

Construction Law in 2010

Putting the Principles into Practice

Construction contracting methods: Managing risk and delivery in an ever-changing environment

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MinterEllison
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**Society of Construction Law Australia
Melbourne Law School**



Overview

1. An ever changing environment
2. Construction contracting methods
3. Alliancing benchmark report 2009
4. Managing risk and delivery
5. Conclusion



1. An ever changing environment

What is happening in the economy?

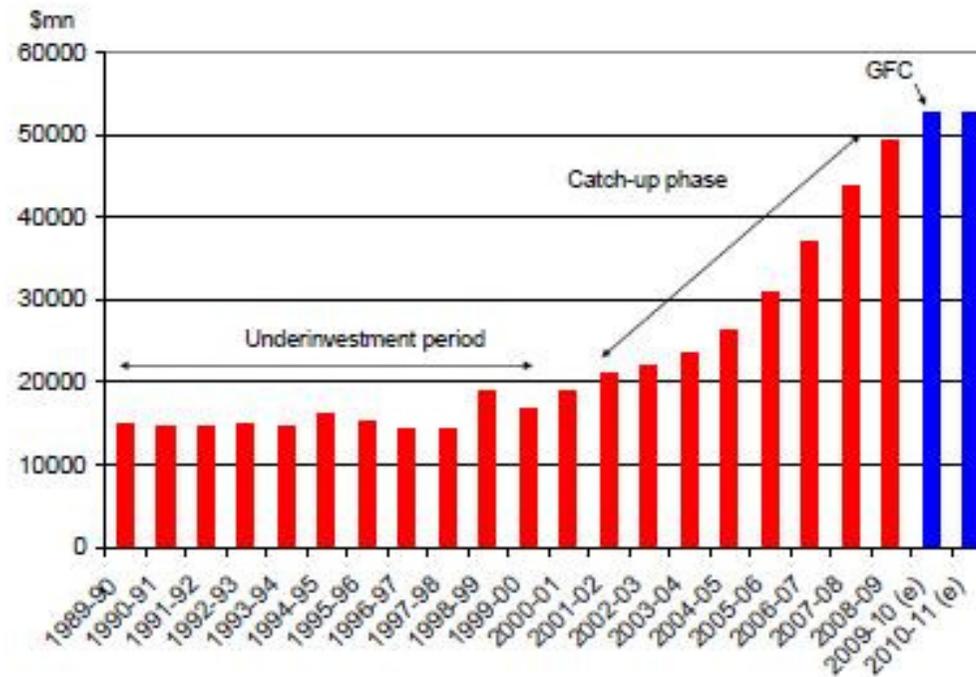
- Catch-up of under investment in infrastructure
- Resources boom
- GFC
- Government infrastructure spending depressed
- Catch-up needed to keep pace with population



1. An ever changing environment

What is happening in the economy?

