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Article

PARTNERING/ALLIANCING

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Abstract: Use of partnering in construction projects and legal issues involved, including partnering process, waiver and estoppel, privilege and confidentiality, fiduciary relationships, good faith, keys to success and possible improvements.

***218** Introduction

Partnering is one of the latest mechanisms being adopted by participants in the construction industry to avoid, or at least minimise, the incidence of disputes arising in relation to construction projects. Other names such as Alliance have been used but the concept is the same. Partnering, when it was first developed, was a form of "post-award" risk management and was non-contractual. Recently there is a trend to make the arrangement part of the deed between the parties in order to overcome some of the difficulties experienced with the earlier model.

Partnering was pioneered by the United States Army Corps of Engineers in 1988 and first trialed on a $70 million contract with FRU-CON Construction Corporation for the construction of a replacement lock and dam on the Black Warrior-Tombigbee Waterway in Tuscaloosa. The results of this test were excellent. An alternative version of partnering was used by the Army Corps of Engineers in conjunction with the Arizona Department of Transportation (ADOT) on the Rose Garden Traffic Interchange project in 1991. This technique has now been used by many organisations in the United States, United Kingdom and Australia.

Charles Cowan, the pioneer of the Partnering technique in the United States Army Corps of Engineers, wrote:

> "Partnering is about going back to the way people used to do business, and putting the handshake back into business. Partnering empowers those involved in the project with the freedom and authority to accept responsibility to do their jobs by encouraging decision making and problem solving at the lowest possible level of authority. It encourages everyone to take pride in their work and tells them it's OK to get along with each other."

"Partnering", as defined by the Construction Industry Institute, is a long-term commitment between two or more organisations for the purpose of achieving specific business objectives by maximising the effectiveness of each participants resources. This requires changing traditional relationships to a shared culture without regard to organisational boundaries. The relationship is based upon trust, dedication to common goals and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost ***219** effectiveness, increased opportunity for innovation, and the continuous improvement of quality products and services.

In the United States Army Corps of Engineers' Partnering Guide 1996, partnering is defined as a process by which two or more organisations with shared interests act as a team to achieve mutually beneficial goals. Typically, the "partners" are organisations that in the past have worked at arm's length, or have even had competitive or adversarial relationships. Partnering is not a legally binding relationship. But it does involve a commitment to:

- participate in structured, facilitated team-building sessions and joint training to acquire the skills needed to work together as a team;

• remove organisational impediments to open communication within the team, regardless of organisational affiliation;
• provide open and complete access to information (except information specifically excluded by law, regulations, or ethical requirements);
• empower the working-level staff to resolve as many issues as possible;
• reach decisions by consensus as much as possible, and when consensus is not possible, achieve resolution in a timely manner using an agreed-upon process for resolving disagreements;
• take joint responsibility for consultation with other affected agencies, groups, or individuals; and
• take joint responsibility for maintaining and nurturing the partnering relationship.

The United Kingdom H M Treasury Central Unit on Procurement Guideline 57 "Strategic Partnering in Government" (May 1997) defined partnering as "a managerial approach used by two or more organisations to achieve specific business objectives by maximising the effectiveness of each participant's resources." This approach is based on:

• shared mutual objectives and cornpatible benefits;
• agreed problem resolution methods;
• shared risks according to who can best manage them;
• an active search for continuous measurable improvements; and
• is a way of managing the client/supplier relationship proactively.

It goes on to state that "A partnering relationship is not a soft option. It requires significant input, both of time and effort, if the benefits are to be delivered."

Essentials of partnering

Partnering can either take the form of a long-term commitment between two parties or be restricted to a particular project. It does not require a written document to be effective. It springs from a commitment by the senior management of the participants to adopt a partnering approach to the administration of a project. There is no set format which the arrangement must assume but it embodies several important management principles including:
• teamwork can overcome organisational impediments;
• the team should be empowered down the line;
• the best approach to resolving disputes is to prevent them;
• shared responsibility involves shared risks and benefits;

• partnering requires open communication and flexible boundaries; and
***220** • partners maximise each other's resources.

It provides mechanism for co-operation between the participants to occur, so that energy-sapping disputation is removed, and productive working relations are carefully and deliberately built based on mutual respect, trust and integrity.

In the construction industry, this is a return to the old-fashioned way of doing business. Great emphasis is placed on mutual trust, and the goals of the project come before each party's agenda. Above all, partnering is an attitude. It is voluntary. It need not be legally binding. It does not necessarily alter the legal and contractual relationships between the parties to a project, but it can shift the focus of responsibility for problems from the individual to the team.

