



CONTRACT OR CO-OPERATION? INSIGHTS FROM THE MIDDLE EAST

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Background

It is appropriate to start by remarking that in the centre of the perimeter of the vast area making up the Middle East, there is a genuine element of homogeneity. Its inner core, that of the Islamic Arab world, represents a reality that closely affects the lives, the interests, and the sentiments of the people to whom it refers; and all those who have to deal with one or more of these jurisdictions must take this into account. For this reason, it is perhaps appropriate to include in the term Middle East, Pakistan and a number of countries in the northern part of Africa. No commercial activities can be entered into without first taking account of the religion in the area, its historical and educational aspects together with the region's legal culture.

Therefore, as a general comment, one cannot discuss construction in the Middle East without first understanding the principles of Islamic law. Islamic law is embedded, albeit to varying degrees, in all the jurisdictions of the Middle East. However, one must also recognise that, in construction, more often than not it is the conditions of contract used, rather than the law of contract, that forms the most relevant reference for the parties' rights and obligations. Therefore, the need for collaboration and conflict avoidance is directed mainly towards the contractual provisions in the conditions of contract.

Construction in the Middle East

A construction project in the Middle East is a meeting point for many cultures, legal frameworks and concepts. It is for this reason perhaps that in many aspects, engineering and construction in the Middle East, or at least in part of it, is at the forefront of technology and development; and this includes development in the forms of contract.

Thus, when the shift to design/build contracts took place in the west in the early nineteen nineties, that shift also took hold in the Middle East. It was seen as a method whereby the relationships on site are enhanced by forging collaboration between the designer and the constructor. It was also a method amenable to the new developing private finance procurement of construction projects, including BOT and BOOT projects.

It is the tradition in the Middle East to amend the FIDIC Red Book (the Conditions of Contract for Works of Civil Engineering Construction) and in the same way, the design/build contracts in the region were developed along

the line of FIDIC's Orange Book (Conditions of Contract for Design-Build and Turnkey) but with changed provisions, particularly for dispute resolution. In this connection, it is worthy of note that most of the civil engineering conditions of contract in the Middle East have been based on the FIDIC Red Book *with certain modifications*, particularly in the position and authority of the Engineer. Experience has shown that these conditions were very successful in the procurement of construction and engineering projects and many national conditions have been based on them.

In the Middle East, the introduction of design/build was not only seen as a method of increasing collaboration on a busy and complex site, but was also seen as a means of getting rid of the mythical independent, impartial and neutral 'Engineer', particularly in his role as quasi-arbitrator and dispute resolver. The independent, impartial and neutral Engineer was not only a fiction, but was in fact disliked intensely by all three parties to a construction contract in the Middle East: Employer; Contractor; and also the Engineer himself. Any doubts about this are dispelled by reading the Final Report on the survey undertaken by the University of Reading at the request of the European International Contractors and FIDIC, and published in 1996.¹

Disputology in the Middle East is in any case different from that elsewhere, as it lies between two established legal concepts. On one hand, you find the concept of respect for the contractual provisions imbedded in the general principles of Islamic law. It is the direct application of the holy Qur'an where verse number 1 of *Surah Al Ma-ida* states: 'O ye who believe, respect your contractual undertakings' and verse number 34 in *Surah Isra* which deals with the same topic stating: '... and fulfill (every) engagement, for (every) engagement will be enquired into on the day of reckoning'. The Prophet Muhammed stressed this meaning in a famous *Hadieth*, saying: 'Believers should honour their engagements ...'.

However, on the other hand, there is the principle of resolution in an amicable manner, with the involvement of facilitators through conciliation/mediation. Conciliation in civil and commercial matters is recognised under Islamic law, the only exception being a matter related to any of the rights of God.² It is taken from the concepts of resolving disputes in family matters, which is based on the wording of the holy Qur'an in the *Surah of Women (Al Nisa')*: verse number 35, states with reference to disputes between husbands and wives that: 'If you fear a breach between them twain, appoint two Hakams, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation'.

