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STANDARD FORMS:
STANDARDISATION, BASTARDISATION AND THE VIRTUAL CONTRACT

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INTRODUCTION

This paper reviews some of the standard forms and considers some of the basic principles relating to their use in the construction industry.

BASIC CONCEPTS

A review of the standard forms cannot be divorced from the procurement pathways that are used in the construction industry. The development of the standard forms that are used in the construction industry is historic in that the mostly widely recognised standard forms were developed by construction professions, principally the Royal Institution of British Architects and the Institution of Civil Engineers. However, with the commercialisation of standard forms and the diversity within the construction industry, not to mention the global international nature of the industry, there are now a wide variety of standard forms and a large number of organisations producing standard forms. The forms have become more diversified dealing not only with employer contractor relationships, but also at the same time more specific, dealing with for example, sub-contractors, suppliers, facilities managers, works contractors, the professions and more recently PFI.

Nonetheless, the most easily identifiable benchmark is the simple distinction between the traditional procurement route and the design and build route. Essentially, standard forms could be divided into those where the contractor simply constructs the design of another (employer led design), and those where the contractor is responsible for design. This simple distinction is not as helpful as it once was, given the development of new

procurement techniques such as Prime Contracting and management contracting, however, it stills serves as a very useful categorisation technique for standard forms.

Probably the most widely recognised, and certainly the most widely used in the UK is the JCT 2005 family of contracts (predominantly the With Contractor's Design 1988 edition being now the most widely used) and the ICE Standard Form of Contract (now in its 7th edition, although the 5th and 6th editions are more widely used in practice). JCT have developed a range of standard forms for a variety of procurement processes. The traditional JCT Private With Quantities (also available without quantities, ie for use with the specification, and local authorities version) have developed from the RIBA Standard Form of Building Contracts. Under these forms the employer is responsible for producing the design and providing it to the contractor in the traditional way.

The design and build version (JCT 1998 Edition With Contractor's Design) is merely an update of the original 1981 JCT Design and Build Contract, which was simply developed from the traditional JCT Form. It is therefore a lengthy contract, adopting almost all of the clauses wholesale from the traditional JCT Form. The risk allocation is therefore much the same in terms of payment, variation and time. The design obligation placed upon the contractor is not the common law fitness for purpose obligation that would be expected of a person that designs and manufactures an article, but one of reasonable skill and care in respect of the design as if the contractor were an architect. The JCT 2005 Design and Build Contract is an updated rationalised version of the 1998 Edition, but much of the philosophy remains the same.

While the contracting market was ready to accept this obligation it must be said that it defeats the fitness for purpose single point responsibility that an employer might expect from a main contractor that holds itself out to design and construct a building to meet the needs of a particular employer. On the other hand, the frequent practice of novating the design team from the employer (having done the initial design work) to the contractor for the purposes of completing the design or carrying out design development in reality means that the contractor has little control over the initial and often very important design decisions that are taken in respect of the project.

The construction industry can be neatly divided into the building sector and the engineering sector. The former dealing with the construction of buildings such as residential houses, flats, apartments, as well as offices, commercial and industrial units. The engineering industry deals predominantly with often large scale infrastructure projects such as roads, bridges, tunnels and rail. The JCT Forms have confined themselves to the building industry, while the ICE Forms have been for use within the engineering industry.

The predominant difference between the forms is that the JCT Forms in the main are lump sum contracts. In other words, the contract sum is fixed, subject to the correction of any errors and adjustment to the scope of the works by way of a change order (usually referred to as a variation in a JCT Contract). On the other hand, the ICE Standard Forms are re-measurement contracts. They are still lump sum contracts in that the rates for the work are fixed. While then the JCT Forms are lump sum contracts, it may be possible to consider that the individual rates for each element in the bill of quantities attached to the ICE Form are also individual lump sums in their own rights. In other words, while the contractor is to be paid for the items as eventually carried out and measured, the contractor will be paid the rate upon which his original tender was based. If the quantities change substantially, then arguments might be raised that the rate should be varied because of the substantial change in the quantities, resulting in a change to the nature of the works.

It is in the nature of engineering work that the scope of the work is not entirely known until the work has been completed. This is because the majority of the work involves dealing with unknown ground conditions, whereas building work is mostly carried out above ground usually on comparatively simple foundations.

In terms of risk, most of the risks are encountered in the initial stages of a building project during the ground works, many of those risks have been eliminated when the foundations are complete. However, civil engineering work by comparison, most frequently involves ongoing risks until the project is nearing substantial completion.

A further aspect of the development of the most widely used standard forms is the competitive tendering procedure used in the industry. Projects are and have been most frequently let to the contractor who produces the cheapest tender. Profit margins have been low within the industry for many years, and it is not unusual for contractors to produce claims in order to protect or ensure their profit margin on any particular project. At the same time this factor highlights an inherent risk not just in the standard forms, but also in the procurement pathways and the practice of selecting the lowest tenderer within the construction industry.

Construction projects take time on site to complete. It is, therefore not unusual for projects to be delayed because of a variety of influences, many of which are external to the parties, but also as a result of changes to the scope of work to occur. Some have argued that changes to the work can be avoided by simply completing the design before issuing the tender. A frequent practice within the construction industry, at least in the UK, appears to be issuing an incomplete design at tender stage which is then supplemented by changes to the design and further variations as the work proceeds.

This in part might be due to a particular employer's inability to precisely define his or her brief, and also because of the employer's perceived urgency to commence work of site as early as possible, in perhaps the erroneous belief that the project will be completed at the earliest possible time. Could it be the case that a later start on site, but with a totally completed design might in fact lead to a project that, with minimal extensions of time, is completed earlier and with greater cost certainty?

It has been the drive towards greater certainty as to outturn cost and a need to meet a planned completion date that more novel approaches to procurement have developed. The result, of course, is that standard forms have developed in order to meet these procurement pathways. Initially, JCT produced prime cost contracts for cost plus work, as well as management contracting forms and standard forms for works package contractors. The ICE has stuck with its traditional approach, albeit with the development of the design and build version, but other new standard form providers have entered the arena.

The NEC (now the Engineering and Construction Contract, Third Edition) has been produced by a private publisher, Thomas Telford (owned by the ICE) in order to provide a suite of contracts for a variety of different procurement pathways. The NEC approach must be the most novel mainly because the NEC has adopted a less is best approach to the drafting, resulting in very short clauses.

The NEC Form comprises a front end "black book" which includes all of the core clauses that might be used to produce a contract to meet the procurement pathway adopted by the employer. These further breakdown into the rainbow coloured suite of contractual variations which comprise:

(a) priced contract with activity schedule "purple book"
(b) priced contract with bill of quantities "blue book"
(c) target contract with activity schedule "yellow book"
(d) target contract with bill of quantities "red book"
(e) costs reimbursable contract "light green book"
(f) management contract "green book"

In addition, there is the engineering and construction sub-contract, the guidance notes and flow charts which identify the procedures that should be followed when using the NEC. The flowcharts are expressed not to be a part of any contract, but they clearly depict how the authors consider how the NEC contract is to be used in practice.

Despite the ongoing development of apparently new procurement pathways and the proliferation of standards forms, the selection of a particular standard form for any

particular project is often based on familiarity. In other words, the construction professional, perhaps the quantity surveyor or engineer that is carrying out the tendering procedure and thus needs to identify the form of contract, will adopt a standard form which the professional is most familiar with. This might mean that the procurement pathway remains relatively traditional, albeit with some consultant specific "tweaks", or it might be that the standard form is inappropriate for the procurement pathway or the project.

Another aspect of the adoption of a standard form based on familiarity is the use of the particular form in question. It is not uncommon for the contract administrator to administer the contract in a particular way that bears little or no relationship to the contractual terms. The contract administrator progressing on the basis that he or she has always done it in a particular way for many years or decades in a mistaken understanding of the contractual terms of any particular form. This is perhaps not the reason why old versions of contracts are more frequently encountered. For example, while the more recent JCT 1998 versions are frequently encountered, one is more likely to encounter the 6th, or even the 5th edition of the ICE Form rather than the 7th edition.

PROCUREMENT SYSTEMS

The most frequently encountered procurement systems could be categorised in the following manner:

- Traditional
    - Sequential
    - Accelerated
- Design and Build
    - Direct
    - Competitive
    - Develop & Construct
- Management
    - Management Contracting and Construction Management
- Design & Manage
    - Contractor
    - Consultant

The standard forms have developed to meet the needs of these procurement systems, and more recently some have been developed to accommodate a specific development to an existing procurement techniques. For example, prime contracting was developed for the MoD, but is essentially built upon a design and build single point responsibility procurement system. Other collaborative or partnering oriented standard forms such as PPC 2000 still require the selection of the initial team by way of competitive tender or negotiation, and the decision as to whether the contractor might be solely responsible for design or design development (design and build), or the whether the project will be approached from a tradition perspective with a separate "employer led" design team.