The key concepts in the statement are "voluntary" and "cost sharing". It is also important that the owners are prepared to delegate the necessary decision making power to their representatives in the partnering team.

The implementation process

Partnering requires a different organisation structure to implement. It is initiated immediately after award of the contract. Instead of having three separate teams each of whom works to the interest of his parent organisation, partnering is like setting up a "virtual" company with a single project team which has the responsibility to deliver the project to achieve the objectives. The team will work in a non-adversarial way for the best interest of the project, not the individual parent organisation. The self managed team is structured in three layers:

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- The principals' board is to set policy and objectives.
- The management team is empowered to deliver the project.
- The joint resource team is responsible for the implementation of the project.

Partnering is normally established through a facilitated process consisting of organised workshops attended by key participants from both parties to the contract. An outside facilitator is usually hired to lead the workshop that normally lasts two to three days. The process is designed to create a structured ***221** environment that develops the co-operative attitude and commitment needed to drive the partnering agreement.

On completion of the workshop, a partnering agreement (the charter) is drafted and signed by all participants to show their commitment to the team. The partnering agreement outlines a list of common project goals agreed to by all participants.

Several key elements to establishing a successful partnering relationship are:

1. early start;
2. commitment from top management on both sides;
3. appointment of a partnering representative on both sides;
4. selection of participants for the workshop(s);
5. selection of facilitator(s);
6. scheduling the workshop(s)
7. conducting the workshop(s); and
8. routine follow-up workshops.

The follow-up workshops are used to evaluate and re-establish the partnering commitment necessary from both parties.

The main purpose of creating this partnering relationship is aimed at creating a mutually beneficial relationship between all involved parties so as to produce exceptional results. In order to achieve this goal, the relationship between the owner and other members of the team has to involve a risk/reward arrangement through which all parties benefit in achieving exceptional performance. Such a relationship will allow all members of the team to focus and adopt a "best for project" approach, which then becomes the common project objectives so as to attain a win-win result.

The success of partnering depends on the following factors:

- the engagement of expert facilitators to support the development and execution of the partnering approach;
- a primary focus on win-win business outcomes for all involved parties using the "best for project" approach;
- an equitable balance of risk/reward for all involved parties and an opportunity to earn rewards commensurate with exceptional performance (a typical arrangement is shown below);
- a careful selection of partnering firms;
- a clear understanding of all parties' roles and responsibilities (including giving up the traditional, ad-

versarial approach of fault finding and blame-laying approach between the parties, that is, to foster the "no blame, no dispute" culture);

• open, straight and honest communication between all parties (that is, openness and trust, with open books, single filing system); and

• unconditional support from parent organisations.

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***222** A summary on the advantage and disadvantage of this form of contract strategy is presented in the Appendix.

Legal issues

Being a non-binding arrangement, and that the process is initiated after the award of contract, the partnering arrangement may inadvertantly affect the legal relationship and allocation of risk between the owner and the contractor. A commonly found assertion is that the contractual allocation of risk has been changed by conduct in the course of the partnering process. For this reason, Capelli [FN1] has summarised the following factors which must be considered carefully if parties to the partnering arrangement do not wish to compromise the rights conferred by the contract: waiver and estoppel, privileged discussions, confidentially, fiduciary relations and good faith. They should consider putting in place documentation which governs the partnering arrangement in such a way that its essential characteristic of mutual trust and confidence is preserved whilst, at the same time, minimising its impact on the formal contract.

Waiver and estoppel

During the partnering process, the contracting parties may make representations to each other which will not be consistent with the provisions of the contract, but upon which they will rely. So long as the arrangement proceeds amicably, this process may minimise disputation and increase efficiency and effectiveness. However, if the process breaks down and disputes arise, there will be an inevitable conflict between the requirements of the contract and the representations made in the partnering process. Parties in dispute may find that they are unable to enforce their strict contractual rights because of the operation of the doctrines of waiver or estoppel. This is likely given that, if the partnering process ***223** is to be effective, it requires parties to act in a manner consistent with achieving their mutual objectives which often will necessitate behaving in a manner different from that required or anticipated by the contract.

Accordingly, parties must take care during the partnering process to ensure that their contractual rights are not compromised. This can be achieved by incorporating a procedure in the partnering agreement which must be followed if, in fact, a party is to be denied the right to insist on performance in accordance with the contract arising from arrangements which may attract the operation of the doctrines of waiver or estoppel.

Alternatively, each agreement which alters the position which would otherwise exist under the contract should be recorded as an amendment to the contract, with the effect of this amendment being strictly limited to the factual situation under consideration.