Once the move from the traditional FIDIC Red Book was made, the amendments to the dispute provisions maintained this second tier of amicable dispute resolution comfortably, but the conditions that must be fulfilled before the parties could reach the ultimate stage of arbitration varied from one

1 *EIC/FIDIC Questionnaire Survey: The Use of the FIDIC Red Book*, Final Report, June 1996, University of Reading.

2 Dr MIM Aboul-Enein, *Liberal Trends in Islamic Law (Shari'ah) on Peaceful Settlements of Disputes*, a paper delivered at a seminar at St Anthony's College Oxford, July 1999.

contract to another. Other important contractual provisions were varied in different contracts: for example, how a claim or counterclaim is made and processed and what is a dispute and how a claim could become a dispute.

The failure of collaboration in design/build contracts

This modification from the standard clauses was one of the areas where the new shift to collaborative styles broke down. My arbitration files are full of some terrible warring clauses. But after a very short honeymoon period, the design/build contract was the subject of other breakdowns in collaboration. These included:

- Shift of risk from the Employer to the Contractor;
- The precise definition of the ‘Employer’s Requirements’;
- De-markation lines between the designer and the constructor and who controlled whom;
- Fitness for purpose provisions;
- Supervision and superintendence and the role of the Employer’s Representative in supervising;
- Variations and their effect on delay and disruption;
- The void created by the removal of the duties of determination of disputes from the Engineer; as in other contracts, the design/build contract cannot be operated without a successful system for determining disputes in a fair manner;
- Ill defined requirements, timing and financial provisions;
- Lack of site investigations, incorrect or insufficient information;
- Insufficient funds;
- Misunderstanding or lack of information on what is meant by the design/build process;
- Human conflict regarding the exercise of power and who is in charge;
- Inadequate descriptions of what happens in delay and disruption situations.

And so, the search for other collaborative ways started again.

Partnering

Partnering came into the picture as a result of the search for a new collaborative method. It was adopted in some contracts in the Middle East, but not in many. The format of an elaborate system took, in general terms, some or all of the headings given in appendix 2 (see page 9). Of course, these headings have to be modified to suit the particular project.

It is accepted by all concerned that whilst the objectives of the different contracting parties in a construction contract are the same, (ie for the project to be completed on time, within budget and to a quality which is in compliance with the drawings and specifications), in general terms, these three objectives are conflicting in nature. To achieve quality would generally cost more; and to complete a project in a shorter time would have its own additional price tag. Furthermore, if there are risks that have not been

identified and allocated under the contract and these risks eventuate, the objectives of the different parties might diverge and the parties might end in conflict as to who should bear these consequences.

Where conflict is concerned, the earlier it is resolved the better and cheaper the solution and the healthier the relationship between the parties at the end. Whilst it is almost impossible to identify all the risks to which a particular project is exposed, it is more prudent to decide ahead of time as to what should be done, and how, if and when these risks eventuate. Therefore, although it is expected that partnering should form the normal relationship between the contracting parties on all projects, it is always better to formally incorporate it in an agreement in writing. Specific examples of successful partnering agreements are provided in the appendices.

In a legal context, partnering may constitute no more than an expression of intent between two parties to behave in accordance with a set of agreed principles. Partnering or alliancing is also used to describe contractual relationships entered into either on a project specific basis or to govern a long term relationship.³

Parties involved in a construction contract through partnering may have a number of different objectives, some of which may be achieved. These can be summarised as follows and they should be the subject of any partnering agreement.

Management and co-ordination

One of the most important aspects of avoiding conflict on a construction project is the provision of an efficient and effective mechanism for communication and flow of necessary information. This mechanism should not only be at the work-face level, but should also be at management level. To facilitate this, alliancing structures generally provide for the creation of steering committees or for regular meetings between the parties. Some alliance agreements provide for the whole project to be directed by an integrated alliance board. Often a permanent core of key personnel is dedicated to the project in order to foster and maintain the partnering/alliancing approach.

Early warning/joint problem-solving

It is generally accepted that problems, and any subsequent conflict which may arise, should be resolved as soon as practicable. A partnering agreement would usually include an early warning system designed to act as a net to isolate any problem that is either envisaged or may occur. In particular, hazards and risks which may cause loss or damage should be identified, analysed and managed. Risks of economic and/or time loss should also be part of the process of management, where the parties can give each other early warning of possible problems that might lead to adverse time, cost, quality or safety consequences.