TRADITIONAL PROCUREMENT STANDARD FORMS

Standard Forms that might be selected for the traditional, employer designed works, include:

- JCT 2005, a suite of new contracts, including the Standard Building Contract (With Quantities, Without Quantities and With Approximate Quantities) and the Intermediate Building Contract. Previously JCT 1998 Edition (With Quantities, Without Quantities, and With Approximate Quantities, and the Intermediate Form, With or Without Bills of Quantities)
- ICE 7th Edition
- NEC
- GC/Works
- Minor Works Agreements

The JCT originally comprised a drafting committee made up of individuals from various sectors of the industry. It included contractors, consultants and representatives of employers. The Forms, therefore, were drafted by the committee and developed slowly over a period of time. They were then amended from time to time in order to deal with important issues, however, the approach of dealing with amendments varied depending upon the individuals comprising the drafting committee at the particular time. It is for this reason that some of the provisions within the JCT Form appear to be more employer or contractor friendly.

In addition to the main contract forms a suite of sub-contract forms have also developed. In respect of the JCT Form these comprised the nominated sub-contractor and nominated supplier terms, Articles of Agreement, Tender Procedures and Collateral Warranty. In addition the Domestic Form of Sub-contract known as DOM/1 (where no design is required of the sub-contractor) and the DOM/2 (for sub-contractor designed works) have developed for specific use with certain of the JCT Forms. These forms have been replaced with JCT

2005 standard sub-contract forms for the Standard Building Contract,[1] Design and Build Contract[2], the Intermediate Building Contract[3], and the Major Projects Form[4]. Versions with Sub-Contractor's design are available as is a JCT Short Form of Sub-contract (short sub), a Short Form of Sub-Contract, a Sub-sub Contract[5] and sub-contractors' collateral warranties.[6]

The more limited range of ICE Forms have spawned the sub-contract for use with the ICE Forms produced by the Civil Engineering Contractors Association known as the "Blue Form". In respect of the main ICE Forms, a design and build version was developed from the ICE 6th, although its use in practice appears to be limited.

The JCT has now been incorporated as a limited company. The result has been a slightly more focused and strategic view on the future of the JCT Standard Form Contracts in order to maintain its market sector while amending and developing contracts in a coherent manner to meet the needs of the market place. The drafting committee has effectively gone, however, in essence individuals from the industry are still co-opted in order to draft the contracts. In this respect sectors of the industry are still represented. This is more focused approach has produced an entirely different JCT contract for major works. The JCT Major Projects Form is much shorter than the original JCT Forms and was drafted by an external consultant for a fee.

JCT

JCT has of course re-launched an entire suite of contracts in order to meet the demands of the industry, changes in procurement, the need for updating generally and also in an attempt to simplify some of the forms. The forms themselves have certainly, in some respects, been simplified, although there is now a wide range of forms for every need. It could be said that there is such a wide range of forms to meet every need it is difficult for many in the industry to identify precisely which standard form they should use, with many still being unaware of the extensive nature of the JCT 2005 documentation.

At a glance, the 2005 suite of contracts comprises:

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1 JCT 2005 Standard Building Sub-Contract Agreement (SBC Sub/A), Conditions, (SBC Sub/C) a version with sub-contractor design (SBC Sub/D/A and SUB Sub/D/C) and the JCT 2005 Standard Building Sub-Contract Guide (SBC/G)

2 JCT 2005 DB Sub/A, DB Sub/C and DB Sub/G

3 JCT 2005 IC Sub/A, IC Sub/C, IC Sub D/A, IC Sub/D/C (design agreement and design conditions). Named Sub-Contract Tender Agreement (IC Sub/NAM) Conditions (IC Sub NAM/C). Sub-Contractor/Employer Agreement (IC Sub/NAM/E), and a guide (IC Sub/G)

4 JCT 2005 Major Project Sub-Contract (MP Sub) and the Guide (MP Sub/G)

5 JCT 2005 Sub-Subcontract (subsub)

6 In favour of Employer (SCWa/E), Funder (SCWa/F) and Purchaser or Tenant (SCWa/P&T).

- Standard Building Contract (With Approximate Quantities, With Quantities and Without Quantities, together with a Guide);
- Intermediate Building Contract (and a version With Contractor's Design, together with a Guide);
- Design and Build Contract (and Guide);
- Major Project Construction Contract (and Guide);
- Minor Works Building Contract (and a version With Contractor's Design);
- Construction Management (an Agreement, Trade Contract, Tender Document and Guide);
- Management Building Contract (the Contract, Tender and Agreement, the Conditions and a Contractor/Employer Agreement);
- Prime Cost Building Contract;
- Measured Term Contract;
- Framework Agreement (Binding and Non-Binding together with Guide);
- A range of sub-contracts for each of the major forms, including versions with contractor's designs. The format follows an agreement and conditions separately, most usually together with a guide. In addition, there is a short form of sub-contract and a sub-sub-contract and collateral warranties;
- Home Owner Contracts (with a consultant to oversee the works, and without. There is also a consultant's agreement for use when a consultant is overseeing the works);
- Housing Grants Works Building Contract;
- Adjudication Agreement (and a version with a named adjudicator);
- Construction Industry Model Arbitration Rules (CIMAR);
- Formula Rules; and
- Collateral Warranties (contractor to funder, purchaser or a tenant and employer and also a sub-contractor to funder, purchaser or a tenant and employer).

There is, therefore, a wide range of documents now available from JCT. Many of the other organisations, such as ICE, and FIDIC (the latter originally only produced one document) are now producing a suite of documents. JCT has in one respect taken the lead by producing more documents than any other body. If the trend continues, then one has to question whether such a wide range of forms could be said to truly benefit the industry.

The 2005 suite of JCT Contracts have attempted to rationalise the approach of the earlier JCT Forms, as well as to deal with some issues that were quite simply previously omitted from the JCT documents. In terms of rationalisation, the contracts have been developed into consistent sections, such as payment, and this is an approach that must be welcomed.

The appendix at the end of the old forms has now been moved to the front, so that all of the projects specific information is clearly placed at the beginning of the contract. Default provisions assist those that are perhaps not as familiar as completing standard forms as others (such as complying with the Fire Code and the need or otherwise for an advanced payment bond). Supplements have been integrated, for example sectional completion and the contractor's designed portion supplement, while statutory backed or simply procedural provisions have been rightly removed. These include the construction industry scheme, and in particular the VAT supplements.

The VAT Supplement was a lengthy document that only rarely re-stated the statutory provisions. The construction industry scheme was somewhat lengthy, and has been quite simply replaced with a short clause.[7]

JCT 2005 DESIGN AND BUILD CONTRACT

The JCT 1998 With Contractor's Design Form was the most widely used standard form in the UK construction industry, and so in anticipation that the JCT 2005 Design and Build Contract may eventually replace it, it is perhaps worth focussing on the layout and terms of that contract.

The contract particulars (replacing the appendices) appear at the very outset of the contract, only preceded by the articles and recitals. The contract can be used for projects with sectional completion without modification, an improvement that must be welcomed. Third party rights is an addition to this form of contract, and the name class a description of person to whom a third party right is to be owed is set out in part 2 of the project particulars. The contractor should therefore be able to identify to whom the third party rights are owed, or to whom the collateral warranties are to be provided. In addition, those sub-contractors providing collateral warranties must also be identified.

The conditions are then divided neatly into nine sections. There are then seven schedules. The sections comprise:

- Section 1: Definitions and Interpretations;
- Section 2: Carrying out the works; dealing with many of the main provisions such as the quality of works, possession, design liability, adjusting the completion date, practical completion, liquidated damages and so on;

[7] Clause 4.7.

- Section 3: Control of the works;
- Section 4: Payment;
- Section 5: Changes, dealing in particular the valuation rules;
- Section 6: Injury, damage and insurance;
- Section 7: Assignment, third party rights and collateral warranties;
- Section 8: Termination; and
- Section 9: Settlement of disputes

The contractor is to carry out and complete the works in a "proper and workmanlike manner" in accordance with the contract documents and:

> "shall complete the design for the Works including the selection of any specifications for the kinds and standards of the materials, goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer's Requirements or Contractor's Proposals, and he shall give all notices required by the statutory requirements."[8]

Clause 2.17.1 deals with design liability, and following the old JCT formulation states that the contractor's liability to the employer in respect of design shall have such liability:

> "as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such a design who, acting independently under a separate contract with the Employer, has supplied such design for or in connection with the works to be carried out and completed by a building contractor who is not the supplier of the design."

The design liability of a contractor remains unresolved. It may be the case that the contractor might still owe a fitness for purpose obligation, even under the new regime. A fitness for purpose obligation has not been excluded, and simply stating that the contractor owes the same duty as a designer does not necessarily exclude a fitness for purpose obligation. Further, the contractor is in many instances taking a partly completed design and then developing it to completion. That obligation in itself requires the contractor to check the existing design, together with the assumptions upon which it is based in order then to develop a completed design that will work in practice.[9]

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[8] Section 2, clause 2.1.1.