Privileged discussions

On the other hand, statements made in the course of the partnering process are not privileged and could therefore be led as evidence in subsequent adversarial proceedings.

To ensure that good faith disclosures and concessions do not, in practice, become limited (and so the whole process frustrated) because of concerns that the statements may be used in future proceedings, the partnering documents should expressly address the issue.

Further, if discussions between the participants result in a variation to their contract or a discharge of an obligation under the contract, then the parties should ensure that the variation or discharge is appropriately documented. In that way, future arguments can be minimised. Once again, the partnering documents should provide a procedure for recording such variations.

Confidentiality

To ensure that the benefits of the partnering process are maximised, participants should be prepared to enter into the relationship on the basis of full and frank disclosure. The risk associated with such an approach is that it may involve the disclosure (whether intentional or unintentional) of confidential information, whether it be of a commercial, intellectual property, or other nature.

To ensure that such an open approach is not compromised by participants' concerns about confidentiality, the partnering documents should contain a confidentiality clause. That provision should protect confidential information disclosed by participants by prohibiting it from being disclosed to parties other than the participants and for purposes other than the partnering process.

Fiduciary relations

Parties to a commercial relationship will usually be governed by the terms of their contract and not by superimposed equitable duties. However, the Courts will impose fiduciary obligations upon parties to a contract if the relationship between them shows that they are putting themselves in a position where they are placing reliance upon each other to act in each other's interest. A joint venture agreement is an example of a contract where the joint venturers can have fiduciary obligations.

***224** Fiduciary obligations, effectively, impose on each party a duty to act in the best interests of the other parties to whom the obligations are owed. Consequently, a party under a fiduciary obligation must avoid any conflicts between its duty to others and its own self-interest and it must not misuse its fiduciary position for personal gains.

The parties to a partnering arrangement must consider whether, just as in the case of joint ventures, they owe fiduciary obligations to each other which impinge upon their freedom to act in their own self-interest.

Parties who wish to avoid the consequences of fiduciary obligations should do so by express provisions in the partnering agreement. A provision could be inserted which purports to totally exclude the possibility of those obligations from arising. Alternatively, if the participants decide that fiduciary obligations are consistent with the spirit of the arrangement, the agreement could define the scope of the obligations for the purposes of the partnering process.

Good faith

The introduction of partnering has created a debate on whether or not there is an implied positive duty to perform a contract in good faith for two reasons. First, partnering has been borrowed from the United States, a legal system which recognises the existence of the doctrine of good faith in contracting but not in the English common law world (although the Australian courts are putting more emphasis on good faith). Secondly, the very principles upon which partnering is predicated are consonant with good faith--mutual trust and confidence, open communication, shared objectives and dispute minimisation.

To avoid any doubt about the implication of such a duty, the parties should clarify the issue by express provision in the partnering document. Otherwise they may find that their "normal" contractual rights are unexpectedly altered by the partnering process.

Conclusion

It is unlikely that the standard conditions of contract forms are capable of meeting the needs for this new concept, partnering, which has the potential to lead to the construction of projects on time, within budget, and with minimal disputation. This is particularly true for major, high construction risk projects such as tunnelling when a very large sum of money can be at stake. These standard forms are normally not equipped to cater for successful partnering approaches because the traditional risk allocation and reward system do not match the partnering intent. The partnering documents should not only set out the systems and procedures to be adopted in the course of the partnering process, but also ensure that the conduct engaged in and representations made in the course of that process are used only for their intended purposes. In summary, the contract incentive must match and reinforce the win-win single team approach so that there is no conflict, for each party, between the "single team" intent and the individual party's commercial interests.

The success stories

The clearest illustration of partnering's success is the 1992 study done in relation to the United States Army Corps of Engineers. The study demonstrated that the ***225** average cost growth for partnered projects was 3.86 per cent as compared to 12.98 per cent for other projects, coupled with a reduction in claims from 4.86 per cent of the contract value to 0.67 per cent.

In the United Kingdom, Bovis (construction management consultant) and Marks and Spencers (retailer) have been described as forerunners in the development of partnering. British Airways Construction Group has partnered with Mace, a professional management company, to achieve improved efficiency. After initial problems, the relationship was recently reported to be working well. British Airways Property are also developing partnered relationships with Ferguson Bucknall Austin to provide facilities management support and with selected contractors for medium to long-term facilities maintenance contracts. Montgomery Watson Limited (engineering consultant) have promoted the partnering arrangement in Hendon Sewerage Treatment Works Project, Northumbrian Outfall Project, the Tunstall Western Bypass Project Phase II, Midland Bypass Project and the Pennington Wastewater Treatment Works Project and are involved in the promotion of this culture with a number of water companies in the United Kingdom.

