

Achieving Success through Innovation – Building a Road, Building Benefits

Julie Frederickson, Crown Counsel

Manitoba Department of Justice

Paper prepared for presentation

At the Best Practices in Transportation Planning Session

Of the 2013 Conference of the

Transportation Association of Canada

Winnipeg, Manitoba

When the East Side Road Authority (ESRA) was given the mandate from the Manitoba provincial government to construct an all-season road linking 13 First Nation communities, one of the key components of its mandate was to ensure that the construction of the road was carried out in a manner that provides benefits to the affected First Nation communities. Since 2009, ESRA has been working with each of the First Nation communities to create and increase benefits to the communities, through the use of Community Benefits Agreements.

This paper will examine the unique Community Benefits Agreements created by ESRA for the East Side Road Project. The goal of the Community Benefits Agreements is to have First Nation-owned, COR certified construction companies in each of the 13 communities. ESRA works in partnership with each community to establish these companies and to develop and mentor the company employees in all facets of the company: construction, project management, safety and environmental management, asset management and financial management. ESRA negotiates untendered, multi-million dollar contracts with First Nation owned construction companies to provide pre-construction and construction services related to the all-season road project. With the experience gained from working with ESRA, companies are then in a position to bid competitively on the road construction contracts.

By working in partnership with the First Nation communities, and with a mandate to provide and increase benefits, the ESRA Community Benefits Agreement model is achieving success on the multi-billion dollar East Side Road project.

Achieving Success through Innovation – Building a Road, Building Benefits

The East Side Road Project ⁽¹⁾

History

In 2000, the Government of Manitoba launched the East Side Lake Winnipeg Planning Initiative, which came to be known as Wabanong Nakaygum Okimawin (“WNO”). In 2004, the WNO submitted a status report to the Government of Manitoba. The status report, entitled “Promises to Keep”, included a recommendation for the construction of an all-season road along the east side of Lake Winnipeg (the “East Side Road Project”).

In April 2007, the Government of Manitoba committed \$15 million to begin construction of the first leg of the East Side Road Project, and announced that an overall route selection process would begin. This route selection process, referred to as the Large Area Transportation Network Study, was carried out by SNC Lavalin.

The Government of Manitoba announced, in late 2008, that it was giving the mandate for the construction of the all-season road to the Manitoba Floodway Authority (“MFA”). The MFA was a crown agency created to manage the construction of the expansion of the Red River Floodway. The Red River Floodway Expansion Project (Floodway Project) was winding down, and based on the success MFA had with managing a significant infrastructure project, the Government of Manitoba determined that MFA was best positioned to take on the East Side Road Project. Legislation was passed, the MFA’s mandate was officially expanded, and the agency name was changed to the Manitoba Floodway and East Side Road Authority, which for the purposes of this paper, will be referred to as “ESRA”.

Project Area

The East Side Road Project encompasses approximately 83,000 square kilometres of land and is bounded by the community of Manigotagan to the south, Oxford House Cree Nation (Bunibonibee) in the north, and from Lake Winnipeg on the west to the Ontario border on the east⁽²⁾.

As part of the Large Area Transportation Network Study, extensive consultations were held with the First Nations and Northern Affairs Communities within the project area. Input and advice was sought as to the route location, taking into account traditional ecological knowledge, local preferences, environmental and social considerations, topography, potential traffic demands and travel patterns.

In June 2011 the Large Area Transportation Network Study was released. It recommended a 1028 kilometre all-season road network for the east side of Lake Winnipeg, consisting of the following:

- A 156 km all-season road from PR 304 to Berens River First Nation;
- A 93 km all-season road from Berens River to Poplar River First Nation;
- A 131 km all-season road linking Little Grand Rapids First Nation and Pauingassi First Nation to a midway point along the all-season road from PR304 to Berens River First Nation; and
- A 648 km east-west route linking the northern Cree and Island Lake communities to PR 373.

ESRA began the Environmental Impact Assessment (EIA) process for the 156 km road from PR 304 to Berens River First Nation (referred to as “Project 1”) in 2009. An Environment Act licence was granted by Manitoba Conservation in August 2010 and federal environmental approval was received in the summer of 2011. Working with the regulators, ESRA has been able to proceed with pre-construction works at locations other than Project 1 based on specific Crown land permits and federal authorizations as required. As the project develops, EIAs will be filed for the other phases of the East Side Road Project.