Figure 25. State and Local Government Capital Investment: Actual and Expected

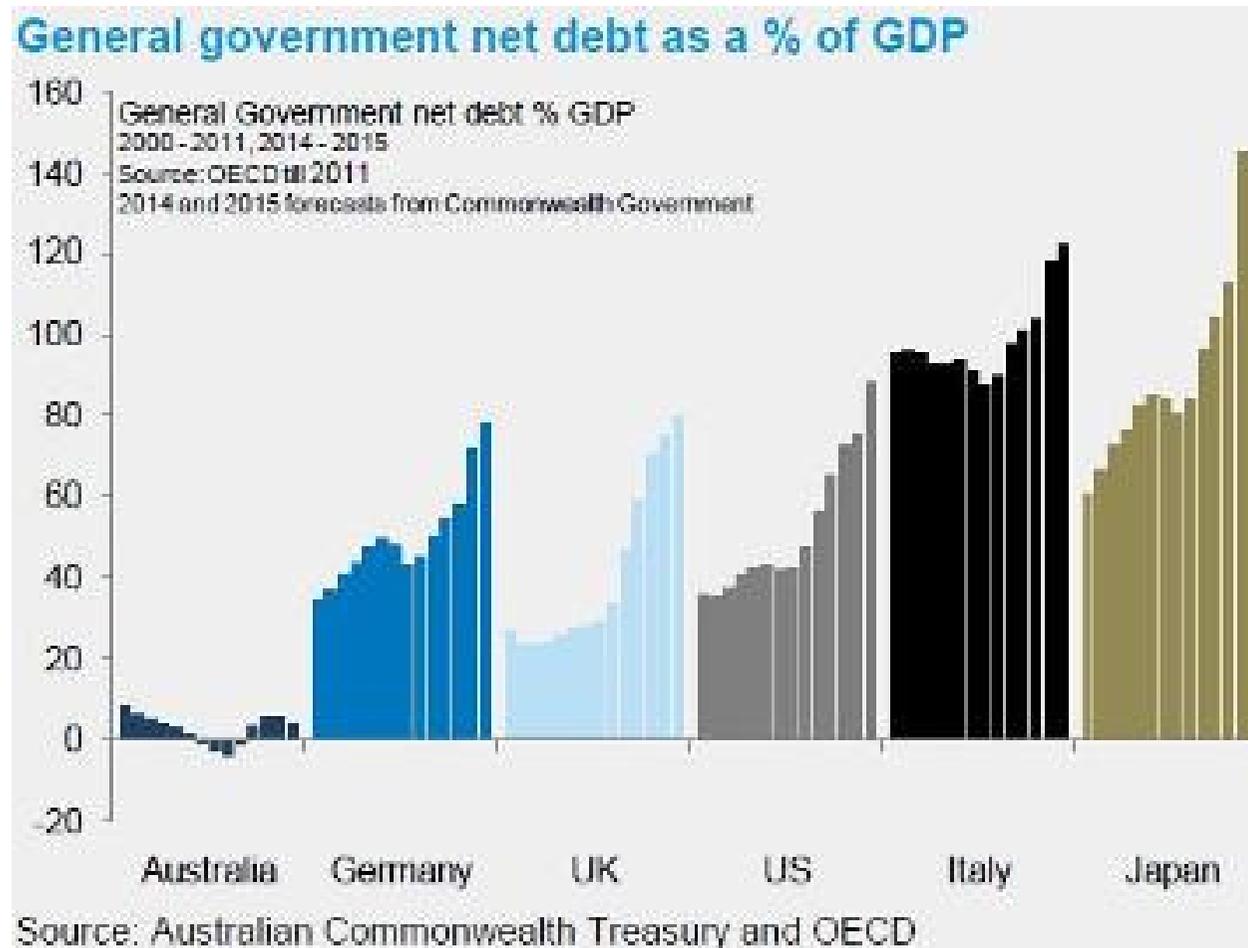


Source: ABS & Citi Investment Research and Analysis



1. An ever changing environment

What is happening in the economy?



1. An ever changing environment

What is happening to infrastructure delivery methods?

- Changes in delivery of major infrastructure projects
 - from 'hard dollar' to relationship-based contracting
 - managing risk rather than risk allocation
 - various hybrid contracts
- Drivers
 - relative bargaining power of parties
 - availability of engineering resources

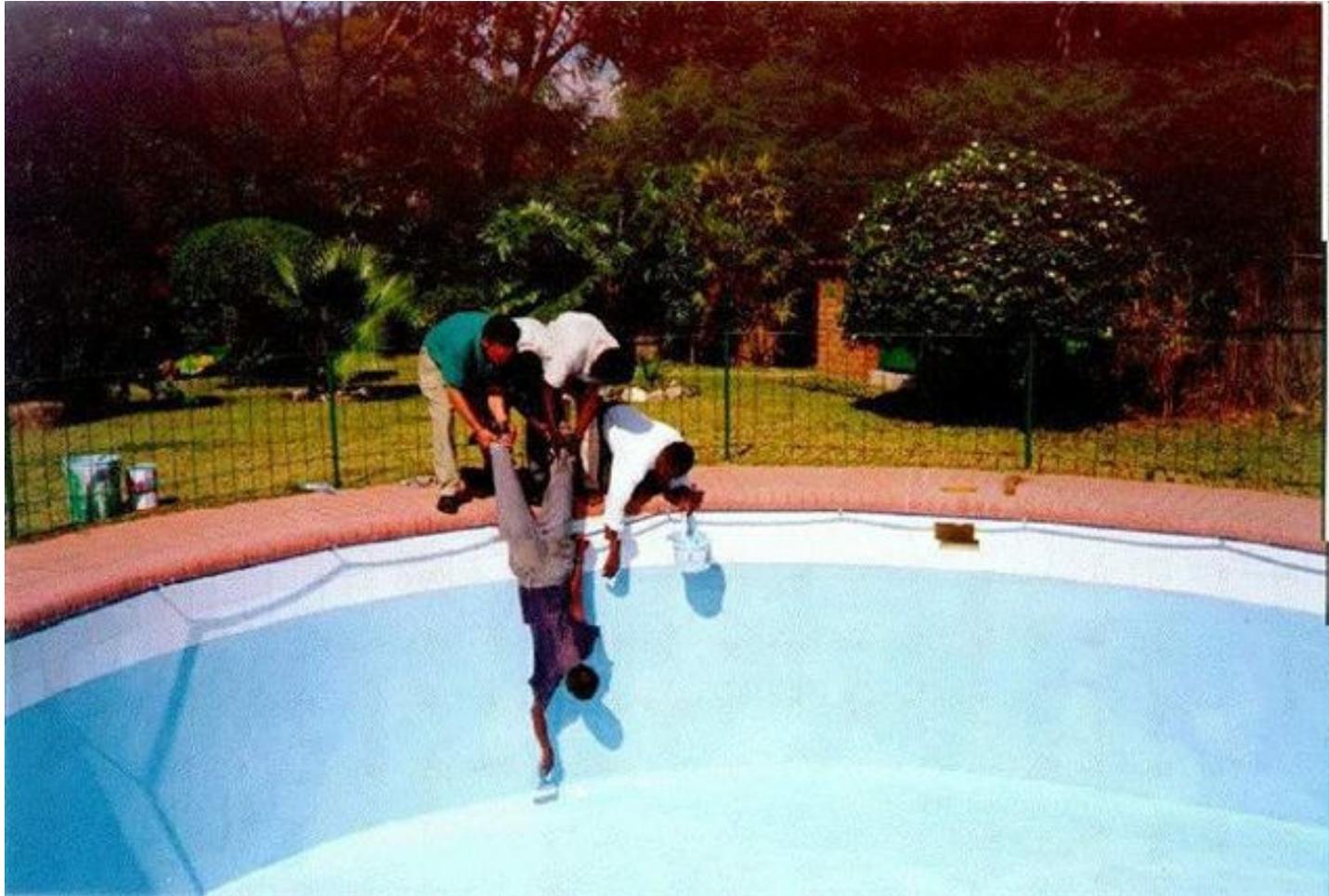


1. An ever changing environment

What is happening to infrastructure delivery methods?

- Recent shift away from alliancing to ECI
- Alliancing benchmarking report 2009 - by State Treasuries of NSW, QLD, WA, VIC
- Use of competitive tender stage for ECI and alliancing models





Getting the cheapest price?



