



**CONTRACT OR CO-OPERATION?
TRENDS AND CHANGES WITHIN
THE UK CONSTRUCTION INDUSTRY -
AN OVERVIEW**

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The story so far

It is nine years since Sir Michael Latham in his report *Constructing the Team* called for a new culture in the construction industry and for a new family of contracts to facilitate this change.¹ His report highlighted the need for a modern construction contract to include, among other things, duties of fairness, teamwork, mutual co-operation and shared financial motivation.

In 1998, in *Rethinking Construction* Sir John Egan's Construction Task Force pointed to substantial improvements that could be achieved in the procurement of projects through the integration of the team and the procurement process.² These are means not only to eliminate the deeply embedded blame culture that so easily triggers construction disputes, but also to improve efficiency, eliminate waste and maximise best performance from all project team members.

The Egan recommendations offered incremental commercial benefits not only to the client but also to other team members, by way of reduced costs, reduced time, reduced defects, reduced accidents, increased predictability, increased productivity and increased turnover and profit. Something for everyone! The Egan report also identified partnering as the medium to achieve these benefits, both as to integration of the team and as to integration of the procurement process.

Since that time, a number of bodies have worked very hard to implement the Egan recommendations. These include the Movement For Innovation, the Housing Forum and the Local Government Task Force, all of which came under the banner of *Rethinking Construction* and are now merged with the Strategic Forum under the joint banner of *Constructing Excellence*. These bodies have supported demonstration projects in a wide variety of fields and have examined closely the means by which to bring the Latham and Egan recommendations to fruition.

1 Sir Michael Latham, *Constructing the Team*, Final Report, HMSO, July 1994.

2 *Rethinking Construction, The report of the Construction Task Force to the Deputy Prime Minister* (the Egan Report), Department of Transport and the Regions, July 1998, available at www.m4i.org.uk (see publications/reports).

Significantly, construction reform has been supported by the Treasury through a variety of policies and guidance notes, and by the National Audit Office through its own reports on procurement (for example *Modernising Construction*³) and through its encouragement of district auditors to analyse and support the achievement of best value rather than to focus only on lowest cost. There is a significant sea change in public sector and private sector procurement in the UK, and this has had an enormous impact on the way that the industry bids for its work and implements its projects.

Any sign of results?

The Egan report invited measurement of the effect of its recommended changes, and it could be said that the development of key performance indicators (KPIs) for this process has become an industry in itself. Although one of my colleagues used a farming metaphor in relation to KPIs to suggest that ‘you can’t fatten a pig weighing it’, it is equally true to say that unless changes are measured as to their impact there is no means of demonstrating that they are worth the effort required to bring them about.

An illustration of the significant achievements secured through construction reform appears in *Accelerating Change*, where statistics confirm that the several hundred demonstration projects for 2001 achieved significantly better results than the industry average against all of the headings of cost, time, defects, accidents, predictability, productivity and profitability.⁴ Examples of the demonstration project results over a four year average include:

- client construction cost 6% lower than industry average;
- project accident rates 61% lower than industry average;
- profit 2% higher than industry average.

What role for a contract?

Early partnered projects were achieved using (and probably in spite of) whatever contractual regimes were available, or alternatively attracted client investment in bespoke contract forms. As more organisations became interested in partnering, questions started to arise as to whether it was appropriate for the language and the terms of the contract to be either bespoke or entirely different from the practical arrangements encouraged and established between partnering team members. The risk was perceived (and proven in numerous cases) to be that there is a temptation to revert to the adversarial and self-serving provisions of standard form contracts at the first sign of trouble, and that this is a risk of moving partnering and collaborative working into the mainstream of project procurement.

In late 1999, the Construction Industry Council (CIC) set up a Partnering Task Force under the chairmanship of John Wright (then president of the

3 *Modernising Construction*, report by the Comptroller and Auditor General, January 2001, available at www.nao.gov.uk/publications (HC87).

4 *Accelerating Change*, A report by the Strategic Forum for Construction, September 2003, available at www.m4i.org.uk (see publications/reports).

Association of Consultant Architects) to examine ways in which partnering could be made more accessible and more sustainable to clients, constructors, consultants and specialists across the industry. The CIC recommended unambiguously that a new, team-based partnering contract was necessary and that: ‘An effective partnering contract should support the full partnering team and aim to deliver an integrated project process. Logically, it should replace any of the existing standard contract forms’. This was a radical proposal that led directly to the development of the PPC 2000 Standard Form of Project Partnering Contract and to NEC Option X12, both of which are discussed below.