MFA Experience

When the Government of Manitoba gave ESRA the mandate for the East Side Road Project, one of the considerations in giving the project to ESRA was the previous success the agency had with the Floodway Project, and specifically the successful Aboriginal Set-Aside Initiative (“ASA”). As is the case with the East Side Road Project, the mandate for the Floodway Project included a statutory requirement that the MFA ensured that the expansion of the floodway was carried out in a manner that provided for “increased benefits”. One way the MFA increased benefits of that project was through the ASA.

The ASA was implemented on the part of the floodway project known as the West Dike. The West Dike consists of approximately 70 kilometres of dike, extending from the Inlet Control Structure and travelling to the south west. As part of the floodway expansion project, the West Dike was raised and extended. All of the construction tenders for the West Dike were set-aside for Aboriginal contractors. In order to bid on the work, the contractor had to be at least 51% Aboriginal owned, and one-third of the employees had to be Aboriginal. If subcontractors were used, a minimum of one-third of the work had to be performed by an Aboriginal contractor. Over 20 tenders were issued under the ASA, and all were completed under budget.

ESRA realized that an ASA, as implemented on the Floodway Project, wouldn't work for the East Side Road Project. Given the scope of the East Side Road Project, there simply aren't enough Aboriginal contractors available to exclusively undertake the work. If an ASA were implemented, it would be likely that mainstream contractors would partner with Aboriginal contractors in order to win the contracts, undertake the work, and leave without imparting significant benefits for the residents of the project area.

Another complication arising from using an ASA on the East Side Road Project could result if an Aboriginal contractor were to win a contract in an area recognized as traditional territory by another First Nation. Although all 13 First Nations in the project area are supportive of the East Side Road Project, differences of opinion remain in terms of how each community sees the work as being allocated between the communities. This wasn't an issue on the floodway expansion project, as there were no traditional territories along the West Dike.

ESRA considered several options, including Impact Benefit Agreements and mandatory aboriginal participation in construction tenders, before conceiving the Community Benefits Agreement ("CBA") concept.

Community Benefits Agreements

Theory

ESRA recognized that there was and will continue to be a significant amount of pre-construction work that needs to be undertaken prior to road construction starting. Millions of cubic metres of aggregate material need to be produced and stockpiled at strategic locations along the proposed right of way, and thousands of hectares of land need to be cleared.

ESRA also recognized that following the traditional method of planning and construction (starting at point "A" and proceeding in a linear fashion to points "B", "C" and "D"), would mean that it would be decades before the more remote communities in the Project area would experience any benefit from the East Side Road project.

In order to address these issues, ESRA determined that it was critical to involve the First Nations in the pre-construction work. By providing meaningful employment, training and mentoring and not limiting the opportunities to communities in a linear fashion, ESRA realized that it could achieve its mandate to provide benefits for the entire project area. ESRA's plan was to engage all 13 First Nations at an early stage in the project.

The main goal of CBAs is to build capacity within each First Nation, which will exist beyond the construction of the east side road. The benefits include untendered, multi-

million dollar contracts, training, mentoring in the areas of project management, contract management and financial management, and are intended to achieve the goal of having a profitable, functioning construction company with COR™ (3) status and a skilled workforce in each First Nation. Labour rates include a “capacity building allowance”, to give the corporation extra funds in which to build up working capital and to provide for funds to be used to undertake further training or skills development for employees. As the construction companies become independent, they will be in a position to subcontract to other contractors and to bid on tendered construction contracts, for the East Side Road Project and beyond.

The CBAs function as a Master agreement, under which specific construction contracts are entered into. They lay out the overall business terms of the relationship, the risk management practices to be followed and ESRA’s commitments for training and mentoring.

All 13 First Nations signed the same CBA template. Even those communities which have achieved a greater degree of capacity are still subject to the risk management practices described below.