2. Construction contracting methods

The main menu

- Construct only
- Design and construct contracts
- Managing contractor contracts
- Construction management contracts
- Alliance contracts
- Early contractor involvement (ECI) contracts



2. Construction contracting methods

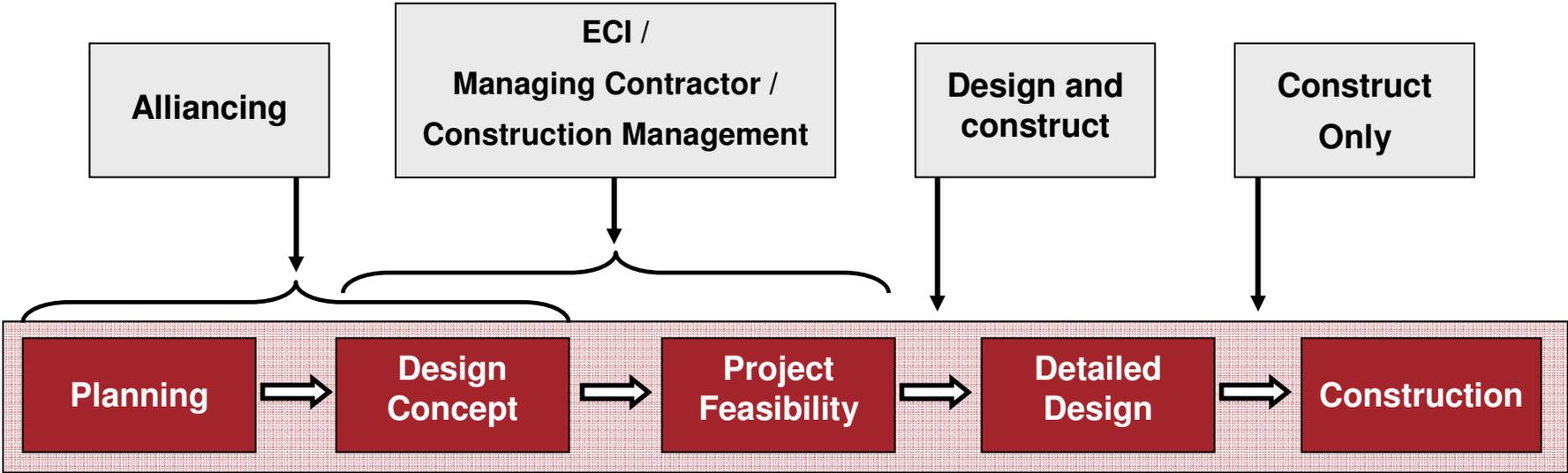
Selection considerations

- Selecting the best contracting method will not guarantee success, but will assist avoiding disputes, and time or cost overruns
- Consider:
 - project objectives
 - project scope
 - inherent project risks
 - time for design development prior to tender
 - expertise of principal in managing construction



