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Dispute Avoidance in Construction

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Conflict Avoidance Coalition Steering Group, founder members

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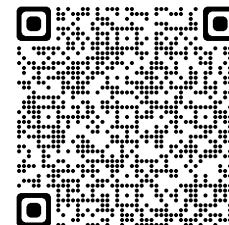
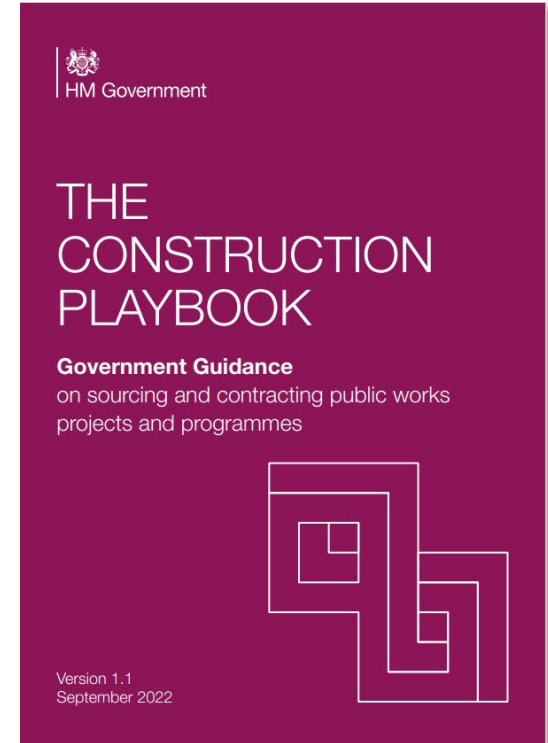


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Construction Playbook: conflict avoidance pledge

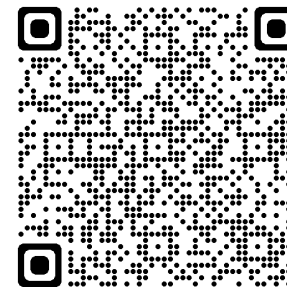
“The conflict avoidance pledge (CAP) ... demonstrates commitment to conflict avoidance and the use of amicable resolution procedures to deal with emerging disputes at an early stage. Contracting authorities should adopt the appropriate provisions as a standard clause in all public works contracts, and use this mechanism to resolve problems before these escalate into disputes.”

“In addition, dispute avoidance boards are a potential way to avoid and manage disputes more effectively and, where appropriate, should be engaged with projects from inception to completion.”



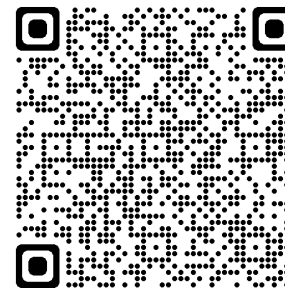
UK: Conflict Avoidance Pledge

- *“We believe in collaborative working and the use of early intervention techniques throughout the supply chain, to try to resolve differences of opinion before they escalate into disputes.”*
- *“We recognise the importance of embedding conflict avoidance mechanisms into projects with the aim of identifying, controlling and managing potential conflict, whilst preventing the need for formal, adversarial dispute resolution procedures. We commit our resources to embedding these into our projects.”*
- *“We commit to working proactively to avoid conflict and to facilitate early resolution of potential disputes.”*



UK: Conflict Avoidance Pledge

- *“We commit to developing our capability in the early identification of potential disputes and in the use of conflict avoidance measures. We will promote the value of collaborative working to prevent issues developing into disputes.”*
- *“We will promote the value of collaborative working to prevent issues developing into disputes.”*
- *We commit to work with our industry partners to identify, promote and utilise conflict avoidance mechanisms.”*



Conflict Avoidance Toolkit: avoiding conflicts and resolving emerging disputes in 2024

- Pre-contract: thorough preparation of project documentation, and appropriate risk allocation is the first step in conflict avoidance
- Dispute avoidance; utilise early warning systems which identify potential conflict and prevent disputes from occurring
- Early intervention: adopt a procedure that fixes problems and enables them to retain control of decisions and outcomes
- Amicable settlement: opt for a meditative method that helps them resolve their dispute that is private and not adversarial
- Dispute resolution: opt for a final determination of their dispute that is quicker and cheaper than the courts and arbitration

UK: Model Conflict Avoidance Clause

- The Employer and the Contractor agree to co-operate with each other in the early identification, notification and avoidance or resolution of any disagreement that may lead to a dispute. Where necessary this may be achieved by using the Conflict Avoidance Process detailed in clause [...]
- The Conflict Avoidance Process is an addition to other dispute resolution processes detailed in section 9 of this Agreement. The Parties agree to use the Conflict Avoidance Process prior to escalating any disagreement between the Parties under clause [...] of this Agreement.

