



**CAPITAL PROJECTS IN THE EDUCATION SECTOR  
PARTNERING - THREATS AND OPPORTUNITIES**

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**What is Partnering?**

At a recent Conference a speaker condemned what he called the failure of Employers and Contractors in the Construction Industry to understand and implement “the acknowledged pathways of partnering”.

It is suggested that there is a fallacy inherent in that statement. In truth, partnering does not, as the statement suggests, comprise a unitary set of precepts that, if applied formulaically, will procure significant benefits in terms of such matters as profit and speed of delivery. Rather, the position is that stated in the Chinese proverb, namely that “the truth is different for everybody”. Thus, as set out below, the partnering requirements of one project will not necessarily reflect those of another.

In this respect it is important to distinguish aims and mechanisms. The aims of partnering seem to be fairly universally acknowledged. The heart of them appears in the Latham Report “Constructing the Team” and the Egan Report “Rethinking Construction”. In detail, they are legion, but the most important concern cooperation (or collaboration), efficiency of production, avoidance of disputes, and reduction of time and cost while maintaining margins.

There are two distinct ways in which the aims can be facilitated. The first encompasses such mechanisms as providing for bonus sharing for early completion, or completion below budget, the meeting of key performance indicators, and multi-tiered dispute resolution. In a contractual context these mechanisms might be referred to as “hard terms”.

The second encompasses relationship-based mechanisms such as partnering charters, the incorporation of collaborative terminology such as the requirement to work together in a spirit of openness and cooperation and to share information. In a contractual context these might be referred to as “soft terms”.

A major reason for partnering failure is the attempt to make soft terms into binding contractual obligations. Obligations, such as that to cooperate, are fundamental to partnering; but their inclusion within an uncongenial framework of a contractual structure has the potential to cause severe problems.

## Threats to Partnering

### *Partnering and Contractual Structure*

In order to examine the relationship between partnering and the contractual structure of a project it is first necessary to consider the role that contracts play in construction. At their most basic level they establish what is to be built, when it is to be built, the quality of the construction, and the price to be paid. At a more sophisticated level, they apportion risk. Thus, they establish whether the contractor will be entitled to an extension of time should certain events occur, such as exceptionally bad weather or unforeseeable ground conditions; and whether the delays caused should also entitle the contractor to additional money.

It has been suggested that where the parties have a relationship underpinned by a partnering arrangement, a contract is unnecessary. In *Rethinking Construction* it is stated:

“The Task Forces wishes to see ... an end to reliance on contracts. Effective partnering does not rest on contract. 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 absolute.”

The principle underlying such cause for the eradication of contracts is that they are the cause of many of the problems that afflict construction: - the rubric runs “no contract, no dispute”. It is suggested that that view is dangerously misconceived: it is the equivalent of a belief that making a will makes a person more likely to die, or that taking out a car insurance policy makes an accident more likely.

Thus, taken to its logical conclusion, the no contract philosophy would lead to a position whereby the parties entered into an arrangement for the construction of undefined works to an unknown quality over an uncertain time and for an indeterminate sum. Whilst it might well be appropriate for the parties to a project to consider these issues in detail before a contract is entered into, to proceed without formal agreement is a recipe for failure. In reality, the consequences of a legal relationship cannot be evaded merely by eschewing a formal contract. Thus, where the Courts can divine a binding agreement that the contractor will complete all of the works, but there is uncertainty as to time or cost, the Courts will imply obligations. Those will generally be to build within a reasonable time for a reasonable cost. Further, if the parties’ relationship is so uncertain that the Courts cannot find any contract between them at all, the contractor is likely to accrue a non-contractual entitlement (in legal parlance “in restitution”) to be paid a reasonable sum for such work as is carried out. And if risk is not pre-allocated it will not be avoided: rather, it will lie where it falls. Thus, if no provision is made for bad weather or unforeseeable ground conditions, the consequences of them will be borne by the contractor - and, doubtless, will be reflected in the pricing of the contract in the usual way.

An analogy that is sometimes asserted in favour of partnering is that of marriage: it is said that some marriages work well despite the absence of a formal legal contract. The reality is that marriage is a very serious contract indeed: the consequences can last longer than a 30 year PFI; there is no break clause; and the legal consequences of repudiatory breach, as

determined in the Divorce Courts, demonstrates just how serious a contract it is. This is why marriage contracts are becoming more, rather than less, formal with the advent of pre-nuptial agreements.