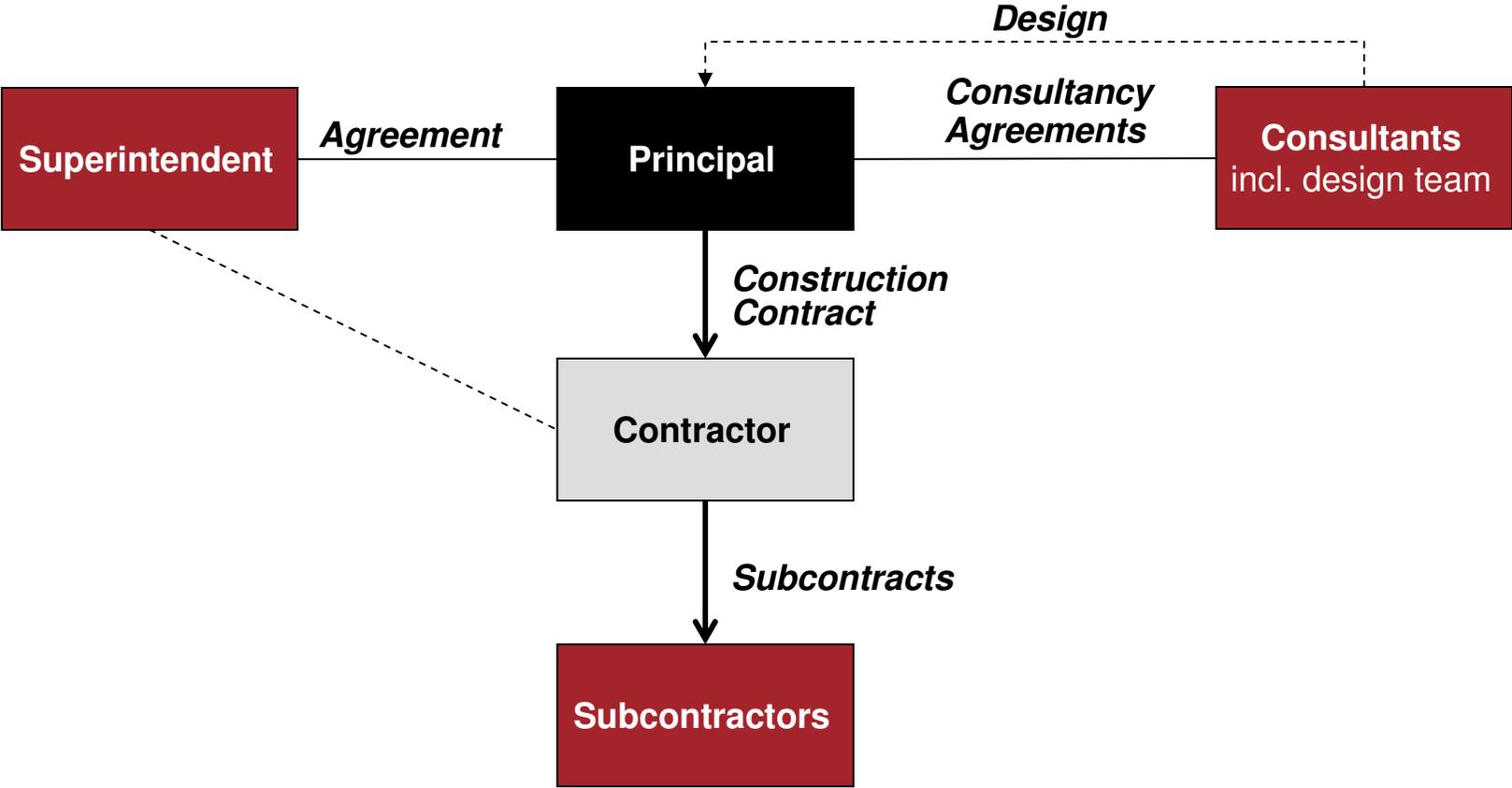
2. Construction contracting methods

Involvement points



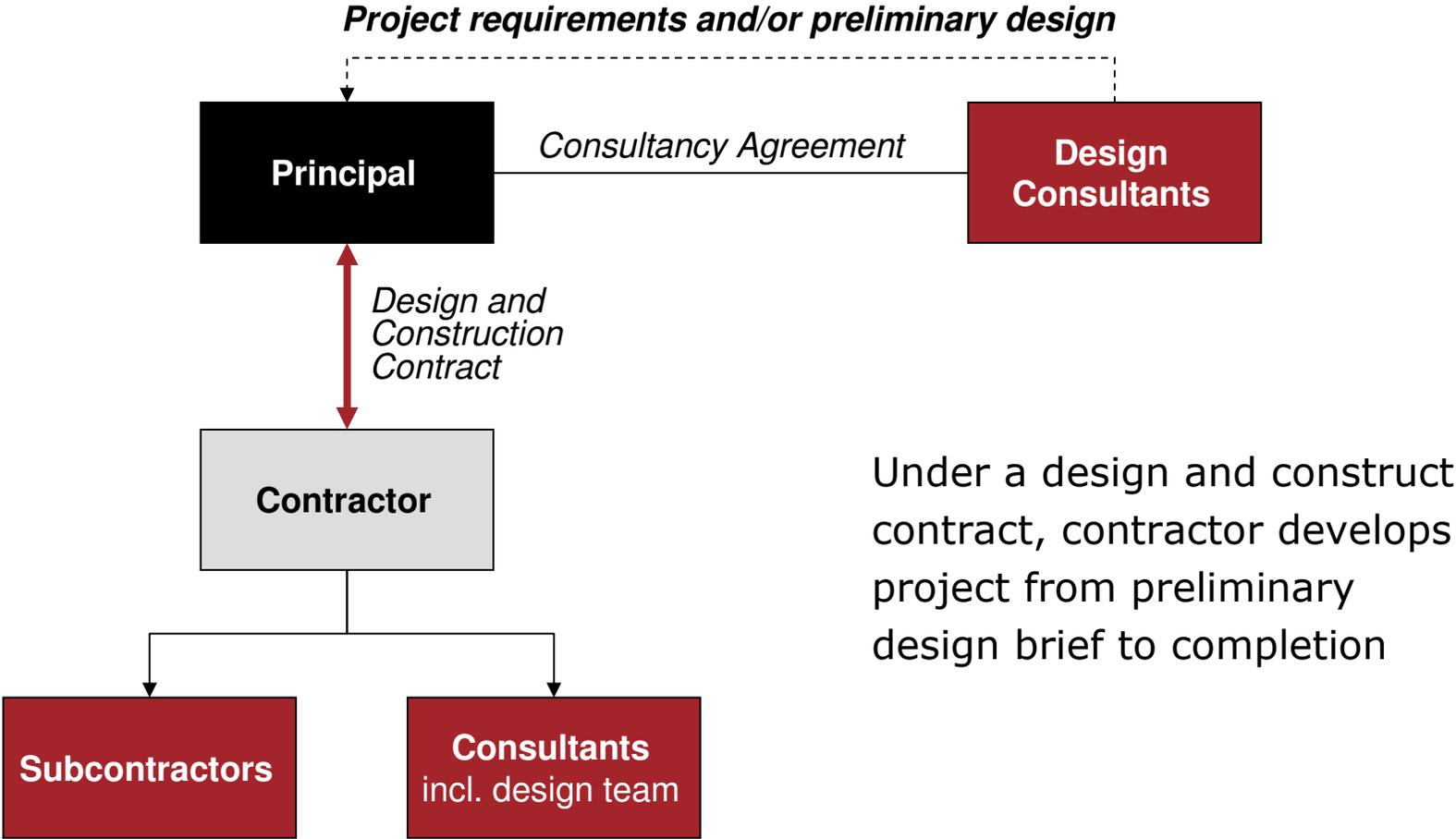