UK: Model Conflict Avoidance Clause

- Any disagreement likely to lead to a dispute, shall, in the first instance, be referred to a Conflict Avoidance Process for a non-binding recommendation on how to resolve the disagreement.
- 17-day process
- The recommendation provided by the Conflict Avoidance Process Panel will always be in writing and include a summary of findings and a statement of its reasons
- 5 days to serve notice if you do not accept the recommendation
- If both parties satisfied, legally binding

NEC Form and Conflict Avoidance

- Early Warning: include obligations for parties to identify and communicate problems early, and commit to achieving quick and amicable resolution.
- Viable CEP: a CEP procedure which aims to establish the cost and time effects of changes at the time each change occurs. Parties should be able to agree the level of compensation or identify the reasons for any disagreement at an early stage.
- Joint use of the accepted programme: helps to ensure collaboration & to provide certainty as to the state of the works.
- Option W1 and W2: disputes to be referred to senior representatives.
- Option W3: dispute avoidance boards - recommendations

- Article 3: Collaborative Working

“The Parties shall work with each other and with other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. To that end, each shall support collaborative behaviour and address behaviour which is not collaborative.”

- Clause 9.1:

“With a view to avoidance or early resolution of disputes or difference (subject to Article 8), each Party shall promptly notify the other of any matter that appears to give rise to a dispute or difference. The senior executives nominated in the Contract Particulars (or if either is not available a colleague of similar standing) shall meet as soon as practicable for direct, good faith negotiations to solve the matter.”

Dispute avoidance

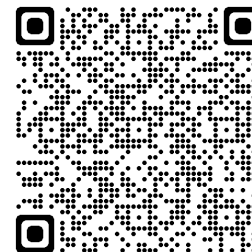
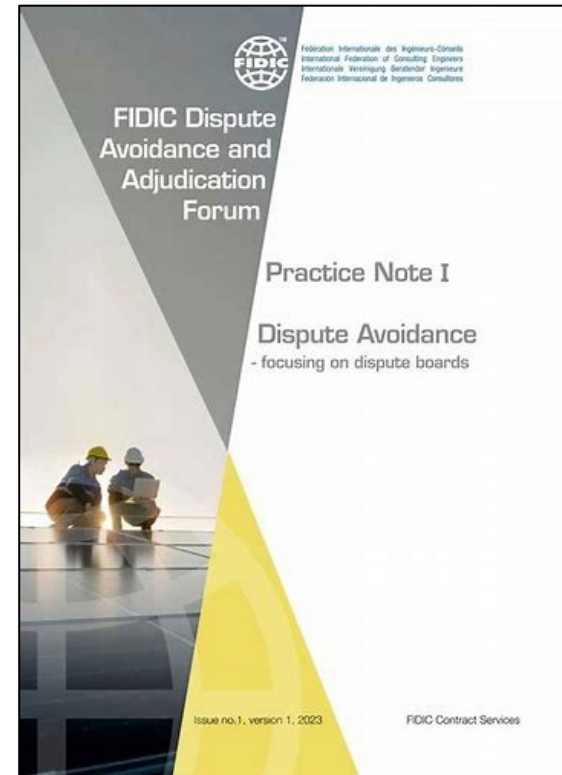
- During periodic meetings, the DB reviews the status of outstanding issues and inquires about any potential disputes or claims;
- Parties are invited to jointly seek “opinions” at the outset of a dispute to put the matter to rest promptly;
- The informal opinion is issued at the request of both parties.

Dispute resolution

- Resolution of claims in “real time” is critical to the success of the dispute resolution process;
- The DB will deliver a decision or recommendation on a formal dispute at the request of one party.

