



## **PARTNERING – WAS MARRIAGE SO BAD AFTER ALL?**

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## **Spouse or partner?**

We start by observing a significant trend within society to by-pass the traditional commitment of a relationship through the declaration of marriage, by some mutual yet loosely defined agreement to ‘live together’.

This paper does not seek to judge society or to attempt to define the reasons for this social formula, except to suggest that it may be part of a broader rebellion against the constraints of prescribed solutions imposed by ‘the Establishment’ at large. Concurrently, there is a clear development of partnering relationships for the procurement of construction projects, which could also be understood as rebellion against the constraints of what used to be traditional contractual relationships.

So these two inter-relational developments may be comparable, but the reasons behind these otherwise complementary ‘paradigm shifts’ are far from identical. Paradoxically, whereas the drift away from marriage appears to be for the purpose of *reducing or avoiding* long-term commitment, the developing experimentation with partnering relationships in construction is arguably designed to *increase* long-term relationships – beyond those that are established merely for the life of an individual project.

We can examine the evolution of these developments within construction procurement, using the concept of marriage as a framework in the exploration of more ‘sustainable’ business relationships. From my study I suggest that framework agreements, negotiated through partnering relationships, can encourage the potential for longer-term associations, in spite of the apparently opposite social drift. The comparisons for construction partnering relationships, therefore, are much more with marriage than with merely ‘living together’.

I conclude by observing that the challenge of this development, for consultants and advisors as the marriage-brokers in this context, is to develop and encourage the use of positive agreements that contemplate successful marriages, rather than anticipating an inevitable divorce.

## **‘For better, for worse, for richer, for poorer ...’<sup>1</sup>**

In her SCL paper ‘After the Divorce – Problems with Partnering Agreements’,<sup>2</sup> Deborah Brown clearly concluded that expressions of intent to co-operate, whether expressly or implicitly incorporated in partnering agreements, have the effect of diluting the ‘protective certainty’ otherwise traditionally expected of construction contracts. This tension between two forms of agreement can be likened to the tension between wedding vows and marriage contract; various forms of agreement have sought to manage this relationship in construction between contract and charter in different ways, as we shall explore later.

Her argument was that partnering agreements should be expressly non-binding; in a simplistic analysis by a lay party, this appears to negate the very object of entering into such relationships. In the context of marriage, such an argument could cast serious doubt on the validity, or purpose, of the marriage vows themselves.

But there are more positive prospects, and it is worth considering three definitions of partnering that describe the genuine efforts to improve contractual relationships in construction procurement. Latham and Egan, of course, are both architects of the current change, and the RIBA has produced a concise analysis of the expected product of partnering.

First, the definition of partnering given by Sir Michael Latham in his report *Constructing the Team*,<sup>3</sup> which provides a striking exegesis of the marriage pledge ‘for better, for worse; for richer, for poorer’. Now over ten years old, the report described the nature of partnering thus:

‘... a contractual arrangement between the two parties for either a specific length of time or for an indefinite period. The parties agree to work together in a relationship of trust, to achieve specific primary objectives by maximising the effectiveness of each participant’s resources and expertise.’<sup>4</sup>

Then in the RIBA’s *Guide to Sound Practice*,<sup>5</sup> we find this hypothesis succinctly summarised:

‘The concept means that ideally all partners should benefit from the success of their collective efforts, and conversely be prepared to share the consequences of failure.’<sup>6</sup>

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1 Common Worship – The Marriage Service (London, Church House Publishing, 2000-2002), also downloadable from [www.cofe.anglican.org/worship/liturgy/commonworship/texts/index.html](http://www.cofe.anglican.org/worship/liturgy/commonworship/texts/index.html).

2 Deborah Brown, ‘After the Divorce – Problems with Partnering Agreements’ (Hudson Prize Winner 1999), Society of Construction Law Paper 86 (March 2001), downloadable from [www.scl.org.uk](http://www.scl.org.uk).

3 Sir Michael Latham, *Constructing the Team – Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (London, HMSO 1994).

4 See note 3, at paragraph 6.43.

5 Stanley Cox, *Guide to Sound Practice* (London, RIBA Enterprises Small Practices Series, RIBA Publishing 2002); obtainable via [www.ribabookshops.com](http://www.ribabookshops.com).

These descriptions support the proposition that the similarities under discussion are between a hitherto non-contractual partnering declaration and the formality of the marriage vows, undertaken to establish a legally acknowledged partnership.