³ *The contractual basis for partnering and alliancing*, an information sheet published by Freshfields Bruckhaus Deringer, November 2001.

Variations

Possible conditions which may be particularly relevant for partnering include: an ability for the contractor to initiate variations, whether or not the client has the unfettered discretion to refuse (in some cases, the client may be obliged to agree such variations if it is objectively reasonable to do so). Some forms of contract allow for value engineering clauses or provisions for incentives in respect of contractor-initiated variations which enhance safety or quality or which reduce time or costs. Where variations arise from external circumstances (for example, a change in the law), obligations of co-operation to identify solutions which mitigate time and cost penalties could be extremely helpful and result in the elimination of possible future conflict. In some cases there may even be an element of risk sharing.⁴

Monitoring of progress

If the time for completion of a project, or certain sections of a project, is of the essence, partnering agreements would be an excellent vehicle for dealing with a problem in this area. In fact, some of the most expensive disputes arise from delay in completion. Achieving milestones and/or completion is relevant to the incentive arrangements on a project and may appropriately include suspension of the payment of liquidated damages.

Snagging and repair work

This is another area that may be dealt with in a partnering agreement. The parties may decide on how to co-operate to identify defects, to programme remedial works and to agree working methods, including acceptable alternatives. It may be agreed that repair work may be carried out on a cost reimbursable basis, without profit. In alliance frameworks, the cost of repair work is generally taken into account in calculations for incentive purposes.

Incentives

Incentive payments are likely to be linked to cost, time, quality and safety. In some cases the contractor's profit, overhead, and perhaps some element of his cost recovery, will be at risk if targets are not met.

The above objectives can be seen from the second example of a partnering agreement in appendix 2 (see page 9). (The example in appendix 1 is intended to provide a simple form adopted in a medium size project, that in appendix 2 is a much more detailed and ambitious programme for a larger project.)

The tension between formal adherence to contractual provisions and collaborative styles

There are difficulties adopting a partnering agreement for all governmental and semi-governmental contracts. The main areas of difficulty stem from the very essence of partnering:

⁴ See note 3.

1. It requires decision-making at a high level, which could be perceived as, at least, controversial.
2. There is a lack of transparency in the need for compromise and in extending a helping hand where one is not required contractually.
3. The lack of sophistication of some governmental organisations, resulting in difficulties in any attempt to develop mutual trust, when the contractor is perceived to be a clever and resourceful organisation.
4. Decision making outside the strict application of the contractual provisions by government employees is difficult when decisions carry with them responsibility that may be used against the employees in a change in government.
5. Political interference: this is particularly prevalent in large projects demanding large injection of funds, which might place difficulties on national budgetary provisions.

Joint ventures

The search went on to joint ventures. Rules were invented for successful management of such ventures, which included: thorough planning; accommodating and dealing with cultural differences, clear strategic leadership, flexible management; and implementing successful practices.

How long and how far – to how less confrontation and more collaboration

However, in the end, it all boils down to two words: ‘conflict management’ or even better one word ‘disputology’. The search goes on, but I suggest the answer is to discover how to stop a simple problem spiraling from a breeze into a whirlwind. One author made this the theme of his paper by referring to a table entitled ‘Spiral of unmanaged conflict’ taken from a paper by Carpenter and Kennedy entitled *Managing public disputes*.⁵

Part of the table is developed below for construction conflicts.

The search must go on. However I suggest that, wherever the project is, collaborative styles of working could only succeed if they deal successfully with conflict management and disputology in the construction industry.

5 Gay Pavelka, ‘Facilitated Discussions – Preventing the Conflict Spiral’, *The Contract in Successful Project Management*, the proceedings of a conference in Christchurch, New Zealand, in February 2002, edited by Ernesto Henriod and Jason La Masurier, published by the Center For Advanced Engineering, 1988, page 159.

