

Bird & Bird

Procurement of Quality Infrastructure

Andrea Chao – Partner/lawyer
Andrea.Chao@twobirds.com

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A major legal hurdle *perceived* to obtain quality infrastructure

Perceived lack of flexibility re:

- Contracts
- Procurement

Why a hurdle? Because flexibility is crucial to obtain such infrastructure

How to tackle these hurdles

Contractual

- Agree on a contract that:
 - Stimulates sharing of ideas & improvement of the project
 - Has flexibility to incorporate new views & new developments
 - Allows for room to deal with unforeseen circumstances & challenges in a cooperative manner
 - Involves supply chain
 - Is geared towards best for project

Examples

Contractual

- Collaborative contracts
- Early Contractor Involvement (ECI)

New:

- FIDIC Collaborative Contract Model (TG17) (expected 2023)
- Launched 6 Oct '22: English translation of Dutch ECI model DG2020 (QR code to download)



Where does thinking FIDIC TG17 currently stand – a few points for inspiration

Contractual

- Alignment on goal, approach & collaboration
- Integration of workstreams
- Flow of information
- Pricing methodology to have a beneficial influence – also re subcontractors, suppliers etc – while also being transparent & allows for exits
- Risk identification & management
- Joint decision making through a decision making forum
- Focus on communication & collaboration
- Duty to warn & inform
- Additional dispute avoidance measures: focus on taking measures with a 'best for project'-purpose

How to tackle these hurdles

Procurement

- Do not focus on price as outcome of the tender
 - Fixed price upfront not required from EU procurement law perspective (academic article to be published end of '22)
- Rather: focus on setting a transparent, proportional & fair (contractual) process to determine price
- Select and award on quality: approach, experience, team, match with employer's team etc.

A few suggestions