Four years after Latham, Sir John Egan in *Rethinking Construction*<sup>7</sup> made a provocative recommendation:

‘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 constructor and employer is soundly based and the parties recognise their mutual independence, then formal documents should gradually become obsolete.’<sup>8</sup>

This was a quantum leap for the industry and was seized on by many, including Martin Howe of ‘Be Collaborative’ fame: he considered the current social trend to ‘live together’ in the context of construction and examined whether in fact there was any need at all for partnering contracts.<sup>9</sup> Howe compared traditional and partnering procurement options, concluding that, whilst traditional contracts tended to be backward looking and negative, partnering contracts looked forward in a positive, pro-active manner.

Partnering relationships should, of necessity, be established by equals but, as Orwell famously asserted in *Animal Farm*,<sup>10</sup> some partners are more equal than others. Latham’s recommendations suggested that in construction relationships maybe it should be the client who emerges as the dominant partner. Clients may have felt that their role as one of the principal characters of a wedding has been sidelined or ignored throughout the process of construction procurement. Their consultants and specialists have taken the lead roles of project management, leaving the client merely to pay the bills.

However, Latham also identified that clients were becoming increasingly diverse and therefore harder to consult or include, perhaps suggesting that their complaints were largely self-inflicted. To arrest this dissent and exclusivity, from whatever cause, Latham recommended that public sector clients generally should set an example by committing themselves to best practice. In particular, he proposed that the (then) Department of the Environment should be identified as the lead Department for implementing the recommendations of *Constructing the Team*, with a Government Construction

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6 See note 5.

7 *Rethinking Construction – The Report of the Construction Taskforce* (chairman: Sir John Egan), (London, DETR, 1998).

8 See note 7, at paragraph 69.

9 Bevan Ashford (now demerged into Ashfords and Bevan Brittan), ‘Who needs contracts? We’re partnering!’, Annual Construction Conference, Bristol, 9th May 2002 (unpublished).

10 George Orwell, *Animal Farm* (1945), chapter 10: ‘All animals are equal, but some animals are more equal than others’.

Clients' Forum (CCF) (1997-2003).<sup>11</sup> In parallel with these proposals, Latham also recommended the creation of a forum to represent private sector clients.

Thus Latham, commissioned by Government in 1993, squarely returned a responsibility back to Government to lead by example, and to implement strategies that would bring about the partnering arrangements that are now emerging, a decade later. The effectiveness of the Government's response is discussed later.

Egan and other commentators considered the supply chain arrangements in other industries such as automobile and aerospace production; the Nissan and Toyota experiences are often quoted to support a 'no-contract' culture.<sup>12</sup> Lean production techniques were introduced to improve quality and production performance, and close collaboration with local component suppliers has extended lean production techniques within the supply chain. Procurement processes have been made more efficient; for example, the supply of rear axles to Nissan is governed by a regular order for components, delivered up to five times a day. Quality and volume of delivery are closely monitored and both customer and supplier work together to minimise problems. This example illustrates a close, collaborative relationship which focuses on success, and has avoided the development of a 'blame culture' through traditional and onerous purchase order conditions which concentrate on identifying remedies for anticipated failure.

It is no coincidence, then, that the procurement of a new European car plant at Swindon for Honda in 2002 incorporated the best-practice project management tools and techniques of car production. The aim was to deliver on time, to quality and within tight financial constraints – an approach discussed by Richard Bayfield and Paul Roberts' SCL paper 'Insights from beyond construction: Collaboration – the Honda experience'.<sup>13</sup> This contains a shopping-list for all the collaborative and partnering skills that are the principles and practice so obviously encouraged by Latham and Egan.

In another SCL paper, Rudi Klein also examined the 'no contract' proposition, considering the rate of change of culture and behaviour within construction.<sup>14</sup> This may be compared with the social culture shift in relation to marriage, but Klein suggested that within the industry such changes may only be facilitated by the adequate provision of a necessary infrastructure. This is the essence of his argument for the retention and development of partnering contracts, whose role will be 'to reflect or echo such changes'. Even the Nissan supply chain arrangements have to operate under the protection of an annual negotiation of

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11 In January 2006 the OGC announced a new Public Sector Construction Clients' Forum (PSCCF), chaired by Sir Christopher Kelly: see [www.ogc.gov.uk/index.asp?id=1002882&app=press\\_release.asp&process=full\\_record&recordid=110](http://www.ogc.gov.uk/index.asp?id=1002882&app=press_release.asp&process=full_record&recordid=110).