FIDIC Dispute Avoidance Practice Note

- The objectives of the DAAB rules as set out at Procedural Rule 1.1 of the 2017 Form are to:
- *“(a) to facilitate the avoidance of Disputes that might otherwise arise between the Parties; and*
- *(b) to achieve the expeditious, efficient and cost effective resolution of any Dispute that arises between the Parties.”*



FIDIC's Five Questions

1. How/when does the dispute board make the parties aware of its dispute avoidance role?
 - As early as possible, in a meeting with the Parties, and then whenever appropriate as the project continues;
2. When should dispute avoidance ideally take place?
 - Joint request made by the parties;
3. Where should dispute avoidance take place?
 - Where all the parties are present, if appropriate

FIDIC's Five Questions

4. What matters most lend themselves to dispute avoidance?

Examples include:

- Questions of contract interpretation.
- Is an instruction a Variation and the evaluation of the additional time and cost caused by that Variation.
- Design responsibility and liability.
- How a particular event would be dealt with under the contract. .
- What evidence of cost incurred would be considered sufficient by the DB board and how it should be presented.

5. What are the most effective techniques for dispute avoidance?

- Informal discussions, issuing opinions

Collaborative Efforts to Reduce Disputes; an example

- How might conflict avoidance apply to variations – a key source of disputes?
- Can you work together to decide whether variations are stand-alone or sit on the critical path?
- Can you agree parameters as to how to measure and value change (methodologies, rates, fees) at an early stage, and if so how?
- Does this help the parties avoiding lengthier discussions later on?
- Or is it wishful thinking?

Some of the elements of conflict avoidance

- People
- Early warning
- Records – how is information recorded and received?
- Valuing change as it occurs – time and money.
- Making use of updated programmes, progress reports and valuations.
- Making use of progress meetings.
- Risk registers.
- Programmes: planned date for completion v Time for Completion.
- Standing DAAB/DB: site visits
- Recommendation or decision?

Moving forward conflict avoidance in 2024

- UK Government support
- Conflict Avoidance Coalition
- Aiming to help change the way to construction industry deals with disputes
- Employ techniques which deal with emerging conflicts early and effectively, before they crystallise into full blown disputes
- Collaborative and co-operative approach to dispute management;
- The key point is that this all starts from a very early stage

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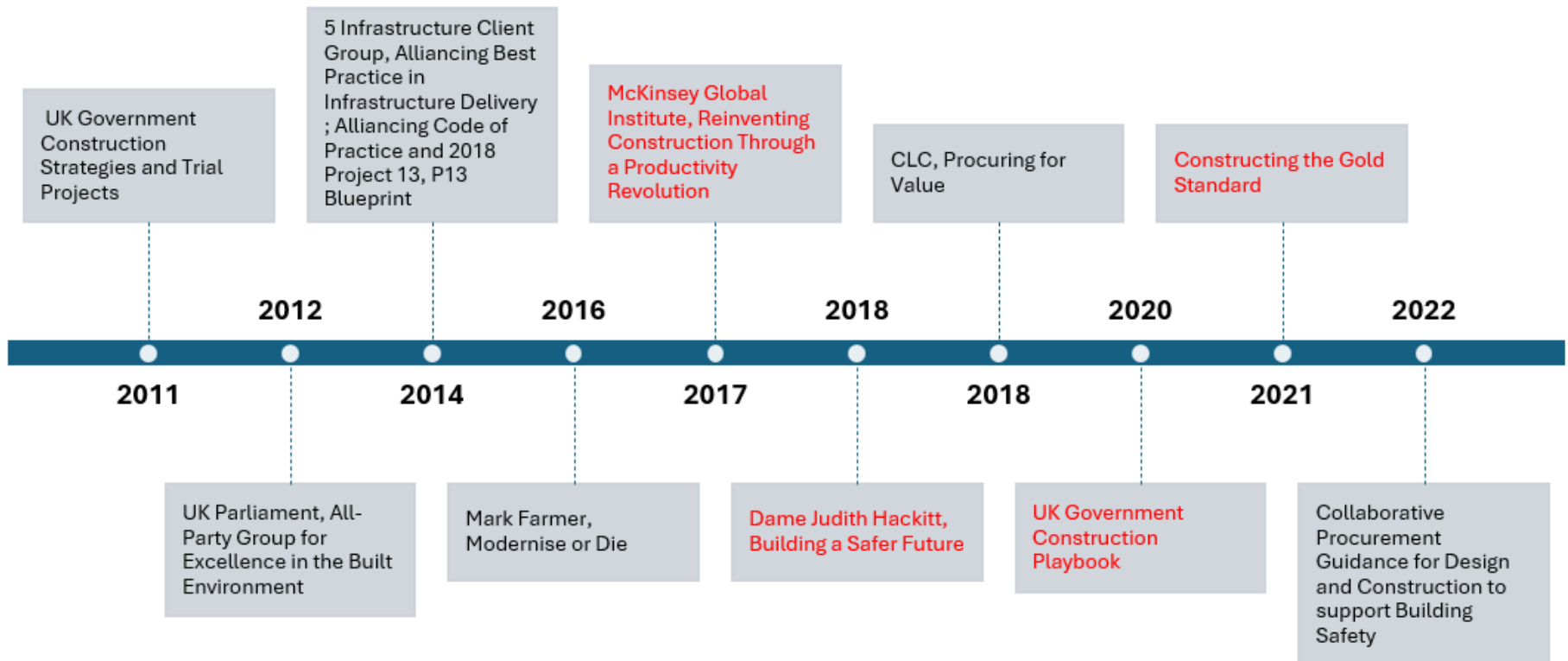


