that are “collaborated” – not the project!

Potential Benefits, Risks and Challenges

Benefits

While not all projects may be suited for collaborative contracting (in consideration of the nature, scale and timelines), it still offers a clear set of advantages as briefly set out below compared to traditional or conventional “arms-length” approaches.

- Unlocks productivity improvements to deliver more for less.
- Potentiality for early contractor and subcontractor involvement.
- Fosters a less confrontational environment and brings about dispute reduction through proactive and collective problem-solving.
- Generates greater efficiency and the opportunity for trusted parties with common objectives who are dynamic, committed and determined to deliver on time and within budget.
- Better time and cost predictability with greater understanding of the challenges of the project and how these should be dealt with through discussions, group deliberations and agreed action plans.
- Encourages parties to seek opportunities for innovative and

value-for-money solutions to garner potential gains collectively.

- Financial motivation through the prospect of incentives and rewards to encourage higher efficiencies, recognise outstanding performance and improved efforts and to act in a manner that is best for the project rather than for one's own party above others.
- Successful collaboration creates an environment for all parties (including the client) to seek solutions collectively through problem-solving and decision-making workshops as the project progresses.
- Early warning triggers on adverse emerging issues and events (before they escalate) ensure timely actions are identified, challenges and problems overcome or new remedial actions implemented, to maximise the likelihood of project success.

Potential risks and challenges

While the fundamentals of collaborative practices and procedures are vital to deal with the unique demands and challenges of complex projects and schemes and the potential failures and disputes that may arise, collaborative contracting approaches do yield better outcomes if the following challenges and risks are effectively and eminently addressed upfront:

- Adequate high-level resources and time need to be invested to coordinate, manage the process, collaborate and resolve complex issues early affecting the project.
- No real commitment to cooperate, and self-interest and contractual positions creep in when relationships become strained, and parties retract into their adversarial shells.
- Disillusionment on the benefits and misalignment of commercial interests as unilateral actions and instructions create uncertainties

and encourage fault-finding and perpetuate the blame-game.

- Key performance incentives (or KPIs) become more of a stick than carrot.
- Unrealistic and excessive performance targets with inappropriate standards and metrics to measure the extent of achievement of the prescribed KPIs.
- Perceived collaboration may become unclear and create distrust when conduct of the parties and stakeholders to work together and contract terms clash.
- Lack of a robust mechanism and clarity in the contract on who is responsible for what, when and with whom, to collaborate, all of which risk having the process falling in disarray.
- When things go wrong rather than proactively working together in collaboration to find a solution and put it right, each party places its own interest first and attempts to seek out who is to be blamed or was at fault.

Early identification and mitigation of the risks and challenges that may cause an otherwise harmonious relationship to quickly descend into a them-and-us environment is the crux of successful collaborative working.

Contractual Approaches to Collaboration

A well-framed collaborative contract provides for parties to work together proactively in a spirit of mutual trust, respect and cooperation and jointly manage risks to achieve the project goals by driving innovation and continuous improvement. The objective is to remove barriers to collaboration and instil innovation with incentivisation (pegged to KPIs) and a sharing of risks and rewards.

Unsurprisingly, when asked to indicate the form in which collaboration was adopted, 74% of the respondents in the survey³ cited the most common is

³ Ibid.

a “contract that included the ethos of mutual trust and cooperation” while 17% adopted a formal partnering agreement, 15% a non-binding partnering charter and 9% an alliancing agreement.

Clearly defined collaborative contracting clauses encourage team building (through partnering workshops), proactive management and investigation of risks together through early warning of matters that could delay completion, impact performance of the works in use and increase cost and provide for the appointment of a dispute board or committee comprising members jointly selected and agreed by the parties for early claims and dispute avoidance and resolution.

Standard forms have been developed in an attempt to interweave the best practice and principles of collaborative working into a clear and binding formal contract.