Norwich Union (underwriter/financier) are also interested in partnering. Its objective is to identify and work with approximately four organisations within each category of service which it requires, so as to benefit from a closer working relationship.

The energy industry is keen on partnering as well. There has been a tradition of partnering in the North Sea (oil/gas industry) for several years. Brown and Root have successfully allied with BP and Total. The Forties Field is held out as a success story for partnering where the benefits are said to include better resource management, improvements in the delivery of materials, the removal of duplication and simpler processes.

Other experience of partnering

Whilst partnering would enhance the general working environment with a more co-operative attitude than may otherwise have occurred, it may not eliminate major disputation. Although small problems would be solved at a lower level, once major money is involved, the system may not work and the normal dispute settling procedures have to be used, which effectively removes the partnering concept.

One of the reasons for the failure of partnering is that the contractual mechanism does not match the intent of partnering charter. For example, the release of the NSW Department of Public Works and Services' new C21 contract in Australia was accompanied by rhetoric about seeking to change the culture of the construction industry by promoting cooperative contracting and partnering. But C21 is actually quite traditional in its risk allocations. Its inherently adversarial structure is quite inconsistent with the department's stated objectives.

Selection of the right contractor is also a crucial factor. As partnering builds on good faith and trust, an unscru-

pulous contractor can take advantage of the project owner's good will and use partnering as a "license to steal". It is mandatory to have a rigorous pre-selection process that only firms with demonstrated understanding and affinity for operating as a partner, and in particular, a record of cooperation, openness and trust.

***226** Another lesson learnt from the unsuccessful cases is that without the culture for "single team" working, the partnering agreement will fail. Team members must be given sufficient delegation from their parent organisation to implement the team approach for the best interest of the project, rather than finding faults of other parties in the team.

Application of partnering in government sectors

There are concerns that partnering may not be applicable to government sectors because government policy requires that all goods and services are procured by competition, the motivations of which are value for money and the competitiveness of the supplier. There is also concern that because benefits from partnering are not immediately apparent, it may not be able to stand scrutiny by the Director of Audit. Furthermore, some of the principles of long-term partnering run contrary to these aims. For example, a long-term relationship may be seen to create a barrier to new suppliers. It may also give the supplier/partner a commercial advantage to the extent that it can obtain lower finance on the strength of its government connections.

It must be borne in mind that partnering was in fact pioneered by the United States Army Corps of Engineers, which is a government agency. It is now accepted by the H M Treasury in the United Kingdom. Various state governments in Australia have also adopted this approach to major construction works.

Whilst any government procurement procedure is to obtain best value for money, the definition of value for money must be revisited in light of the problems experienced using the contractor's all risk and lowest lump sum approach as it is evident that the tendered, lowest lump sum only represents the lower bound of the final cost. In the United Kingdom H M Treasury Publication, "Setting New Standards--A Strategy for Government Procurement 1995," it is stated that "the assessment of best value for money must be based not only on price considerations but also on the quality of the bidders".

In another Treasury Publication "Construction Procurement by Government: An Efficiency Unit Scrutiny 1995" paragraph 241, the following guideline was given:

> We see scope for more long-term relationships especially with independent advisers, and on major works projects, as long as the initial competition conforms with those rules and the requirements of propriety and accountability. Such arrangements should contain performance-related break clauses"

Another Treasury Guideline, CPU Guideline No. 57 (first published May 1992, updated May 1997) states that "strategic partnering is likely to be more appropriate in the public sector where the clients' requirements are expressed as clearly as possible but are likely to develop or change and/or where the supply market is immature or not fully competitive. It is applicable to most types of government procurement but is especially relevant as an option to get best value for money in long term strategic contracts." It further states that according to research in the United Kingdom and United States, waste elimination using strategic partnering methodology may yield value for money benefits of up to 40 per cent. In order to comply with the competitiveness requirement, the guideline requires that a partnering relationship must be:

***227** • tested competitively;
• established on clearly defined needs and objectives over a specified period of time;
• include, from the outset, appropriate safeguards for genuine competition in the future; and
• capable of demonstrating continued value for money (VFM) throughout the contract period.

The United States Army Corps of Engineers have also published a comprehensive guideline, the "Partnering Guide" July 1996 which sets out the procedures to be adopted in partnering.