The *CIC Guide to Project Team Partnering*, launched by Nick Raynsford MP (then Minister for Construction) in 2000, and in its second edition launched by Sir Michael Latham in 2002, states that: ‘An effective contract can play a central role in partnering. It sets out the common and agreed rules; it helps define the goals and how to achieve them; it states the agreed mechanism for managing the risks and the rewards; it lays down the guidelines for resolving disputes.’⁵ The *Guide* also emphasises that: ‘A contract should not encourage a self-serving or adversarial stance or a battle with other team members for the benefit of one party.’

In the early development of partnering in the UK construction industry, there have been a number of half-way house measures intended to attach partnering relationships/process/controls to more traditional contractual structures. These have often taken the form of ‘partnering charters’, whether binding or non-binding on the team members who sign them, although the courts (eg in *Birse v St Davids*⁶) have thrown doubt on whether a ‘non-binding’ charter is actually what it claims.

In recommending a new form of partnering contract, the *CIC Guide* states that: ‘For the avoidance of doubt, what we are talking about is a legally binding contract and not a non-legally binding charter or any equivalent ... While it is recognised that partnering charters have served a valuable role, the time is right to see a fully integrated approach, so that the relationships and processes required for effective partnering are not at odds with the contractual rules and relationships of partnering team members’.

In terms of the industry’s view of such a move, the *CIC Guide* refers back to an earlier report of the Housing Forum ‘*How to Survive Partnering – It Won’t Bite*’ which published the result of a wide-ranging industry survey with the following comment: ‘There was almost unanimous agreement that partnering agreements should be in place early in the project and that these agreements should be formalised and eventually merged with contracts’.⁷

5 *A guide to project team partnering*, 2nd edition, Construction Industry Council, 2002.

6 *Birse Construction Ltd v St David Ltd*, unreported 12th February 1999, TCC; 1999 CILL 1494.

7 *How to survive Partnering – it won’t bite*, The Housing Forum, 2000, available at www.thehousingforum.org.uk (see publications/reports).

What contracts so far?

PPC 2000

PPC 2000 is the only published form of project partnering contract,⁸ and was launched by Sir John Egan in September 2000 when he described it as, ‘a blow for freedom’. Sir Michael Latham in turn has described PPC 2000 as, ‘The full monty of partnering and modern best practice’. The key features of this form of contract, which are derived directly from the heads of terms recommended by the CIC Partnering Task Force, include the following:

- A single multi-party contract for the entire partnering team, signed by the client, the constructor, the consultants and key specialists (ie subcontractors/suppliers/ sub-consultants);
- A single contract governing the pre-construction phase as well as the construction phase of a project, therefore signed at a much earlier stage, with pre-conditions to be satisfied before the project can proceed on site;
- Partnered mechanisms (in particular during the pre-construction phase) for the development of design, supply chain arrangements, open-book prices, and joint risk management;
- Partnered mechanisms to support the partnering team throughout the life of the project, through open communication (including early warning of problems), measured performance (against agreed KPIs and targets), and incentivisation;
- Problem-solving mechanisms and alternative dispute resolution techniques.

PPC 2000 has been adopted on over £5billion of projects in both the private and the public sector during the three years since its publication.

NEC Option X12

Peter Higgins of the New Engineering Contract (NEC) Users’ Group sat on the CIC Partnering Task Force and it is fair to say that NEC were faced with a dilemma. They had published a successful suite of contracts, endorsed by Sir Michael Latham in 1994, yet they supported in principle the greater integration recommended by the CIC *Guide*. The result was the publication in June 2001 of the NEC Partnering Option X12 which has the following features:

- It is a brief document that needs to be added to each of the two-party NEC contracts (namely the ECC Building Contract, each NEC Professional Services Contract and each ECC Sub-Contract);
- The client and its project manager need to ensure that all NEC contracts are consistent and that all team members are aware of each other’s roles

⁸ See also David Mosey, *PPC 2000: The First Standard Form of Contract for Project Partnering*, a paper based on a talk given to a meeting of the Society of Construction Law in London on 3rd April 2001, September 2001, available at www.scl.org.uk. (paper no 95).

through the medium of a schedule of partners set out in NEC Option X12;