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Collaborative contracts and dispute avoidance – *the example of FAC-1*

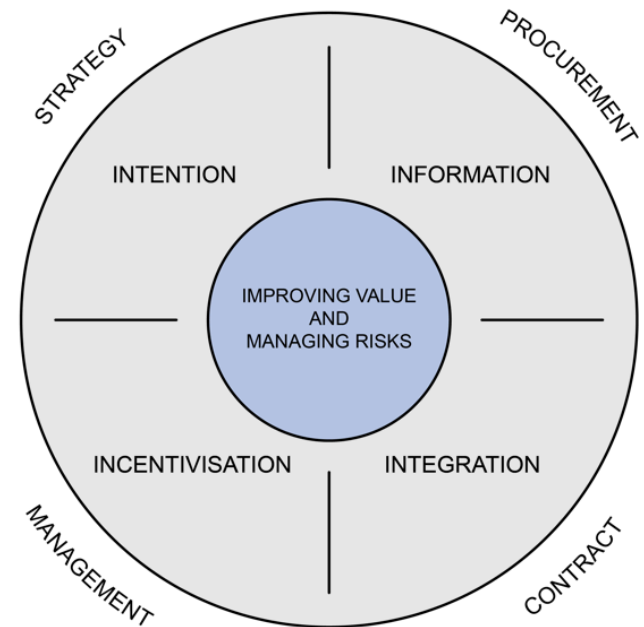


What kind of reports mention collaborative procurement and construction contracts?



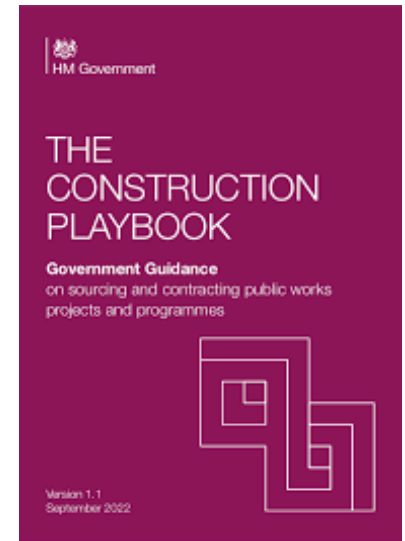
What is critical for effective collaborative contracting?

- **Strategy** establishing the **intention** of clients in terms of credible plans and commitments, clear requirements for project outcomes and clear expectations for improved value and reduced risks
- **Procurement** exchanging the **information** between clients and prospective suppliers that forms the basis on which to implement agreed plans and commitments, to achieve required project outcomes and to meet expectations for improved value and reduced risks
- **Contracts** creating and sustaining **integration** of the mutual commitments of clients and suppliers, supported by supply chain members and managers, to implement agreed plans and commitments, to achieve required project outcomes and to meet expectations for improved value and reduced risks
- **Management** achieving **incentivisation** through instructions, support, guidance and motivation for clients and suppliers to integrate their mutual commitments, to implement agreed plans and commitments, to achieve required project outcomes and to meet expectations for improved value and reduced risks