With regard to the "accountability issue" without the open, competitive tender, this can be achieved by having a third party estimator and possibility probity auditor involved in checking the estimate for the project owner and deeming it fair and reasonable (rather than lowest).

Hence there is a demonstrated trend that partnering can be applied to both private and public sectors in Australia, United Kingdom and United States and such partnering arrangements do in fact comply with government procurement procedures on openness and competitiveness.

Improvements to traditional partnering approach

The unsuccessful experiences on partnering highlight the drawbacks of the partnering approach such as post-award and non-contractual nature of partnering when the chosen partner is in fact not willing to honour his commitment in good faith, trust and openness. It is therefore necessary to make provisions in the partnering agreement to cater for these events.

The improvement is to make the agreement binding and form part of the contract. The project owner will select a "managing contractor", usually consisting of a consortium of contractor and consulting engineers. The owner then enters into a legally binding "joint venture" with the managing contractor to form a single delivery entity. An integrated team, which is built on the principle of integration rather than the traditional "man-marking" approach where the owner's personnel oversee contractor work, is formed by pulling the best available resources from each of the teams to deliver the project. The target price and schedule are agreed with risks and rewards shared between the parties according to the schedule.

In respect to the target price, this is determined early in the project (after the formation of the "joint venture"), the time required depends on the state of the owner's design development. The better the design information the sooner the estimate can be done. The owner pays the alliance partners for the estimating effort. With little design done it could take up to six months for the target estimate to be finalised. With good information, as little as three months could be achieved. Risk items need to be identified and a process for including them in the price or for separate reimbursement needs to be established early in the process. The principles of risk reward need to be in place before the contract is signed and work starts.

These improved arrangements are being used in the Sydney Northside Storage Tunnel Project. In addition to the pain/gain sharing in cost, other risk/reward schemes have also been incorporated in this project and it was found to be ***228** beneficial to the promotion of the overall project image. These included: safety, environmental and community benchmarks based on the schemes below:

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The project commenced in 1997 and is still under construction. As of to date, the arrangement performs satisfactory.

Conclusion

More owners are now aware of the need to share risks with the contractors in complex projects, especially when time for completion is a key concern, with cost overrun to be contained and managed. They now realise that contractors' risks will eventually become their problems. The adoption of a partnering ***229** arrangement which aims at aligning the owner's and contractors' interests together has proved to be successful in the United States, United Kingdom and Australia. Obviously the key factor to success is the willingness for the owner to share risks with contractors and delegate the necessary decision making power to the management team.

Appendix

Advantages and disadvantages of alliance/partnering contract strategy

Alliance/Partnering	
Advantages	Disadvantages
• Contractor involved in design process with an incentive to develop a design to deliver lowest cost in delivered cost.	• Final build established later in project
• Client changes incorporated at lowest cost at all phases of the project.	• Bid process for contractor complicated by "softer" selection criteria
• Owner can influence spread of subcontractors (and quantify any extra cost from such diversity)	• Cost overruns shared by all parties in proportion to their ability to influence outcome and carry the cost
• Non conventional contractual dispute resolution via "cooperative" contract document and management resolution process outside of delivery team to reduce distraction of project team. All members to focus on project delivery with common goals.	• Personal relationships can affect outcome. Management committee must be committed to ensuring a good working team. Trust is essential for optimum outcome. Flexibility essential.
• Cost savings shared by all parties in proportion to their ability to influence the outcome (and ability to absorb risk)	• Alliance team co-ordinates subcontractors and takes associated risks.
• Shortest delivery time, with contractor engaged	• Company and person-

al
earliest and involved in expediting al processes
parties

• Combination of cost plus contracts for contracts
mal
with ill defined details and/or high undefinable
risk to lump sum design and construct for clearly
defined components.

al

• Lowest level of duplication of resources as
design
reviews, QA and construction delivery provided by
the
"team"
• Senior management involvement throughout
project
to support project suc-
cess
• Most likely to get best combination of owner,
designer and contractor resources (with ability
to
include other groups to improve delivery)
• Remuneration (bonus) based on total project
performance (cost and/or schedule) to
meet
client's project needs. (Needs need to be defined
early). Bonus based on total project perform-
ance
not individual company performance.

culture of all

must be compatible.
• Better than nor-

rewards required to
drive better than
average results (both
Company bonus/project
and individu-

bonus/incentive)

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FN1. Capelli, S. "Australia--Construction: Partnering, Some legal Issues" Hieros Gamos Comprehensive Internet Sites for the Legal Profession (http:// www.hg.org) 1319 April-June 1994.

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