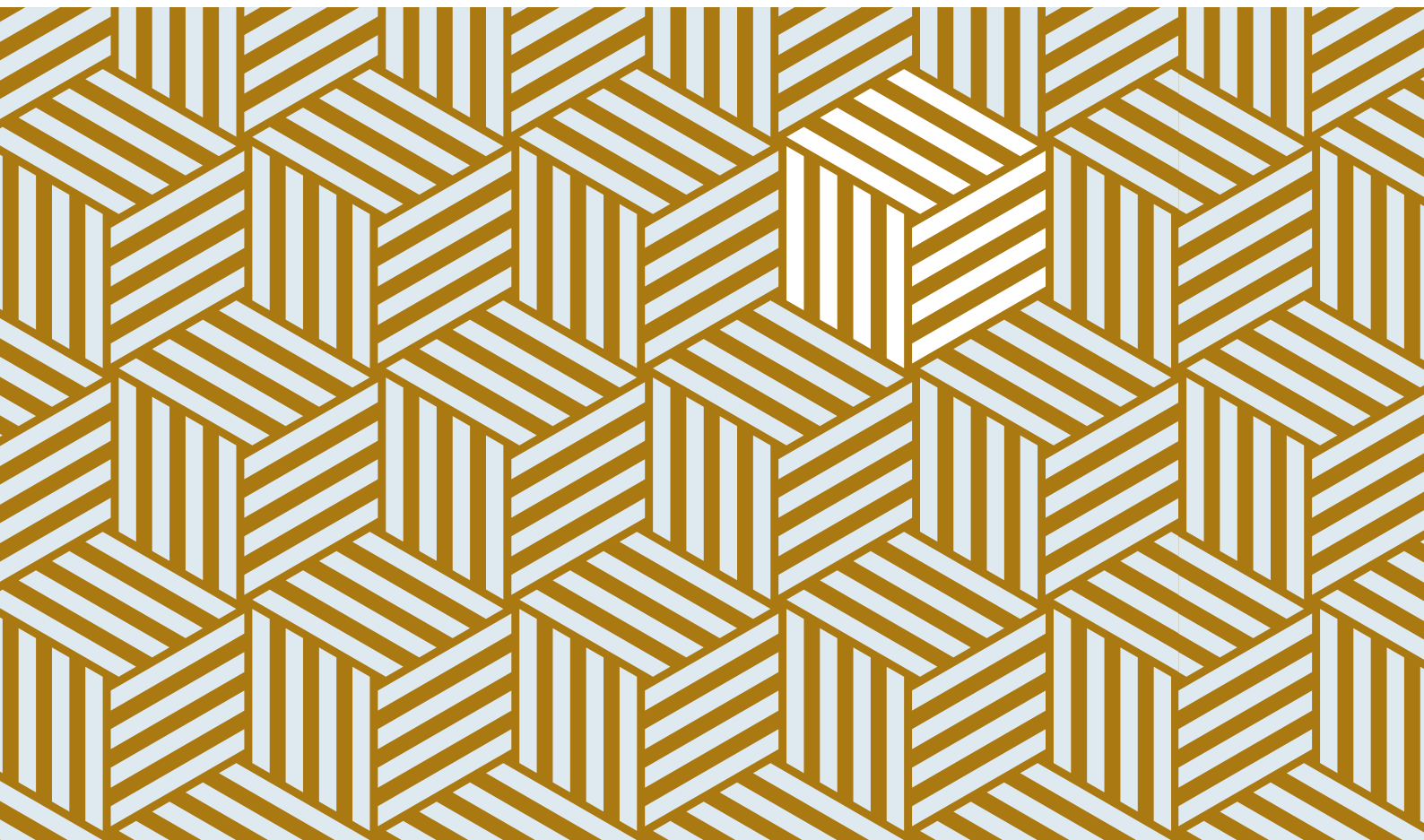


Singapore Academy of Law
Law Reform Committee

Guide on Collaborative Contracting in the Construction Industry

January 2022



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The Law Reform Committee (“LRC”) of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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GUIDE ON COLLABORATIVE CONTRACTING IN THE CONSTRUCTION INDUSTRY

SUMMARY NOTE

The collaborative contracting model has been successfully implemented, particularly, in public sector projects in various countries, including, the UK, USA, Australia and Hong Kong. This model is intended to address problems typically associated with the traditional contracting model that is used in Singapore. These FAQs are intended to provide a primer to and raise awareness on the collaborative contracting model. It is hoped that project participants will consider the adoption of this model for suitable projects and reap the benefits from its successful implementation.