Currently, examples of contractual approaches include the following agreements:

Framework⁴

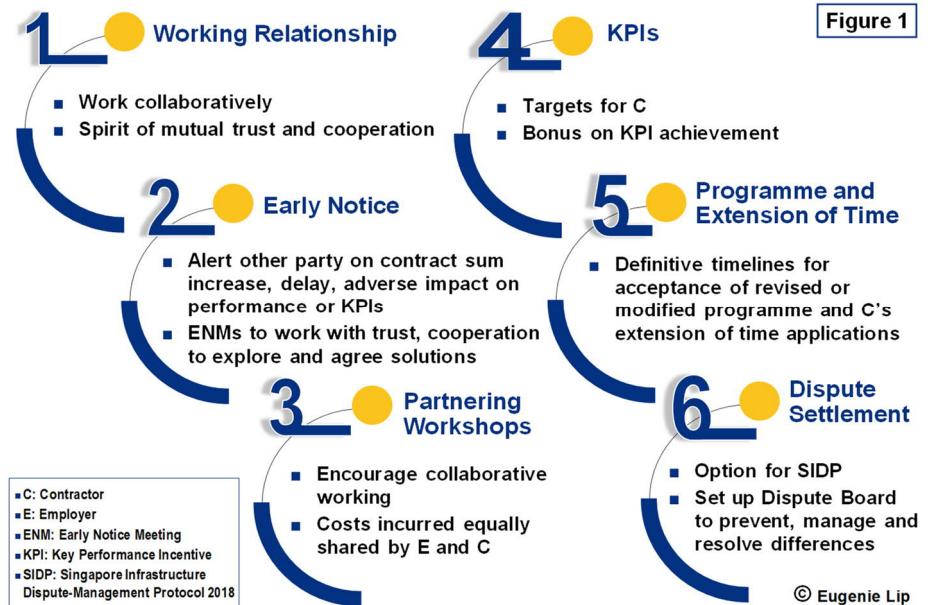
- JCT Framework Agreement 2016.
- NEC4 Framework Contract 2017.

Alliancing⁵

- ACA Framework Alliance Contract 2016.
- ACA Term Alliance Contract 2017.
- NEC4 Alliance Contract 2017.

Partnering⁶

- ACA Project Partnering Contract (Amended 2013).



Bolt-on Clauses on Collaboration

Public sector projects

Under the Public Sector Standard Conditions of Contract (PSSCOC) standard contract forms which are widely used in the public sector both for conventionally procured and design-build projects in Singapore, bolt-on clauses on collaborative contracting are incorporated as an option module⁷.

The following key aspects feature in the collaborative contracting option module (the “Option Module”) as illustrated in Figure 1:

- Contractual commitment to use best endeavours to work collaboratively in a spirit of mutual trust and cooperation.
- Early warning mechanism by way of a notice to alert the other party on emerging matters that may:
 - Increase the contract sum;
 - Delay completion of the works;

- Adversely impact performance of the works; or

- Have an adverse major effect on the achievement of the KPI or KPIs.

- Early notice meetings are held, starting within 14 days from the date for commencement and thereafter at regular intervals, or on an ad-hoc basis to work together with mutual trust and cooperation to explore and agree on possible solutions.
- Participation in partnering workshops to encourage collaboration, the costs of which are shared equally by the parties.
- Key performance incentive targets for the contractor with corresponding bonus payment pegged to achievement.
- Definitive timelines for acceptance of the revised or modified programme and decision-making on the contractor’s extension of

⁴ A framework is used where a client has a long-term development programme, anticipates a significant volume of work over a period of time and desires a collaborative approach to work together and cooperatively, deliver continuous improvements and to encourage deeper relationships and trust.

⁵ Alliancing provides for multiple parties (including the client) to enter into an agreement to form a cohesive unit for the provision of the works and services and collaborate to achieve common goals and objectives. There is a heavy emphasis on “no claim/no blame” culture where parties agree not to commence litigation (with certain exceptions) and jointly share all risks and rewards.

⁶ A term often used interchangeably with “alliancing”, partnering is an arrangement involving two or more parties working together in a collaborative environment to improve performance and achieve mutual objectives and goals. Unlike alliancing, the partnering parties still retain their respective independence and individually have legally binding rights and obligations. The parties can opt for strategic partnering which is a long-term relationship for a series of projects or project partnering for a single project.

⁷ Under the PSSCOC for Construction Works 2020, it is incorporated as Option Module E – Collaborative Contracting while for the design and build version, as Option Module C – Collaborative Contracting.

time applications by the superintending officer.

- Option for incorporation of the Singapore Infrastructure Dispute-Management Protocol (or SIDP) which involves the setting up of a one-member Dispute Board to prevent, manage and resolve differences or disputes.

