Partnership for Change

Reliance information

AUSTRALIAN CONSTRUCTORS ASSOCIATION

CONSULT AUSTRALIA

Partnership for Change

The Australian Constructors Association and Consult Australia have joined forces to bring forward sector-wide reforms through our Partnership for Change initiative. The initiative aims to improve productivity and address industry challenges through the publication of a series of thought leadership papers.

These papers are intended to provide the basis for collaborative discussions between government and industry.

Partnership for Change papers:

- **Reliance information (this paper)**
- Multiple design reviews
- Model client
- Digital technology

Case for change

For government tender processes to be most efficient and deliver the best quality tender submissions, reliance on client issued information is fundamental. Client issued information, referred to in this paper as reliance information, can include:

- geotechnical reports
- concept/reference design
- utilities data
- as built drawings
- contamination reports
- condition of existing assets.

The accuracy of reliance information is essential to avoid significant impacts on the tendered cost, the project program and ultimately the quality of the project. The impact of unforeseen cost and delays on the overall success of projects is well documented. Cost increases and program delays, regardless of liability, place all parties under additional pressure notably from acceleration measures, increased cost scrutiny, disputes including associated legal and other expert costs and high staff turnover.

Tenderers are routinely required to assume risks for the accuracy of reliance information provided by clients, with no opportunity for relief where the information is inaccurate. Tenderers (both contractors and consultants) are often provided with insufficient time to independently verify reliance information during the tender period, and this verification is also an unnecessary productivity drain for all parties.

The competing requirements on tenderers to meet short tender timeframes and develop quality submissions without certainty on the reliance information creates a disproportionate risk profile for tenderers which is unsustainable. The impact of these risks can have catastrophic consequences for all parties concerned as the project develops. A balanced approach to reliance information is needed.

Risk management vs risk transfer

Reliance information will often be prepared by third parties on behalf of the client, with those parties being contractually liable to the client for the accuracy of the information. Tenderers will typically have no contractual relationship with these initial advisors.

The terms of tender will often state that tenderers are required to take all risk in relation to the accuracy of the reliance information and any qualification will be rejected. In this situation, the best way for a tenderer to manage that risk is to undertake investigations to verify the accuracy of the reliance information. Not only is this an unnecessary drain on resources, but to meet the typical tender periods, tenderers have little opportunity to carry out such investigations and have no option but to assume there are no errors in the information—taking on significant risks. In practice, parties then attempt to pass these risks down through the supply chain. The resultant contracts give no relief should the reliance information prove to be inaccurate. This is not risk management. This is simply risk transfer. This practice has a significant impact on contractor and consultant insurances and the insurance market more broadly. These pressures inevitably put all elements of a project at further risk.

It is incorrect to assume that because a risk is deemed to have been transferred that it no longer exists. Good commercial practice is for all parties to do their utmost to ensure that the likelihood of delays and cost increases is negated as much as possible. Knowing that 100 per cent of information cannot be 100 per cent correct, 100 per cent of the time, tenderers are not asking for clients or their original advisors to guarantee reliance information. Instead, tenderers are asking clients to allow them to rely on the information and if there is an error, an opportunity be provided to collaboratively assess the resultant risk and find solutions to successfully deliver the project, avoiding cost and delay overruns.

Recommendation

In the interests of promoting a fair, balanced and collaborative approach, the risk on the accuracy of reliance information should be approached as follows:

1. Preferred approach
– the client secures third party reliance from the original advisors

The client can, and should be able to, secure with the original advisors the ability for third parties to rely on the reliance information for the strict purposes of delivering the project within a set timeframe. Often, consultants working directly with clients on initial advice/designs will not agree to third party reliance because it is drafted too broadly. For example, to allow any third party the ability to rely on the information without any link back to the project it was initially developed for. This unnecessarily elevates the original consultant's risk profile. As stated above, tenderers do not expect original advisors to guarantee reliance information to be 100 per cent correct 100 per cent of the time. Tenderers simply want the ability to rely on the information for the purposes of tendering for the project. Where an error is found in the reliance information, there should not be a 'blame game' between the parties resulting in disputation taking precedence over delivery of the project. Instead, there must be a mechanism to collaborate to find a solution.

