



COMPARING AND CONTRASTING
THE PARTNERING AGREEMENTS OUT THERE

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Ladies and Gentlemen

Welcome to the graveyard slot.

Let me start with a couple of very old jokes.

The first one goes: What is the difference between a hedgehog dead in the road and a lawyer dead in the road? Answer: Skid marks in front of the hedgehog.

Secondly: What have you got if you have got a lawyer buried up to his neck in sand? Answer: Not enough sand.

Lawyers don't always get a very good press. There is a tendency, therefore, to think that they are part of the problem when projects go wrong. And since lawyers peddle contracts, contracts must also part of the problem. Therefore, getting rid of lawyers and contracts would be a good start to solving the industry's problems.

Well, that's one view. I'm going to spend a little time this afternoon trying to explain why contracts are important for successful partnering and have a look both at how they can help and what can happen if you get them wrong.

Let's briefly take a look at the traditional standard forms. I was recently told that the JCT Standard Form has 86,000 words, and success isn't one of them. In fact, over the years, the poor old JCT Standard Form, and its predecessor, the RIBA Form, have taken quite a hammering.

As long ago as 1967, Sachs LJ in *Bickerton -v- NW Metropolitan Hospital Board* [1967]1 ALL ER 977 at 978 - 9 referred to:

... the unnecessarily tortuous and amorphous provisions of the RIBA Contract ... the position reflects no credit on the RIBA. It is lamentable ... and deviously drafted with what in parts can only be a calculated lack of forthright clarity ...

and Salmon LJ in *Peak Construction -v- McKinney Foundations* (1971) 69 LGR 1 said that:

Indeed, if a prize were to be offered for a form of building contract which contained the most one-sided, obscurely and ineptly drafted clauses in the United Kingdom, the claim of this contract could hardly be ignored even if the RIBA Form of Contract was amongst the competitors.

And that brings me back to the idea that the role of the contract has become so discredited that there shouldn't be a contract at all where the parties are partnering. This is said clearly in the Egan Report on partnering - Rethinking Construction, which states:

The Task Force wishes to see ... an end to reliance on the contracts. Effective partnering does not rest on contracts. Contracts can add significantly to the cost of a project and often add no value for the client. If the relationship between a Contractor and Employer is soundly based and the parties recognize their mutual interdependence, then formal contract documents should gradually become obsolete.

On the other hand, an increasing number of so-called partnering contracts have been published in recent years. Perhaps the earliest form is the New Engineering Contract. Although, in some ways, it's quite a traditional form, it does incorporate elements of partnering. For example, it talks about the parties working together "in a spirit of cooperation". Since then, we've had the NEC Partnering Option X12, the JCT Practice Note 4 on Partnering, PPC 2000 and, most recently, the Be Collaborative Contract which was published last autumn.

So, what I want to explore with you today is whether we need a contract when we're partnering, and, if so, what form it should take. So, let's think briefly what contracts do. At their most basic, they set out what the parties have got to do, when they have got to do it, and how much they have got to pay. They also apportion risk. For example, they set out who bears the consequences of unforeseen ground conditions or especially bad weather. And when risks are apportioned contractually, then they can be priced for.

But if you don't have a contract, it doesn't mean that you don't have obligations and risks. As to obligations, if nothing is said about the time for completion, the Courts will imply a reasonable time. If nothing is said about quality, a reasonable standard is implied, and if nothing is said about costs, a reasonable sum is implied. As to risk, if risk isn't expressly apportioned it lies where it falls. If you don't make any provision for unforeseen ground conditions or exceptionally bad weather, the contractor bears the risk of them. That might of course be what you want in that particular case. But there is a world of difference between assessing risk and deciding whether to make contractual provision as to who bears it; and simply ignoring its existence and hoping for the best. What I'm saying is that you can't escape lawyers and legal obligations just by ignoring contracts. There's no opt out entitlement [Revenue]. All you do is lose the opportunity to ensure that there's some certainty as to what those obligations are.

So, what happens if you do go ahead without any sort of express contract because you're "partnering"? Instead of having a contract that says who does what, and when, and for what cost, you agree instead that you will work together to produce an interminate product at an undefined time, for an uncertain price - but you will do it in the spirit of openness and cooperation.