2. Construction contracting methods

Construct only



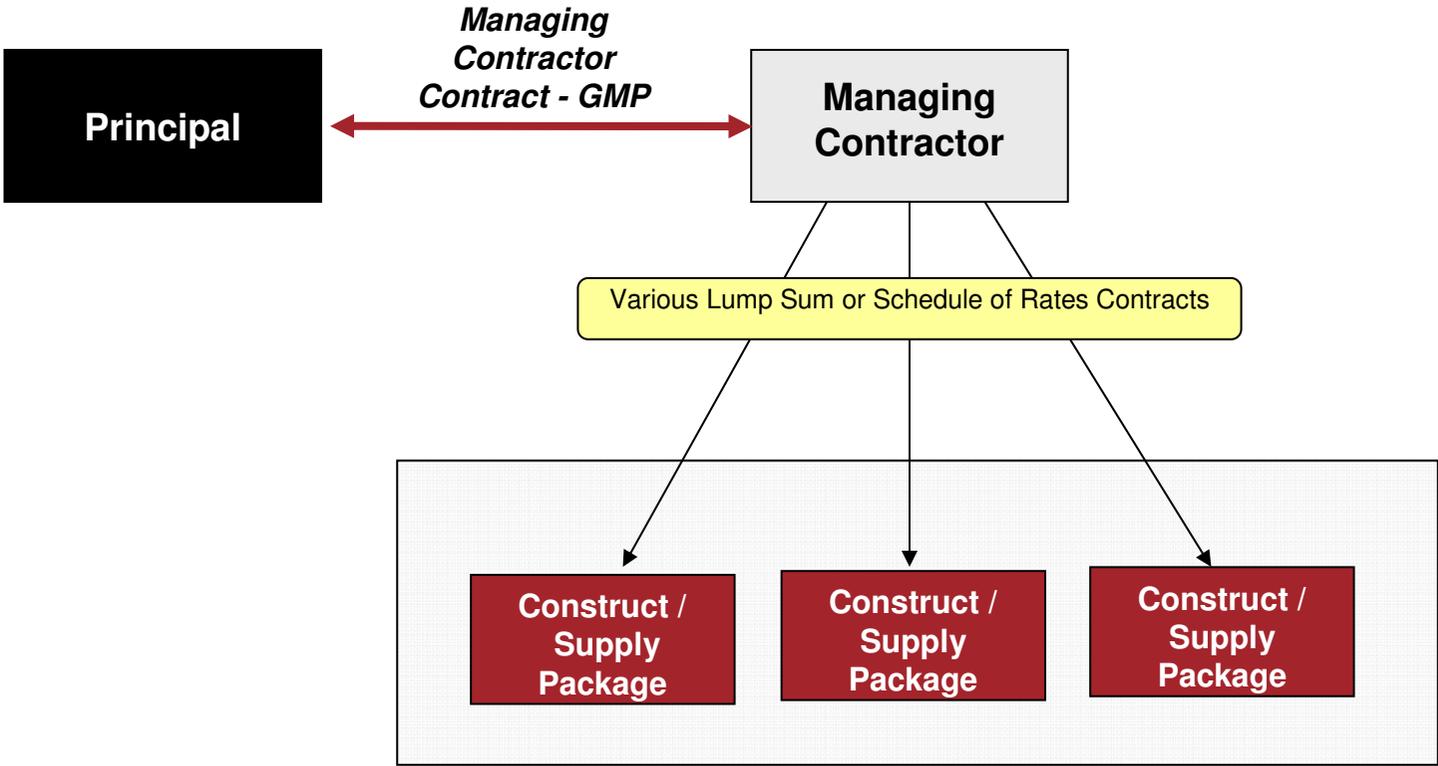
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Design and construct