In reality, much of the above philosophy has been recognized even by the strongest proponents of partnering. Buildings are not duplicatable products such as makes of car: they are usually unique and complex. Accordingly, the forms of so-called partnering contract that have started to develop do not repudiate the role of the contract in its entirety but, instead, import into it obligations considered by the draftsmen to be conducive to partnering. Thus, probably the best known partnering form, PPC 2000, states in the Guidance Notes:

“A number of myths have built around partnering, including firstly the suggestion that you can partner with no contract at all ... 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.”

The Notes also draw attention to the CIC Guide to Project Team Partnering which states:

“There has been much talk in the press and comments from industry experts that may suggest that partnering is not about contracts. This is partly true. What partnering is not about is for each party to use contracts to strengthen their position at the expense of others and the overall project. It is not about the conflict and the lengthy and complex disputes that are frequently the result when parties are bound by intrinsically adversarial contracts.”

However, it is suggested that existing partnering contracts are open to criticism owing to their attempt to make the terminology of collaboration into binding contractual obligations. Thus, as noted above, partnering mechanisms can be divided into “hard” and “soft” categories.

Hard terms are characterized by being capable of clear contractual meaning and have a direct and measurable impact on the contract. Examples are the provisions for bonus sharing (“pain/gain”) in the new Federation of Property Societies Public Sector Partnering Contract, the key performance indicators in PPC 2000, or the compilation of a Risk Register in the Be Collaborative Contract. These require clear incorporation into the Contract Conditions.

Soft terms, on the other hand, are characterized by their nebulous nature and their consequent incapability of constituting precise contractual obligations. Essentially, they are referable to the promotion of the parties’ relationship. They have an equal role to play in partnering, but need to be set out in expressly non-contractual documentation, and implemented by training and changes of culture.

One of the first examples of such a soft term incorporated into a Contract appears in the New Engineering Contract Clause 10 (which, for reasons never adequately explained, is the first Clause within the Contract) and which states:

“The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this Contract and in a spirit of mutual trust and cooperation.”

Very similar terms appear in the other published forms, e.g. PPC 2000 Clause 1.3:

“The Partnering Team members shall work together and individually in a spirit of trust, fairness and mutual cooperation for the benefit of the project,”

and the Be Collaborative Contract Clause 1.1:

“it is [the parties’] intention to work with each other and with all the other Project Participants in a cooperative and collaborative manner in good faith and in a spirit of mutual trust and respect.”

It is suggested that a fundamental difficulty with introducing such terms into the contract is their innate uncertainty.

Thus, consider the above quotation from PPC 2000. Leaving to one side the question of how cooperation is possible that is *not* mutual, it is difficult to give a clear contractual meaning to “fairness” and “cooperation”. Not only it difficult to see what they add in terms of specific rights and liabilities, but they also have the potential to cause severe difficulties. Thus, there has already been a reported case on partnering, being *Birse Construction Limited -v- St. David Limited 1999 (CILL 1494)*. In that case, the parties had agreed a partnering Charter. The Judge made it clear that that Charter could indeed affect the parties’ substantive rights. He said that the Charter was “clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct was to be measured.”

Thus, the Courts are likely to try to give meaning to obligations such as fairness and cooperation if they are included in the contract; and that could lead to some startling results. For example, a contract may make it a condition precedent to receiving an extension of time or recovering loss and expense that the relevant application is made within a specific period. If the contractor serves such a notice out of time he might nevertheless seek to argue that the Employer is obliged to “cooperate” by extending the period in question. If that argument found favour with the Court it would surely undermine the underlying contractual mechanism.

Obligations to work “for the benefit of the project” have equal potential to produce unintended consequences as it is difficult to dissociate the needs “of the project” from the rights and liabilities of the parties themselves.

Accordingly, it is suggested that whilst hard partnering mechanisms such as bonus sharing should be incorporated into the contract wherever possible, soft partnering mechanisms such as the agreement to cooperate, should be kept outside the contractual matrix. They undoubtedly have an essential role to play within partnering but need to be brought into being by way of arrangements that are not contractually binding and to be implemented by rigorous training and team work-building initiatives. It must be remembered that relationships can fail for many reasons - e.g. insolvency of one of the parties. In such circumstances, it is unlikely that a liquidator or receiver will pay close attention to the “relationship”. Rather, he will seek to exploit the plain contractual terms to their full extent. Therefore, it is essential that the underlying contractual terms are plain and unambiguous and not infected with the uncertainty of partnering vocabulary.