- Option X12 leaves open for agreement a number of matters that are specified in PPC 2000, for example arrangements for partners and core group meetings, arrangements for joint design development, value engineering and value management and arrangements for risk management;
- NEC Option X12 does not present itself as a multi-party contract or a single contract for the project process. It depends on individual two-party contracts being concluded between the client and main contractor, the client and each consultant and the main contractor and each subcontractor. For engagement of the main contractor during the pre-construction phase, it also depends on the award to the contractor of a separate Professional Services Contract in advance of an ECC Building Contract;
- The NEC take the view that the success of their published suite of contracts in securing project results and avoiding disputes means that a wholesale restructuring was not appropriate, and that Partnering Option X12 was the best way to recognise and document the Egan report recommendations.

Other initiatives

A two-party standard form contract known as the Be Collaborative Contract, was published on-line on 12th September.⁹ It is suitable for arrangements between the client and main contractor, client and consultant or main contractor and subcontractor. This contract focuses in particular on risk management and seeks to simplify the language of a variety of other standard forms.

The Joint Contracts Tribunal, as the publisher of the most used construction contracts in the UK, have released Practice Note 4 with a standard form Partnering Charter, but have not published or proposed the use of any project partnering contract. It is understood that they have a working group considering this possibility.

Finally, it is worth noting that in 2000 the Government published an amendment to their construction contract GC/Works to reflect recommendations of the Government Construction Clients Panel. This introduced supplemental clauses dealing with risk management, whole-life costing and value engineering.

⁹ See www.beonline.co.uk.

Practical pitfalls to partnering

Having advised on over 100 partnered projects in the last five years, I have seen where the apparent adoption of a partnered approach can fail to achieve its objectives. Examples of these problems include:

- Intoxication with the change in culture, such that team members believe they can ‘take their hands off the controls’. Design and construction remain a high risk process with narrow financial margins, and there is no sense in which partnering should encourage sloppiness or woolly thinking if it is to achieve the desired results.
- Delays in team formation which mean that the benefits of early constructor and specialist subcontractor involvement are lost. If the design consultants hold onto the procurement process for too long, there is simply not enough opportunity for a main contractor or any of its subcontractors to contribute meaningfully to design development, open-book pricing or risk management – and a supposed partnering project gets shoehorned into a very short pre-construction phase and a very unexciting result.
- Lack of genuine commitment on the part of any partnering team member, which can undermine collaborative working. Cynics as to the potential for change can breed an atmosphere of suspicion and uncertainty which means that good ideas are not shared and problems are not brought to other team members’ attention.
- Failure to clarify new relationships/processes (ie through contracts), so that the parties can allow fundamental misunderstandings to persist. It is remarkable how team members can walk out of a meeting with a different recollection of what took place, hence the danger of relying on the differing interpretations of partnering that can emerge if a mutual understanding is not properly documented.
- The absence of timetables, so that (for example) creating a contract to govern the pre-construction phase processes cannot actually define any measure of their efficient progress. Clarity of who does what and when is essential to effective collaboration and the avoidance of misunderstandings/missed deadlines/wasted resources.
- Lack of clarity in treatment of cost or risk which can lose sight of the reasons why project partnering was recommended by Sir John Egan in the first place. Open-book costing to reveal (and hopefully secure) profit, and joint risk management (with an action plan intended to reduce risk and its attendant cost), are the best ways to test the extent to which the team is actually committed to a partnered approach.
- Failure to align partnering with contractual relationships/processes, leaving the risk of ‘parallel agendas’ whereby the contracting parties will revert to their contracts at the first sign of trouble, and can use as an excuse the recommendations of their advisers, the requirements of their professional indemnity insurers and the duty owed to their shareholders to protect corporate self-interest.

And in conclusion ...

Partnering is now a 'mature approach to procurement'. The honeymoon unquestioning enthusiasm is over and to sustain and embed partnering in the UK construction industry it is not sufficient for partnering teams only to rely on simplistic expressions of mutual enthusiasm.

Worse than that, use of the wrong contracts can undermine co-operation by creating divisions and by neglecting the techniques needed to ensure the intelligent treatment of problems and challenges when they inevitably arise.

The right contracts, on the other hand, can facilitate and support effective partnering in the ways that the CIC Partnering Task Force recommended, namely:

- Defining goals and how to achieve them;
- Stating agreed mechanisms for managing risks and rewards;
- Laying down guidelines for resolving disputes.

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

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