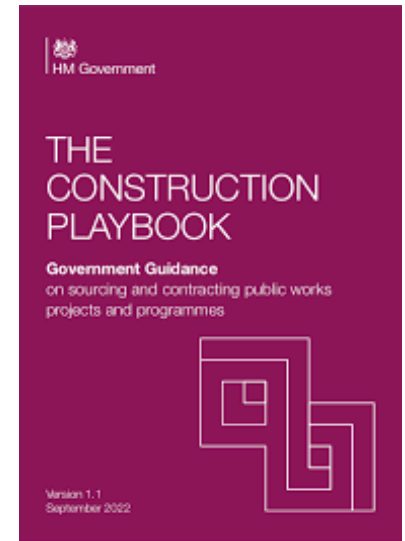
The Construction Playbook

- December 2020/September 2022: 14 procurement policies mandated on a “*comply or explain*” basis to underpin a commitment to “*delivering better, faster and greener solutions that support our recovery from the COVID-19 pandemic and build the economy of the future while improving building and workplace safety*”
- Collaborative procurement and long-term contracts for portfolios of work to improve industry commitment, investment and innovation, public sector clients to aggregate and standardise demand through pipelines of multiple projects in order to deliver improved outcomes
- Playbook requires public sector clients to adopt modern methods of construction (“*MMC*”), to embed the use of BIM, to procure using early supply chain involvement and outcome-based performance measurement, and to use benchmarking for a better understanding of costs



The Construction Playbook

- Contracting authorities to “*set out strategies and plans for achieving net zero GHG emissions by or ahead of 2050 for their entire estate/infrastructure portfolio... aligned under an overarching sustainability framework*” and that “*systems and processes should be in place to ensure their projects and programmes deliver on the targets set*”
- Potential for “*efficiencies and higher quality and safer solutions with lower GHG emissions quicker than traditional construction methods*” and requires that “*solutions put forward by potential suppliers are accompanied by a whole life carbon assessment*”
- Social value offers “*a way of maximising the benefits of public procurement by encouraging employment opportunities, developing skills and improving environmental sustainability*”, noting that “*SMEs are experts in their fields and can provide insight into MMC, innovative technologies and ways to minimise the GHG footprint of the proposed solutions across their whole lifecycle*”



What do collaborative agreements/alliances offer?



A fresh approach to procurement and contracts



An alternative to the defensive and fragmented culture caused by fear of disputes and failure to share information



Improved integration among design consultants, subcontractors and manufacturers



Improved integration of capital and operational works



Motivation for improved performance



A strong basis for collaborative working combined with clear legal rights and obligations

What are the origins of FAC-1?

Misunderstandings have arisen from varying assumptions and vague guidance as to collaborative systems

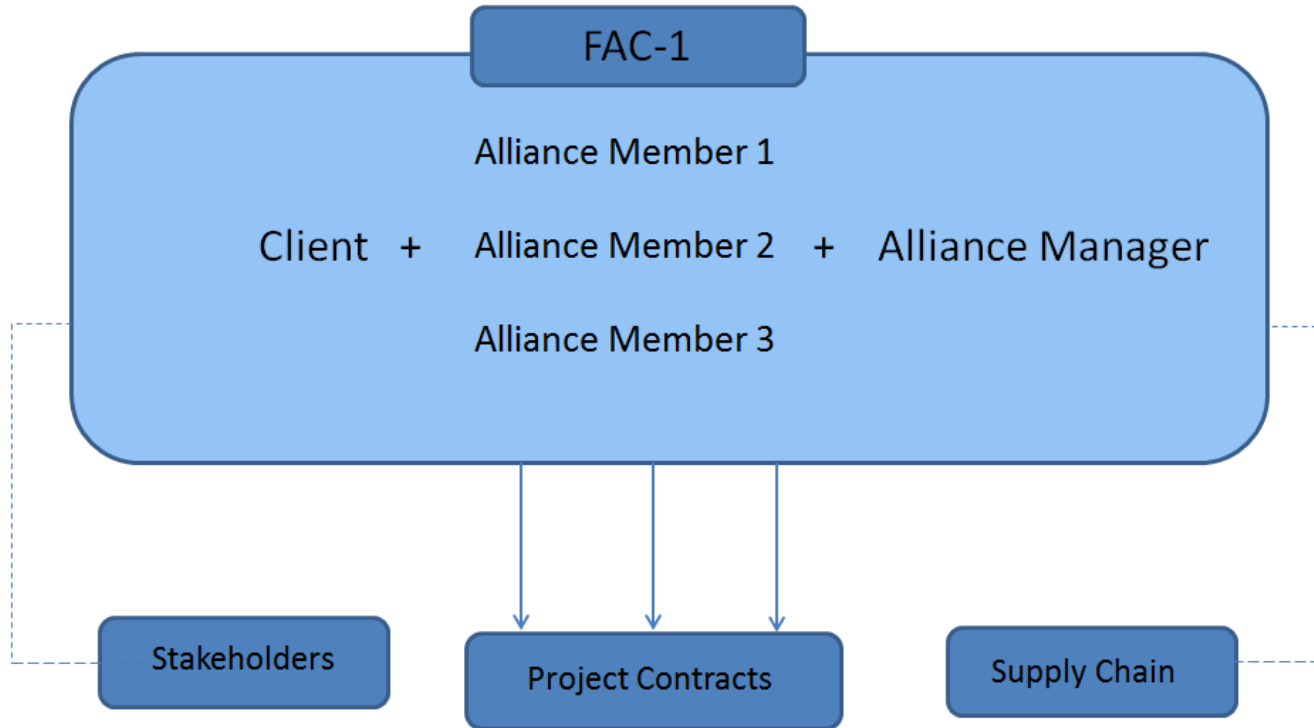
Evidence from successful alliances has not shifted the attachment to defective fixed procurement paradigms

