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Unity in diversity: current trends in Alliance contracting in the UK

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Who are we?

- A full service, independent, commercial law firm based in the City of London
- An adviser to FTSE-listed, national and international businesses, including many household names
- A Top 10 UK Firm for client service in The Legal 500's Client Service Awards 2019
- International construction practice

Experience of advising on Alliancing contracts

- London Underground PPP
- Network Rail Staffordshire Alliance - the first “pure” alliance in the UK rail industry
- Numerous contracts based on PPC2000 and alliancing hybrids

Snapshot of alliancing in the UK

- Early alliance contract used by BP in the 1990s for Project Andrew
- More recently embraced by major clients including
 - Network Rail
 - Water companies (Thames Water, Anglian)
 - National Grid (Substations)
- Project 13
- Focus of this presentation: liability and risk/reward regimes

PPC2000 (current edition published in 2013)

- First widely used multi-party contract in the UK
- Used extensively by UK housing associations and the Ministry of Justice
- Collaboration at the heart of the form:

Clause 1.3 Roles and responsibilities

“The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Project.....”

PPC2000: A potential claims environment

- PPC 2000 does not create a “no claims” environment:

“Clause 22 - DUTY OF CARE AND WARRANTIES

....each of the Partnering Team members shall use reasonable skill and care appropriate to their respective roles, expertise and responsibilities..[]... and shall owe each other such duty of care in respect of all their agreed obligations....

Each of the Partnering Team members stated in the Project Partnering Agreement shall provide or obtain for the benefit of each of the parties stated...[]...collateral warranties in the specified forms...”

- Exposure to cross claims

PPC2000: Disputes/ Problem-Solving Hierarchy

- First step: attempt by named individuals to agree resolution;
- Second step: non-binding conciliation and/or adjudication under Construction Industry Council Model Adjudication Procedure
- Third step: arbitration

PPC2000: Payment

- Traditional “bi-party” arrangements based on payment terms agreed between the Client and the respective Partnering Team members
- Parties can agree shared savings, shared added value and pain/gain Incentives based on achievement of Targets - all to be agreed on a project by project basis.

FAC-1: Framework Alliance Contract

- Published by Association of Consultant Architects in 2016
- Limited feedback/not widely taken up to date
- Key difference from PPC2000 is that the FAC-1 is a contract which
 - sets out a framework for the award by the Client of separate Project Contracts with Alliance Members
 - overlays these with additional “alliance” obligations

Clause 1.1 Alliance Members

“The Alliance Members shall work together and individually in the spirit of trust, fairness and collaboration for the benefit of the Framework Programme.....”

FAC-1: A potential claims environment

- FAC-1 does not create a “no claims” environment:

Clause 10 DUTY OF CARE

10.1 “...the Alliance Members shall use reasonable skill and care appropriate to their respective roles, expertise and responsibilities..

10.2 “...the Alliance Members shall owe each other such duty of care in respect of all their agreed obligations....

- Exposure to cross claims

FAC-1: Disputes/ Problem-Solving Hierarchy

- Right to refer disputes to adjudication is recognised where the governing law provides a statutory right to adjudicate
- First step: attempt by named Core Group and involved Alliance Members to agree resolution;
- Second step: reference to Dispute Board (non-binding unless parties agree otherwise) or conciliation
- Third step: arbitration or litigation

FAC-1: Payment

- Most payments are assessed and paid under Project Contracts, not FAC-1
- Only payments to the Alliance Manager and for Alliance Activities payable under FAC-1.

Network Rail Project Alliance Agreement (NR21)

- First downloadable UK alliance agreement published by major UK Client
- Used as a basis for a number of NR major projects
- Follows Australian model
- Agreement to act in Good Faith and in accordance with Best for Project approach
- Commitment to “no blame” culture
 - *Clause 6.2: No litigation, arbitration or adjudication*
“Subject to clause 6.4, the Parties agree that there will be no litigation, arbitration or adjudication between them arising out of or in connection with this Agreement.”
- No liability for losses incurred by NR as a result of
 - delayed Completion (clause 25.7)
 - Latent Defects (clause 26.5)

NR21: Carve-outs from “no claims” environment

Carve-outs under Clause 6.4:

- Wilful Default
- Claims which cannot be excluded under law
- Breach of Statutory Requirements except where covered by insurance
- Owner’s payment obligations
- Insurers’ subrogated claims [may be deleted if Owner’s insurers consent]
- Indemnities under the Project Alliance Agreement, notably
 - Non-compliance with insurance obligations
 - Wilful Default
 - Infringement of third party IPRs

NR21: Payment

- Entitlement to be paid Reimbursable Cost plus Fee
- Pain or Gain to be shared on a collective “win together, lose together” basis
- Details of Risk or Reward Regime set out in relevant Schedule based on NOPs’ tender proposal

NEC4 Alliance Contract (published in June 2018)

- First standard form alliance contract following Australian model published in UK for cross-industry use
- Limited feedback/not widely taken up to date
- Agreement to act in a spirit of mutual trust and cooperation and to work collectively on a best for project approach

Clause 94: No claims

“The members of the Alliance agree that any failure by a member of the Alliance to comply with their obligations...does not give rise to any enforceable right or obligation at law except for an event which is a Client’s or Partner’s liability....”.

- No liability for
 - delayed Completion or
 - latent Defects?
- Position not as clear as NR Project Alliance Contract but no claims may be pursued unless listed in the Contract Data as additional Partner’s liabilities

NEC4 Alliance Agreement: Exceptions to no claims environment

- Client's liabilities
- Partner's liabilities

NEC4 Alliance Contract: Resolving and avoiding disputes

- All disputes to be resolved by Alliance Board.
- Process for reference to independent expert - opinion is advisory only and/or to Senior Representatives
- No reference to English courts having jurisdiction but this cannot be ousted.
- Ditto statutory right to refer disputes to adjudication cannot be ousted.
- Courts/adjudicators will enforce “no claims” provisions

NEC4 Alliance Contract: Payment

- Entitlement to be paid Defined Cost (excluding Disallowed Cost) plus Fee
- Pain or gain to be shared on a collective “win together, lose together” basis
- Details of risk or reward regime set out in Performance Table in part one of the Contract Data



CONCLUSIONS

The Million Dollar Question...

What works best?

Q & A

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