2. Fallback position
– re-investigation of the reliance information

Where the third-party reliance given by the original advisor has expired (e.g. due to time delay or because of substantial changes to the project) the client should arrange for re-investigation of the reliance information. This could be done by an advisor contracted directly to the client or by the tenderer. There are several ways this could be managed between a tenderer and a client (noting that in all instances the tenderer would need to be paid for this re-investigation work in addition to the other tender/contract elements):

- Early Contractor Involvement (ECI) - whether via a formal ECI model or other form of early engagement process, the client could engage tenderers earlier to allow chosen tenderer/s to work collaboratively to re-investigate the reliance information and then together mitigate the risks before a cost and program is agreed.
- Provisional Sums/Entitlement to Extension of Time - Where the client wants to execute contracts promptly, and the impact of potential inaccuracies of the original reliance information is sufficiently constrained, the parties could agree to allocate provisional sums to matters impacted by the reliance information as well as suitable extension of time provisions to cover the re-investigation and identification of issues. This enables a contract to be formed with only a limited element of cost uncertainty. Upon award, there will be an opportunity to re-investigate the reliance information and conversion of the provisional sum to a firm figure if required.

Risk sharing when errors are identified in reliance information

Tenderers want to find solutions to issues rather than dispute liability. Where the preferred approach above is used and tenderers rely on reliance information that is later found to have errors, risk sharing can occur in a number of ways:

- Baseline reports based on the reliance information - The formation of baseline reports would provide tenderers with a defined risk in relation to reliance information. For example, a baseline report could stipulate an upper limit on quantities of contaminated material based on the reliance information. Any quantities up to those stated in the baseline report would be at the tenderers risk—any beyond would be at the client's risk.
- Relief for errors in the reliance information – The simplest method would be to provide tenderers with entitlement to both cost and time relief if inaccuracies are discovered in the reliance information after tender submission. This would not necessarily extend to all client provided information and the parties must agree at the outset the information which the tenderer reasonably relied on (and was not expected to verify or re-investigate) and which could also create an unfair risk profile for the tenderer to assume.

Case studies

Early Contractor Involvement (ECI)

Level Crossing Removal Project – Southern Program Alliance (SPA)

Two processes were used in tenders for additional work packages within SPA:

	Initial Work Package (IWP) – Competitive bid	Additional Work Package (AWP) – Single source bid within alliance framework
Competition	Competing against another Proponent	Competing against the State's budget
Team includes	Contractor and designer only	Contractor, designer, client and rail operator
Total bid time	88 weeks	38 weeks
Proof of value for money	Competitive tension between tendering proponents	Checks by independent estimation and benchmarking across packages and programs

The AWP tender process was conducted similar to an ECI process. All SPA participants were fully involved and invested in the outcome. During the AWP tenders, additional investigations were completed. Confidence in the reliance information significantly increased prior to the submission of the proposal when compared to the IWP process. Where reliability was still low when the proposal was submitted, a collaborative and "best for project" decision was made on how the risk would be allocated. Below is a comparison of results between the two procurement models.

	IWP – Competitive tender	AWP1 – Alliance tender
Estimate omissions (mistakes and missed scope)	5% of direct cost	0.9% of direct cost
Result over / underrun in direct cost	6.6% of DJC Overrun	2.2% of DJC Underrun

The AWP tender process was able to provide a more reliable cost estimate. The determining factor in achieving the results was the early involvement of tenderers so that risks could be properly investigated, understood and managed.

Baseline reports

Snowy 2.0 Pumped Storage Project (SPSP)

The SPSP is a major expansion of the existing Snowy Mountains Hydro-electric Scheme. The project consists of significant sub-surface structures within a complex geological and hydrogeological environment. The geological conditions made estimating the time and cost of construction extremely challenging.

Rather than seeking to pass this risk to the tenderers, a decision was made to implement a geotechnical baseline report (GBR). The GBR set out the risk allocation for geotechnical matters between the client and tenderer. The implementation of the GBR achieved a reasonable and principled risk-sharing regime where tenderers were not expected to assume risks which they had no way of assessing prior to contract award.

Reference: Gomes A.R.A., Chapman B., Chapman N. and Cortes F. (2021) Development of the Geotechnical Baseline Report for the Snowy 2.0 Pumped Storage Project – Proceedings of the Australasian Tunnelling Conference (ATS2020+1), May 2021, Melbourne.

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