[9] See *Co-Operative Insurance Society Limited -v- Henry Boot Scotland Limited,* [2003] CLJ Vol 19 No 2 page 109, the decision of His Honour Judge Seymour QC stating that in his judgment, the obligation of Boot "was to complete the design, that is to say, to develop the conceptual design [of Co-Op] into a completed design capable of being constructed. … assessing the assumptions upon which it is based and forming an opinion whether those assumptions are appropriate. … the concept of "completion" of a design of necessity, in my judgment, involves a need to understand the principles underlying the work done thus far and to form a view as to its sufficiency."

The old JCT extension of time provisions has been replaced with provisions dealing with an "adjustment of completion date". The contractor is required to give notice of delay in accordance with clause 2.24, identifying the causes of delay and identifying any events which are in his opinion, "Relevant Events". An estimate of any expected delay in completion is also required. Further, notices are required of any material change in the estimate. The employer is then required to give an extension of time "as he then estimates to be fair and reasonable" in accordance with clause 2.25.

The relevant event provisions at clause 2.26 have certainly been rationalised. The usual requirements are there, such as the adjustment to the completion date in respect of changes and instructions of the employer. A "catch all" approach has been adopted in order to try to avoid listing out numerous, and unnecessary, individual reasons for extending time. The catch all appears at clause 2.26 as follows:

> "any impediment, prevention or default, whether by act or omission by the Employer or any of the Employer's Persons except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor's Persons;"

A similar provision appears in respect of loss and expense. However, it is interesting to see that the catch all does not provide the employer with an opportunity to grant an extension of time where the contractor has caused any part of the delay or contributed to it. It may be that we see arguments that time have been set "at large" resurfacing. If an employer is unable to give an extension of time that would otherwise be due, then time can be set at large.

Arguably, where there is a concurrency of delay and there is an obligation on the employer to give an extension of time so as to alleviate the contractor from liquidated damages, but the employer is unable to do so, then time will become at large.[10] It must be remembered that the purpose of the extension of time provisions are quite simply to allow the employer the benefit of the liquidated damages provisions where not only the contractor is in delay, but also where the employer has not caused any of that delay.

The English Law principle of prevention means that an employer cannot benefit from its breach. If therefore, there is concurrency of delay and the employer refuses to award an extension of time (thus alleviating the contractual liquidated damages), then the contractor may be released from those liquidated damages in any event.

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[10] See *Peak Construction (Liverpool) -v- McKinney Foundations* (1971) 69 LGR 1 CA; 1 BLR.

The defects liability period has been replaced with a rectification period, during which schedules of defects instructions may be issued.[11]

Section 5 deals with payment. The lengthy VAT provisions have been replaced with two short clauses and the lengthy construction industry scheme provisions are now simply dealt with in one short clause.[12] The certification procedure remains, however, the contractor may make an application. There are two alternatives in respect of interim payments. The regular payment approach, and no doubt monthly, and then payments made by reference to specific dates.

The final date for an interim payment is 14 days from the date of receipt by the employer of the application[13]. Not later than 5 days after receipt of that interim payment, the employer is to give a written notice identifying the amount to be paid[14]. In effect, this is the Section 110 Notice anticipated by the Housing Grants Construction and Regeneration Act although there is perhaps some difficulty with that analysis. If a withholding notice is to be given, then it must be given not later than 5 days before the final date for payment.[15] The old clause 30.3.5, requiring payment by the employer of the total amount of the contractor's application in default, has been abandoned.

The contractor is to submit its final account within three months of practical completion and clause 4.12 deals with the final account procedure.

Loss and expense is now dealt with in several very short clauses at clause 4.19 to 4.22 inclusive. The relevant matters are relatively short, once again with catch all in order to avoid an extensive list. Note that the prevention principle arguments raised above in respect of time will not apply in the same was to loss and expense.

Section 6 deals with injury, damage and insurance. These provisions are overall, much shorter than in the previous JCT forms. In the old JCT forms, insurance made up a considerable part of the contract. This area has certainly been rationalised. In addition, a requirement for professional indemnity insurance has been introduced.

Third party rights together with collateral warranty requirements are covered in section 7. There is no longer a blanket ban on assignment, which is to be welcomed. This was one of the major criticisms of previous forms, and always gave funders considerable difficulty with those forms. Warranties and third party rights fell into the same category. Any developer

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11 See clause 2.35 and clause 2.36.
12 Clause 4.4.2.1 and clause 4.4.2, and CIS at clause 4.5.
13 Clause 4.10.1
14 Clause 4.10.3
15 Clause 4.10.4 (14 days is clause 4.10.1 and payment notices clause 4.10.3).

seeking external funding for a new project would need to provide collateral warranties not just to the funder but also to a purchaser and any tenant in order to be able to sell the completed development. Previous forms did not provide for this at all, which it must be said, was quite unsatisfactory. The new approach is to provide not only for third party rights but also to include for collateral warranties. These are alternatives, but it is possible now to establish a regime for providing rights to a funder, purchaser and tenant.

The dispute resolution provisions anticipate that the parties may resolve their disputes by way of mediation, adjudication or arbitration. Adjudication is of course available depending upon the nature of the works in any event. JCT have abandoned their detailed adjudication provisions in favour of the Scheme. This of course rationalises the contract and adopts the approach of the JCT's Major Projects Form.

Arbitration is to be carried out in accordance with the Construction Industry Model Arbitration Rules current at the base date of the contract. Arbitration will only apply if the article 8 of the contract applies. If article 8 does not apply then the final method of dispute resolution is legal proceedings.

The schedules sweep up some of the more procedural aspects of the parties relationship:

- Schedule 1: Contractor's Design Submission Procedure;
- Schedule 2: Schedule 2 Quotation (much like the old clause 13A quotation);
- Schedule 3: Insurance options A, B and C;
- Schedule 4: Code of Practice (relating to opening up and testing issues);
- Schedule 5: Third Party Rights;
- Schedule 6: Forms of Bonds; and
- Schedule 7: Fluctuation option.

Of particular interest is Schedule 1, which sets out the Contractor's Design Submission Procedure. The contractor is to prepare and submit to the employer two copies of its design documents. The employer then has 14 days to review those documents and then return one copy marked "A", "B" or "B". The purpose of marking up the documents is for the contractor to understand the employer's position in respect of those documents. Clause 5 of Schedule 1 sets out the meaning of the A, B or C formulation:

- "A" means that the contractor is to carry out the works "in strict accordance with that document";
- "B" means that the contractor can carry out the works "provided that the Employer's comments are incorporated into it …"; and

- "C" means that the contractor "shall take due account of the Employer's comments" and then either re-submit to the employer or disagree with the employer.

If the contractor disagrees, then he shall within seven days of receipt of the comment, notify the employer that the contractor considers that the comment amounts to a change. It may be that the employer accepts that it is a change and the work continues. Alternatively, the employer may withdraw the comment. No doubt, any dispute could of course be referred to adjudication.

JCT MAJOR PROJECTS FORM

The Major Protects Form ("MPF") is a lump sum contract for larger projects. A Form of Sub-contract has also been produced. The key principle is that all design work and design development beyond the initial employer design is produced by the contractor. It contains approximately 14,500 words, compared to the 85,000 words in the JCT 1998 With Contractor's Design. The reduction in the length of the contract has been achieved by focusing on the core obligations and by not including lengthy VAT rules, clauses relating to nominated sub-contractors and suppliers and also lengthy adjudication rules. VAT rules are already covered by legislation, and in respect of the rules for adjudication the legislative Scheme has simply been adopted and incorporated by reference. In addition, the MPF has made use of the Contract (Rights of Third Parties) Act 1999 in an attempt to meet employer's needs, but at the same time avoid the production of multiple collateral warranties.

The dispute resolution procedure provides for mediation, adjudication (under the Scheme) and then litigation. This is one of the few forms that now departs from arbitration as the predominant and final form of dispute resolution, instead adopting litigation in the technology and construction courts as the final method of dispute resolution. It is true that the JCT 1998 versions of the Contract provide for court proceedings as an alternative, however, the default mechanism is still arbitration.

The payment provisions provide options including Interim Valuations (Rule A), Stage Payments (Rule B), Schedule of Payments (Rule C) or other terms which the parties might decide to incorporate. Interim Payments remain the predominant method, and a single payment notice is to be issued, covering any amounts to be withheld. The Form is therefore combining the requirements of Section 110 and Section 111 of the Housing Grants, Construction and Regeneration Act 1996 by the provision of a single notice, thus attempting to avoid arguments as to whether a Section 111 Withholding Notice has been properly served at the correct time and or in the correct format.

At the other end of the scale are minor works agreements.

SHORT FORM AGREEMENTS

A variety of short standard form contracts have been produced:

- JCT 2005 Minor Works Building Contract (MW) and a separate version With Contractor's Design (MWD) replacing the JCT 1998 Agreement for Minor Works;
- ICE Conditions of Contract for Minor Works 3rd Edition: July 2004; and
- NEC The Engineering and Construction Short Contract 1999.