Fine. It may work very well. But what happens when the relationship breaks down and the goodwill evaporates? Don't forget that that can happen for external reasons unconnected with the good intentions of the parties. Suppose one partnering company is taken over by a different company with a negative attitude to partnering. Or your partner becomes insolvent. Are you going to be able to rely upon a receiver or liquidator to honour a commitment to work honestly and openly for mutual benefit? I'm put in mind of a quotation that appeared in the Construction Press:

Failure to crystallize an agreement with the other party is akin to putting your head in the guillotine and saying to your partner, the potential executioner: "put it in the basket - I'll read it later"

And as for those who say that having a contract makes disputes more likely, you might as well say that making a Will means you're more likely to die; or insuring your home contents makes it more likely that you'll be burgled.

Now, having said all that, I'll retract a little bit. BAA is carrying out the procurement of T5 by way of a collaborative process that does not involve using traditional contracts. Instead, teams are put together with representatives from both Contractor and Employer with a brief to achieve particular results. And, ultimately, BAA carries pretty well all the risk. I'm told that the project has to be done this way because it has an immensity that means that the use of ordinary contracts would be unworkable. However, I think that that sort of strategy only works for projects of that kind of complexity, and for Employers the size of BAA.

So, lets assume that generally there needs to be some sort of contract. This is the line taken in the ACA Guide to PPC 2000 and in the JCT Practice Note. The ACA say:

A number of myths have built up around partnering, including firstly the suggestion that you can partner with no form of contract at all, secondly, the suggestion that you can partner with any form of contract whatsoever because you do not need to refer to it; and thirdly the suggestion that the only really important document is the Partnering Charter.

As to the first suggestion, it is difficult to find any public or private sector organization that does not need to know the terms on which it commits or expects to receive a substantial sum of money.

As to the second suggestion, for team members to sign any form of contract whatsoever and not refer to it is both a dangerous mistake and a sad reflection on the irrelevance on many construction industry Standard Forms. If a contract is not consulted during the course of the project, it cannot operate as a process document and cannot assist the progress of the project itself. Worse than that, if a contract is left unread, it is unlikely that the team members will be fully familiar with its terms, and they may be unpleasantly surprised when, in the event of a discrepancy, the terms override the other contract documents.

As to the third suggestion that you only really need a Partnering Charter, this is generally a very brief document intended to capture headline statements of the agreed values, goals and priorities of a partnering team. A Partnering Charter is

not a working document and does not describe specific roles, responsibilities and relationships. To quote once more from the CIC Guide, "while it is recognized that partnering charters have served a valuable role, the time is right to see a fully integrated approach, so that the relationships and processes required for effective partnering are not at odds with the contractual rules and relationships of Partnering Team Members.

Similarly, the JCT Practice Note 4 on partnering states:

Egan's view that we should end reliance on contracts is helpful in that it says that there is far more to a construction project than a contract, but it is unhelpful if it leads to a belief that formal contracts can be dispensed with in their entirety. It is doubtful that there is any merit in dispensing with formal contract documents. Breakdowns will still arise and the costs of unravelling a problem, where the first step is to determine what constitutes the contract, far outweigh the transaction cost of putting one in place at the start of the project.

So, if it is accepted that it is advisable to have some form of contract even when you're partnering, what is the relationship between the contract and the partnering structure?

Well, there are numerous ways in which the contract can help to promote partnering objectives. Many of them are set out in the new partnering contracts, and some of them are fairly new. Most of them I believe to be helpful. You will be familiar with most of them. They include:

- providing bonuses for early completion or completion below budget;
- setting KPIs, and giving incentives when KPIs are met;
- giving incentives for innovative ideas and value engineering;
- the express identification and apportionment of risk by way of a risk register;
- the setting up of a Core Group containing representatives of all the participants which can carry out management functions on behalf of the project, such as the setting up of partnering workshops;
- the providing for dispute resolution without recourse to arbitration or the Courts; and
- in the case of PPC 2000, providing for a Partnering Adviser who is an independent person qualified to assist any of the parties in respect of any aspect of the project.

If you look at the various partnering forms they are actually very different in content.

The NEC

Take the NEC. This merits a conference in its own right. Many of you may be familiar with it. It seems to me that, in fact, it's only a partnering contract in a limited way. However it does have two partnering aspects. In the first place, as I have said, it contains an obligation to contract in a spirit of trust and cooperation; and the guidance notes to the

NEC say that this obligation was expressly included on the recommendation of the Latham Report - Constructing the Team.

Beyond that, the NEC sets out to become a management tool rather than just a set of legal rights and obligations. It's not a contract you can leave in the drawer and pull out if things go wrong. You've got to operate its provisions throughout the construction phase.

The NEC has come under criticism from some users who have found that some of it is almost impossible to put, give effect to in practice - for example, the Compensation Events Clause and, certainly, when I have looked at that Clause and other parts of the Contract, it is often very difficult to work out the exact nature of the parties' legal rights and liabilities.