Risk Management

As CBAs are unprecedented both in terms of the benefits they provide to First Nations and the amount of public funds flowing into the communities, risk management practices are included in all CBAs:

- A requirement to establish a separate, incorporated entity that is wholly owned and controlled by the First Nation. This corporation will be the entity which enters into contracts with ESRA.
- A requirement to create and keep a set of accounts and financial reports separate and apart from the other First Nation activities.
- A requirement that shareholder dividends of the corporation may only be paid when the corporation is in a for-profit position, and with prior approval of ESRA.
- A requirement that ESRA have co-signing authority on all cheques written on the corporation’s bank account; and
- A requirement that all joint ventures, partnerships or untendered sub-contract arrangements are subject to ESRA’s approval.

The underlying principles behind these risk management practices include transparency, accountability, and sustainable economic development for the First Nations. The risk management practices are the same in all CBAs, and apply equally to all First Nations.

Construction Contracts

The construction contracts entered into with the First Nation owned corporations are run like any other construction contract, with the difference that the owner (ESRA) provides mentorship in project management, contract management and financial management. The corporations hire locally for the positions of general manager, safety and environment managers and financial manager, and ESRA works closely with these individuals in managing the contracts and building their capacity, so that over time less mentoring and oversight by ESRA is needed.

Payment is made on approved progress payments and funds are only advanced when the work has been completed. This approach serves two purposes: funds aren't provided in advance of work being done, thus eliminating the risk that they are used for a purpose other than the contracted work, and the corporations become familiar with how "mainstream" contracts are run.

All CBAs and the resulting contracts are subject to audit, and annual audited statements must be provided to ESRA. In addition, all CBAs are posted on ESRA's website. By making the CBAs transparent, they hold up to public scrutiny and provide both the First Nation and ESRA with answers to questions about the flowing of public funds to the First Nations.

Challenges

Diverse Communities

The East Side Road Project area includes 13 different communities. With registered populations⁽⁴⁾ ranging from as few as 607 (Pauingassi First Nation) to as many as 4,352 (Garden Hill First Nation), the experience and available work force in each community can differ widely. The communities consist of Cree, Oji-Cree and Sauteaux heritages. Election dates and terms vary from community to community, with some First Nations following the *Indian Act*⁽⁵⁾ electoral system, while others follow band custom election processes. The frequent change in leadership in Chiefs and councils often means that both ESRA and First Nation representatives need time to familiarize themselves with the status of the CBA contracts, key members of the CBA companies, and their respective roles and expectations.

Planning and Scheduling

Geography also poses a challenge, with a project area covering approximately 83,000 square kilometres of varying terrain. There are 3,100 lakes and 30 major rivers. The area is home to a wide variety of wildlife, including threatened and endangered species such as the woodland caribou and the bald eagle.

With the exception of Hollow Water First Nation, none of the communities currently have all-season road access. They all rely on the winter road network, which is generally open from mid-January to mid-March, to transport in goods and supplies and to travel from community to community, and to larger centres such as Winnipeg, Norway House and Thompson, Manitoba. Berens River, Bloodvein and Poplar River First Nations have access to barges which cross Lake Winnipeg, giving them seasonal access to the provincial road system on the west side of the lake. The airport which services the Little Grand Rapids and Pauingassi First Nations is not connected to either community by an all-season road, and in the Island Lake region (which includes St. Theresa Point, Wasagamack, Garden Hill and Red Sucker Lake First Nations), the airports that service the region are located on an islands, which require users to either take a boat, helicopter or snowmobile (depending on the season) to the community.

These geographical and transportation challenges require special consideration when planning and scheduling both CBA work and tendered construction contracts. Mobilizing, demobilizing and moving of heavy equipment, such as crushers, must be undertaken during the winter road season or when the barges are operating. Access roads from communities to gravel pits must be constructed in order to give year-round access to the crushing sites. Many activities cannot be undertaken in the spring and early summer, when the ground conditions are too wet.

Preserving Local Benefits

Another challenge faced by ESRA and the First Nations is finding a way to ensure that the benefits of the CBAs remain, for the most part, in the community. Experience has shown that, with other infrastructure projects, mainstream contractors will partner with a First Nation to undertake the work. Few local residents are employed on job, and the jobs often don't involve any capacity building or mentoring in management roles. Most of the profit is kept by the contractor, leaving the First Nation with new infrastructure but little in the way of gained experience or financial reward.