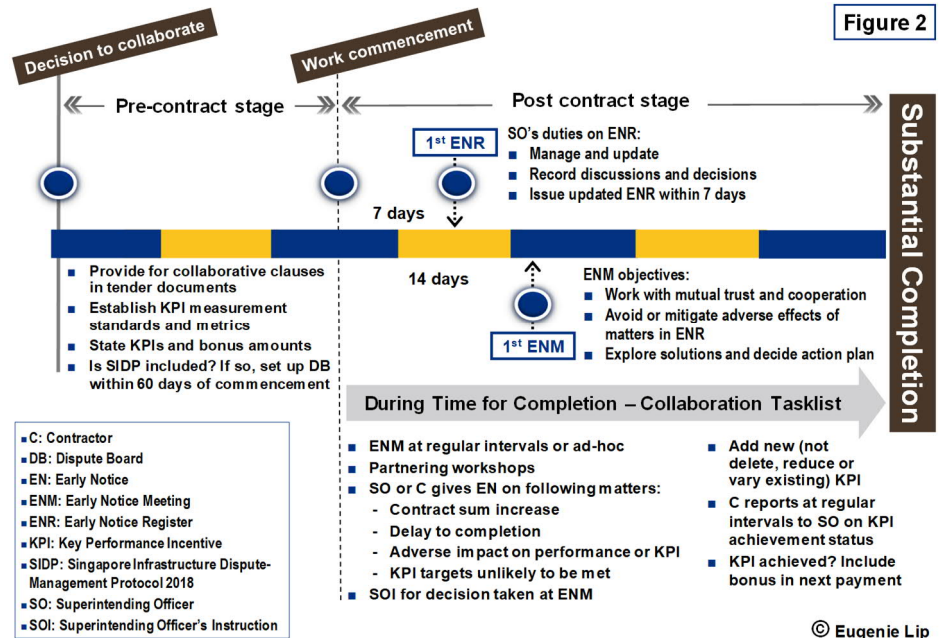
As briefly discussed earlier, the Option Module provides for an early notice clause to encourage identification and proactive and collective resolution of problems by alerting the other party on any cost increase, delays in completion or adverse impact on performance of the works or achievement of the KPIs.

In contrast to the approach in the NEC4⁸ where the contractor is only compensated if an early warning had been given which an experienced contractor would have recognised ought to be done, the Option Module is not prescriptive on such consequence if the contractor has not complied with the early warning protocol. No doubt a similar provision can hopefully be considered in subsequent updates of the Option Module to encourage the contractor to be proactive on giving early warning notices rather than reactive when it is already too late to deal with the problem.

An illustrated snapshot of the procedural requirements described in the Option Module is set out diagrammatically in Figure 2.

Private sector projects

With an increased emphasis on collaboration in the built environment sector and the tangible mutual benefits and improved value for money outcomes that emanate from such procurement concepts, there is no reason why well-constructed bespoke



particular conditions incorporating collaborative clauses cannot be produced with legal advice for the following commonly used private sector standard forms in Singapore:

- REDAS Design and Build Conditions of Main Contract, 4th Edition.
- SIA Building Contract 2016.

Some Watchpoints

Collaborating contracting clauses are typically couched in a language which encourages parties to get on with one another.

It is still early days yet to say with any certainty how statements like “mutual trust” and “cooperation” will survive close legal scrutiny when disputes arise, and the collaborative spirit evaporates. Signatories to a contract have legally binding rights and obligations which presumably are enforceable when any party steps out of line or does not “work together” collaboratively with “mutual trust” and “cooperation”.

The English court⁹ had the opportunity to consider the meaning of a clause in NEC3¹⁰ which included an obligation to act in “a spirit of mutual trust and cooperation”. The judge in that case noted from the comment in Keating on NEC3¹¹ that parallels could be drawn between common law “good faith” obligations¹² and the term of “mutual trust and cooperation”. The passage further suggested that “whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are ‘honest, fair and reasonable, and not attempts to improperly exploit’ the other party”.

A contract decides on the rights, obligations and liabilities imposed on each party as mutually and voluntarily agreed between themselves. Collaborating parties must bear in mind that the courts do not make contracts – they only interpret the terms as agreed between them to give efficacy to what they intended it to be. The parties are “the masters of their contractual fate”¹³.

⁸ The New Engineering Contract (NEC) first published in 1993 is now widely used and has been recognised as a standard form suited for collaborative working. The current edition, NEC4, was released in 2017. The NEC4 conditions are tier-structured and comprise core clauses, main option clauses and secondary option clauses.

⁹ Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC) at 121.