Frustration that bespoke alliance contracts can be hard to understand, can attract high risk premiums and do not improve consistency or learning

12 months' consultation with over 120 clients, consultants, contractors, lawyers and academics confirmed demand for a flexible standard form alliance contract suitable for any type of project in any jurisdiction

Publication of the **FAC-1 Framework Alliance Contract** in June 2016 based on successful prototypes

Take up on procurements worth over **£100 billion** in first 6 years plus early evidence of improved value



*D. Mosey, Collaborative Construction
Procurement and Improved Value 1st Edition*

FAC-1 as framework/contract/ umbrella/enabler/integrator

- The Playbook states that the *“FAC-1 framework is a good example of a standard form framework contract that can achieve this and many of the ambitions set out in this Playbook”*
- **FAC-1** operates as an umbrella that connects and enables learning/improved performance
- **FAC-1** integrates contracts awarded by one or more clients to one or more consultants and/or contractors and/or suppliers
- **FAC-1** supports and integrates:
 - A programme of related/ unrelated projects
 - The contracts for different components and phases comprising a complex project
 - The contracts for different components and phases comprising a project using BIM

FAC-1: planning and integrating multiple *Projects* and *Project Contracts*

- **FAC-1** *Alliance Members* include the *Client*, *Additional Clients*, an in-house or external *Alliance Manager* and any combination of selected consultants/ contractors/ suppliers/ providers, with the facility to add *Additional Alliance Members* (clauses 1 and 3 and Appendix 2)
- **FAC-1** states why the alliance is being created, stating agreed *Objectives*, *Success Measures*, *Targets* and *Incentives* (clause 2 and Schedule 1)
- **FAC-1** states how work will be awarded to *Alliance Members*, under a *Direct Award Procedure* and/or *Competitive Award Procedure* and under early standard form Orders (clauses 4, 5 and 7, Schedule 4 and Appendix 3)

FAC-1: planning and integrating multiple *Projects* and *Project Contracts*

- **FAC-1** states how the *Alliance Members* agree to seek *Improved Value*, working together through *Supply Chain Collaboration* and other agreed *Alliance Activities* in accordance with an agreed *Timetable* (clause 6 and Schedule 2)
- **FAC-1** states how the *Alliance Members* will manage risks and avoid disputes using a shared *Risk Register*, *Core Group* governance, *Early Warning* and options for an *Independent Adviser* and alternative dispute resolution (clauses 1, 3.3, 9 and 15 and Schedule 3)
- **FAC-1** provides flexibility to include particular *Legal Requirements* and *Special Terms* required for any sector and in any jurisdiction (clause 13 and Schedule 6)

How does FAC-1 fit with *Project Contracts*?

