
COVID-19: An infrastructure-led recovery is possible, if the key players survive

During the Government-enforced lockdown of NZ as part of its COVID-19 response, all non-essential work on capital projects has been halted. The Government has, so far, taken a very limited view of essential works and required major infrastructure projects to stop.

As a result, all levels of the NZ construction supply chain are suffering. Construction is a low-margin, high risk industry and participants do not generally carry large balance sheets or squirrel away cash for a rainy day. Speculation continues to grow that solvency issues abound, including for established contractors.

We look at how certain contractual models may assist the Government in kick-starting the construction sector, and the NZ economy in the wake of COVID-19.

Announcements and clear intent

In January 2020 the NZ Government announced the *New Zealand Upgrade Programme*, a \$12bn infrastructure investment package.

In the months following, the full impacts of the COVID-19 pandemic have been realised and further announcements have followed.

The NZTA is offering 'advance payments' to contractors to assist with cashflow through the lockdown. It remains to be seen whether these payments will, as seems likely from the terminology, simply defer cashflow issues to later in a project – and whether they are in addition to fair variation payments for the stand-down period.

An Infrastructure Industry Reference Group was announced as the latest attempt to speed up project delivery, and provide assurances to NZ's creaking construction industry, its intention being to identify "shovel-ready" projects for fast-tracking after the lockdown period has ended.

It seems almost certain that, at some stage, the Government will announce further funding for infrastructure projects, as part of its overall fiscal response to the current crisis, as NZ leveraging its comparatively healthy balance sheet to finance recovery and sustain employment levels.

Time is of the essence

The announcements offer some hope, but it is unclear if the projects (and the money) will flow soon enough to save the construction industry from significant disruption through insolvencies, job losses and the ensuing loss of productivity.

Certainly it seems unlikely that the Government will have the requisite volume of projects stored away in a “shovel-ready” state, ready for immediate construction – unless, in an unlikely turn of events, the Government looks to reinstate some previously abandoned projects (some Roads of National Significance, for example, may re-emerge).

Even the most ambitious announcements refer to a six month delay before the projects are commenced (or perhaps before contracts are inked) and they may be further delayed by the procurement procedures the Government must follow and by consenting processes under the RMA.

So, what can be done to speed things up?

We would like the Government and its various agencies to openly commit to fast-tracking projects through collaborative contracting models. Such models can be used to leverage the expertise and capacity of the construction industry, in order to better and more quickly feed itself projects. They can also therefore serve as a mechanism through which Government can support the industry more immediately.

Because of their nature, these contracts can be signed far quicker (and at an earlier stage of project development) than traditional construction contracts.

In particular we believe Government agencies would benefit from using two particular contracting models: Alliancing and a variant of Delivery Partnering.

The two models are complementary and one in particular (Alliancing) is tried and tested in the context of emergency response in NZ (the Christchurch and Kaikōura quakes), and we believe the fallout from COVID-19 should be viewed as a post-emergency scenario. NZTA has standard forms for Alliancing, which are largely uncontroversial when fairly drafted using a conventional NZ approach.

Alliancing

Alliancing is well understood in NZ. Essentially it involves the client bringing project participants (generally contractors and consultants, teamed in a consortium) into its team to deliver a specific project or programme of projects. Its defining legal characteristic is that the parties enter a ‘no sue’ arrangement, and agree to work together for the good of the project. Alliancing was developed primarily to

accommodate projects of high value and risk (risk that could not be carried or priced effectively), which would include projects being procured at break-neck speed (where perhaps design is being developed on a rolling basis and there is no time to consent the whole project neatly before commencing work).

Traditionally, Alliancing has been used for single, large projects in NZ. However, more recently Alliancing and Alliancing principles have been applied by public sector clients with large pipelines of smaller projects. We believe that approach should continue and, in the current circumstances, with the need to move quickly, the model could be used for individual projects (schools for example).

Delivery Partner – and variants

Delivery Partnering is much less used in NZ, but elements of this model have started to creep into procurement here (most notably Watercare's Enterprise Model and in the increased prevalence of early contractor engagement).

It has been described by some as a glorified (or complicated) consultancy arrangement and, again, involves bringing a team of staff from contractors and consultants 'in-house' to work with the client. The concept behind the model is simple: often a client will not have the expertise, capacity and industry knowledge to rapidly procure a major project (or series of projects or packages) in the way that works best for the client whilst also presenting an acceptable risk profile to the industry.

Delivery Partnering has been successfully employed overseas on multiple projects in Australia and was used to deliver the London Olympics.

History has shown us that, Alliancing aside, projects procured quickly by Government, whether under pressure from Ministerial announcements or otherwise, will result in a 'dumping' of risk onto the private sector – whether appropriate or not – often with catastrophic consequences. Under a Delivery Partner model, the client will use private sector expertise, simultaneously, across multiple projects, to identify the most efficient packages of work and the most efficient delivery model for each package and also progress design and mitigate risks to an acceptable level.

Why would collaborative contracting help now?

Both the Alliancing and the Delivery Partner models can be implemented (and participants, including contractors, can be paid) from a far earlier stage in project development than traditional contracting, if done properly. That is the reason we believe it will be of particular use to Government now, in light of announcements.