NEC Option X12

However, the NEC has now produced a further partnering form being Option X12. The notes to X12 assert that the NEC is indeed a partnering contract although, as I have said, I think that's rather questionable. Anyway, X12 is intended to add an additional level of partnering to the NEC make-up. The NEC itself is a contract between two parties. X12 is intended to be used for partnering between more than two parties working on the same project - what the form calls "multi-party partnering".

The form doesn't try to give all the various parties enforceable legal rights against each other. The NEC obviously worked out that that would cause huge technical legal difficulties. Therefore, compliance seems to be more of a moral obligation than a legal obligation. The form says that:

The final sanction against any partner who fails to act as stated in the Partnering Option is for the partner who employed them not to invite them to partner again.

The form is actually pretty modest in its scope. It's only four clauses long. The key to it, apart from the usual business about a spirit of mutual trust and cooperation, is the formation of a Core Group. The Group has a general supervisory role in respect of timetabling and sharing of information.

The JCT Practice Note 4 - Partnering

Next there's the JCT Practice Note on partnering. The note is useful as far as it goes. It gives a brief definition of partnering, says some good things about the relationship of partnering and contracts, and says a little bit about Partnering Charters and the implementation about partnering. However, it doesn't purport to set out any partnering terms.

JCT Non-Binding Charter

We do now have the JCT Non-Binding Charter but it is very brief and generalized. It talks about good faith and cooperation, delivery first time with zero defects, and added value etc. These are all very helpful but won't go very far without pretty rigorous management techniques to ensure that the Charter doesn't just become a lot of empty words that everyone ignores.

PPC 2000 / Be Collaborative Contract

PPC 2000 and the Be Collaborative Contract are really the only two contracts that put partnering at the heart of the drafting and move away from traditional standard forms. They include all the mechanisms that we have been talking about - KPIs, information sharing, bonuses etc.

PPC 2000 is particularly radical in that it tries to bring in all the participants in the project under the umbrella of a single contract. Therefore, it includes not only the contractor but also all of the design team. This does make it very difficult to work out where responsibilities lie if things go wrong.

The Be Contract is much simpler and is only made between the Employer and the Contractor.

However, rather than trawl through all the conditions of the forms, what I should like to do at this stage is raise an important point of general principle and explain where I part company with the drafting of PPC 2000 in particular.

Many of the provisions that we have been discussing such as bonuses for completion below budget or for achieving KPIs can easily be translated into clear binding contractual terms. It is fairly straightforward to draft terms about bonuses, for example, that make it plain who is to be paid, what they're to be paid, and when they are to be paid it.

However, there is a generically different sort of obligation that is also incorporated into various sections of the forms that we have been discussing. It's what we might call soft obligations. These are the sorts of terms that go to the nature of the parties' relationship: they're the "be nice to each other" bits.

The most obvious example is contained in Clause 1.3 of PPC 2000. It states:

The Partnering Team Members shall work together and individually in a spirit of trust, fairness and mutual cooperation for the benefit of the Project.

Leaving aside the question of how you can have cooperation that is **not** mutual, what do fairness and cooperation mean? They are expressed to be contractual obligations; they must, therefore, be capable of enforcement. You can go to court and say this obligation to cooperate has been breached and therefore you are entitled to judgment and damages.

On the fact of it, this all sounds pretty innocuous stuff. We can all agree that cooperation is important to a project and that there ought to be a lot of it. But what does it mean in practice?

Let me give you an example. Clause 18.4 of PPC 2000 provides that where the Client or Contractor disputes any extension of time awarded by the Client's Representative, he has 20 days to object. If he doesn't, the extension given becomes final. So, what happens if the Client or Contractor wants to object outside the 20 days? On the face of it, the right to do so has been lost. But what's to stop the disaffected party invoking the obligation to cooperate? Might the obligation to cooperate include a requirement on the other party to extend the 20 day period as requested? You might think not. But I have already had a similar point argued against me by a well-known firm of construction lawyers. And if the

obligation to cooperate does have this sort of softening effect on the clear contractual terms, its going to be immensely difficult to know just what your rights and obligations are. Again, that's all very well while relationships are strong. But what happens when they break down? I believe you've heard earlier today a lot about that possibility. And I think that's a good thing. Because the real problem with forms like PPC 2000 and, indeed, the NEC, is that they work on the basis that everything will go well. I don't believe that they make adequate provision to assist the parties when relationships fall apart.

