

Pre-bid agreements for consortiums

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In this article we explore the role of Pre-bid agreements for consortiums involved in competitive bid situations.

The role of pre-bid agreements

Multiparty consortium arrangements are becoming more common for tenders for big projects that require a range of specialist and complementary skills.

Members of a consortium can structure their relationship in many ways – including using incorporated or unincorporated joint ventures, limited partnerships, and head contractor/subcontractor arrangements. In all cases, it is important to the success of a consortium for it to organise itself early in order to maximise its chance of winning a bid process and, if successful, delivering the works efficiently and profitably.

A multiparty consortium for any significant project should prepare and enter into a consortium agreement that reflects its chosen structure and governs the relationships between its members for the duration of the project delivery. However, in a competitive bid situation, it may not be cost effective for the consortium members to negotiate and agree the terms of a detailed agreement at the outset. If the consortium's bid fails, time and cost spent on a detailed agreement would be wasted.

Taking the time to prepare a Pre-bid agreement (sometimes referred to as an MOU) that governs the members' dealings during the bid process can greatly assist in facilitating efficient communications between consortium members and save everyone time and money in the long run.

The benefits of preparing a Pre-bid agreement

Preparing a Pre-bid agreement can help the members in their planning phase by turning their minds to key issues ahead of the bid submission date. In particular, it can help them decide how they will most effectively work together to win a bid process, and what process will need to be followed after submission of the bid, without expending as much time, effort and money as might otherwise be required to negotiate and finalise the terms of a more detailed consortium agreement upfront.

A Pre-bid agreement typically applies only to the period from when the members first come together as a consortium to prepare and submit a bid, until that consortium's bid is either successful (at which point the Pre-bid agreement would generally be replaced by a more detailed consortium agreement to apply for the duration of the project) or unsuccessful (in which case the consortium arrangements fall away).

When preparing a Pre-bid agreement, the members should turn their minds to the following issues:

- Do all the members fully understand the specific bid process that the consortium must follow?
- How will the consortium members ensure there is a consensus on any tags or amendments that are to be made to the principal's proposed form of contract (if any)? The larger the consortium, the harder this can be, particularly amongst members of varying sizes and with varying contributions to the consortium.
- How will consortium members finalise and agree all other aspects of a bid response? Is there a key member who will take the lead?
- If shortlisted, how will the consortium manage negotiations with the principal? Who will lead negotiations, and what is the extent of that person's authority to bind other consortium members without further consultation? Are consortium members committed to the point that they are obliged to sign up to any contract awarded by the ultimate principal?
- Have members already agreed some of the key terms that will be included in a detailed consortium agreement? Ideally, a detailed consortium agreement should be in place before the contract with the principal is agreed and signed, and preparing a Pre-bid agreement can help fast track this by encouraging an early consensus on key issues.
- Are all members committed on an exclusive basis, or is there flexibility for some members to be part of another bidding consortium? When does any exclusivity of dealings fall away?

- Are there any conflicts of interest with the principal or with competing bidders that should be disclosed to all consortium members and consented to up front to avoid surprises?
- What is the extent of any liability that members may have to each other in respect of the bidding process?
- What confidentiality obligations apply in respect of information shared during the bid process?
- Who owns any intellectual property rights in the bid documents themselves, and what (if any) rights do members have to use those documents for other future purposes?
- Is the Pre-bid agreement a legally binding agreement, or is it non-binding? Perhaps the members prefer that only some provisions are legally binding, and the rest of the document is an exercise in making sure the members are on the same page.

The content of a Pre-bid agreement will ultimately reflect the needs of the parties and the intended structure chosen by the consortium.

Case study: Pre-bid agreement for a "project lead/subcontractor" structure

We recently advised a client who was the "Project Lead" for a multiparty consortium that comprised over ten members of varying sizes and contributions. The Project Lead's agreed roles were to lead and co-ordinate the bid process and to negotiate with the principal on behalf of the consortium.

In this situation, if successful, the Project Lead would also sign the final agreement with the principal in its own name as a head contractor. All other consortium members would in turn be engaged by the Project Lead as subcontractors on back to back terms. Therefore, the Project Lead was 100% responsible and liable to the principal for the delivery of all of the works to be delivered under the head contract, even though its own contribution was limited to a specific portion of those works.

The project was very large and the timeframe for the bid process was very tight. A Pre-bid agreement was prepared and executed by the members to ensure that everyone understood and agreed how the consortium would manage the bid process on such a tight timeframe. This included specifying how tags to the proposed head contract would be agreed, how negotiations with the principal would be progressed if shortlisted, and how and when its own formal consortium arrangements would be implemented.

Several specific key issues were addressed in the Pre-bid agreement, including the following:

- **Back to back terms:** Because the Project Lead would be signing a contract with the principal as head contractor, the members each had to agree to enter into a subcontract with the Project Lead on back to back terms in respect of their own particular contributions to the works, and provide appropriate indemnities. This ensured that risk and liability for the works would ultimately lie with the appropriate party.
- **Tags and amendments:** Each member needed a reasonable opportunity to comment on and propose amendments to the head contract. The Pre-bid agreement set out a clear process for receiving, consolidating and re-circulating for final approval material tags and amendments suggested by members.
- **Smaller members:** Some of the smaller consortium members were unable to agree to some of the back to back terms due to the size of their business and of their particular contribution to the consortium, particularly the liability and insurance requirements. The Project Lead had to assess on a case by case basis the terms on which it would engage some of the smaller members. Where appropriate, engaging members on the Project Lead's standard terms replaced the obligation to subcontract on back to back terms.
- **Authority to negotiate:** If shortlisted, the Project Lead would front negotiations, and required flexibility and authority to bind the consortium and its members, while the members required a level of comfort that the Project Lead would not "negotiate away" the agreed commercial position. A balance was struck by using a materiality threshold, beneath which the Project Lead had authority to agree and bind other members, and above which the Project Lead required a consensus approval from the other members.
- **Pay-if-paid regime:** In this case, the works comprised a range of specialist consultancy services to which the provisions of the Construction Contracts Act 2002 did not apply. This meant that "pay-if-paid" provisions were not prohibited, and were included in the Pre-bid agreement as being one of the essential terms, ultimately to protect the position of the Project Lead given the subcontract structure. This ensured that the Project Lead would not itself be liable to pay other members out of its own pocket for works not yet paid for by the principal.

In the above case, the work put into the Pre-bid agreement ensured that all members of the consortium were able to move through the bidding process on a "no surprises" basis, with a common view of how each step in the process was to be handled, giving the Project Lead the confidence to proceed on a tight timeframe. While time was invested in this process up front, it ultimately meant that the members organised themselves properly so that they could meet the bid process deadlines, and avoided issues arising after bid submission.

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