To combat this, the CBAs provide that any joint ventures, partnerships or untendered subcontracts must be approved by ESRA. In approving these arrangements, ESRA requires specified provisions be incorporated in the deal, to ensure that local residents are employed to the greatest extent possible, that management mentoring plans are in place, that a minimum of 51% of the profits (if a joint venture or partnership) are retained by the First Nation corporation and a limited, specified mark-up on subcontracted work is established up-front.

Successes

Current

As noted previously, all 13 First Nations within the project area have signed CBAs with ESRA. From August 2009 to March 31, 2013, 19 CBA pre-construction and construction contracts have been entered into between ESRA and nine of the 13 First Nation-owned CBA construction companies. The completed value of these CBA contracts is just under \$57 million. The completed contracts have produced:

- 62,6461 cubic metres of aggregate produced
- 533.57 hectares of land cleared
- 5 kilometres of road constructed
- 1 Acrow panel bridge assembled; and
- 2 Acrow panel bridges underway.

The majority of the aggregate has been produced for and used on Project 1, the 156 km route from PR304 to Berens River First Nation. Clearing work has occurred in the Project 1 area, and near Poplar River, Little Grand Rapids, Pauingassi, Wasagamack, Red Sucker Lake First Nations and Bunibonibee Cree Nation.

Strategically, the East Side Road Project is working in partnership with Manitoba Infrastructure and Transportation to make improvements to the winter road network. In the Wasagamack and Red Sucker Lake region, three Acrow panel bridges have either been assembled or are in the process of being assembled, at locations in the winter road network. These Acrow panel bridges extend the length of time that local residents can use the winter road network, and over time the winter roads will be converted to all-season road. As noted above, the Acrow panel bridge assembly is being performed under CBA contracts and is giving the First Nation companies experience in the building Acrow panel bridges and approach road works.

The Bloodvein First Nation has had the greatest success to date. Working in joint venture with an experienced Métis contractor, BFN Construction Inc. (BFNCI) has completed two aggregate production CBA contracts, two CBA clearing contracts and has constructed five kilometres of road, both on and off-reserve. It also recently won a tendered road construction contract.

In addition to the CBA contracts in the Project 1 region, ESRA has tendered five road construction contracts, three bridge contracts and one Acrow panel bridge contract. A fourth bridge contract is about to be tendered, and weather permitting, all-season road access from PR 304 to Bloodvein First Nation will be achieved in the fall of 2014.

To date under ESRA's training program, which is a part of every CBA, over 200 individuals have received training in various ESRA-run programs such as Heavy Equipment Operator training, Introduction to Construction training, Skilled Labourer training and First Aid/Chain Saw Safety training.

Since the beginning of the East Side Road Project, three First Nation companies have achieved COR safety status, and another is working with ESRA to achieve its COR status. Five communities had COR status prior to ESRA's involvement, and ESRA continues to work with these communities to ensure that their workplace safety and health plans migrate to cover the activities of the construction companies.