SPIRALING OF UNMANAGED CONFLICT IN CONSTRUCTION

Conflict spiral <i>To be read from bottom up</i>	Evolution	Psychological effect on parties
Sense of crisis emerges	Sanctions become issues	Motivation based on revenge Momentum of conflict beyond individual's control
Perceptions become distorted	New ideas are stalemated	Process as a sense of frustration
Conflict goes beyond the parties	Unrealistic ideas are stalemated Threats become issues	Sense of urgency
Resources are committed	Issues shift from specific to general, simple to multiple	Militant hostility
Communication stops	Issues become polarised	Inability to perceive neutrals Power explicitly exercised Stereotyping Rumors and exaggerations
Positions harden	Issues and positions are sharpened	Hardening of positions
Sides form	Individuals take sides on an issue	Intensification of feelings
Problem emerges	People become aware of a problem	Expression of feelings Increased anxiety

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Appendix 1 – first example

A Partnering Agreement⁶

A PROJECT CHARTER

Name of Project

The Parties involved: *Owner/Employer*
..... *Contractors*
..... *Engineer/ Architect*

do hereby commit to the following core values:

- Effective management, resourcing and communication
 - Respect for the environment and the public
 - Mutual trust, respect and integrity
 - Effective listening and discussion

and our mutual goals are:

- Achievement of budgets, thereby delivering reasonable returns
 - Timely resolution of issues at all levels
 - A high standard of quality and safety
 - Job satisfaction for the whole team
 - On time completion

Accordingly, we are committed to the following mission statement:

We will work together with openness and integrity, committed to effective teamwork and co-operation to make this a successful project

Signed on behalf of [the Owner/Employer]:

Signed on behalf of [the Contractors]:

Signed on behalf of [the Engineer/ Architect]:

Place:..... Date:

⁶ This appendix is taken from *Examples of Partnering Agreements*, provided by Nael Bunni in a book on the proceedings of the conference, see note 5, page 145.

Appendix 2 – second example

PROJECT PARTNERING CHARTER

Contents

- 1. Project partnering charter
- 2. List of participants
- 3. Identification of the objectives
- 4. Issue resolution ladder
- 5. Resolving problems and developing action plan
- 6. Follow-up plan
 - 6.1 Team leaders
 - 6.2 Partnering performance evaluation
- 7. Results of the partnering workshop evaluation
- 8. Recommendations as a result of the partnering evaluation.

1. Project partnering charter

Name of Project

The Parties involved: *Owner/Employer*
..... *Contractors*
..... *Engineer/ Architect*

We do hereby commit to work together.

We commit to work together in a professional and collegial manner to provide that is recognised for its distinct quality, prestige and functionality.

We further commit to deliver this facility in a cost-effective and timely manner while achieving the highest standards of workmanship and ensuring that each individual contributor will be proud to have been associated with this project.

Consequently, we will assist each other with all the knowledge and skills at our disposal to provide and maintain an open forum for the prompt identification, discussion and timely resolution of any problem which may arise on our Project.

We shall do this with enthusiasm through co-operation, ingenuity and integrity.

Mutual trust, respect, dedication, open-mindedness and honesty shall be the medium in which all members of the Project team will be working.

Signed on behalf of etc

2. List of participants

Name	title	phone	fax	e-mail
Owner/employer:				
1.				
2.				
3.				
Contractors:				
1.				
2.				
Subcontractor number 1:				
1.				
2.				
Subcontractor number 2				
1.				
2.				
Supplier number 1				
1.				
Supplier number 2				
1.				
Consultant number 1				
1.				
2.				
Consultant number 2:				
1.				
Senior employees:				
1.				
2.				