FAQ ON COLLABORATIVE CONTRACTING IN THE CONSTRUCTION INDUSTRY

1. WHAT IS COLLABORATIVE CONTRACTING FOR CONSTRUCTION PROJECTS?

It is a contracting model based on the recognition that there can be mutual benefit for a project owner and project participants from a more co-operative working relationship. Collaborative contracting arose out of a desire to address problems often faced in traditional contracting, including:

- (a) Misalignment of commercial interests: Traditional fixed price contracting can create incentives for project participants to act in a manner that is contrary to the interest of the project and/or the project owner. For example, where there are changes to the design, project participants may charge higher prices for the extra work because it is usually not practical for the project owner to competitively tender such additional work.
- (b) 'Blame game': In traditional contracting, delayed or defective performance by one participant typically excuses the other participants from strict compliance with their obligations. As a result, when things go awry, it is in the personal interest of the participants to blame each other rather than collaborate to solve the problem together.
- (c) Minimum compliance: As commercial entities with the ultimate aim of generating profits, project participants engaged under traditional fixed-price contracts will try to minimise costs to maximise profits. Accordingly, project participants are financially motivated to do no more than is minimally required of them. For example, where the project owner engages a contractor under a fixed-price, build-only contract, and the design is found to be defective during the construction process, the contractor has no financial incentive to suggest a construction solution that will solve the design defect, if such a solution will increase its costs without a corresponding increase in its fixed fees.

Collaborative contracts incorporate features designed to overcome the above problems which are associated with traditional contracting. These features can include:

- (a) contractual commitments that expressly require parties to cooperate, act in good faith and in the spirit of mutual trust and confidence;
- (b) early warning and risk management mechanisms designed to give early warning to the other participants of potential issues

which may arise, so that solutions can be discussed and agreed before the issues escalate;

- (c) payment arrangements which financially motivate each project participant to act in a way that is better for the overall project;
- (d) agreement between parties to waive the respective right to sue each other for breach and negligence;
- (e) governance arrangements that facilitate joint decision making; and
- (f) pro-active project management involving all project participants.
- (g) pain share – gain share arrangements

A collaborative contract does not necessarily have to incorporate all of the above. Parties are free to choose the model of collaborative contracting which matches their desired level of risk-sharing and cooperation.

2. ARE THERE DIFFERENT MODELS OF COLLABORATIVE CONTRACTING?

Yes. The various models of collaborative contracting differ depending on the extent of risk-sharing and cooperation. On the one end of the spectrum, the partnering model has a lower degree of collaboration and risk-sharing whereas the project alliancing model has a high degree of collaboration and risk-sharing, including the adoption of a ‘no-fault’ clause whereby parties agree to forfeit their legal rights to sue another party for any breach or negligence.

	Partnering	Engineering, Procurement and Construction Management (EPCM)	Project Delivery Partner	Project Alliancing
Contract structure	Traditional contract coupled with a non-binding ‘partnering charter’. This charter will set out guidelines on how parties should conduct themselves in the partnership to create an environment of	EPCM contractor is principally responsible for design and to manage project implementation. Owner may directly contract with other consultants and downstream contractors or EPCM contractor may contract	Owner engages one or more delivery partners and directly contracts with consultants and contractors	Owner, consultants and contractor(s), enter into a single multi-party agreement

