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Partnering pitfalls being overlooked?

Partnering increasingly looks like the industry's main hope of a post-Latham way forward from the contractual argy-bargy which sets client against contractor and contractor against subbie. Scepticism is rife in construction about anything that sounds like a buzz word imported by management and marketing gurus from other industries, usually those where all production takes place in a cosy factory after the customer has already placed an order for a product which will be specified just as the manufacturer decides it will be. At the moment, for example, the industry seems to be girding itself for another battle to prevent managerial techniques found appropriate in car plants being imposed on construction sites as a result of the investigation by the government's task force headed by Sir John Egan. It might be surprising that Sir John is considering these techniques when his own company, BAA, and other major clients like Railtrack report themselves impressed by the benefits of the partnering approach. Partnering looks like having some staying power and is winning over sceptics.

Partnering has not been around construction for very long but already has seven pillars, according to a new guide published in April from Reading University's John Bennett and Sarah Jayes. This guide follows on from *Trusting the Team* last year which forms the basis for the approach of many now involved in partnering relationships. The new guide provides examples of partnering in practice on real construction contracts, including from those involved in what is called third generation partnering, like Tarmac. The third generation partners use partnering to generate

innovative solutions for clients, partnering with suppliers and partnering on facilities management of completed projects. Much of the industry is still in the first and second generation category and most is in fact still not yet in the embryonic stage, nor even a twinkle in anybody's eye.

Great hopes are being pinned on partnering, but there seems to be a yawningly large hole which the industry is well capable of falling into. The fact is that the pathbreakers have run so far so fast that they have completely overtaken the ability of the paperwork to keep up with them. All hinges on good relationships between partners and this has been carrying projects through. But if all parties to existing procurement techniques were full of good cheer and will to one another then the legal profession could be sent off on voluntary service overseas. Many partners seem to have overlooked the fact that when things do go sour – as eventually they will on some projects – they need a contractually laid down procedure for getting them over their dispute and getting the project finished. There must be no ambiguity over what the parties' rights and responsibilities are.

The new guide suggests that there is no reason why a non-legally enforceable partnering charter cannot work alongside a traditional contract such as JCT 80. And there is the rub – these partnering charters might not in fact have as little legal force as many imagine. There is no reason why partnering cannot be more widely adopted than it is now, but it is not yet totally clear what the contractual position is. Some partnering relationships have developed to the

point where clients have felt sufficiently confident in their contractor that they have agreed to omit liquidated damages clauses from their contracts. Retentions is another contractual feature which the new guide says is withering away under partnering. This latter measure implies that the client does not regard contractor insolvency as a risk, which is fair enough, perhaps, with the industry giants but far from guaranteed below the top layer.

Stripping out defects clauses has been another feature of some partnering agreements. Partnering agreements are being made between commercially sophisticated people who must be well aware of the implications of what they are doing – or at least will be assumed to be so by the courts. The first standard form partnering contract cannot be too far away. So far there is only one book on the legal aspects of partnering which we are aware of and that has just been published, written by regular *Construction Law* contributor Julian Critchlow, a partner in the Construction Group at solicitors SJ Berwin & Co. This will be reviewed in a forthcoming issue but it can already be recommended as worth reading alongside the Reading University guide.

The seven pillars of partnering: a guide to second generation partnering. Published by Thomas Telford Publishing, £50.00. Tel: 0171 987 6999.

Julian Critchlow, *Making partnering work in the construction industry.* Chandon Publishing, £55.00. Tel: 01865 884447

Joint contracts tribunal

The capacity for the construction industry to find disagreements within itself should never be underestimated. It never will be by anyone who

has observed the internal wrangling at the joint contracts tribunal recently. This is supposed to be a forum for co-operation on producing standard form contract documents, but when the JCT meets vested interests seem to come out with a vengeance. This is nothing new, but the organisation has usually kept its arguments largely behind closed doors and out of print. Recent infighting, however, has been such as to cause the organisation to almost self-destruct.

For those who have not followed the story, JCT was formed into JCT Ltd at the behest of Sir Michael Latham. In the old JCT those who were directly to be affected by particular documents were sometimes to be found making objections and putting obstacles in the way over matters which did not directly concern them, sometimes with ulterior motives. Under the new scheme the bodies constituting JCT were to be reconstructed into relevant colleges and only those involved with a particular contract form could veto proposals concerning it. The constitution of those relevant colleges is the problem. The specialists represented by the Constructors Liason Group felt that they were being denied any say in contracts which directly affect them intimately, all main and direct contracts. So the CLG is keeping out of JCT Ltd. It is reported that most of the constituent bodies of JCT have major reservations. Sir Michael Latham had a vision of a National Construction Contracts Council which would produce a family of standard form documents for use across the industry. On the record so far every body would still keep their own standard amendments under the table. In the next issue of *Construction Law* we will provide a detailed analysis of the travails at JCT.