12 See for example *Rethinking Construction* (note 7 and linked main text).

13 Richard Bayfield and Paul Roberts, 'Insights from beyond construction: Collaboration – the Honda experience', Society of Construction Law paper 119 (September 2004), downloadable from [www.scl.org.uk](http://www.scl.org.uk).

14 Rudi Klein, 'Do we need partnering contracts?', Society of Construction Law paper D27 (September 2002), downloadable from [www.scl.org.uk](http://www.scl.org.uk).

cost and quality issues, and the Honda experience used modified trade contracts to define expectations.

**‘... to honour and protect’,<sup>15</sup>**

In examining the necessity for partnering, we cannot ignore the landmark Court of Appeal judgment in *Baird Textile Holdings Ltd v Marks & Spencer plc*.<sup>16</sup> This in effect denied the existence of any ‘partnering’ obligation, despite an association between M&S and its supplier which had lasted for 30 years. Baird expected to be entitled to ongoing commercial and financial benefits from a relationship with M&S without the formality of a governing agreement, just as couples ‘living together’ might expect without the formality of marriage.

To the layman the *Baird* judgment has effectively excluded implied ‘squatter’s rights’ from partnering relationships; it upheld the first instance judgment that the courts will treat the parties’ conduct, even over many years, as creating obligations only in exceptional circumstances. In maintaining his argument for partnering contracts, Rudi Klein concluded that this judgment, in contrast to the aspirations of *Rethinking Construction*, upholds the need for contractual relationships to be established and publicised through traditional means; it may be seen as the *raison d'être* for the retention and development of partnering agreements as contractual declarations of commitment.

The other notable judgment cited by many commentators came from Judge Humphrey LLoyd QC in the TCC in *Birse Construction Ltd v St David Ltd*.<sup>17</sup> In particular this highlighted the significance of a partnering charter in determining the status of a proposed contract agreement. It established that the terms of the charter were important in providing the standards of conduct of the parties, although such terms may not have otherwise been legally binding. The partnering charter thus acquired an authority that would certainly bear examination and govern the conduct of the parties in the absence of any other agreement. Far from being non-binding, as Deborah Brown had proposed,<sup>18</sup> the charter was in this case a statement to be taken seriously as a declaration of assurance.

In his commentary on this judgment, Tony Bingham gave a typically incisive description of the partnering charter:

‘Perhaps the charter gives a context, a backdrop, a feel for the intentions of the parties against which the facts are set. The word ‘ethos’ crops up; it goes to the characteristics or spirit or attitude intended by a community of people or system of working within a contract. It may be that the courts of arbitrators will see fit to give effect to that ethos since that is what the parties intended. Partnering is not legally binding, but

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15 See note 1.

16 *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

17 *Birse Construction Ltd v St David Ltd* [1999] BLR 194, TCC.

18 See note 2.

smoke and mirrors, together with lubricant and glue, can make quite a difference.<sup>19</sup>

Tony Bingham discusses the implications of a charter, warning of the unintentional conferring of obligations and duties on partners in the legal rather than social meaning of the word, which therefore needs to be addressed. In particular, signatories to a partnering charter may not be able to enter into the building contract or appointment itself.

PPC2000<sup>20</sup> addresses this matter by the formal recognition of Partnering Team Members, and this approach has been acknowledged in the NEC Partnering Option, X12.<sup>21</sup> The Be Collaborative Contract<sup>22</sup> also recognises both the binding legal obligations of the parties to act collaboratively as well as the non-binding project-specific protocol requirements for successful business development.

### **‘I, M, take you, N ...’<sup>23</sup>**

So far there appears to be little case law or reported litigation to date concerning the status and consequences of partnering agreements within construction commercial procurement arrangements. Is this because there is limited experience to date, or could it be that ‘marriage vows’ expressed in partnering agreements have been accorded appropriate respect and importance, through a desire make the relationship last until ‘death us do part’?<sup>24</sup> Such limited precedent as has been reported would appear to promote the declaration of commitment to a partnering relationship, to extend the purpose of the agreement (perhaps) beyond mere ‘living together’. In this context, therefore, it is possible to examine the manner in which ‘marriage vows’ may be exchanged in the context of framework agreements and partnering relationships.

A number of attempts have been made to encapsulate the spirit or ethos of partnering within contractual arrangements, ranging from the non-binding partnering agreements favoured by Deborah Brown<sup>25</sup> through amended traditional standard forms to the new breed of partnering contracts now emerging. A brief overview of some of this variety now available follows.