¹⁰ Clause 10.1. In NEC4, it is included as clause 10.2.

¹¹ David Thomas QC, Keating on NEC3 (Sweet & Maxwell, 2012) para 2-004.

¹² While clause 10.1 does not expressly state “good faith”, the court in Van Oord UK Ltd v Dragados UK Ltd [2021] CSH 50 made clear that it “reflects and reinforces the general principle of good faith in contracts”. In Ng Giap Hon v Westcomb Securities Pte Ltd [2009] SGCA 19, a term imposing an implied duty of good faith in the context of contractual performance was rejected by the Singapore Court of Appeal.

¹³ Pagnan SpA v Feed Products Ltd (1987) 2 Lloyd's Rep 601 at 619.

CONCLUSION

The construction industry is transforming. Admittedly, it is known not to be the first in the queue to accept change preferring to cling on to tried and tested traditional ways of doing things. But transformation there must be if parties are to work together by consensus rather than by conflict.

Is a collaborative contract required to ensure that parties do get on amicably when what really matters is people management and a dovetailing of aspirations, attitudes and conduct?

Attempts founded on concepts of bespoke charters, alliances, teaming agreements and relationship-based arrangements have been used successfully in developing and improving collaboration between parties in a construction project. There are also non-binding statements on trust, fairness, openness and cooperation intended to supplement formal contracts. With the launch of the Option Module, such statements become statements which can be contractually enforced.

Is the Singapore construction industry, both individuals and organisations alike, who are used to working in a traditional adversarial project environment ready to embrace and transition into collaborative working? Does everyone have the same understanding about collaborative culture and behaviours and share a sense of team-working? A paradigm mindset shift and reimagining are fundamental to the success of collaborative relationship-based contracting. This change does not (and will not) happen quickly and requires client-driven leadership, pedagogical initiatives and support.

The true test of collaboration is when things go wrong, and parties become entangled in a web of conflict and disputes and ponder on the real benefits. They should instead pause to evaluate whether it could have been done better and take away the lessons learnt for improvement and implementation on the next project.

Collaborative attitudes and relational behaviours must be imbued and inculcated in each team member at every level of the wider supply chain, and it starts from the top with a committed client leadership at project initiation stage. Sensitivity to and sensibility on project issues and delivery challenges as and when they arise complemented with a fervent desire to work collaboratively (without being confrontational) are the bedrock of dispute prevention and collective early resolution of problems.

Whatever contracts there are now and to follow, let us be mindful that they are only the tools that empower the people and encourage them along. At the end of the day – collaboration or no collaboration, it all depends on the people – the parties themselves!

About Asia Infrastructure Solutions

Asia Infrastructure Solutions is a leader in delivering sustainable design, engineering, project and programme management, cost management, business advisory and consultancy solutions for the infrastructure, building and environmental markets.

The company has a strong and diversified team of project managers, construction managers, programme managers, cost managers, sustainability consultants and various disciplines of engineering professionals with a long track record in the infrastructure, building and environmental markets delivering the future for the built and natural environment.

About AIS Academy

AIS Academy is a dedicated learning and development division within AIS. Spearheaded by AIS leaders, its core objective is to train and upskill AIS' professional staff through its unique MasterClass pedagogy on construction contracts, procurement and project delivery strategies, standard contract forms, claims management and in all aspects of contract administration and professional practice.

Beyond nurturing internal talent, the academy also engages with the wider built environment academia, client organisations, consultant groups, professional institutions and universities in thought leadership events on contract advisory work, best practices, lessons learnt and on the latest developments in contractual issues. Through insightful thought leadership contributions and shared expertise, AIS Academy aims to enhance awareness, imbue continuing professional learning and build competencies within the broader built environment realm.

- MasterClass Seminars.
- Construction Law Updates.
- Contracts Advisory and Support.
- Thought Leadership and Occasional Papers.

Contact Us

Eugenie Lip

Executive Director
Contracts Advisory and Support Group
AIS Academy
T: +65 6239 8284
E: eugenie.lip@asiainfrasolutions.com

Fong Siew Hui

Senior Director
Contracts Advisory and Support Group
AIS Academy
T: +65 6239 8218
E: fong.siewhui@asiainfrasolutions.com

Asia Infrastructure Solutions Singapore Pte Ltd

230 Victoria Street
#12-01 Bugis Junction Towers Singapore
188024
T: +65 6222 3888
W: asiainfrasolutions.com