	trust, openness, and collaboration	with them as agent for the owner, under the owner's close control		
Time risk	Similar to a traditional contract, partnering contractor has a 'hard' obligation to complete by a completion date. Liquidated damages recoverable from partnering contractor for delayed completion	EPCM contractor has a 'best endeavours' obligation to complete by a completion date. Owner can recover actual losses flowing from delayed completion if it can be shown that EPCM contractor has not tried its best to achieve timely completion. Owner can also recover liquidated damages for delayed completion against downstream works contractors, if engaged directly	Similar to EPCM contractor, delivery partner(s) has 'best endeavours' obligation to complete by a completion date. This obligation is complemented by gain share/pain share payment for early/delayed completion	Target date for completion is supported by gain share/pain share payment. No-fault clause whereby project participants forfeit rights to claim against one another for delayed completion
Remuneration regime	Similar to traditional contracts, may be in the form of a fixed-price lump sum or re-measure.	Fixed price fee for services and, if engaged directly by EPCM contractor, reimbursement for downstream contractor and consultant costs. May include gain share payment for value engineering	Fixed price fee for services, reimbursement for direct costs, and gain share/pain share payment linked to achievement of pre-agreed KPIs.	Fixed price fee for services, reimbursement for direct costs, and gain share/pain share payment linked to achievement of pre-agreed KPIs.
Risk of defects	Similar to traditional contracts whereby Partnering contractor assumes full risks of defects.	EPCM contractor typically only accepts responsibility to exercise due care and skill in carrying out design. Owner has recourse for defective workmanship	Owner has direct contractual relationship and legal recourse against downstream contractors and consultants for defects.	All participants are responsible for defects, as reflected in the gain share/pain share payment structure. No-fault clause whereby project participants forfeit rights to

		against downstream contractors if engaged directly or through collateral warranties if not engaged directly		claim against one another for defects
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3. WHAT KIND OF PROJECTS ARE SUITABLE FOR COLLABORATIVE CONTRACTING?

The type of projects that are suitable and would benefit the most from collaborative contracting typically have some or all of the following characteristics:

- (a) scope of work is subject to significant change after project commencement;
- (b) scope of work is complicated by technical and/or stakeholder issues which render it difficult to allocate risk and/or sensibly price for such risk at the time of tendering;
- (c) short timelines require design and construction to progress concurrently;
- (d) works would benefit significantly from innovation and risk-taking by project participants;
- (e) project owner has technical expertise and experience such that project owners direct and hands-on involvement will benefit project; and
- (f) the project is sufficiently large and complex to justify the time, costs and resources that would have to be deployed towards establishing the joint project monitoring, management and decision making protocols and procedures associated with the collaborative model.

4. WHAT ARE THE ADVANTAGES OF COLLABORATIVE CONTRACTING?

The advantages of collaborative contracting turn on the model of collaborative contracting employed and the degree of risk-sharing and collaboration involved. Broadly speaking, the practical benefits to be gained from successful collaborative contracting can include the following:

- (a) Encourage innovation: In traditional contracting, it is often the case that parties would push blame to other project participants when things go wrong. The inclusion of a 'no fault' clause removes the incentive to resort to such tactics and motivates participants to take risks in pursuit of increased efficiency.

- (b) Potential cost savings from early risk management: Collaborative contracts may deliver projects at a lower cost than traditional contracts. Early risk management mechanisms in collaborative contracting allow potential issues to be managed collaboratively at an early stage, resulting in significantly less time and cost impact if the risks do eventuate. This may result in lower cost for the project owner compared to if the contract had been a fixed-price traditional contract, as the contractor in the latter case may have accounted for the risk by pricing premiums.
- (c) Reduce costs associated with disputes: The inclusion of a 'no fault' clause or establishing an independent disputes board to manage dispute avoidance and early resolution of issues caters for a non-adversarial way of resolving conflict. This may reduce the costs associated with adversarial dispute resolution, for example, by reducing the internal costs associated with adversarial contract administration which requires the keeping of a detailed paper trail to prepare for the parties' respective positions in the event a dispute does arise and engagement of claims consultants and lawyers.
- (d) Flexibility: The collaborative contracting model allows the contract and parties to adapt easily to changes that become necessary on large scale, multi-disciplinary projects by enabling parties to effectively collaborate to tackle complicated design and technical issues which may not have been anticipated at the outset of the project.