### *Different Partnering Regimes for different circumstances*

As observed above, it is suggested that the needs of the parties to a project will be as various as the projects themselves. BAA, when building a major airport terminal, has extremely limited recourse to detailed contractual provisions: the projects are too large to lend themselves to that sort of contractual rigour. However, the potential problems inherent in the lack of a clear contractual structure are greatly mitigated by BAA's very strong commercial position in the market. A similar approach by a commercially smaller employer on a contract of more limited scope could find such an approach disastrous. Thus, the participants in a project need to tailor the available partnering initiatives to their particular circumstances rather than to seek to rely upon an unchanging formula. This is best demonstrated by reference to specific projects and these are outline below. These demonstrate how partnering principles can be employed in very different ways in order to obtain the desired benefits.

### **Methodologies for successful partnering - Case Histories**

#### **The Open University**

The Open University is based at Milton Keynes where it has an extensive Campus and had an ambitious scheme for new build development (a scheme that may be somewhat reduced as local buildings formally owned by De Montfort University have become available). As such, the University is a fairly sophisticated purchaser of construction services. However, it is unable to hold out to potential suppliers (contractors, consultants etc) a steady flow of high value work in the manner of organizations such as BAA and the major utilities. Nevertheless their experience of traditional contracting under Standard Forms had not been satisfactory and they had the foresight to perceive that collaborative working could greatly assist future projects.

So, given the absence of a steady stream of work over many years, the use of a framework agreement regulating a series of projects was inapposite. Instead, the University contemplated successive projects that would each be subject to individual project partnering agreements. The University was well aware that forging effective teams for single projects can be difficult: there is insufficient time for relationships to develop. To minimize the problem the University sought tenders from consortia rather than from individual contractors, those consortia to provide a comprehensive service comprising establishing the University's detailed requirements, design, and construction. This ensured that all those involved in the project, if they had not actually worked together before at least had an active desire to do so; and it also had the effect of involving the consortium in the project from the conception stage so that they had a thorough understanding of the University's requirements. To ensure that the University did not itself become isolated as against the consortium (since the consultant team was not instructed by the University separately) the University employed an independent project manager for the first project. However, success of that project, gave them the confidence to undertake project management in-house for the second project. They also appointed a Partnering Adviser who was responsible not just to the University but to all those involved with the project as a resource for advising on the partnering relationship and to assist with the speedy and appropriate resolution of any disputes that might arise.

Each of the consortium members was a party to the legal contract, and not just the lead contractor or consultant. That tied all concerned closely into the production matrix although the University recognized that, in doing this, they lost the advantage of having a single point of contractual responsibility.

The University then faced the question of how to incorporate partnering principles into the contract without serious legal exposure in the event of problems. They were aware that they did not have the power in the market place to limit problems by holding out the offer of significant work in the future. They were also aware that, as noted above, however strong the relationship might be at the beginning of a project, relationships can deteriorate for many reasons, some of them external to the interrelation between the parties. Thus, a contractor could suffer cash flow problems or, worse, become insolvent. On the other hand, they wished to avoid the rigid and adversarial nature of the Standard Forms. PPC 2000 was considered but rejected on the basis that whilst many of its mechanisms were useful, as has been seen, its attempt to turn the language of partnering into binding legal obligations could cause immense difficulties.

Accordingly, the University elected to introduce a two-stage process. The first stage was pre-construction and concerned the production of detailed design and costing information. This process enabled the University to communicate its requirements in considerable detail and to ensure that the product accurately reflected those requirements without the need for significant change during the build phase. Further, given the preliminary nature of this initial exercise, it was possible to incorporate many partnering mechanisms without importing significant risk of the sort identified above in respect of PPC 2000.

The agreement, accordingly, provided for:

- the appointment of a partnering adviser;
- the formation of a Core Group;
- dispute resolution as administered by the Core Group'
- incentives as determined by the Core Group;
- production of a risk register and assessment of risk.

Once the deliverables in terms of specification and programme had been produced according to the initial contract it was then possible to have the work itself undertaken according to a Standard Form of Construction Contract (in this case JCT 1998 with contractor's design with certain bespoke amendments).