3. Identification of the objectives

Owner/employer and consultants	
Number	Within the context of the applicable law codes, culture and public policy, and also in accordance with the provisions of the contract
1. 2. 3. 4. 5.	Scope Schedule Cost Quality Future relationships
Contractors and subcontractors	
1. 2. 3. 4. 5. 6. 7. 8. 9.	Satisfaction of the Client Time Quality Fair compensation Satisfaction of the parties Avoiding conflict Exposure and implementation to the Canadian methods Prestige to be involved in this work Potential economic spin-off from participation in the project

4. Issue resolution ladder

	Reaction time	Client/owner	Consultants	Main contractor	Ditto	Sub-contractors	Others
First partaker	1 hour						
Second partaker	24 hours						
Third partaker	24 hours						

5. Resolving problems and developing action plan

PROBLEM	ACTION PLAN		
Category: administration	What to do	By whom?	When?
1. Permits	Obtain required permits	As required	As required under the contract
2. Procrastination/delay	Weekly meetings <ul style="list-style-type: none"> Identify problems Establish responsibilities Establish target dates 	All personnel	Periodic updates
3. Ensure that all parties are fairly compensated for costs relating to resources and time	<ul style="list-style-type: none"> Develop clear implementation schedule to enable all to plan their resource allocations and compensation requirements accordingly. Initiate action according to contractual provisions to resolve overhead costs that have not, to date, been compensated for. 	All personnel	By date as agreed
Category: communication			
4. Communication problem: language - is there a language problem on site?	Resolve as appropriate	As required.	Daily
5. Provide appropriate periods for the process of approval and review; this period can be doubled if there is a rejection either by the consultant or the client.	To identify very early items that have a potential to be rejected (equivalents) and to apply for acceptance for the equipment before the presentation of the shop drawings.	By sub-contractors	Before the presentation of shop drawings
6. Communication problem: distance and time.	Written message asking for an appointment for verbal communication	By all parties involved	Minimum of one day
7. People are not talking to each other	All parties involved in a certain problem should meet, talk openly and reach a decision before the meeting is over	Parties involved in a problem	Immediately after the problem is identified
Category: design			
8. <ul style="list-style-type: none"> Define scope of work On site problems/site conditions Shop drawings and submittals 	<ul style="list-style-type: none"> Define scope of work of different subcontractors mainly electrical and mechanical subcontractors Site conditions to be brought up for attention Programme for shop drawings to be discussed 	Client Contractors All concerned	Prior to preparation of shop drawings In a timely manner To comply with requirement schedule

Category: health and safety			
9. Identify hazards and risks	All to discuss	All concerned	At commencement and periodically
Category: environment			
10. Work area restrictions	<ul style="list-style-type: none"> • Deliveries to the site? • Storage of materials? 		
11. Traffic permit	Contacts with the traffic dept, to ensure obtaining a permit and constant follow up for its renewal	By subcontractor	When needed
12. Neighbour's complaints	Major works that generate too much noise might need to be specifically planned	By main contractors	
Category: quality			
12. Very high standards <ul style="list-style-type: none"> • Quality • How will it be monitored and maintained 	<ul style="list-style-type: none"> • Proper verification • Supervision of execution 	Contractors and consultants	Full time supervision of work in progress
13. Time crashing v Quality of work	<ul style="list-style-type: none"> • Quality will <i>not</i> be sacrificed for time • Appropriate resources are required • Proper supervision & testing 	All parties All parties	As required according to schedule
14. Perceived non-compliance with quality assurance and quality control procedures	<ul style="list-style-type: none"> • Submittal of quality control plan • Review of quality control plan • Proper testing methods • Proper reporting methods 	All concerned	2 weeks before starting work and periodically
Category: programme			
15. Approval of shop drawings and various contractors' submittals	<ul style="list-style-type: none"> • Drawing submittal to be in an orderly fashion • Review of shop drawings 	All concerned	As per schedule, either in contract or to be agreed
Category: resources			
16. Specific problems to be discussed	<ul style="list-style-type: none"> • ??? 	Contractors and sub-contractors	Immediately

6. Follow-up plan

- 6.1 Team leaders
Indicate names and communication numbers

- 6.2 Partnering performance evaluation
 - 1. Communication
 - 2. Team spirit
 - 3. Respect for dead lines
 - 4. Availability of resources
 - 5. Availability of information
 - 6. Clarity, coherence and precision of documents
 - 7. Quality of work
 - 8. Meetings' efficiency and effectiveness
 - 9. Participants' actions with respect to requests for changes.

NameDate

7. Results of the partnering evaluation

8. Recommendations as a result of the partnering evaluation

*‘The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry’*

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