5. WHAT ARE THE DISADVANTAGES AND RISKS OF COLLABORATIVE CONTRACTING?

The disadvantages and risks of collaborative contracting also depend on the degree of risk-sharing and collaboration involved. The potential disadvantages and risks of collaborative contracting can include:

- (a) Potential ramifications of the 'no fault' clause: In a collaborative contracting model where the entitlement of each non-owner participant to its gain share/pain share payment depends on the performance of other participants, any defective or non-performance by a party will lead other participants to suffer financial loss. Where there is a 'no fault' clause, the other parties may not have any recourse against the non-performing party.
- (b) Difficulties with traditional insurance policies: In standard insurance policies, when an insurer pays for a claim, it typically has the right of subrogation to step into the shoes of the insured party to seek recovery from the participant whose actions caused the loss. However, in collaborative contracts where there is a 'no fault' clause, parties will not have legal

recourse against the participant who caused the relevant loss. Therefore, traditional insurance products may not be a good fit for certain collaborative contracting models. Tailored policies which are designed to address the risks of collaborative contracting would be required, which may be more costly than traditional policies.

- (c) No guaranteed cost-savings for the project owner: Although project owners may potentially derive cost savings, there is no guarantee that collaborative contracting will deliver a project at a lower cost compared to traditional contracting. For example, defects may reduce the non-owner participants' gain share entitlement, it is not necessarily the case that such reduction will cover the costs incurred by the owner to rectify the defects where there is a no-fault arrangement.

6. WHAT ARE THE KEY REQUIREMENTS FOR COLLABORATIVE CONTRACTING TO WORK WELL?

The key aspects that underpin successful collaborative contracting include:

- (a) Aligned goals: Collaborative contracting works well where there are aligned objectives, and where all parties commit to work towards these objectives by acting collaboratively and in good faith.
- (b) Open communication: Parties should be able to work together effectively and efficiently based on mutual respect and honesty. Parties should share information openly, and a regular forum for communication between all parties is encouraged to build and maintain an efficient team.
- (c) Effective dispute resolution procedure: An effective dispute avoidance and resolution procedure should be set up to encourage collaborative problem solving over the use of adversarial methods. Examples include: early risk management measures to enable parties to discuss and deal with potential issues before it escalates, establishing an independent disputes board at the outset of the project to facilitate dispute avoidance and resorting to non-adversarial dispute resolution methods, such as, mediation.
- (d) Collaborative mind-set: When setting up collaborative contracts, all participants should be guided to embrace the philosophy of collaborative contracting – i.e., that a more cooperative relationship can lead to mutual benefits in the wider and longer term. Participants should work to embrace the mind-set of collaboration and reduce tendencies to use legal swords and shields.

- (e) **Trust:** Trust is a cornerstone for collaboration and parties should channel time and effort towards building trusting relationships.