Government could stick to its tried and tested methods of reviewing and 'fast-tracking' projects, while the construction industry waits with baited breath for announcements (and decisions!), or Government could invite the industry 'into the camp' in a meaningful way (being paid for its input) – to apply its innovation, expertise and voracious appetite for new projects to achieve Government goals. At a time when we regularly hear we are 'in this together' and when other Government assistance is operating on a 'high trust' basis, it seems to us there is a

good case for Government to be proactive and move quickly to bring the private sector in-house for mutual gain.

We believe there is scope for these models to be adopted notwithstanding existing government procurement rules. They would not cut across neither the aim of open competition, transparency or securing strategic outcomes. They would be exclusively focussed on securing the best public, social and economic outcomes. In any event, Government procurement rules recognise the legitimacy of procuring projects in less conventional ways than usual, more flexibly, in and immediately following emergency situations. Alliancing and Delivery Partner models by definition are well equipped to deal with the risks usually seen in departing from the norm, particularly in areas of risk such as conflicts of interest, over-inflated prices, improper governance and lack of accountability.

With Alliancing, a project will need to be identified and funded, although typically it can accommodate a two-stage process starting with an 'Alliance development' phase, which is used to rapidly progress design and pricing – and to mitigate key project risks (such as consenting) to a suitable level, before the client is required to commit to the construction stage. This model would probably suit a number of projects that the Government has already progressed to a stage where they are identified and reasonably defined.

The Delivery Partner model can be rolled out from an even earlier stage, and it is the model that most interests us in the wake of the COVID-19 lockdown – and the resulting cancellation of many private sector projects.

The Government is looking to speed up project procurement, consenting and delivery to market. The Government is necessarily resource constrained. However, capacity (and a hunger for sustainable long-term workflow) exists in the construction supply chain.

The Government could in theory sit back, wait for the redundancies and then look to employ the recently unemployed, but that would arguably just cannibalise and disrupt the industry.

However, using the Delivery Partner model – or a NZ variant of it – we believe Government can effectively partner with and leverage off the private sector, leading to Government money flowing, and jobs being secured, almost immediately – whilst also speeding up Government project planning and delivery.

Whilst the Delivery Partner model used in the UK and Australia has several financial overlays that ensure that partners are incentivised to deliver the project in line with clear targets, that degree of detail may not be available at the outset of NZ's re-start. We imagine however, that similar to the 'interim' stage of an Alliance, an early stage could be developed under which those that partner with the Government may be subject to more general KPIs (and more moderate bonuses), at least until projects become fully costed, authorised and commenced.

Put another way, under our proposed model: Government would do what it does best in providing strategic leadership and overall decision making and the private

sector would be free to do what it does best: deliver quickly.

What are the cons?

Generally Alliancing and other collaborative contracting models are regarded as being faster but more expensive on the whole (despite reporting often stating that Alliancing delivers projects 'under budget', it rather depends when that budget is set). Given the challenges facing the country at present, cost seems likely to be less important now than ever before.

Recently, certain public-sector clients in NZ have begun to tweak the traditional Alliancing model (generally to erode the 'no sue' concept, and pass more risk to private sector participants). Given the circumstances, we believe now is not the time for such an approach and we recommend a traditional approach to Alliancing.

Alliancing is also viewed as quite niche within the industry – and requires a different mind-set, and arguably a greater degree of sophistication than traditional contracting. Whilst there are limited parties that have actual Alliancing experience in NZ, we believe that there is no reason others cannot be trained effectively and quickly to operate within the model.

At its most basic, and without the right protections, a Delivery Partner-based model may become a simple 'secondment' or 'consultancy' arrangement, where Government covers its partner's staff costs for those involved. This is why it is important to find and overlay the right financial models – to ensure partners buy into the strategic objectives, are motivated by appropriate financial returns, and to minimise the prospect of inefficiency.

Additionally, it is worth noting that projects delivered under these models will not necessarily deliver the huge volumes of immediate work (and associated cashflows) that the construction industry desperately requires at the moment. Initially, in the early stages, the Delivery Partner model would help contractors cover their cost-base (salaries) whilst making some margin, whilst Alliancing would provide certainty of workflow.

Additionally, it is worth noting that the industry was stretched for resource before the current crisis and, whilst a number of private sector resources have been cancelled or are in doubt, the industry may still be lacking in the type of senior expertise that would be required within collaborative contracting models.

Whilst a lot of design and planning can usefully be done without site-based activity, there are limits. Geotechnical work and site surveying, for example, could not currently be undertaken, although if the Government's response to COVID-19 is effective, it is conceivable such activities may become permitted – subject to specific precautions.

So, these contract models alone are not a panacea for all the industry's ills, but we believe they are likely to be useful and effective in speeding up recovery and 're-starting' the industry.

Greenwood Roche is a national law firm, which specialises in advising on major projects. Greenwood Roche's Construction team is led by Barry Walker (Auckland), James Riddoch (Christchurch) and Amy Rutherford (Wellington). All have gained extensive experience overseas and in NZ of project and contract structures, including Alliancing and Delivery Partnering. For more information on our Construction team, [view](#) our website.