The JCT Minor Works Agreement has been around for some time, and was initially proposed for projects under £50,000 in value. The form is also valuable for use on larger value projects with a simple content. While the guidance as to the maximum figure has increased, the form is often used for higher value and complex projects. This is often because of the familiarity of a particular consultant with the Minor Works Agreement.

Views are divided as to whether short forms are of any value at all, or whether they should be used more frequently. From one perspective, the purpose of a contract is not just to capture the prime obligations between the parties, in terms of time, cost and scope of works, but also to set out the obligations between the parties for some unforeseen circumstances. In that sense, the contract is allocating potential risks, no matter how unforeseen, between the parties in order to avoid a dispute about who might be liable when and if the event occurs. There is, therefore, much to be said for a more lengthy contract that deals with a wide variety of matters regardless of the value or complexity of the project.

Alternatively, a simple short form contract might be more readily used by participants on smaller projects because it will act as a simple manual between the parties of how they are to act in respect of their primary obligations, for example monthly valuations and the giving of extensions of time. A good example here is simply to look at the extension of time provisions in the old JCT Standard Form (clause 25) and the short extension of time provisions in the JCT Minor Works. Clause 26 provides a detailed series of "relevant events" which might give rise to an extension of time providing that the contract completion date is delayed by the relevant events. The contractor can therefore identify a particular relevant event or events and request an extension of time or indeed base a claim upon those relevant events. Now replaced with clause 2.26 in JCT 2005 with reduced provisions, the Minor Works form is still more direct.

By contrast the Minor Works Agreement simply provides that the contract administrator or architect can award and extension of time for events which are beyond the control of the contractor. This gives the architect or contract administrator relatively wide powers to decide whether an extension of time is to be granted, and also provides that the contractor simply needs to raise the issue and provide suitable evidence. However, it might be said that the Minor Works Agreement is of greater risk to the employer because the contract administrator or architect will be obliged to grant the contractor an extension of time for anything which is beyond the contractor's control which in certain circumstances might be wider than the list of relevant events or items for which the employer would be responsible.

MANAGEMENT CONTRACTING AND CONSTRUCTION MANAGEMENT

Management contracting and construction management are innovations from the 1980s which largely developed from the greater fragmentation of the construction industry. Main contractors no longer employed large workforces to carry out the works, but instead relied upon sub-contractors to carry out the physical works on site. Management contracting and construction management simply take this process one stage further. They arise from the need to design the project as it is constructed in order to speed the construction process to an early completion. They are, therefore, more appropriate for larger projects where a benefit might be perceived to be gained by commencing the work before the design stage is completed. So, once the foundations have been designed, those packages of work can be let to specialist sub-contractors for, say, piling and civil engineering works while the superstructure and rest of the project is designed.

The benefits are the ability for contractor input into the design, a fast commencement on site the ease with which changes can be incorporated and the speed with which a completion date is met. However, cost risks are associated with this approach and greater risks of the need to design within not just previous design constraints but that which has been physically built on the site.

The difference between management contracting and construction management (although the terms are often used interchangeably) is that predominantly management contracting is used to describe a contractor that becomes involved in the buildability of the project, who then in turn lets works packages to a specialist sub-contractor. There is therefore only one contract between the end user or client and management contractor.

On the other hand, construction management envisages that the construction manager will become a part of the design team. The individual specialist work packages are then let

direct by the client, upon the recommendation of the construction manager. This represents a higher risk to the client. The client will find that they have 30 or 40 individual contracts with a range of works package contractors who might seek direct recourse against the employer. The employer will therefore need to be an extremely knowledgeable client in the industry, or rely heavily upon the construction manager.

The results of management contracting and construction management have been mixed. There have been some successes, but also some disasters.[16] Some construction managers have simply provided teams which are used to dealing with traditional contracting and therefore do not appreciate the crucial role that they play in carefully programming the works, identifying suitable works package contractors and then managing those contractors in order to make the best of the benefits that can be derived from the construction management process.

JCT originally produced a standard form for construction management, together with works package contracts:

- JCT Standard Form of Management Contract 1998 Edition; and
- JCT Works Contract 1998 Edition

These forms have now been replaced with:

- JCT 2005 Construction Management (CM);
  - Construction Management Agreement (CM/A);
  - Construction Management Trade Contract (CM/TC);
  - Construction Management Tender (CM); and
  - Construction Management Guide.

- Management Building Contract (MC):
  - Management Building Contract (MC);
  - Management Works Contract Tender and Agreement (MCWK);
  - Management Works Contract Conditions (MCWK/C); and
  - Management Works Contractor/Employer Agreement (MCWK/E).

These are once again based upon some concepts that are familiar from the standard JCT contracts. An important issue arises in respect of the liability of the construction manager. Clause 1.7 of the Contract states that the management contractor is fully liable to the employer for breaches of contract including those of the work package sub-contractors. Clause 1.7 provided:

[16] See *Great Eastern Hotel Co Ltd v (1) John Laing Construction (2) Laing Construction PLC* [2005] EWHC 181 (TCC), (2005) CILL 2217.

> "Subject to clause 3.21 the Management Contractor shall be fully liable to the Employer for any breach of the terms of this Contract including any breach occasioned by any Works Contractor of his obligations under the relevant Works Contract."

However, clause 1.7 is subject to clause 3.21. Clause 3.21 provides that the contractor is to operate the terms of the Works Contracts including enforcement through arbitration or litigation if necessary, and meet any claim properly made under the Works Contract, other than a claim by a Works Contractor who was in breach of the Works Contract.

The interaction of these clauses were considered in the case of *Copthorne Hotel (Newcastle) Limited v Arup Associates* (*No. 2*).[17] Copthorne had engaged Bovis under the JCT Standard Form of Management Contract (1987 Edition) in order to complete works that had already been commenced in respect of the construction of a hotel. The individual works packages were carried out under the JCT Works Contract (1987 Edition). The works were defective. Copthorne issued proceedings against Arup who had acted as the engineer, architect and quantity surveyor. Arup sought to join in the contractor pursuant to Section 1 of the Civil Liability (Contribution) Act 1978. A question arose as to whether Bovis could be liable under the JCT Management Contract for defects other than for a liability arising under clause 3.21 of the Management Contract. Bovis argued that 3.21 placed specific but limited obligations on the contractor. In effect operating like an exemption clause.

The Court of Appeal held that clause 3.21 did not exempt the management contractor from liability for its own breach. It did however provide some limited protection against the extremely wide and strict consequences of clause 1.7 where liability arose only from the fault of a works contractor not the fault of the management contractor.

TERM MAINTENANCE AND FACILITIES MANAGEMENT CONTRACTS

A number of these have been produced:

- JCT 2005 Measured Term Contract, replacing the JCT Standard Form of Measured Term Contract 1998 Edition ;
- Highway's Agency Measured Term Contract; and
- CIOB Facilities Management Standard Form.

[17] 85 BLR 22

The JCT have produced a standard form of contract for term contracts. The JCT Measured Term Contract has been widely used for ongoing maintenance works. Typically, a contractor will be engaged on a schedule of rates as a result of a competitive tender. The contractor will then be engaged for a set period of time, say 3 years. During that time the employer can call upon the contractor to carry out any of the work on the priced schedule, and the contractor is obliged to complete the work within a given response time.

It is typically used by local authorities to carry out regular repairs and emergency work, such as boarding up doors or windows after a break or repairing leaks. Uplifts to the prices are paid for quicker response times and indexed linked or simple percentage additions are used to inflate the prices each year in an attempt to keep up with inflation.

NEC

The NEC is a major attempt to draft a simple and direct standard form contract from first principles without attempting to build upon the standards forms that already exist. The authors of the NEC gathered under the auspices of the ICE, and were principally led by Dr Martin Barnes. The specification prepared by him in 1987 set out the aims of those drafting the NEC. These included:

- To achieve a higher degree of clarity when compared to other existing contracts;
- To use simple commonly occurring language and avoid legal jargon;
- Repeat identical phrases if possible;
- Produce core conditions and exclude contracts specific data to avoid the need to change the core terms;
- Precisely and clearly set out key duties and responsibilities;
- Aiming for clarity above fairness; and
- Avoid including details which can be more adequately covered in a technical specification.

In summary, the three core principles might be said to be flexibility, simplicity and clarity, and a stimulus for good management. On the basis of these principles the authors drafted core claims that apply to all NEC contracts. The core clauses were then used as the basis for 6 main options (each with varying risk allocation and reflecting modern procurement practice):

- Option A (priced contract with activity schedule);
- Option B (priced contract with bill of quantities) provides that the contractor will be paid at tender prices. Basically, a lump sum contract approach;

- Option C (target contract with activity schedule);
- Option D (target contract with bill of quantities) provides that the financial risks are shared between the contractor and the employer in agreed proportions;
- Option E (cost reimbursable contract); and
- Option F (management contract) is a cost reimbursable contract, where the risk is therefore largely taken by the employer. The contractor is paid for his properly incurred expended costs together with a margin.