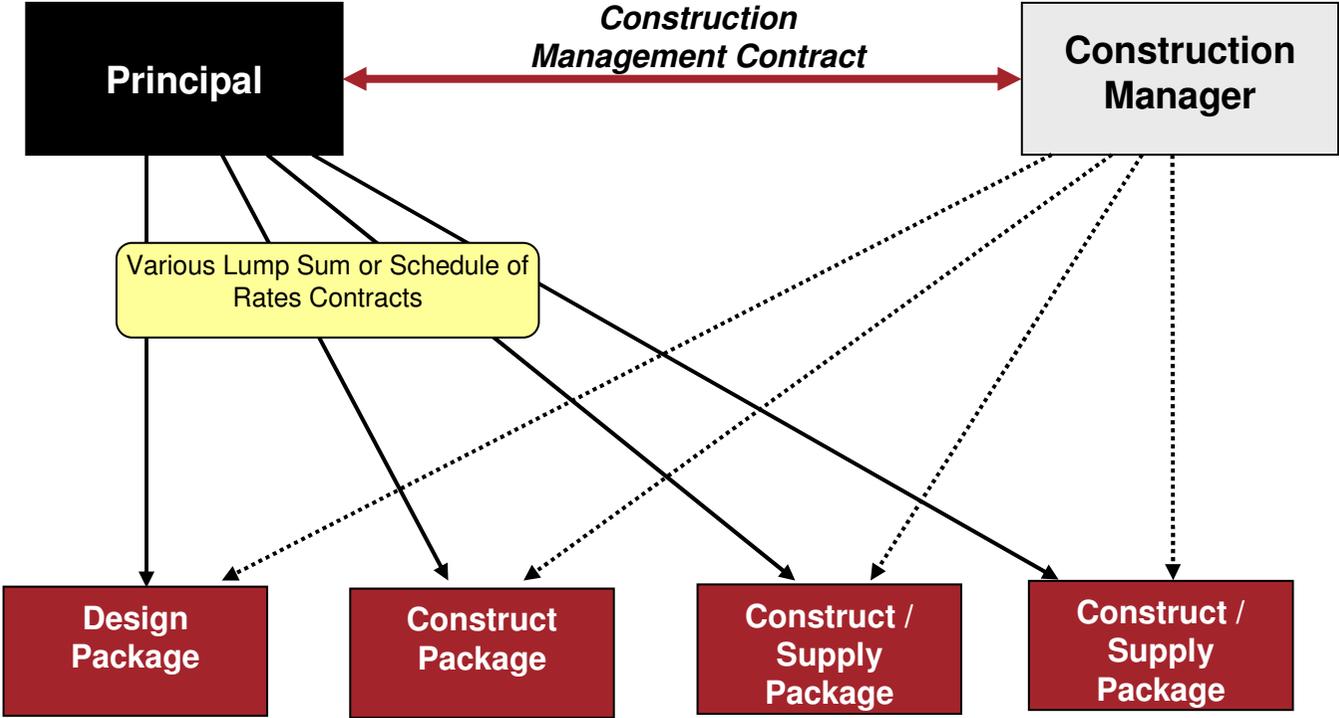
2. Construction contracting methods

Managing contractor



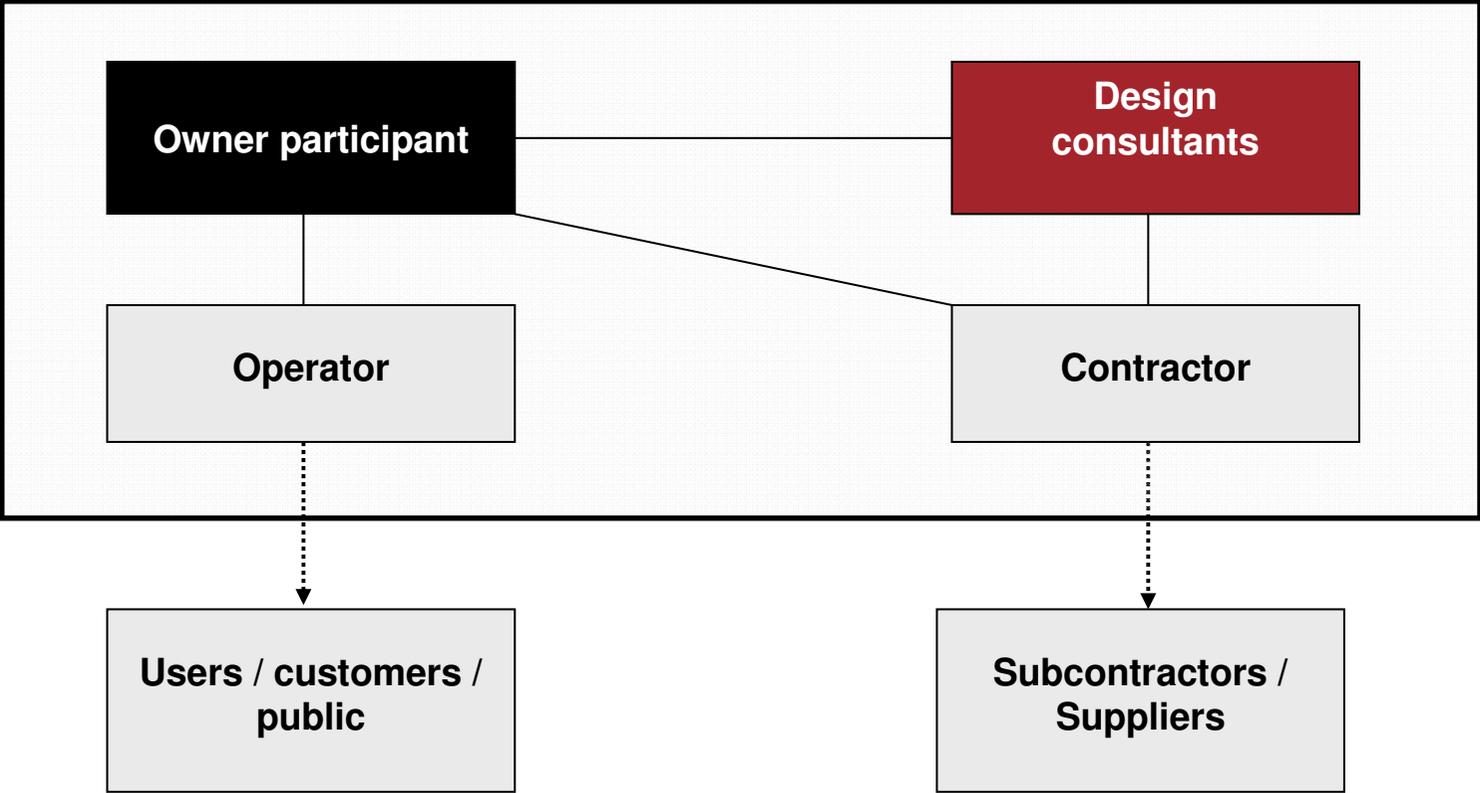
2. Construction contracting methods

Construction management



2. Construction contracting methods

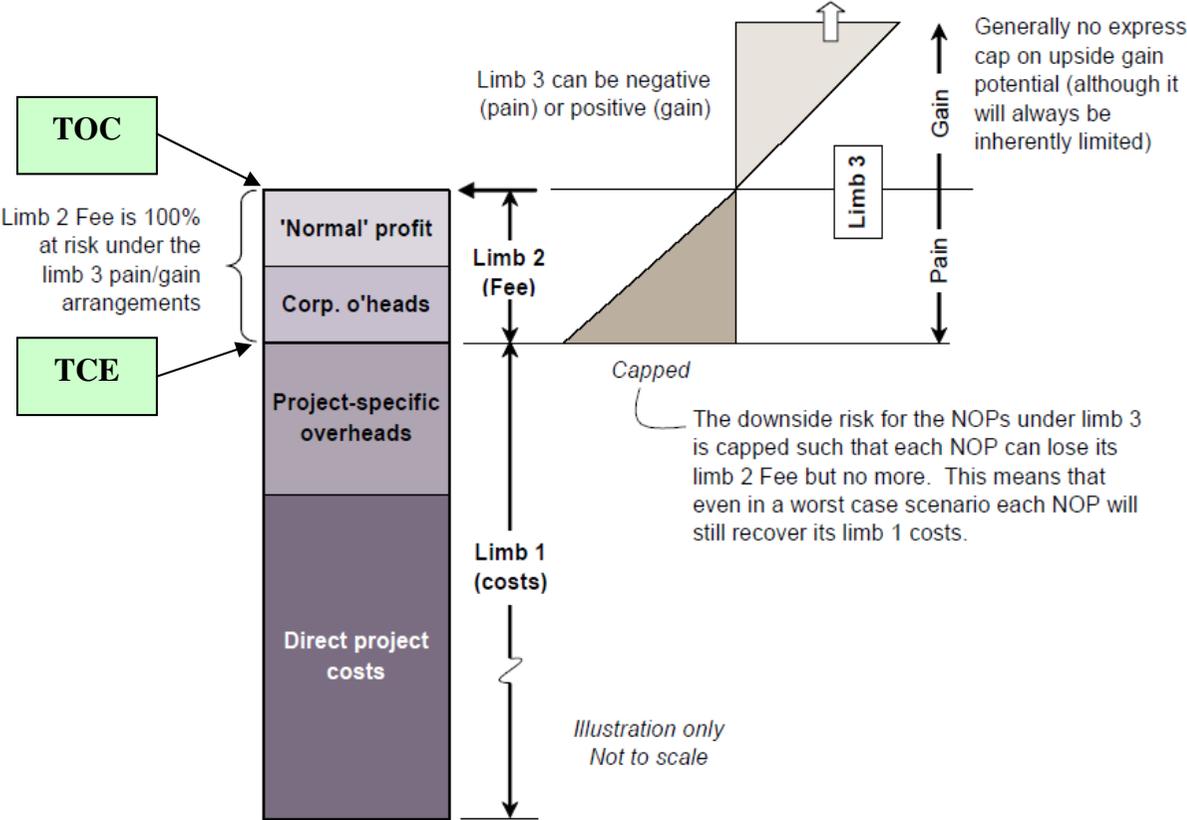
Alliance



2. Construction contracting methods

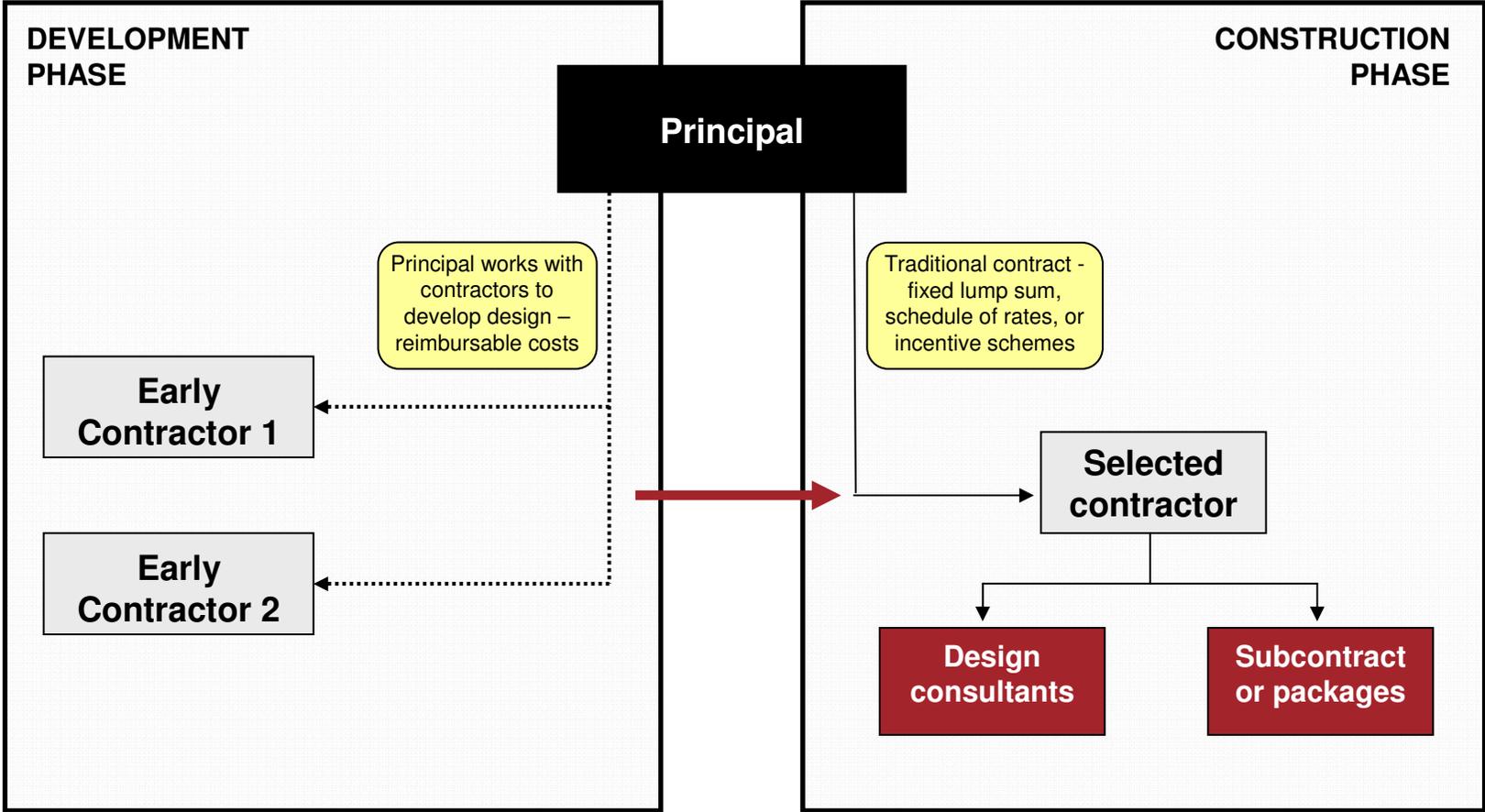
Alliance

Compensation framework



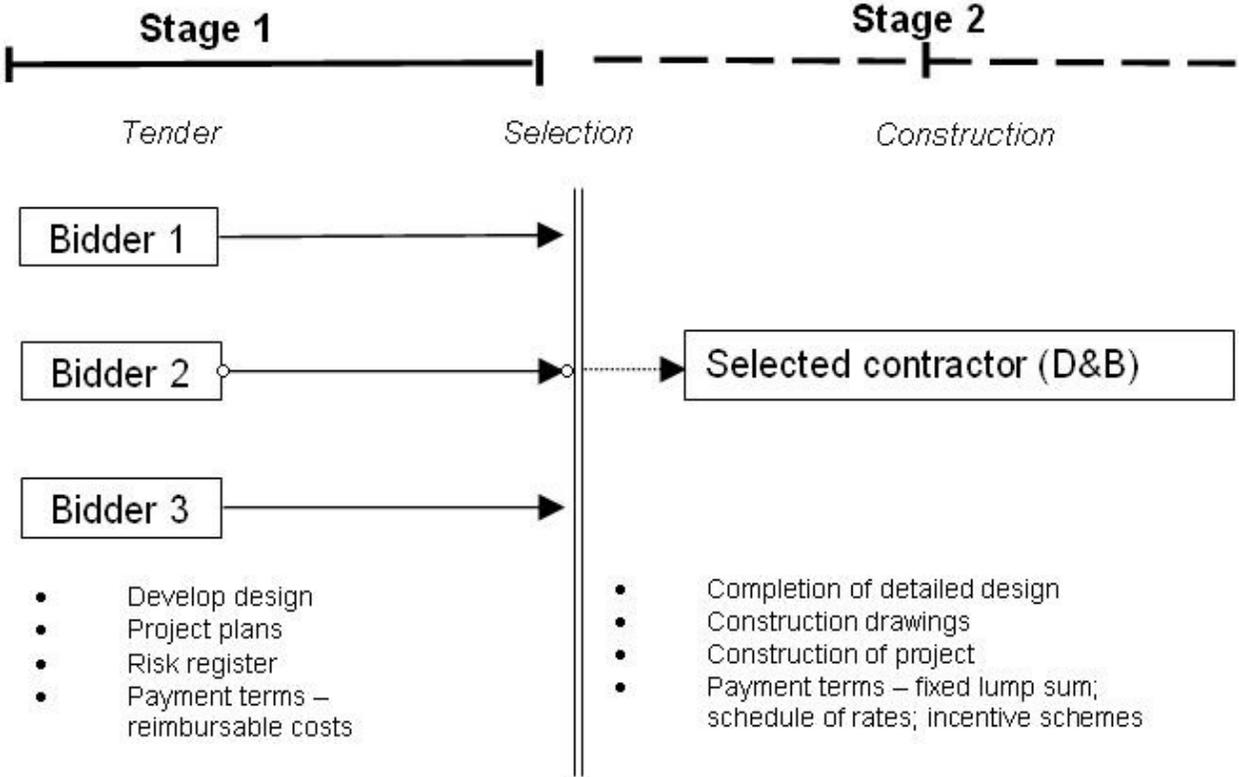
2. Construction contracting methods

ECI



2. Construction contracting methods

ECI



2. Construction contracting methods

ECI – the tips

- Reduced pre-tender costs
- Experience harnessed early
- Increased opportunity for innovation
- Shortened delivery time
- Better integration of construction methods
- Reduced risk of 'surprise'
- Realistic price



2. Construction contracting methods

ECI – the traps

- Tender costs
- Involvement of senior staff
- Too early
- Too many cooks
- Higher prices / finance
- Uncertainty



3. Alliance benchmark report 2009

Alliancing under the microscope

“In Pursuit of Additional Value: A benchmarking study into alliancing in the public sector”