The entire arrangement was produced joined with the consortium who were involved in the project more or less from its conception and collaborated in formulation of the contract terms. Participation was initially by way of open forum and, once the contracts were put into operation, communication was continued through meetings of the Core Group and Partnering Workshops.

Hitherto, the University has found that its projects have proceeded without dispute and time and budget. Thus, the University has taken the benefit of aspects of partnering whilst, at the same time, protecting its legal position should problems arise.

## Somerfield/KwikSave

Somerfield's position differs from the Open University's. Their need for construction services is much longer term, albeit that the project cost is generally lower and involves more maintenance than new build. However, its construction turnover is such that it can offer the incentive of significant and regular work to suppliers. Consequently, relationships can be forged over a longer period and there is a commercial imperative on suppliers to ensure that their relationship with Somerfield is satisfactorily maintained. Therefore, Somerfield has decided to devise a Collaboration Agreement to be entered into with each of its suppliers with a Standard Form of Project Specific Contract operating under its Aegis. Somerfield's firm wish is to operate in a true spirit of openness and trust and to adopt an approach which, if appropriate, will be wholly emotive. Indeed, to this end, they have undertaken a number of projects without any formal contract at all. They do, recognise that the absence of a formal written contract does not mean that no contractual obligations can arise between the participants. Thus, if Somerfield asks a supplier to carry out work on its behalf but states nothing as to time or price, the supplier may have a forcible obligation to carry out the work within a reasonable time, and an entitlement to be paid a reasonable sum. Certainly, where the relationship is a strong one, determining such rights and liabilities can be done in a spirit of cooperation. However, there is potentially greater efficiency in the process if all participants have, from the beginning, a clear understanding of their rights and obligations. Furthermore, in the absence of a contract, risk lies where it falls: and this may not comprise an appropriate allegation of risk. Thus, if a contractor has an obligation to complete within a reasonable time, he will get full credit for all neutral events, such as exceptionally adverse weather. However, commercially, a sharing of risk (e.g. an extension of time but no additional money) may be more appropriate. Equally, as in respect of the Open University, Somerfield was concerned to ensure that excessive contractual detail did not polarize the parties and inhibit cooperation. They have sought, therefore, to try to obtain the best of all worlds by retaining the principal legal obligations within the project specific contracts and importing those partnering obligations that are not readily susceptible to becoming legal obligations into the Collaboration Agreement.

Thus, Collaboration Agreement and a copy of the original draft on which the Collaboration Agreement was based is enclosed with these notes is expressed to be outside the formal contractual matrix.

Despite being extra contractual, the Collaboration Agreement does, nevertheless have practical significance: it goes beyond a mere assertion of how the parties agree to inter relate. The headings include achieving best practice, health & safety, quality, environment, risk and identification, concurrent engineering, efficiency, training, and a framework management team.

The Framework Management Team is of particular significance. It encompasses representatives from each of the principal participants and is responsible for coordination of new projects, formation of joint management teams (or Core Groups) for individual projects, arranging partnering workshops, liaising with management teams, and forming a Disputes Resolution Panel. As to the latter, the distinguishing characteristic of an effective partnering arrangement is not the absence of disputes but their swift and efficient resolution achieved without damage to the parties' relationships.

The standard contract for individual projects has yet to crystallize. However, it is envisaged that, in the first instance, it will be short - not more than about 10 pages (as opposed to 100 pages for JCT 1998). Somerfield take the view that excessive detailing of contractual rights and responsibilities is more likely to encourage disputes rather than forestall them. The contract is intended to incorporate partnering mechanisms including key performance indicators, other incentives for completion below budget, a risk register, a free flow of information, and open book accounting.

### **Conclusion**

Partnering has the potential to produce significant benefits to all participants in terms of, amongst other things, time, cost, profitability, and satisfaction. There are various mechanisms that can be imported into a project in order to promote partnering and reap those benefits. However, in doing so, it is essential to remember that:

- (i) the underlying contractual rights and obligations need to attain their certainty;
- (ii) consistent with (i) above, soft mechanisms which pertain to the relationship rather than the operation of the contract should not be given contractual force; and
- (iii) each project needs to be considered on its own merits in order to determine the most effective form of partnering to be incorporated.

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