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BOOK REVIEW

Partnering and Alliancing in Construction Projects. By Sally Roe and Jane Jenkins.
London: Sweet & Maxwell. 2003. 210pp. + Appendices, Index and Tables.
ISBN 0-421-74040-X. Hardback. Price £125.

Partnering has a long history although it was never recognised as such. Organisations and companies have always preferred contractors whom they could trust and *vice versa*. The essential elements of partnering have been present whenever those responsible for a project work together as a team. Cost control was not normally top priority. The advent of competitive tendering and its equation with value for money precludes such elements. But even in the public sector collaboration continued where necessity dictated, such as work in wartime, or defence or other work of national importance. Partnering was present before any contract was negotiated—indeed there might never be a contract. The authors refer early on to *Baird Textile Holdings Ltd v. Marks & Spencer plc* [2001] EWCA Civ 274 which concerned the sad consequences to the claimant of trusting the latter and not having a contract. It is salutary to recall that with great success Marks & Spencer pioneered with Bovis Ltd the fixed fee form of contracting in which the contract documents were at times nominal. In an instructive and valuable Foreword Mr Bob Scott recalls the advantages to BP and the contractors involved of an alliance developed in the 1990s for a North Sea project. This was a natural development of trends in the oil industry which has rarely forgotten that pre-planning and co-operation pay dividends and that it does not usually pay to fall out with someone (and certainly not irretrievably as one never knows when they might be needed again).

However, as this excellent work notes in its first chapter, partnering in the form discussed in it traces its origin to the United States where partnering was developed over 20 years ago by the US Army Corps of Engineers. It is now a key feature of the way in which the Corps operates. Its aims are to reduce conflict and to resolve problems by discussion and ADR. Whereas the focus was originally on improving relationships with contractors, it was found that the principles of partnering could be applied to others and to every project. In a country so litigation-minded as the United States I found striking evidence of the success of partnering: in Bruner & O'Connor's massive and definitive seven-volume treatise on *Construction Law* there does not appear to be a single case on a partnering contract.

That does not of course mean that lawyers as eminent and experienced as Sally Roe and Jane Jenkins should not have written about partnering or alliancing. Both are partners in the construction and engineering group at Freshfields Bruckhaus Deringer. Sally Roe is the head of the group. Notwithstanding the changes in attitude brought about by initiatives such as the New Engineering Contract (now the ECC) we have not yet reached some

nirvana where participants to a project contract, if that be the word, on the back of the proverbial envelope and where lawyers are both absent and never needed thereafter. We have not even got to the stage where a single neutral lawyer is retained from the genesis of the project to advise the participants. If partnering is to work as each participant would wish, each must be alive not just to the role of every other and to their expectations and to their limitations, whether actual or imposed. This work admirably contributes towards those objectives and no prospective participant should be without it.

The work begins with two general chapters about the nature of partnering and alliancing and their historical development. (As the latter may be no more than a synonym or variant of the former (or the other way about), I shall refer only to partnering to cover both concepts.) The third chapter outlines the structures. It is at this point that the authors lay the foundations for the later chapters since they are at times quite critical of some of the terms and terminology used. Thus they signal that it is unwise to enter into a partnering arrangement by postponing difficult decisions about known or likely problems and using imprecise if well-meaning formulae. They also introduce the reader to documents which have recently been introduced for use in the United Kingdom (in which the work is primarily for use), e.g. the first multi-party partnering contract PPC 2000, the Non-binding Charter produced by the Joint Contracts Tribunal, and the NEC Partnering Option and the ICE Partnering Addendum. (The work does not cover the Be Collaborative Construction Contract or the consultative draft of the Movement for Innovation (M4I) Model Form of Partnering Contract for a Virtual Company.) It also sets out points that need to be borne in mind in considering corporate and other structures. The chapter refers to the very useful Appendices. Appendix A is a checklist; Appendices B, C, D and E set out the text of the relevant contract forms and the JCT's Practice Note.

Chapters 4, 5 and 6 examine the requirements for a Works Contract in relation to the choice of form, payment terms and specific contract terms. Each has comparisons with the model forms so as to bring out the points that matter in each. Thus prospective participants are thoroughly educated in the objectives. Chapter 7 deals with the interpretation of contract terms. The authors prudently do not lead the reader to believe that partnering arrangements will necessarily be interpreted in an innovative manner. A number of the judicial decisions which they provide suggest to the contrary. This is again important. It should not be thought that a tribunal will make good imperfections or to be able to divine with confidence the parties' unvoiced thoughts. The moral must be to leave little or nothing to chance (or as the authors discuss, in the aptly numbered chapter 13 on dispute resolution, to devise a suitable way to prevent or cure difficulties, rather than relying on a customary forum). As the authors later say, there are significant legal uncertainties about the meaning of the core obligations as expressed within the NEC partnering option and PPC 2000.

Chapter 8 covers the vital subject of "Information Flows" which is perhaps

the best illustration of where pious hopes founder. The authors wisely note that problems may be averted by the use of electronic data transmission. Maintaining programming in real time seems now essential to any but the simplest project. Chapters 9 (Intellectual Property Rights) and 10 (Competition Issues) complete the range of relevant issues.

Chapters 11 (Procurement Issues), 12 (Staff Issues in Partnering) and 13 (Dispute Resolution) cover matters that bear directly on the success of partnering but which can be neglected as they are about the actual design and execution of the work. The authors draw particular attention to the unsuitability for partnering of the UK system for the compulsory adjudication of disputes (unless the project falls outside or is exempt from the scope of the system). In their final chapter the authors look, somewhat too briefly, to the future. In fact they look mainly at the present, in the form of experience in Australia and the United States.

The candour and realism of Sally Roe and Jane Jenkins is perhaps best seen from their first conclusion: "... partnering has yet to live up to its excellent reputation. It has been heralded as a radical way of improving results but ... its impact has yet to be felt" Forms of contract cannot change attitudes but they can fulfil the parties' aspirations. Subject to developments in the fields of procurement and competition the flight from competitive tendering could well continue and thus partnering may come into its own. This guide to its concepts and implementation is and should remain invaluable.

HUMPHREY LLOYD

BOOKS RECEIVED

Amongst the books that we have received the following may be noted. Pressure on space precludes a fuller review at present.

Evaluating Contract Claims. By R Peter Davison. Blackwell Publishers Ltd. 2003. 272 pp. ISBN 1-405-106360. Hardback. Price £49.50.

The Application of EC Law in Arbitration Proceedings. By Dr Natalya Shelkopyas, University of Tilburg. Europa Law Publishing. 2003. 488 pp. ISBN: 9076871167. Hardback. Prices €89, US\$99, £62.