One of the most noticeable features of the NEC are its short direct clauses. The simplicity of language is apparently to reduce the instance of disputes. A review by the drafting panel led to the launch, in June 2005 of NEC3.

Of particular interest is the early warning procedure included in clause 16. This provides that:

- The contractor to give the project manager warning of relevant matters;
- A relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished works;
- The contractor and project the manager are then required to attend an early warning meeting if one or the other party request it. Others might be invited to that meeting; and
- The purpose of the early warning meeting is for those in attendance to co-operate and discuss how the problem can be avoided or reduced. Decisions focus on what action is taken next and who is to take that action.

It could be said that this is a partnering based approach to the resolution of issues before they form into disputes. Co-operation between the parties at an early stage of any issue identified by the contractor or project manager provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.

This is a departure from the usual approach of the contractor serving formal notices. A contractor may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if a contractor fails to give an early warning of an event which subsequently arises, and that he was aware of, then the contractor is assessed as if he had given an early warning. Therefore, if a timely early warning would have provided an opportunity to identify a more efficient manner of resolving the issues, then the contractor will only be paid for that economic method of dealing with the event.

Core clause 60 deals with compensation events. If a compensation event occurs, which is one entitling the contractor to more time and/or money, then these will be dealt with on an individual basis. If the compensation event arises from a request of the project manager or supervisor then the contractor is asked to provide a quotation, which should also include any revisions to the programme. The project manager can request the contractor to revise the price or programme, but only after he has explained his reasons for the request.

NEC3 has adopted a more strict regime for contractors in respect of compensation events. Core clause 61.3 is set out in terms:

> "The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects to happen as a compensation event if
>
> - the *Contractor* believes that the event is a compensation event and
> - the *Project Manager* has not notified the event to the *Contractor*.
>
> If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the Contractor but did not."

Clause 6.1 is effectively a bar to any claim should the contractor fail to notify the project manager within 8 weeks of becoming aware of the event in question. The old formulation of a 2 week period for notification has been replaced with an 8 week period, but with highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18) which states that a compensation event includes:

> "A breach of contract by the *Employer* which is not one of the other compensation events in this contract."

Clause 61.3, therefore, effectively operates as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

The courts have for many years been hostile to such clauses. In more modern times, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.[18]

The contractor must of course be "aware of the event" in order to notify the project manager under clause 61.3. There will no doubt be arguments about when a contractor

[18] See for example *Photo Production Limited -v- Securicor Limited* [1980] AC 827.

became aware or should have become aware of a particular event, and also the extent of the knowledge in respect of any particular event. Ground conditions offer a good example. Initially, when a contractor encounters ground conditions that are problematic, he may continue to work in the hope that he will overcome the difficulties without any delay or additional costs. As the work progresses the contractor's experience of dealing with the actual ground conditions may change such that the contractor reaches a point where he should notify the project manager. The question arises as to whether the contractor should have notified the project manager at the date of the initial discovery, rather than at the date when the contractor believes that the ground conditions are unsuitable. The answer must be that the contractor should give notice when he encounters ground conditions which an experienced contractor would have considered at the Contract Date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price having regard to all of the information that the contractor is to have taken into account in accordance with clause 60.2.[19]

A further question arises in respect of clause 61.3, and that is who precisely needs to be "aware". Is it the person on site working for the contractor, the contractor's agents or employees or is it the senior management within the limited company organisation of the contractor? Case law suggests that it is the senior management of the company and not merely servants and agents.[20]

The prevention principle considered elsewhere in this paper may also apply in respect of any employer's claim for liquidated damages. If the contractor does not make a claim, then the project manager cannot extend the Completion Date under NEC3, and so an employer will be entitled to liquidated damages. However, those liquidated damages could be in respect of a period where the employer had caused delay. The employer can only recover losses for delay in completion for which the employer is not liable.

It might be said that the true cause of this loss was in fact the contractor's failure to ensure a notice. However, judgements such as they are divided. The case of *Gaymark Investments Pty Limited -v- Walter Construction Group*[21] is a decision of the court of the Northern Territory of Australia. That decision follows the English case of *Peak -v- McKinney* holding that liquidated damages were irrecoverable as the completion date could not be identified as time had become "at large".

Finally, the contractor may be able to rely upon the equitable principles of waiver and/or estoppel. It may be that the contractor does not serve a formal notice because, by words

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19 Clause 60.2 deals with physical conditions.

20 *HL Bolton Engineering Co Limited -v- TG Graham & Sons Limited* [1956] 3 ALL ER 624, in particular the judgment of Denning LJ.

21 (2000) 16 BCL 449.

or conduct, the employer or indeed the project manager represents that they will not rely upon the strict eight week notice period. The contractor would also need to show that the contractor relied upon that representation and that it would now be inequitable to allow the employer to act inconsistently with the representation made by the employer or project manager. In addition, this approach could be further supported by core clause 10.1 which requires the parties to act "in a spirit of mutual trust and co-operation".

Clause 63 provides that changes to the price as a result of the compensation event are assessed by reference to the actual Defined Cost of the work already done, forecast Defined Cost of the work to be done, and any resulting fees.[22] It is the project manager that assesses compensation events. In the event of a disagreement, then disputes may be referred to an adjudicator.

FIDIC

FIDIC is the Federation International Des Ingenieurs-Conseils. It is an association of national associations of engineers, which formed in 1913. Its headquarters are in Switzerland.

The first edition of the FIDIC form was produced from the ICE standard form, and so was virtually the same. The 4th edition of the "Red Book" has been widely used around the world for major projects. Many public works department contracts are based on it, for example the Malaysian Public Works Department contracts PWD203.

It cannot now be said that there is much similarity between ICE and FIDIC. Both the ICE and FIDIC have developed by way of revision, and then the issue by FIDIC of a suit of contracts:

- Conditions of Contract for Construction Building and Engineering Works Designed by the Employer (Red Book);
- Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant and for Building and Engineering works designed by the Contractor (Yellow Book);
- Conditions of Contract for EPC/Turnkey Projects (Silver Book); and
- Short Form of Contract (Green Book).

The Red Book is used for works that are designed by the employer, while the Yellow book is for design and build. Another important aspect of the FIDIC contracts has been their

[22] Clause 52.1 sets out the meaning of Defined Cost

adoption by many of the international funding agencies, in particular the World Bank, which uses the FIDIC terms in its standard bidding documentation.

In respect of dispute resolution, FIDIC has undertaken a major departure from the usual dual role expected of the engineer. Traditionally the engineer was retained by the employer to design and approve the works, but at the same time fulfil the conflicting role of making engineer's decision in respect of disputes. This dual role has been abandoned. The engineer is now seen to be the employer's professional, and dispute resolution is dealt with by way of a DAB, comprising a panel of 3 or a single person (DRA).

PRIME CONTRACTING

Prime Contracting is the Defence Estates approach to adopting the recommendations made not just by Latham but also Egan. The approach utilises a procurement pathway that integrates the supply chain. It is a major departure from the Defence Estates traditional approach to the procurement of Projects and also the maintenance of its existing stock. Defence Estates deals with property aspects of the Ministry of Defence, and its expenditure is in excess of £1 billion per year. It manages a wide range of property, including not just staff accommodation but also complex airfields, naval bases, garrisons, defence structures, as well as large tracks of open land.

The key principles behind Prime Contracting involve single point responsibility and supply chain management. It does not provide a single standard form of contract, but instead provides the basis for regional Prime Contracting and standalone contracts that can be developed for a particular major project. Defence Estates is responsible for in excess of 3,000 individual sites, and used to place hundreds of contracts each year. The purpose of Prime Contracting is to place just 8 major contracts every few years, thus allowing the prime contractor to deal with a large number of sites. Rather than short term contracts, a prime contractor will not only deal with a large number of sites but will also enjoy a contractual period of 7 years (with an option to extend to 10 years).

The philosophy behind this approach is to reduce costs as a result of the prime contractor enjoying economies of scale and also to encourage innovation in the private sector by developing the supply chain, and thus developing the principle of shared profits throughout that chain. In this respect it can be said that Prime Contracting appears to adopt many of the features of a partnering procurement process. In addition, Prime Contracting apparently adopts many of the other topical approaches such as industry best practice, life cycle models, and value engineering in order to reduce costs, increase innovation and produce a co-ordinated supply chain managed approach.

The "prime contractor" handbook for supplying chain management, (1999) defines Prime Contracting as:

> "Prime Contracting is a systematic approach to the procurement and maintenance of buildings. It draws on the best available tools, techniques and practices, including through-life costing, supplying chain to management, value engineering and risk management to achieve efficiency of the completed building."

