THE 'COLLABORATIVE' FUTURE OF CONSTRUCTION AND INFRASTRUCTURE

By Michael Weatherall and Lisa Curran

Framework Contracting, that is well planned from the outset, can be an effective tool to deliver an entire programme of infrastructure with benefits for all sides.

While it is simply one way to address resource constraints and the need for fair apportionment of risk in the evolving construction sector landscape, Framework Contracting is increasingly being used to good effect - especially by local authorities and Council Controlled Organisations.

In summary - What you need to know

- Clients are having to re-consider traditional procurement approaches to attract a market that is resource constrained and more risk adverse than it was a few years ago
- Framework Contracting is a move away from more traditional models, that procured a programme of works one project at a time. Instead, its objective and focus is to deliver an entire programme of works as efficiently and quickly as possible
- The benefits of this type of model include faster delivery times due to efficient procurement processes, and increased quality and innovation - contractors can invest in the development of staff and subcontractors as they have a pipeline of work on the horizon.

Background - sector issues created need for change

There is no doubt that the New Zealand construction industry is facing many challenges today. New Zealand is in the unenviable position of being both in a construction boom, but not having the necessary resources to meet demand.

The New Zealand construction market is not alone, Australia is facing very similar issues with some of its main contractor market challenging the markets historical risk profile and announcing that lower risk profiles must be implemented.[1]

Why have so many contractors been placed into liquidation, when the New Zealand infrastructure market is screaming out for more experienced contractors? High profile struggles and failures within the sector have drawn attention to the previous risky (and now unpopular) practice of contractors increasing competitiveness at tender stage by accepting risks that they could not control. This practice resulted in underpriced contracts that essentially funded construction for the client and imperiled the contactor's operations and ability to complete active projects.

Both clients and contractors are now forced to re-consider previous procurement contracting strategies to respond to the change in the contractor market appetite for risk and the shortage in the industry of resources.

Changing attitudes to risk

We all know that risk should lie with the party best place to control, manage and mitigate risk, however this is not always reflected in the contracts we have seen coming out of the sector.

The common stance that '*the contractor can price the risk*', needs to be interrogated. Does the contractor have the necessary information to price

the risk and has any thought been given as to whether it is value for money for the contractor to price the risk?

Considering allocation of risk fairly does not mean that the contractor market is given an easy ride, simply that the parties have considered risk and fairly allocated it.

With many off-shore construction companies entering the New Zealand market, New Zealand clients are faced with having to re-consider previously held views on limits of liability and allocation of risk. A fair allocation of risk is now critical to ensure that the best contractors will tender for projects. Contractors will no longer consider taking on risks that they cannot control, (eg unknown ground conditions, weather risk, design creep etc).

Contractors' change in attitude to risk and the severe shortage in the market has led to clients and contractors developing tools on how to best manage risks in a construction contract. Tools such as risk registers, early identification of risks, sharing of risks (eg sharing the time and cost risk), and incentivising management of risks through Performance Regime's etc, are now all common in contracts.

Securing supply and getting the best out of the market – collaborative framework arrangements

Collaborative framework contracts (or panel contracts) are increasingly being used, especially by entities looking to deliver multiple capital works projects, to ensure that the programme of works will be delivered by a group of pre-selected contractors.

Councils and Council Controlled Organisations (CCOs) that have recently implemented Framework Contracts, include Christchurch City Council, Queenstown Lakes District Council and Watercare. Massey University has also implemented a framework arrangement for its capital works programme.

These organisations took the initiative to develop a contract framework that gave them certainty that they could deliver much needed infrastructure over a period of time, while giving the contractor market a much needed pipeline of work, all of which are designed to deliver the best public value.

Features and benefits of Framework Contracting

Importantly, Framework Contracting is not simply a panel of contractors that have pre-qualified in some way to be considered for work in the future.

Typically, contractors under panel type arrangements have simply pre-qualified on the basis of health and safety or insurance criteria and broadly have the skills to deliver the scope of work/services. Such arrangements usually have a large number of pre-qualified contractors/consultants and they are not set up to deliver a set scope of work/services, but rather may be called on by the client to provide a quotation for work as demands and the client sees fit. These arrangements do not provide the market with any guaranteed or reasonable expectation of a pipeline of work, which the market needs to ensure that it retains the necessary resources to deliver projects/services as they arise.

Framework Contracting, on the other hand, is for a specific programme of works/services over a set period of time. The client selects a small number of contractors to deliver that scope, so that each framework contractor has a reasonable expectation, if it performs, that it will get a pipeline of work over the designated time period. Contractors then have a much needed pipeline of work and the client has certainty that it has a small pool of contractors that will deliver the works/services.

This is all achieved while still ensuring the best public value, as the client can ask more than one Framework Contractor to provide a quotation for a particular scope of work/services. Another benefit of these arrangements is that the terms of the contract for delivery of the works/services (which can be based on a New Zealand standard form such as NZS 3910/3916 or CCCS for consultants), has been agreed upfront so there is no time (or money) wasted on procurement or negotiating standard terms.

A note for government agencies - Framework Contracting under the Government Procurement Rules

The new Government Procurement Rules (4th Edition) (**GPR**) which come into effect on 1 October this year (but which agencies can adopt now), contemplates this type of secondary procurement that a Framework Contract offers.

Rule 57 deals with a Panel of Suppliers and acknowledges that selection of methods for secondary procurement may include a variety of processes such as direct source, competitive quotes from the panel suppliers, and equal division of work.

The Framework Contract will set out the client's selection method for seeking this secondary procurement, and what that is will depend on how many Framework Contractors there are, the scope of the work, the performance of the Framework Contractors, and whether there is any guarantee of a certain scope of work.

Of course, the selection of the pool of contractors to be part of the Framework Contract would be competitively tendered and, if the GPR are mandatory for a particular agency, that agency must comply with the GPR when setting up the Framework Contract arrangement.

For advice or assistance with Framework Contracts or any other construction law matter please get in touch with one of our specialists, below.

[1] Lendlease made this announcement in relation to its Engineering and Services division in February 2019, and is now trying to sell this poor performing

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