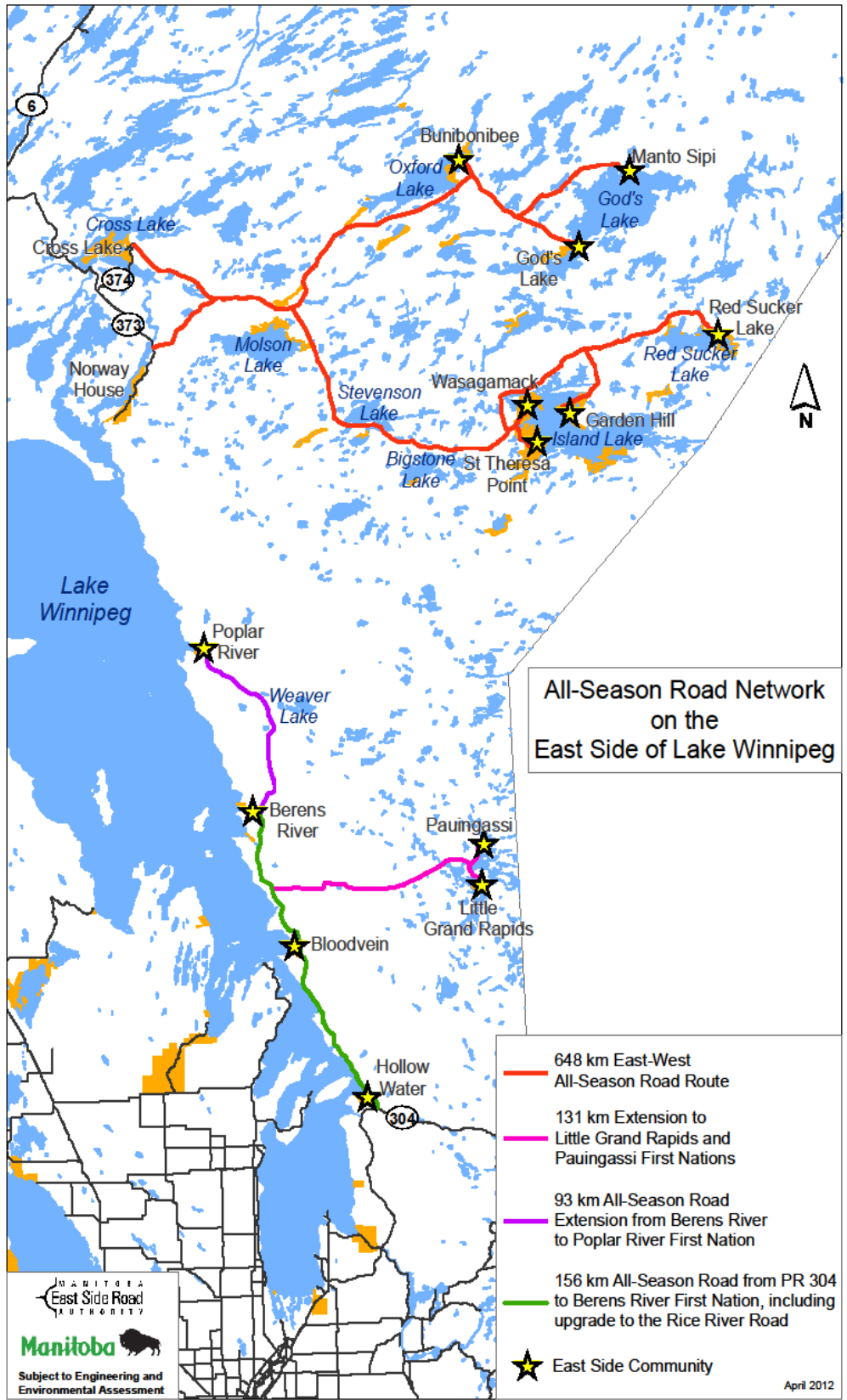
Looking Forward

BFNCI has achieved the goal of bidding on and winning a tendered construction contract, and is well-positioned to bid on future contracts. Based on this success, ESRA is encouraging BFNCI to share some of the capacity it has gained by partnering with Little Grand Rapids and Pauingassi First Nations in a joint venture. The joint venture will be managed under the CBA process, and ESRA will continue to have a role to play in the capacity building of all three participants. If it proceeds, this will be the first multi-First Nation joint venture arrangement working together on the East Side Road project.

ESRA is continuing to approach Canada for funding for the project. To date, Canada has funded one on-reserve access road (in Bloodvein First Nation), and discussions are underway to fund additional on-reserve access roads.

Summary

The East Side Road Project is a significant infrastructure project for the Province of Manitoba. By engaging the Aboriginal communities in a unique manner through the CBA process, ESRA is achieving its mandate to increase the benefits related to the construction of the East Side Road. The First Nation communities are gaining a skilled, trained workforce that will provide benefits for many years to come. And communities that have waited generations for access will finally get their road.



Map 1

References

- (1) With information from www.eastsideroadauthority.mb.ca
- (2) See Map 1 – Project Area
- (3) Certificate of Recognition Program
- (4) From <http://fnpim-cippn.inac.gc.ca/index-eng.asp>
- (5) the *Indian Act*, R.S.C. 1985, cl-5