Planning to win
Procurement and contract strategy

Our expertise
Eversheds’ construction and engineering team is one of the largest in the world, working out of 50 international offices. We have vast experience in advising clients on all types of procurement and contracting strategy, which means the way in which the responsibilities for the design and construction of a construction project are contractually allocated.

The procurement models we advise on include:
- traditional contracting (based on employer design) or design & build/EPC arrangements
- partnering arrangements with supply chain
- construction management or management contracting
- alliancing and collaborative working arrangements
- framework agreements
- PFI/PPP arrangements

Our experience of advising on major projects, many of national strategic importance, means that we understand the industry specific challenges faced by clients in their own sectors.

We advise on procurement and contracting strategy for both individual projects and longer term programmes of works and services including in relation to new build, refurbishment and repair and maintenance of existing infrastructure.

We act for employers, contractors and supply chain companies which gives us a wider industry understanding of the relevant business drivers, legal and commercial risks that impact on different clients.

Our team has significant experience of advising on construction and engineering contracting strategy across a wide variety of jurisdictions and the full spectrum of industry sectors including:
- real estate and commercial development
- transport including rail, road and logistics
- power generation
- electricity and gas transmission and distribution
- water and wastewater
- renewable energy
- industrial and process plant
By way of example, we typically work with clients to identify the most appropriate procurement and contracting strategy using the following systematic approach:

**Initial strategic procurement advice**
From the inception of any project we work in an integrated way with the client’s own technical, commercial and/or in-house legal teams in order to first identify the client’s project specific objectives, including any constraints governing or risks impacting on the procurement of the project, whether funding or timing related, regulatory or statutory (including relevant EU procurement matters).

We consider that there is no “one size fits all” approach to procuring most projects and at project commencement we therefore work with the client’s team to jointly identify the most appropriate procurement strategy. The choice of procurement route and associated contract forms will be influenced by the experience of the client, the nature of the project works and the client’s desired outcomes and the relevant sector.

As part of this procurement strategy work, we provide our recommendations to the client for its consideration regarding best practice that could be adopted in procuring the project based upon our previous experience of working in the client’s own sector or, very often, drawing on best practice ideas we have identified from other analogous sectors. For example, the timing of procurement of the building contractor may be important to the success of the overall project – early contractor involvement (“ECI”) may enhance the efficiency of the design, eventual “buildability” of the works and the safe procurement of the project.

Additional factors apply where the matter involves creating a long term relationship between the parties rather than just contracting for a single project. We have a market leading team of advisers who specialise in advising on advanced and pioneering models involving long term collaborative working and alliancing between clients and their construction team. Our advisers include dual qualified lawyers and engineers who have previously worked directly in industry which gives them a unique insight and deep understanding of the behaviours, risks and opportunities involved with collaborative working.

**Selecting the contract form**
Once the type of procurement model has been agreed with the client and its team, whether traditional, design & build, partnering or otherwise, then we work with the client to identify the most appropriate forms of contract on which to engage its contractor(s) and professional team. Contract terms and conditions may be either based upon industry standard forms of contract or sometimes, for more complex projects, bespoke forms of contract.

There are numerous standard form contracts available for use in the UK and international construction and engineering industry and we regularly advise on all of those main forms, including the JCT, NEC3, FIDIC, IChemE, MF/1, ICE/ICC and LOGIC contract suites. Within all standard form or bespoke contracts there are a number of variables to be considered including the basis of payment (for example lump sum, cost reimbursable or target cost), the extent of design responsibility and liability for defects and other limitations on liability - some construction sectors typically require shorter defects limitation periods or other limitations/exclusions of liability.

We therefore consider each relevant contract variable with the client, often working jointly with its internal or external technical and commercial advisers, in order to identify and select the most appropriate option for the particular project which we will then draft into the contract conditions. In our experience, we also consider that reviewing and managing the interface between the legal, technical and commercial documents which will form any contract is critical to achieving certainty as to all parties’ contractual duties and rights and avoids possible future disagreements.

This contract selection step in the process would also apply when advising a main contractor in procuring its supply chain contracts, albeit working within the confines imposed by its main contract with its own employer.
Case study 1
We have advised a number of the ten main water and sewerage companies in England and Wales in relation to the procurement of their multi-billion AMP4, AMP5 and AMP6 regulated capital investment and operations programmes. The procurement models that our team have advised on have ranged from long term framework agreements to alliance agreements under which integrated delivery teams are created between clients and their contractor/consultant partners in order to maximise the alignment of their respective interests, collectively focussing on project delivery. The alliance agreements our team have worked on include the Anglian Water @one Alliance for the AMP4/AMP5 period which has recently been recognised as representing best practice by the UK Government’s alliancing group.

Case study 2
We acted for a national developer client in advising on the drafting, negotiation and completion of all the construction documentation for the redevelopment of a major shopping centre in the Midlands. This was a mixed use project and included the design and construction of new retail buildings (including a new flagship department store), a new cinema, residential premises and a new car park. In particular, our work for the client included preparing, negotiating and finalising all professional team appointments, the enabling works contracts and the main development building contract.

Case study 3
In recent years we have advised a number of major national and international infrastructure and utilities clients, including in the electricity, gas and rail sectors, in relation to the procurement of their largest and most strategically important capital investment and new build projects and programmes, valued at over £5 Billion in total.

The procurement models we have developed with those clients have in many cases been pioneering in the industry, ranging from bi-party contracts with different supply chain members implementing project wide joint incentive mechanisms to multi-party alliance models under which there is extensive risk sharing between the client and its fellow alliance members. In each case, we worked with the client’s commercial and technical specialists to develop advanced commercial incentivisation models focussed on incentivising all parties to achieve the desired project outcomes while delivering a fair commercial outcome for all alliance members.

What happens next?
For more information please contact:

Simon Oats
Partner
Tel: +44 20 7919 4750
simonoats@eversheds.com