- Commissioned by the state treasuries of NSW, QLD, WA & Victoria
- Evans & Peck and the Uni. of Melbourne
- Review of alliance performance in Australia
- Survey of alliance participants



3. Alliance benchmark report 2009

The recommendations

- Six key policy recommendations
- More focus on 'value for money' outcomes needed



3. Alliance benchmark report 2009

Policy recommendations

1. Retention of alliancing
2. Development of procurement selection guide
3. Development of common policies / guidelines
4. The role of government
5. Business cases
6. Default competitive process



3. Alliance benchmark report 2009

The future

- Standardisation of guidelines
- Better decision making tools
- A more robust business case - increased focus on value for money outcomes
- Further scrutiny by Treasuries





Perceptions of risk



4. Managing risk and delivery

What has changed?

- The environment is always changing
- Infrastructure investment still needs to catch-up
- State funding difficulties
- Private funding difficulties – on-going effect of the GFC
- Resources boom



4. Managing risk and delivery

What is being done?

- Contracts not as soft as a couple of years ago – less alliancing, more hard-dollar
- Trying to maintain relationship-based approach – more ECI
- Managing risk rather than risk allocation
 - joint management of some risks
 - risk pools
 - KPAs / KPIs with incentives / disincentives



4. Managing risk and delivery

Some things never change

- Risk can be dealt with by:
 - transferring to another party
 - insurance
 - managing
- Risk should lie with the party (or parties) best able to control that risk
- Risks beyond the control of either party should generally be shared



5. Conclusion

- Construction delivery models must take account of the current environment
- Need to account for:
 - economic conditions
 - government and private spending constraints
 - availability of resources
 - contracting trends



5. Conclusion

- New project delivery models are being developed (mostly evolutionary) to suit new environments
- Identify project objectives and find (or create) the model most likely to deliver them
- What is the next new model?





Innovation?



Questions?

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