#### **(i) Measured term contract**

The concept of term contracting has demonstrated team working and collaboration over a number of years, since without those attributes the output

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19 Tony Bingham, ‘Charters and partners’, *Building*, 14th May 1999.

20 Association of Consultant Architects, *Standard Form of Contract for Project Partnering (PPC2000)* (2000, amended 2003); obtainable via [www.ppc2000.co.uk](http://www.ppc2000.co.uk).

21 Institution of Civil Engineers, *NEC2 Partnering Option X12* (2001); downloadable from [www.newengineeringcontract.com/partnering\\_option/index.asp](http://www.newengineeringcontract.com/partnering_option/index.asp).

22 Collaborating for the Built Environment (Be), *Be Collaborative Contract (CC)* (2003); obtainable via [www.bcc.beonline.co.uk](http://www.bcc.beonline.co.uk).

23 See note 58.

24 See note 58.

25 See note 2.

objectives of a term contract could not be realised. This approach allows a central set of conditions and rates to be established, with the flexibility thereafter to issue individual works orders. It is argued that this simplifies documentation, which is also the purpose of strategic and framework agreements.

A major drawback of existing term contracts is the issue of turnover volume which, typically, is difficult to predict and is not normally underwritten. This will affect the economic effectiveness of the particular procurement method; in contemplation of this, a ‘break clause’ is normally included, effectively allowing one or other party to ‘walk away’. This will not normally be an aim or expectation of a strategic framework agreement or partnering agreement.

Both ACA and NEC have also recognised the benefits of partnering within term contracts. TPC2005<sup>26</sup> has now been published under the authorship of David Mosey, and the NEC’s new suite of contracts includes the TSC,<sup>27</sup> a cousin of the ECC. JCT 05<sup>28</sup> continues the tradition of term contracting within that family of contracts.

### **(ii) Defence Estates Prime Contract**

This is the Ministry of Defence response, developed through *Building Down Barriers*,<sup>29</sup> to the Egan challenges as implemented through *Achieving Excellence*.<sup>30</sup> The Regional Prime Contract used by Defence Estates requires a single Prime Contractor to design, construct and maintain projects in a particular geographical region, typically for a period of seven years, with options to extend to 10 years depending on the Prime Contractor’s performance. Four out the total five Regional Primes have now (2005) been established, but a funding crisis recently highlighted by the NAO may be disrupting continuity within individual programmes. The contract provides for open-book accounting, encourages collaborative working and innovation, and may require employers to provide (only) output specifications, rather than traditional ‘prescriptive’ specification constraints.

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26 Association of Consultant Architects, *Standard Form of Contract for Term Partnering (TPC2005)*; obtainable via [www.ppc2000.co.uk](http://www.ppc2000.co.uk).

27 Institution of Civil Engineers, *NEC3 Term Service Contract (TSC)* (2005); obtainable via [www.newengineeringcontract.com](http://www.newengineeringcontract.com).

28 Joint Contracts Tribunal, *JCT 05 Measured Term Contract (MTC)*, replacing the *JCT98 Standard Form of Measured Term Contract*; details and stockists obtainable via [www.jctcontracts.com](http://www.jctcontracts.com).

29 *Building Down Barriers – The Prime Contracting Handbook of Supply Chain Management* (parts 1 and 2, 1999), downloadable from [www.mod.uk/linked\\_files/sc-handbook.pdf](http://www.mod.uk/linked_files/sc-handbook.pdf); the Strategic Forum for Construction (SFfC) also offers a Building Down Barriers Toolkit online at [www.strategicforum.org.uk](http://www.strategicforum.org.uk).

30 See eg Office of Government Commerce, *Achieving Excellence in Construction – Building on Success* (2003), downloadable with many other relevant documents from [www.ogc.gov.uk/sdtoolkit/reference/ogclibrary/achievingexcellence/](http://www.ogc.gov.uk/sdtoolkit/reference/ogclibrary/achievingexcellence/); also National Audit Office, *Improving Public Services through Better Construction* (HC 364-I 2004-2005), downloadable at [www.nao.org.uk/publications/nao\\_reports/04-05/0405364.pdf](http://www.nao.org.uk/publications/nao_reports/04-05/0405364.pdf).