7. WHAT ARE THE INHIBITORS TO COLLABORATIVE CONTRACTING?

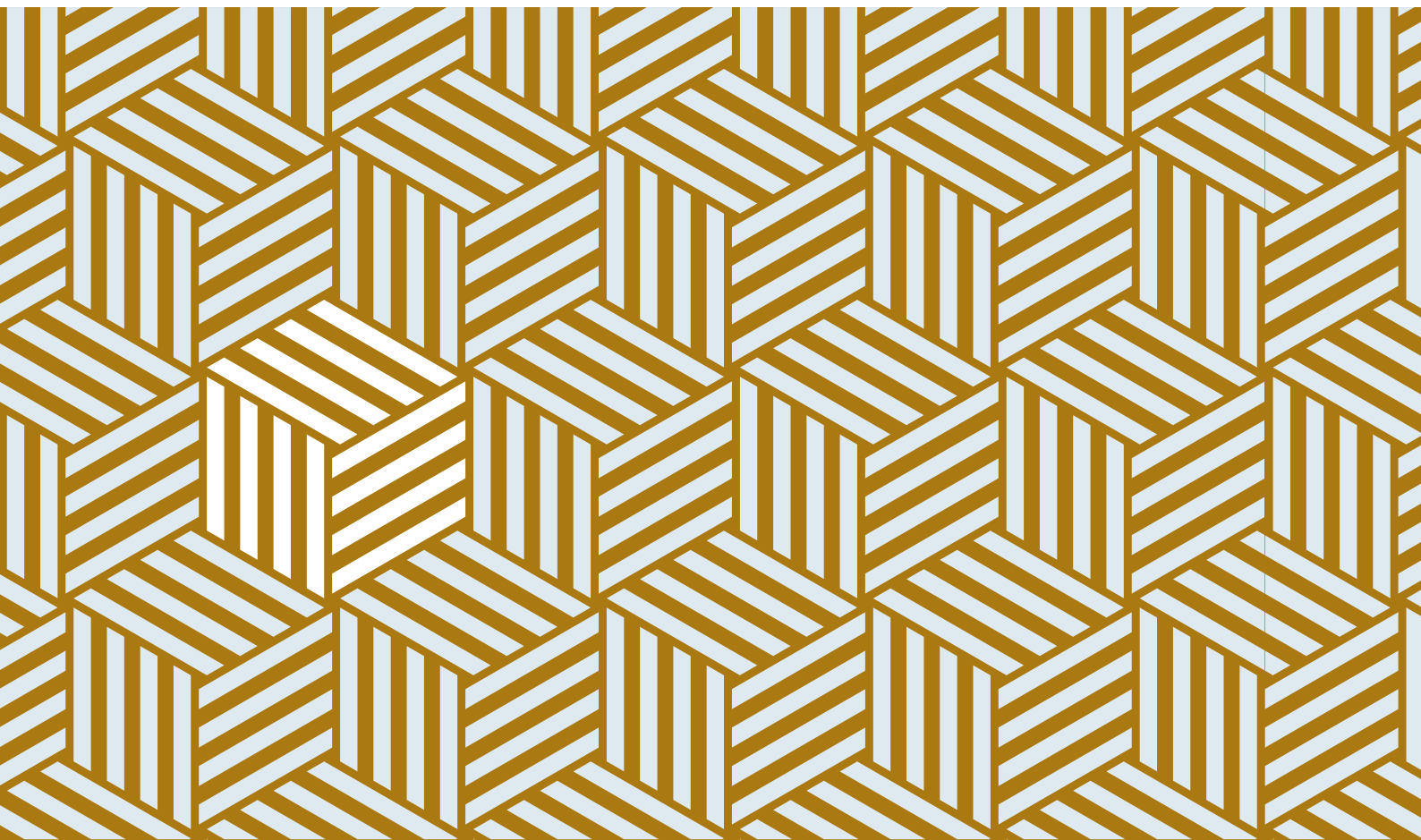
- (a) **Lack of familiarity:** Collaborative contracting is an unfamiliar concept for many parties in the construction industry in Singapore. Parties may be resistant to step out of the 'comfort zone' of the more familiar traditional contracting and embrace a different contracting model.
- (b) **No change in mind set:** Successful collaboration entails close co-operation between the project owner and all project participants as they work towards the best interests of the project. This requires a change in the mind set of parties more used to traditional contracting where the focus is on parties acting to protect their own interests rather than the interests of the project.
- (c) **Lack of mutual trust and confidence:** The project owner and project participants may be sceptical of each other's intentions and actions, especially where they are involved in a project for the first time. Parties may be reluctant to invest the time and effort needed to build trusting relationships. Project owners may not be prepared to share control and decision-making powers with other project participants.
- (d) **Lack of commitment:** There must be sufficient incentives for all project participants in achieving successful project delivery. Where KPIs and gain share/pain share payment structures do not sufficiently incentivise project participants, there will be a lack of commitment to performance and collaboration towards the successful delivery of the project.

8. HAS COLLABORATIVE CONTRACTING BEEN ADOPTED IN SINGAPORE PROJECTS?

Yes. Collaborative contracting has been adopted in Singapore projects, for example, in the Punggol Digital District Project. The Building and Construction Authority has introduced an Option Module E (Collaborative Contracting) to the Public Sector Standard Conditions of Contract (PSSCOC), which may be adopted in addition to the PSSCOC terms. The collaborative principles in Option Module E include, establishing:

- (a) a collaborative working relationship whereby the Employer and the Contractor will use best endeavours to work together and act in a spirit of mutual trust and cooperation;

- (b) a set of Key Performance Incentives (KPIs), the achievement of which will be monitored and, if achieved, will entitle the Contractor to specified bonus payments;
 - (c) a mutual obligation on the Employer (through the Superintending Officer) and the Contractor to promptly notify each other of any matter that could cause time or cost overruns or have an adverse impact on the performance of the works or KPIs and to work together to mitigate the adverse effects of such notified matters; and
 - (d) a dispute board based on the Singapore Infrastructure Dispute-Management Protocol 2018 to facilitate dispute avoidance and early resolution of disputes.
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