- **FAC-1** is not itself a *Project Contract* and is designed for use with any one or more forms of *Project Contract Conditions* entered into in accordance with clause 5 and included in the *Template Project Documents* at **FAC-1** Schedule 5
- **FAC-1** is compatible with all and any combination of the *Project Contract Conditions* such as JCT, NEC and PPC Any combination of standard or bespoke forms
- All **FAC-1 Framework Documents** are ‘*treated as complementary*’ but in the event of any ‘*error, discrepancy or omission*’ that cannot be resolved by agreement of *Alliance Members* following ‘*Early Warning*’ the order of priority is set out in the ‘*Framework Alliance Agreement*’ and a *Project Contract* takes precedence over the *Framework Documents* (clause 1.5)
- Option for *Client* to issue ‘*Orders*’ for ‘*Pre-Contract Activities*’ in advance of a *Project Contract* under clause 7 but insurances under clause 12 should cover those *Pre-Contract Activities* and they should be incorporated in the *Project Contract* when awarded

FAC-1 prototype: Eden Project Phase 4 multi-party bespoke framework

Main contractor and team of consultants appointed under multi-party framework agreement that contained provisions for joint preconstruction phase design development, pricing, risk management and programming prior to award of each NEC3 Option C construction phase contract. Attracted the team's early commitment to joint design of the innovative Education and Resource Centre (the "Core") as well as a number of smaller projects



FAC-1 prototype : Job Centre Plus- two client ,14 contractor bespoke framework

Public and private sector clients and a total of 14 main contractors invested in common preconstruction phase processes and shared supply chains under multi-party frameworks applied to over 960 projects

Value improvement processes described in frameworks enabled teams to achieve savings of £244m against projected costs of £981m and to win awards for supply chain integration and health and safety



FAC-1 prototype : SCMG local government

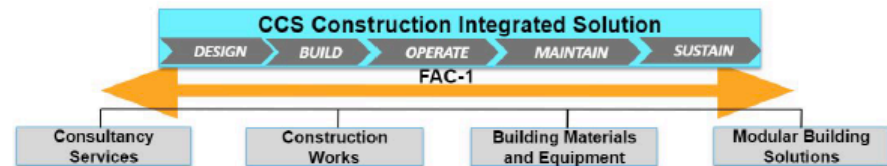
<http://www.gov.uk/government/publications/two-stage-open-book>



- | | |
|--|---|
| <ul style="list-style-type: none">• Early appointment of range of tier 1 contractors and tier 2 and tier 3 sub-contractors and suppliers• Engagement with residents• Joint analysis of cost and quality• Savings and other improved value agreed through joint working with tier 1 contractors and tier 2/tier 3 supply chain members (14%) | <ul style="list-style-type: none">• Reduced waste through lean programming and rationalised specifications• Sustainability proposals from tier 2/3 supply chain members• Substantial time savings on mobilisation• New opportunities for local SME subcontractors and suppliers• Employment and skills initiatives• Improved maintenance |
|--|---|

CCS Construction Works and Associated Services Framework

The Integrated Solution



The CCS Integrated solution model enables clients to procure construction goods and services flexibly, interlinking framework providers to enable a collaborative delivery approach to be adopted. Supported by FAC-1 this is an industry leading contracting structure that delivers a compliant route to market for public sector clients, whilst drives innovation through access to modern methods of construction, social value, continuous improvement and sustainable solutions as well as complying with other key policy drivers, including embedding the Government Playbook policies.

The integrated solution also offers access to a consistent selection of industry recognised standard call off terms, e.g. NEC/JCT), which are further supplemented by government standard 'Boilerplate' clauses, (or CCS standard terms). This provides consistency across frameworks and supports a simpler and flexible way to manage Additional Client call offs through the suite of agreements.

By adopting the FAC-1 as the centre point of our framework agreement structure, this enables CCS to establish closer relations with the additional clients and supplier alliance members, focus on collaborative opportunities, drive best practice, improve framework performance and outputs across our frameworks. Through the adoption of a 'strategic sub-alliancing', this formalises the agreement at call off stage for all parties to the sub alliance to work towards the same objectives, targets, success measures and incentives with the additional client, through a collaborative working and delivery approach.