In their book *Contracting for Business Success*,<sup>31</sup> Cox and Thompson review this principle of Prime Contracting, commenting that a single-point responsibility relationship would be established where the main (Prime) contractor became the only interface with the client. They conclude that this would be an answer to the blight of fragmentation infecting the construction industry by providing a truly integrated first tier within the supply chain. In reality, single-point responsibility is being delivered via the Integrated Project Team, rather than the contractor acting in isolation. This approach is essential to ensure that the stakeholders – user-clients and other interested parties – are represented in strategic decision-making activities, which should facilitate collaborative change management and encourage partnering principles in practice.

The Integrated Project Team concept is championed in the *Defence Estates Summary Guide*,<sup>32</sup> although the *Guide* itself does not appear to have any contractual authority. The *Summary Guide* refers to the ‘Authority’s Integrated Project Team’ which, although a Prime Contractor interface is anticipated, may indicate a perversely partisan approach to integration. Ownership of this unique vehicle should not be seen to be held by one principal party alone.

### **(iii) PPC2000<sup>33</sup>**

This form, promoted by Sir John Egan, has attempted to marry partnering principles to contract conditions and is thus a clear response to the challenges of *Rethinking Construction*. The contract provides for transparent supply chain management to be maintained, and enables the principal partnering team members to be engaged by the employer in a mutually responsible disposition. This multi-party relationship may be a concept difficult for some to absorb, but is arguably essential in upholding a pragmatic delivery through partnering.

Value and risk management can thus be accomplished at the most effective stages of project development, and the establishment of the Core Team provides a strategic level of executive management, essential where a framework agreement is desired.

PPC2000 claims to be the first form to be specifically written for partnering purposes. Cox and Clamp describe it as:

‘... plainly worded and easy to read. However attractive the notion of a single contract bringing all-important parties together in a binding relationship is, inevitably this calls for an open and receptive mind. Contract administration and project management under it seem likely to prove demanding, but the contract has apparently been used in practice with successful results. ... The result is a substantial document, with a closely interlocking set of terms, which is complex and not immediately

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31 Andrew Cox and Ian Thompson, *Contracting for Business Success* (London, Thomas Telford 1998).

32 Defence Estates, *Prime Contract Core Conditions and Summary Guide* (2001).

33 See note 20.

easy to understand. Realistically the ACA advises that it should be used with the benefit of experienced legal advice.<sup>34</sup>

#### **(iv) NEC with Option X12<sup>35</sup>**

The New Engineering Contract was championed by Sir Michael Latham as an early answer to the problems he identified in *Constructing the Team*. His support is upheld by the declaration in the Core Contract that the parties will act in a spirit of mutual trust and co-operation. In the partnering context the NEC Option X12 aims to achieve results similar to the PPC2000 approach, so previous comments regarding partner relationships therefore apply in principle. The major difference, however, is that NEC is not designed to be a multi-party agreement, although partners are identified in the Schedule of Partners forming part of the Contract Data.

The standard NEC allows for selection of other options to establish the method of evaluation and payment, including two which are Target Contract based,<sup>36</sup> incorporating the incentive of shared savings as between actual and target cost. NEC's intention is to provide a procurement method for individual projects which can be adapted for a framework approach utilising the 'compensation event' mechanism to allow for the introduction of subsequent, discrete, projects or works orders. However, NEC3 now includes a new Framework Contract which has been developed expressly to address this situation.<sup>37</sup>

Both the partnering option and the Framework Contract provide for the use of common information systems, requiring partners to co-operate over the provision of information. Early warnings of matters likely to affect other partners are required to be given, an extension of a fundamental NEC core condition. The establishment of a Core Group is required which, like the Integrated Project Team of the Prime Contract discussed above, has become a 'trademark' of partnering relationships under varying forms of contract.

In *Which Contract?*, Cox and Clamp<sup>38</sup> describe Option X12 as an orderly way of bringing about partnering relationships through a NEC contract, by identifying the necessary actions within the partnering clauses of the option.

#### **(v) Non-binding partnering charter**

In its Practice Note 4 on Partnering,<sup>39</sup> the JCT included a non-binding Charter, specifically for single projects rather than to be used as any form of

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34 Stanley Cox and Hugh Clamp, *Which Contract? Choosing the appropriate building contract* (London, RIBA Publishing, 3rd ed 2003).

35 See note 21.

36 Institution of Civil Engineers, *NEC3 Engineering and Construction Contract, Option C: Target contract with activity schedule; or Option D: Target contract with bill of quantities* (2005); obtainable via [www.newengineeringcontract.com](http://www.newengineeringcontract.com).