The standard provisions that have been produced for development for each contract include a target cost incentive mechanism based upon a pain/gain cost sharing arrangement between the prime contractor and Defence Estates. This operates in respect of cost overruns and cost savings up to a maximum price target cost. An open book accounting process is adopted in order that Defence Estates can monitor the costs incurred against the target cost.

The dispute resolution procedure for these large value contracts includes a dispute review board. The DRB comprises three persons, adopting the procedure commonly found in DRBs where the contractor points one member, the employer the other and then the last member of the DRB is jointly appointed, usually nominated by the first two DRB members.

A spirit of co-operation will apparently be required in order to make Prime Contracting work and achieve its desired goals. No doubt, from an economic point of view, Prime Contracting will have to prove its self to Defence Estates in terms of managing the 3,000 odd sites more efficiently and to a better quality than has been seen in the past, whilst at the same time driving down overall costs.

PARTNERING

Partnering cannot be said to be a clearly defined process. Research carried out by James Barlow et at has identified three approaches to the following. [23] The first comprises a tool for improving performance of the construction process in order to maximise the effectiveness of each of the participants in the construction process. A definition of this approach to partnering has been provided by the US Construction Industry Institutes Partnering Taskforce, which has described partnering as:

> "… 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

[23] Barlow, J., Cohen M., Jashapara, A., and Simpson, Y. (1997) *Towards Positive Partnering: Revealing the Realities in the Construction Industry*, the Policy Press, Bristol.

culture without regard to organisational boundary. The relationship is based upon trust, dedication to common goals, and an understanding of each other's individual expectations and values."[24]

Second, partnering is considered as a management process involving strategic planning in order to improve the efficiency of large construction projects. From this perspective, it has been described as the formation of the project team with the identification of common goals.

Finally, some have focussed on the contractual relationships in order to implement partnering. From this perspective, partnering is about capturing within a contractual framework the essence of commercial and moral business people seeing through their business commitments. This is based upon the presumption that in "days gone by" commercial business people would ensure that they completed their side of the bargain quite simply on a handshake.

Regardless of which approach one considers encapsulates partnering it is clearly seen as a collaborative process. The emphasis is upon identifying, agreeing and then attempting to achieve common goals such that all members of the partnership benefit and as a result the project is delivered in a more efficient and economic manner.

A distinction is often made between long-term and project based partnering. Long-term partnering relates to strategic co-operation between a range of organisations in order to deliver a series of projects. Project partnering refers to narrower co-operation between organisations in order to deliver a single project. It may relate to the entire project, merely the design or simply the conceptualisation of the project. The question is then, how if at all are these partnering processes captured in a formal contractual manner and are standard forms available that captures the essence of partnering. The documents that are available could be considered under the following categories:

- Contractual partnering arrangements;
    - PPC2000;
    - BE Collaborative Contract;
    - Strategic Forum Model Form of Agreement for an Integrated Project Team: and
    - JCT 2005 Framework Agreement

[24] CII, (1991) page 2.

- Non-contractual partnering charters:
    - JCT 2005 Framework Agreement (Non-binding).
    - JCT Partnering Charter; and
    - NEC Partnering Option X12.

PROJECT PARTNERING CONTRACT: PPC2000

The PPC2000 was published by the Association of Consulting Architects and launched in September 2000 (updated June 2003). It provides a multi-party standard form partnering contract which provides a contractually binding partnering agreement. It seeks to integrate the entire project team, who sign up to this single contractual form. In this respect, it is the client, construction contractor, or consultants and any key specialists or suppliers that comprise the "partnering team members". The contract form is not limited to the construction phase, but is written to cover the entire duration of the construction process from inception, feasibility, design and physical production on site.

The SPC2000 provides a back-to-back arrangement for sub-contractors who are referred to as "specialist" for use with PPC2000.

PPC2000 boldly attempts to provide a multi-party contractual arrangement encompassing the partnering principles. These are expressed by contractually requiring the parties to "work together and individually in the spirit of trust, fairness and mutual co-operation". Quite how the courts will interpret these provisions is unclear. Further, the contract expressly includes the Egan principles and refers directly to the Egan Report. The Egan Report sets out examples of partnering based co-operation best practice, for example, the manner in which Tesco has organised its construction work in a particular manner. Does this mean that those who sign up to PPC2000 are, by reference to the Egan Report, obliged to follow a practice that Tesco has adopted and that a failure for them to do so will mean that they are in breach of contract?

Arguably the benefit of the multi-party approach is the avoidance of the need for separate and no doubt inconsistent consultant's appointment. The new consultants or specialist sub-contractors can be joined into the single multi-party agreement by signing a "Joining Agreement". The consultant's services schedule attached to the Joining Agreement sets out the services to be provided by the particular consultant and identifies their responsibilities, as well as providing the consultant's payment terms. There is, therefore, the possibility for gaps between the particular services of each consultant and inconsistency in their role and responsibilities and payment terms.

A further advantage of the multi-party approach might be the avoidance of a raft of collateral warranties to fund as purchasers and tenants via a simple use of the Contract (Rights of Third Parties) Act 1999. However, it seems that the specialists and the consultants will most likely have to produce collateral warranties in the usual manner.

A further aspect is the net contribution options which are included within the project partnering agreement. This provides the ability to limit each of the partnering team's liability to the proportion of his responsibility for any damage. Net contribution clauses are frequently encountered in collateral warranties but are rarely if ever accepted in the primary contractual arrangements. It is only in recent years that they have started to appear in standard forms and then this has only arisen in the profession's standard forms in an attempt for the professions to limit their own liability. It cannot be said to be a generally acceptable practice.

Further, the ramifications on the insurance cover provided in respect of the project cannot be overlooked. The insurance industry that provides cover for projects does not anticipate that a net contribution clause will be included in the primary contract and so this may affect the cover that is available.

However, the fundamental question relates to the liability of the individual's involved within the project within a contractual collaborative working arrangement. Precisely what liability does each of the parties have, does liability extend between each member rather than just to the employer? The responsibilities between the parties have been blurred by clause 8.2 which provides:

> "… each Design Team member shall contribute those aspects of the design of the project that fall within its role, expertise and responsibilities as stated in the partnering documents. The Design Team shall work together and individually in the development of an integrated design, supply and construction process for the Project …"

In this respect, the problems of delineating responsibility have been exacerbated because there is no longer a clear delineation of responsibility between the individual parties. Further, the Joining Agreement provides that further design professionals and specialists may join, but may also leave and/or be replaced. The integration of individuals from different organisation working together in one team makes it difficult to identify which party or parties might be responsible for a particular design or construction error.

On the more positive side, clause 3.7 provides an early warning system in similar terms to that encompassed by the NEC Contract. In respect of dispute resolution there is a problem

solving hierarchy incorporating ADR principles. The early warning system sets out contractually a sensible management process, and a dispute resolution hierarchy also provides a practical management based approach to the resolution of disputes.

However, the implications of adjudication pursuant to the Housing Grants, Construction and Regeneration Act 1996 cannot be ignored. Any of the parties to the multi-party PPC2000, provided that the project is covered by the Act, will be able to call upon an adjudicator "at any time". While the adjudication process has been shown to be extremely effective within the construction industry, the ability for any party to call upon an adjudicator at any time does not assist the partnering based approach.

THE BE COLLABORATIVE CONTRACT

This standard form partnering agreement is for use with design and construct projects. It was initially developed by the Reading Construction Forum and has already been trialled on some projects. It is limited to the design and construction phase like most standard forms, and therefore does not deal with the operation or performance of the building once completion has been achieved. Further, it is merely a two party contract not a multi party contract like the PPC2000.

The Be Collaborative Contract comprises a set of standard conditions and a purchase order. One set of conditions and a purchase order have been produced for a party that supplies and constructs, and the other for a party that merely acts as a supplier.

Once again, the operative and introductory condition set out in Section 1 under the heading "Overriding Principle" deals with the collaborative manner in which the parties are to work together:

> "To work together with each other and all other project participants in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect."

The rest of the terms are to be read in the light of that overriding principle, and therefore the terms, and possibly the conduct of the parties is to be read against the obligation on the parties to co-operate and collaborate in good faith. An open book accounting procedure has been adopted. The parties are supposed to reach a consensus on how variations to the scope of work are to be incorporated. If the parties cannot reach a consensus then the contract provides a dispute escalation mechanism for resolving the matter.

In addition to the contract the parties are expected to develop a "project protocol". This sets out what the parties hope to gain from their collaboration and how those goals might be achieved. The protocol is not intended to be contractually binding, and therefore this aspect can be considered more akin to the non-binding charters such as NEC Option X12 and the JCT Partnering Charter and more recently the JCT 2005 Framework Agreement (Non-binding).

A further interesting aspect of this contract is the preparation of a "Risks Register". The contract therefore anticipates that the parties will analyse and identify risks. There is, therefore, a pro-active approach to risk management requiring identification of risks which might affect not just the delivery but also the performance of the works or the parties to the contract.