FAC- 1 as a contractual integrator for EPC Contracts – ENEL Campillo I, II and III- 3 wind farms project

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Arcadis Global Disputes Report 2020



“The key [UK] focus from the survey responses relates to those administering the contracts, however, the second cause suggests contract obligations are drafted in a manner which makes it difficult for all parties to follow

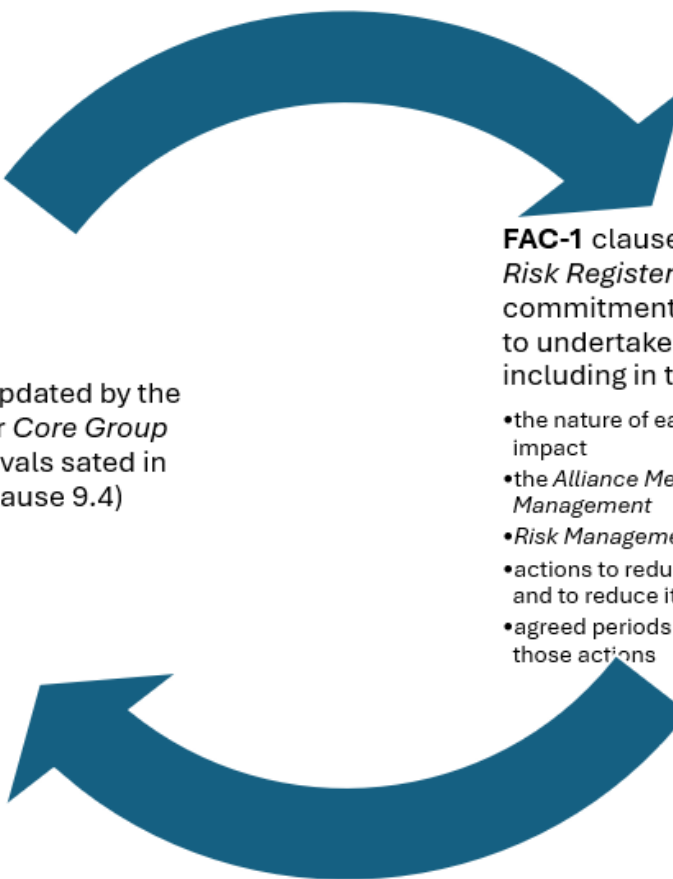


*Greater use of more collaborative standard forms of contracts, i.e. PPC 2000, TPC 2005 and **FAC-1**, might provide more confidence in project delivery*



*However, this can only really be driven by the **owners and their representatives**”*

FAC-1 *Risk Management and Risk Register*



The *Risk Register* is updated by the *Alliance Manager for Core Group* approval at the intervals sated in the Timetable (clause 9.4)

FAC-1 clause 9 and the Schedule 3 *Risk Register* record the commitment of *Alliance Members* to undertake *Risk Management*, including in the *Risk Register*:

- the nature of each risk, its likelihood and impact
- the *Alliance Member(s)* responsible for *Risk Management*
- *Risk Management*
- actions to reduce the likelihood of each risk and to reduce its financial/ other impact
- agreed periods or deadlines for completing those actions

FAC-1 *Risk Management* actions

FAC-1 clause 9 and the Schedule 3 *Risk Register* record the commitment of *Alliance Members* to undertake *Risk Management* actions that include:

Obtaining additional information

Performing additional tests/simulations

Allocating additional resources

Improving communication and managing organizational interfaces



Agreed *Risk Management* actions include actions to reduce the likelihood of each risk and to reduce its financial and other impact plus agreed periods or deadlines for completing those actions

FAC-1 *decision-making / dispute avoidance*



The **FAC-1 Core Group** of named individuals or agreed alternates reach decisions unanimously by *Consensus* of those members present at a meeting (clauses 1.6, 1.7)



Core Group monitor and support agreement of improvements under **FAC-1** and seek an agreed course of action following *Early Warning* given by *Alliance Members* if any matter adversely affects or threatens the *Alliance* or the *Framework Programme* or any *Alliance Member's* performance (clauses 1.8, 15.1)



An equivalent *Core Group* system has avoided disputes under PPC2000 contracts (five court cases in 22 years)



FAC-1 also provides options for appointment of an '*Independent Adviser*' (clause 3.3) and/or '*Dispute Board*' (clause 15.2)

FAC-1 – dispute avoidance

- **FAC-1** clause 15 and Appendix 4 provide for non-adversarial dispute avoidance and dispute resolution by means of:
 - *Early Warning* as soon as an *Alliance Member* is aware of any dispute
 - Consideration by the *Core Group*
 - Options for *Independent Adviser*, *Conciliation* and *Dispute Board*
 - Adjudication and option of arbitration
- Hackney Homes and Homes for Haringey (SCMG) **FAC-1** prototype resolved '*potential disputes with the benefit of full cost and time information plus the motive to retain long-term relationships*'

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Thank you.
Questions?

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