37 Institution of Civil Engineers, *NEC3 Engineering and Construction Contract: Framework Contract (FC)* (2005); obtainable via [www.newengineeringcontract.com](http://www.newengineeringcontract.com).

38 See note 34.

39 Joint Contracts Tribunal, Series 2 Practice Note 4: Partnering (2001); obtainable via [www.ribabooks.com](http://www.ribabooks.com).

framework agreement. This allows a ‘Mission Statement’ to be articulated and acknowledged by members of the partnering ‘team’, which can extend beyond the parties to the stand-alone building contract. The JCT Charter proposes agreed aims and objectives that focus on delivery, people, teamworking and commercial. Clearly, these can be amended to suit the requirements and aspirations of individual project teams, whilst upholding the key elements of partnering.

These are identified in the Practice Note as:

- trust and respect
- commitment to mutual objectives
- co-operation through teamwork
- interdependence
- communication
- risk identification and management
- continuous improvement
- joint problem-solving.

A ‘non-binding’ declaration is incorporated in the Charter to exclude the establishment of ‘any relationship or agency’, which reflects the recommendations of Deborah Brown in her paper.<sup>40</sup>

The new 2005 series of JCT contracts has extended this concept through a Framework Agreement,<sup>41</sup> designed for use by anyone who anticipates procuring a significant volume of construction work or services. Like its predecessor it is not a ‘stand-alone’ document, but is designed to ‘clip on’ to most standard construction contracts, especially the new JCT 05 family. The JCT however, is obviously still aware of Deborah Brown’s arguments and cannot yet bring itself to provide a binding Agreement alone, so offers the Framework in both binding and non-binding versions. The significant difference between these two formats is in the area of dispute resolution: the non-binding version has no provisions, remaining in essence a ‘gentleman’s agreement’, whatever that is!

#### **(vi) The Be Collaborative Contract<sup>42</sup>**

Sponsored by ‘Collaborating for the Built Environment’ (Be), a one-time merger of the Reading Construction Forum and the Design Build Foundation,<sup>43</sup> this contract, written by Martin Howe, specifically embraces the partnering ethos necessary for successful framework agreements. Collaboration is identified as the Overriding Principle, intended to sit above all

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40 See note 2.

41 Joint Contracts Tribunal, *JCT 05 Framework Agreement (FA)* and *JCT 05 Framework Agreement (Non-binding) (FA/N)* (2005); details and stockists obtainable via [www.jctcontracts.com](http://www.jctcontracts.com).

42 See note 22.

43 See <http://www.dbfregistration.com/dbf>.

the other contractual obligations, and will be the benchmark used by any third party in the event of dispute referral.

Standard terms have been established and applied to individual purchase orders that, in turn, allow the specific details of an individual project to be negotiated and confirmed. Maximum price/target cost mechanisms are included which embrace collaboration and cost-saving incentives. This construction allows a Framework Agreement to be developed using the standard terms, with individual projects being authorised and ordered by issuing appropriate purchase orders.

A Project Protocol can be developed as an early task to set out joint aspirations concerning the overall project and to encourage the development of relationships between Project Team members. This provides an opportunity for expression, in ‘hearts and minds’ terms, of a Programme or Project Mission Statement.

Particular emphasis is given to early, collaborative, successful risk management, and the consequences of risk may be mutually identified and allocated in terms of responsibility, cost effect and time effect. Provision is made in individual purchase orders for the establishment of Key Performance Indicators that, in a long-term strategic environment, may be determined globally for implementation across the entire Framework activity.

The contract possesses an inherent expectation of integrated team working and collaboration. In particular, the opportunity is provided to identify and declare the roles of supply-chain members, and early involvement of construction and design project participants is encouraged to implement pro-active preparation and collaborative pre-planning. Currently this form is being considered for adoption by the JCT, who are proposing to republish it as the JCT Partnering Contract in response to market demands.

## **Marriage of convenience?**

The last contract the JCT published before the new Sweet & Maxwell JCT 05 editions was the Major Project Form (now the Major Project Construction Contract),<sup>44</sup> designed for use where experienced clients with robust existing procurement systems propose to engage experienced risk-aware contractors. This initiative was a response to the increasing number of bespoke amendments to the old JCT98 With Contractor’s Design form,<sup>45</sup> which did nothing for clarity and understanding.