Once the risks have been identified the parties need to then produce a "Risk Allocation Schedule" identifying the time and financial consequences of those risks. In other words, the parties are then identifying who bears the time and cost risk of any particular item on the Risks Allocation Schedule. This approach has become more common on larger projects, but should be encouraged on a much wider range of projects. A detailed risk allocation schedule produced for a specific project goes a long way towards avoiding disputes about who might be liable or any particular issue.

Subcontractors must also participate in the production of the Risk Register, and also the Risk Allocation Schedule before they can commence any work on the project. This is an attempt to manage delay and costs in advance of the particular event.

If disputes develop then they are to be initially resolved between the parties. If this does not work then the project team is to make objective recommendations about the resolution of the dispute. The senior executives are then involved. There is an escalation of negotiation processes in an attempt to resolve disputes. Adjudication is also expressly available, and the final mode of dispute resolution is litigation.

NON CONTRACTUAL PARTNERING CHARTERS

As partnering initially developed in the Construction Industry the parties would sign a short, often only one page, "partnering charter" or "mission statement" identifying their partnering objectives. Some of them are expressed to be not contractually binding, but instead to simply capture in a subjective manner the parties' partnering objectives. They are often produced as a result of a partnering workshop, which the key individuals from the client, contractor, design team and other key suppliers will attend. A typical mission

statement might state that the team would strive to make the project "the most exciting retail and working environment, whilst mutually benefiting from our success.".

The mission statement then may set out a series of objectives, such as being committed in an open, honest and trusting manner, as well as to develop realistic objective timescales and to achieve them. It would not be uncommon to see such a signed mission statement placed on the wall of the site office for all to see.

Many of these early mission statements do not contain a statement that they are not contractually binding. It is therefore open to debate as to whether these mission statements comprise a separate contract, or a variation to the contract or contracts between the parties, or some collateral contractual arrangement. If there is a dispute between any of the participants then such a mission statement will only serve to exacerbate the issues between the parties as the parties debate the status of the mission statement and how its terms might affect the contractual agreement between them.

The mission statement is often then the result of the partnering workshop, which simply sits alongside the contract between the parties. It is an attempt to capture the culture of co-operation, collaboration and transparency between the parties in order for them all to achieve their goals, such as early completion of a high quality project, and a reasonable profit margin. Partnering is essentially a management process that seeks to establish a way in which the parties will carry out their contractual obligation. From this perspective it is easy to see how a simple non-contractual partnering charter or mission statement can be used on any contract regardless of the standard form. As a result the JCT and the NEC have produced partnering options that can quite simply be used alongside their standard form contracts, which continue to regulate the rights and obligations between the parties.

The first of these was the NEC partnering option X12. It formally recognises that the parties have entered into a partnering arrangement, but at the same time recognises expressly that the NEC option X12 does not create any legally enforceable contractual obligations between the partners other than the parties to the contract.

NEC option X12 anticipates that there will be a partnering workshop, and then seeks to develop common information systems as well as processes for design development, value engineering, value management and risk arrangements.

The NEC option X12 was possibly one of the first standard forms available for non-contractual partnering arrangements. More recently the JCT has also issued a practice note for use on a single project (JCT practice note 4). It is once again drafted to work alongside

the existing JCT Standard Forms of Contract and promote a collaborative working, much like NEC option X12.

The practice notice is relatively short setting out how the parties are to interact and identify four objectives for the partnering team to achieve:

1) Delivery,
2) People,
3) Teamwork, and
4) Commercial.

The JCT charter states that the parties are to act in a co-operative manner, fairly towards each other and to avoid dispute by adopting a no blame culture. These terms are once again not intended to create any legal enforceable obligations between the signatories to the charter. The JCT charter has now been replaced by the JCT 2005 Framework Agreement (Binding and Non-Binding).

Performance indicators are to be established in order for the partnering team to measure whether it is achieving the full objectives set out in the charter. Given that the charter is non contractual, there is little that any party can do if the partnering team fails to establish the key performance indicators, or indeed work in a co-operative manner. That, however, in itself emphasises the need for the parties to embrace partnering as a sensible management process which will help all of them to achieve their commercial goals if it is to work in practice. Whilst contracts are there to establish the rights and obligations of the parties, they are also there to provide recourse to one party for breach by the other. Once the relationship between the parties has deteriorated to that extent that the parties are relying upon the strict terms of the contract the trust and co-operation required for partnering to work will have expired.

On the basis of the dicta of His Honour Judge Humphrey LLoyd Q.C. in *Birse Construction Limited v St David Limited*, there are potential problems with partnering agreements.[25] Whilst his comments in regard to partnering agreements were strictly obiter and, whilst the case was overturned on appeal, the Court of Appeal did not address any of the matters concerning partnering agreements.

In *Birse*, His Honour Judge Humphrey LLoyd Q.C. considered that, if a party had agreed to co-operate in a partnering agreement, it could not then go back on its word by then failing to co-operate. So, while partnering agreements are non-binding, it seems that the court may think otherwise and imply standards of conduct into the contract. Moreover the court

[25] (1999) BLR 194; (1999) CILL 1494.

has a wide ranging power to open up and review certificates, and it may well be that it could take co-operation into account in so doing. The Judge said:-

> "In addition it is necessary to recall that the parties had attended the "team building seminar" a few days earlier at which the partnership Charter was signed. The terms of that document, though clearly not legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured. If Mr Heath had thought that Mr Goff had agreed to something that he ought not to have accepted Mr Heath would have said so for that would be consistent with an expression of "mutual co-operation and trust" and a relationship which was intended "to promote an environment of trust, integrity, honesty and openness" and "to promote clear and effective communication…
>
> This is particularly surprising since these days one would not expect, where the parties had made mutual commitments such as those in the Charter, either to be concerned about compliance with contractual procedures if otherwise there had been true compliance with the letter or the spirit of the Charter. Even though the terms of the Charter would not alter or affect the terms of the contract (where they are not incorporated or referred to in the contract or are not binding in law in their own right) an arbitrator (or court) would undoubtedly take such adherence to the Charter into account in exercising the wide discretion to open up, review and revise, etc which is given under the JCT conditions…
>
> I have little doubt that the parties considered that the "partnering" arrangement that they had made, as exemplified by the Charter, made it unnecessary. People who have agreed to proceed on the basis of mutual co-operation and trust, are hardly likely at the same time to adopt a rigid attitude as to the formation of a contract."

No formal contractual document was signed, but the learned judge found it clear from the relationship between the parties that they had agreed to be contractually bound to each other. It could be argued that in doing so he took a commercial and pragmatic view. In particular he noted that where, as here, an agreement to proceed via partnering made a close relationship of mutual co-operation inevitable, parties are unlikely to adopt a rigid attitude as to the actual formation of the contract. It is also significant that he found that the Plaintiff was (unfairly) trying to capitalise on the situation by sitting on, the unexecuted and unsigned contract in order to try and improve its position. If the procedure under the contract had not been strictly complied with but the spirit of the contract had been complied with, the Court could reflect on that Charter when making a decision.

There is one other case (albeit not a construction case but one which features one of the prime exponents of partnering) which highlights the danger for contractors of partnering. In the case of *Baird Textiles Holdings Limited v Marks and Spencer Plc*, a claim was made by Baird arising out of the termination of its trading relationship.[26] Baird had been one of the principle suppliers of clothes to Marks and Spencer for 30 years when without warning Marks and Spencer determined all supply arrangements between them with effect from the current production season. Baird claimed that Marks and Spencer could not do this without a reasonable notice of perhaps as long as 3 years.

In a statement given by a former chairman of Marks and Spencer, Sir Richard Greenbury stated that:-

> "The special partner relationship which M&S developed with all its suppliers of goods and services was, from its inception some 70 years ago, a cornerstone principle of the company. Furthermore, it was at the very heart of the way we did business with our suppliers M&S was going to carry on doing business with the manufacturer season after season, year after year … Once a major supplier to M&S, always a supplier - unless the manufacturer's performance was considered to be poor …"

A Marks and Spencer witness said:-

> "M&S was developed by principle of partnership. This was not a partnership in the legal sense, but more in the sprit of cooperation. The people involved in managing M&S and the suppliers had known each other for a long time, seeing their companies grow together. As a result, they were able to trust each other, converse freely and work together for mutual benefit … both fed off each other … it was in the best interest of M&S for its suppliers to grow with it, thereby passing on greater economic scale to M&S and hence its customers …"

It was Baird's case that given the length and nature of the relationship, it was a long term one which would only be terminable upon the giving off reasonable notice. Marks and Spencer were required to deal with Baird in good faith. However, the Court held that there were no contractual obligations between M&S and Baird because of a lack of certainty. There were no objective criteria by which the Court could assess what would be reasonable in relation to quantity or price. The lack of certainty confirmed the absence of any clear evidence of an intention to create legal relations. It could not be said that the conduct of the parties was consistent with the existence of the contract that Baird sought to imply.

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[26] Court of Appeal 28 February 2001.