Now, you might think that the Courts would come to assist so that, in the example that I have just given, they would say that the obligation to cooperate was not intended to override any of the express contractual terms. But can you be sure? There are already some signs that the Courts might very well decide, where the parties are partnering, that time limits in a contract need to be construed against the background of the obligation to cooperate. In the case of *Birse Construction Limited -v- St David's Limited (1999) CILL 1494* it was expressly held that partnering obligations would be taken into account when deciding legal rights. In this case there was a Partnering Charter. HH Judge Humphrey Lloyd QC said that the Charter was "clearly intended to provide the standards by which the parties were to conduct themselves and against which that conduct was to be measured."

But let's take another example from PPC 2000. Clause 4.2 states:

Each Partnering Team Member undertakes to the others to do all that it can, within its agreed role, expertise and responsibilities and in accordance with the Partnering Documents to implement the recommendations identified by the Construction Task Force in their July 1998 Report "Rethinking Construction" and to pursue for the benefit of the Project and for the mutual benefit of Partnering Team Members the targets stated in the KPIs.

Now, this woolly phraseology is supposed to amount to a binding legal obligation. If the other party doesn't honour it you can sue him. So what it potentially means is that each and every phrase of the Egan Report becomes a fixed requirement.

Now, if we look at the Egan Report, it provides, for example, that Tesco has introduced visitors' centres, on-site canteens, changing rooms and showers on its sites. The Report says:

The increased team spirit and commitment engendered by these simple innovations have contributed to Tesco's achievement of a 40% reduction in construction costs.

So, technically, if you have PPC 2000 in place and don't make provision for visitors' centres and on-site canteens, you are immediately in breach of contract.

You might say that that's a ludicrous example; perhaps it is. Though don't forget that ludicrous decisions in the Courts are not unknown. However, take another example. Clause 3.1 of PPC 2000 provides that the Partnering Team Members are to work together and individually "to achieve transparent and cooperative exchange of information in all matters relating to the Project."

Suppose that you are involved in a partnering Project. Things start to go wrong and you take legal advice as to your position. Does the information that you have to share with your partners relating to the Project include your solicitor's and Counsel's advice? You might well think that that sort of information is confidential and shouldn't have to be disclosed. But that's not what the Clause says on its face. Certainly, it's the sort of point that you could end up spending a lot of time fighting against a partner's liquidator or receiver.

Having said all that, a lot of these problems are specific to PPC 2000. I don't have quite the same reservations about the Be Collaborative Contract. In many ways that Contract is much more carefully drafted. For example, if you look at the equivalent provisions dealing with information sharing, the information that the parties have to provide is "that reasonably considered relevant to the delivery of the Project." You might think this a rather legalistic point, but if you examine the Clause closely it is much more capable of clear meaning than the PPC 2000 equivalent. PPC 2000 refers to "information in all matters relating to the Project." "Reasonably considered relevant of the delivery of the Project" does not seem to me so likely to include confidential material such as legal advice.

The Be Contract is also very easy to use. Its short; and its concisely written. And it has an extremely useful Purchase Order pro forma that enables the parties to make provision for bonuses, KPIs, and risk allocation.

In most respects, I wouldn't hesitate to recommend it. Whilst it does not strive for legal precision in the way that, say, the JCT Standard Forms do, it can be given sensible legal effect and still retains important mechanisms, such as liquidated damages and a defects liability period, to guard against default. In my view, it is an effective tool for promoting partnering objectives. However, even the Be Contract needs to be treated with some caution. For example, I have trawled through it in some detail and it does not have a variation clause. I should be very reluctant to advise an Employer to enter into a contract where he was unable to change the scope or quality of the works in any way during the construction phase without the Contractor's consent.

So, if you accept my view that the soft relationship based sort of obligation, such as to proceed to a spirit of openness and cooperation, that should be kept clear of the contract terms, where **should** those sorts of terms be included?

I believe that they should be included in a non-legally binding document. At a rudimentary level it can be a Partnering Charter. This is the approach adopted by the JCT in the Non-Binding Partnering Charter that we've considered. At a more sophisticated level, it can be a collaboration agreement of a kind that I've included at the end of my notes. I don't believe that making relationship-based obligations non-contractual actually makes them weaker. If a party won't cooperate voluntarily, you are not going to get very far litigating to try to make him do so. If you would like some further information as to what two organizations, Somerfield and the Open University have done to adopt partnering, and how they have dealt with some of the issues that we've looked at today, details are in the notes.

I firmly believe that, get the partnering process right, and it has the ability immeasurably to improve the construction process. Get it wrong, and, as has been said by others, it amounts to synchronized swimming with sharks.

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