Unlike the Be Collaborative contract, this new form unilaterally passes greater risk to the contractor, on the expectation that he will be afforded greater

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<sup>44</sup> Joint Contracts Tribunal, *JCT 05 Major Project Construction Contract (MP)* (2005) (formerly *JCT Major Projects Form (MPF03)* (2003)); details and stockists obtainable via [www.jctcontracts.com](http://www.jctcontracts.com).

<sup>45</sup> Joint Contracts Tribunal, *JCT 05 Design and Build Contract (DB)* (2005) (formerly the *JCT98 Standard Form of Building Contract with Contractor’s Design (WCD)*); details and stockists obtainable via [www.jctcontracts.com](http://www.jctcontracts.com).

flexibility in delivery. This will suit an output-specification prescription, but may not be appropriate for the expectations of a partnering relationship. The risk transfer principle adopted does not encourage the collaboration that is essential within a strategic framework relationship, and may endanger overall project team success. Value Engineering is proposed through the management of change, and there are mechanisms for shared savings as a result. This process does not, however, appear to be encouraged as a collaborative action, since design responsibility and production remains a primary obligation of the contractor.

Initial commentaries from lawyers seemed to champion the new form, with for example Ann Minogue of Linklaters and Julian Vickery of the British Property Federation welcoming it: '[It] offers the single-point responsibility for design-and-build procurement that is required. We think that it can ensure that design and build delivers what it promises.'<sup>46</sup> Andrew MacCuish of Hammonds, however, hopes that the new form will not be despoiled by heavy amendment, suggesting that, since the form 'addresses many of the needs of the employer whilst at the same time allowing for certain of the concerns of the contractor; this in itself may serve as a disincentive to amendment.'

This form is designed to procure individual projects, possibly under existing in-house procedures and protocols. The JCT's linked guidance<sup>48</sup> emphasises that it is specifically for the needs of experienced employers with their own in-house procedures for regular construction procurement. This may promote its use in a framework agreement for strategic delivery of multi-projects, but the clear risk transfer to the contractor may militate against a 'love match'.

## Arranged marriages?

The dogmatic and partial imposition of any of these agreements may suggest the less desirable characteristics of the 'arranged marriage', introducing the prospect of the 'in-laws' as the driving force behind particular procurement methods. In this regard, some attention should be paid to the otherwise honourable intent and encouragement of central Government, notably through the activities of the Office of Government Commerce (OGC).<sup>49</sup>

As the original inspiration behind the Construction Taskforce that produced *Rethinking Construction*,<sup>50</sup> central Government is championing the use of collaborative and innovative procurement methods in construction. In 1999 the OGC launched its action programme entitled *Achieving Excellence in Construction*,<sup>51</sup> aiming to improve the performance of central Government departments. This initiative set out a route map with challenging targets for

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46 Ann Minogue with Julian Vickery, 'Single cream', *Building*, 1 August 2003.

47 Hammonds Alert construction newsletter, July 2003.

48 Joint Contracts Tribunal, *JCT 05 Major Project Construction Contract Guide (MP/G)* (formerly *Guidance Notes for the Major Project Form* (2003)); details and stockists obtainable via [www.jctcontracts.com](http://www.jctcontracts.com).

49 See [www.ogc.gov.uk](http://www.ogc.gov.uk) for an overview of the OGC's activities.

50 See note 7.

51 See note 30.

Government performance in respect of standardisation, measurement, management and integration.

Arguably these targets may themselves become counter-productive. Standardisation, if taken to extremes, for example, can depress the enthusiasm and initiative essential for a healthy Value Management approach to partnering projects. Equally the establishment of irrelevant or unattainable KPIs can bring the whole measurement process into disrepute, as recently experienced within the health and education sectors.

In a parallel response to the *Rethinking Construction*<sup>52</sup> agenda, the Local Government Task Force was set up, to encourage local authorities to reconsider their procurement strategies. In particular, they were asked to ensure that construction projects were assessed against quality standards, whole-life costs and best value. No doubt here, then, of the desires of at least one set of parents, but are their offspring able to satisfy them? Local Authorities have been ‘timetabled’ to establish framework agreements and to institute the imperatives identified above, but are their motives honourable?

There is a danger that frameworks will be established, apparently innovative procurement policies will be published and arranged marriages will take place, merely to satisfy the whims of the parents rather than to develop the real partnering arrangements which would deliver best value-for-money projects. To date this may be sufficient to earn recognition for the individual local authority, yet it would fail to achieve the long-term objectives identified by the Local Government Task Force.