Equally, the Court of Appeal rejected the argument that Marks & Spencer's conduct in establishing and maintaining the long term relationship induced Baird to believe that the relationship was long term and would only be terminated upon the giving of reasonable notice and as such as a consequence of reliance upon this, it would be unjust and inequitable to allow Marks and Spencer to act inconsistently with this belief. Thus Marks and Spencer would not have been estopped from denying the relationship with Baird.

In short, whilst the parties had an extremely good long term commercial relationship (based on partnering principles), it was not one which they ever sought to express or which the Court would ever seek to express in terms of long term contractual obligations.

In the case of Baird, the lack of certainty was identified at paragraph 28 of the Particulars of Claim:

> "*Marks & Spencer deliberately abstained from concluding any express contract or contracts with BTH* either to regulate the parties' on-going relationship or their respective rights and obligations season by season because it considered that it could thereby achieve much greater flexibility in its dealings with BTH than could be achieved under a detailed contract or contracts. *The absence of such an express contract or contracts was accepted by BTH because, as Marks & Spencer knew and intended or ought to have known,* BTH understood from the above pleaded conduct of Marks & Spencer that there existed a relationship between the two companies which was to continue long term and be terminable only on the giving of reasonable notice and under which the parties had the reciprocal rights and obligations pleaded in paragraph 9 above." [Emphasis added].

Significantly, Marks and Spencer's deliberate abstention from concluding any express terms meant a contract had not formed with Baird, and therefore Baird were unable to claim any loss of profits. As a result, the claim for £56 million in respect of loss of profit failed because the contract could not be objectively identified.

INTEGRATED PROJECTS AND VIRTUAL COMPANIES

The next development from a partnering form such as PPC 2000 is that proposed by the Strategic Forum for Construction (originally M4i). The Strategic Forum for Construction has produced a Model Form of Agreement for an Integrated Project Team, based upon a "virtual company".

It is a multi party binding partnering contract including not just the entire team, but also the insurers. Like PPC 2000 it comprises general contract conditions and then a series of schedules used to identify project requirements, project constraints, team members and a payment. It can be downloaded without cost from the internet. Alongside the contractual provisions are a series of non contractual guidance notes.

The contract envisages that there will be principal members of the partnering team together with "cluster partners". The cluster partners comprise particular subcontractors and suppliers that are an important part of the team such as the M&E specialist.

An innovative and interesting aspect is the "virtual company". The virtual company is not a legal entity, and is not a company in the traditional limited liability sense. It merely provides an umbrella under which each of the partners can work as if they were all employed by the same organisation. The contractual approach therefore recognises that it is the individuals that are important to the co-operation and success of the project rather than their organisation. Each individual brings their particular skills to the project, and all of these individuals from the various organisations work together (employer, contractors, design consultants and specialists alike) in order to develop the project in a collaborative manner.

BAA has adopted a similar project team approach at Terminal 5, Heathrow Airport, London. The integrated team works from one office in order to deliver the T5 project. Individuals from many organisations work together in order to reach the common goal of the successful completion of the new airport. The approach to the Strategic Forums Model Form is much the same.

Like the Terminal 5 Project the cost of the work is based on an open book cost reimbursement basis.

The organisations are allocated a specific share in the virtual company, which in turn identifies their specified risks. A party therefore may be liable in the event of some breach leading to a particular loss to the employer or end user. It is less clear how this works in practice in respect of BAA's arrangements at Terminal 5. BAA hold itself out as holding all of the risks, but quite what this means in practice is another matter.

CONSULTANTS' STANDARD APPOINTMENTS

Many of the professional institutions have developed their own standard forms for the provision of professional services. These include:-

- The RIBA Standard Form of Agreement of the Appointment of an Architect (SFA 99);
- The RICS Standard Conditions of Engagement for Quantity Surveying Services;
- The ACE Suite of Standard Form Appointments for Engineers;[27]
- The ACA Association of Consulting Architects Standard Form for Project Partnering and The appointment of a Consultant Architect for Small Works, Works of a Simple Content and Specialist Services;
- The CIC Consultant's Contract, first edition 2006, Form of Agreement Parts 1 -6 and Guidance, Part 7A Services Introduction (Introduction, Overview Definitions and Specific Scope) and Part 7B and Services.

There are others. One noticeable aspect of these standard forms is the unfortunate divergence of the provisions, as well as the protection afforded to the professional to the detriment of the paying employer. This creates two problems.

First, for an employer putting together a bundle of contractual documentation in order to obtain funding none of the contractual provisions will fit together neatly, indeed the opposite is the case. It is therefore more beneficial to negotiate with each of the design team from a single precedent appointment.

Second, the increasing protection afforded to the professionals in their own standard forms often means that the allocation of risk in the forms does not record the actual allocation of risk agreed between the parties. Further, the allocation in the standard form appointments is often unacceptable to many knowledgeable employers or indeed funders. This is unfortunate and unhelpful. A more unified approach to the production of standard forms and a more reasonable allocation of risks would considerably reduce time and money spent negotiating standard forms for any particular project.

SECTOR ORIENTATED STANDARD FORMS AND OTHER MISCELLANEOUS STANDARD FORMS

A variety of industry or sector orientated standard forms have been developed. A more widely recognised selection of them include:

[27] Many ACE standard forms are available, see www.acenet.co.uk

- MF/1;
- IChemE;
- ENAA (Engineering Advancement Association of Japan) Model Form International Contract for Power Plant Construction;
- ECA Conditions of Contract (and Articles of Agreement) for specialist engineering and construction work; and
- The National Federation of Demolition Contractors Form of Direct Contract.

AMENDING STANDARD FORMS

The guidance notes to most of the standard forms state that the forms have been drafted to carefully balance the rights and obligations of the employer and contractor or other participants as the case maybe. On this basis users are warned not to upset this balance by amending the standard form. In many cases un-amended forms are used. However, it is rarely the case that the standard form balances the risk of the parties in a manner which is applicable to the particular parties.

More importantly, the level of security that can be obtained if an external funding institution is providing capital for the project is rarely adequate. A bank will require the ability to step-into the contractual arrangements and complete the project or sell on the development if the employer or developer defaults or becomes insolvent. This will require warranties to the bank with step-in rights, or the ability to assign the contract (most funders require both). Most standard forms are expressed to be non-assignable.

In addition, a bond might be required as a measure of security. Bonds are rarely required by the standard forms of building contract and so would need to be introduced by amendment.

Relevant events for the awarding of an extension of time might be upon reflection unacceptable to an employer. For example, clause 25 of the old JCT forms anticipated that a contractor would receive an extension of time if the contractor suffered a labour or materials shortage. Most employers rely on the contractor to obtain adequate labour and materials for the works. This relevant event has been removed from the JCT 2005 suite of contracts.

Certificates expressed to be final and conclusive might be inappropriate for certain parties. The use of nominated sub-contractors, or a price adjustment formulae might also be inapplicable.

Proactive measures for the management of change might be incorporated by amendment. The NEC has gone some way to requiring such an approach with an early warning system and compensation events. However, the privately drafted PFE Change Management Supplements for use with JCT contracts introduce by amendment a change management process.[28] Guidance Notes exist for each of the supplements. It should therefore be possible for a construction professional to follow the guidance notes and insert the amendment in the usual way.

The Supplements are intended to provide the parties with specific binding obligations in respect of the management of change. The contractor is required to produce information including the programme and if he does not produce that information then he will be liable for liquidated damages. The benefit is that if the parties are pro-active then the contractor and the employer (or employer's representatives) will have a detailed plan of how the contractor proposed to build the project, together with resource related records in order to assist in the more objective termination of extensions of time and compensation as the work proceeds.

Further, the parties will also be working towards a planned actual completion date rather than a contractual but incorrect Completion Date. In order to assist this process the Supplements introduce the new concept of a risk manager, who is retained by the employer in order to check the programmes produced by the contractor. The purpose of the Supplements is to allow the employer to become more closely involved with the change process and therefore to manage it more effectively rather than leaving it to the contractor in the hope that all will be well.

PFI STANDARDISATION

Initially there were no standard forms available for use with PFI projects. Many PFI projects are based on bespoke purpose written contracts. However, some standardisation has developed, principally as a result of the Treasury Taskforce[29] and then the National Health Service Trust.

The NHS has produced a Standard Form Project Agreement for the development of a hospital and the provision of services, now in its 3rd edition. This is the principal concession agreement between a particular NHS Trust and the SPV service provider. As the agreement is to last for around 25 years the standard form deals with a large number of issues, which is reflected in the length of the document, including: land ownership issues, the design construction and then provision of the services, and quality standards. While it is hoped

[28] Specimen copies of the PFE Change Management Supplement for use with the JCT 1998 Private with Quantities and the applicable Guidance Notes can be downloaded from www.fenwickelliott.co.uk.

[29] See the Treasury Taskforce PFI Clauses

that the form will be used with minimal amendments, an amount of project specific customisation will be needed for each PFI project.

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