The ultimate test for these marriages will be consummation, and local authorities must be required to demonstrate in future that projects are *actually being delivered* under the framework agreements to recognise and resolve the issues and criticisms originally raised by Latham. The ‘Common Worship’ Marriage Service describes the purpose of marriage as ‘for the foundation of family life in which children are born and nurtured’,<sup>53</sup> and the true aim of framework agreements, like marriage, is to enable relationships to be fulfilled – through the procurement of individual projects under their umbrella. Failure to use the facilities, privileges and obligations of these arrangements will inevitably result in barren marriages. This consequence would be totally at odds with the expectations of the ‘parents’ promoting the marriage.

So the future of public sector partnering may well depend on implementation, although there needs to be a will. The *will* may ultimately be imposed; the *implementation* may be helped along by a new ‘Best Practice Toolkit’, Perform21,<sup>54</sup> endorsed by the Federation of Property Societies in Local Authorities. It has been developed to build on experience gained over many years of partnering within the local government sector, and to embrace central Government’s Best Value guidelines. Perform21 is an acronym for ‘Performance in the 21st Century’; its objective is ‘to utilise proven

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52 See note 7.

53 See note 1.

54 See [www.perform21.com](http://www.perform21.com).

construction Best Practice to deliver Best Value and disseminate the benefits and shared knowledge with other Local Government organisations'.

It uses a number of essential tools for collaborative procurement, including:

- best practice process maps
- a new form of public sector partnering contract
- internet-based collaborative software, to encourage the 'virtual project office' approach
- the support and advice of an 'experienced implementation team'.

The Perform21 contract itself includes a number of elements that have been previously innovated by recent partnering contracts. For instance, the flexible use of options is very reminiscent of the NEC family; Pre-start Agreements follow the PPC2000 concept of the Pre-Commencement Agreement; and the ability to use the same contract to secure contractor, consultant and sub-contractors was a particular selling point of the Be Collaborative Contract. Perform21 seeks to strip out the procedures from the underlying principles, which results in a slender volume of 12 pages of conditions, sandwiched between a two-page Agreement and six pages of Appendix information.

## **Hope over experience?**

It was Dr Johnson who described a second marriage as a triumph of hope over experience.<sup>55</sup> Some may view partnering in a similar light, but in this deliberately upbeat review of partnering some welcome and positive indicators have been identified. If Latham and Egan have given construction its last 'wake-up call', the evidence we have explored tends to confirm a willingness on behalf of the industry to respond positively. Whether as a direct response to *Rethinking Construction*,<sup>56</sup> as a result of pressure from the 'in-laws', or simply in response to a desire to improve relationships, the increasing adoption of long-term partnering procurement strategies should bring about the improvements urgently required.

The traditional position of marriage, generally based on trust rather than a formal contract, is at odds with the traditional position within construction based on mutual distrust and monitored by complex contract mechanisms. The partnering movement in construction is clearly aiming to close the gap between these two contrasting concepts. Contractual arrangements and framework agreements must be seen to be the facilitators of these intentions, providing guidelines for success, rather than merely expectant procedures for the consequences of failure.

In 2004 David Jones of Hammonds promoted the suggestion of a 'Single Project Lawyer' for partnering arrangements.<sup>57</sup> This role, rather like that of

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55 Dr Samuel Johnson, in *Boswell's Life of Johnson* (see the year 1770).

56 See note 7 and linked main text.

57 David Jones, 'The future role of lawyers in partnering projects', (2004) 15(4) Construction Law 6.

the ‘Partnering Advisor’ in PPC 2000 projects, could provide a seamless involvement, from inception through development, procurement, delivery and close-out, as well as administering a project-wide conflict-avoidance and resolution process. His conclusion was that, in the environment of partnering, this role was likely to be taken up by one professional or another and he suggested that the legal profession, with its codes of ethics and rules of professional conduct, was best qualified for the task.

Earlier I suggested that consultants and advisors could be identified as ‘marriage-brokers’. In addition, the skills of the marriage guidance counsellor will doubtless be called upon, and this is where the greatest paradigm shift may be required. Divorce really does have to be the last option, and the mediation and conciliation skills of the parties and their advisors must be deployed through the dispute resolution processes written in to partnering agreements to achieve reconciliation *within* the marriage.

‘It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.’<sup>58</sup>

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58 The Form of Solemnisation of Matrimony (Book of Common Prayer, 1662); downloadable from <http://justus.anglican.org/resources/bcp/england.htm>.

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