

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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Alliancing: What does the NEC4 Alliance Contract have to offer?



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In June 2018 the NEC published its first Alliance Contract “designed for use on major projects or programmes of work where longer term collaborative ways of working are to be created”.¹ In this Insight we examine what is meant by alliancing, its perceived benefits and when it tends to be used. We then review how the NEC4 Alliance Contract works and what it has to offer given the relatively limited market of standard form alliancing contracts.

What is alliancing?

HM Treasury’s *Alliancing Best Practice in Infrastructure Delivery* defines alliancing as:

“... an arrangement where a collaborative and integrated team is brought together from across the extended supply chain. The team shares a set of common goals which meet client requirements and work under common incentives.”²

The key to alliancing is the alignment of the parties’ goals commercially so that parties are financially motivated to focus on achieving agreed outcomes. Typically in alliancing (as opposed to partnering), cost overruns and savings are shared between the parties regardless of how they came about.³ The idea is that this results in the confrontational behaviour, sometimes associated with traditional construction contracts, being avoided. In particular, alliancing focuses on creating an integrated project team which is highly motivated to ensure the best overall project outcome as opposed to serving its own particular employer’s interests. Alliancing arrangements often also extend down the supply chain in order to try and encourage innovation and good value.

Some alliancing contracts take the non-confrontation goal to its extreme by including “no dispute” clauses which essentially waive contractual and tortious claims against alliance members in advance with the exception of fraud or wilful default. It is debatable whether such clauses are in fact enforceable, or what their likely impact on insurance policies the parties may have is likely to be, but historically they have been widely used in Australian alliancing contracts.⁴

What types of construction works tend to use alliancing?

Contracts using alliancing tend to be high value and are frequently for longer-term projects. Alliancing was first used in the UK for delivering investment in the North Sea oil fields during the 1990s.⁵ In Australia and New Zealand alliancing is also widely used for delivering high value infrastructure investment such as for roads.⁶

Examples of alliancing contracts within the UK include:

1. Alliances entered into by British Gas with lead partners and members of their onward supply chain to deliver their brownfield investment programme;
2. The Anglian Water @one alliance which describes itself as: “a collaborative organisation of consultants and contractors working together to deliver more than half of Anglian Water’s capital investment programme”;⁷ and
3. Alliances entered into by Network Rail. For example, Network Rail entered into an alliance with Atkins, Laing O’Rourke and VolkerRail for the design and construction of the East-West Rail phase 2.⁸

What are the perceived benefits of alliancing?

Alliancing is perceived as particularly beneficial where there is a complex environment with multiple stakeholders, interests and goals. The idea is that creating an alliancing contract will help collaboration and enable better performance. Similarly, it is viewed as a good tool for achieving performance improvement and

changing behaviour patterns. Alliances are also popular where there is an extended supply chain and either innovation of some form is required or direct customer access if through that supply chain.

As outlined above, alliancing is generally perceived to be more beneficial for long-term and high value projects. This is essentially because the costs of setting up an alliance are high and the benefits that alliancing may bring will need to be discounted against this cost. Obviously for higher value projects the benefits are likely to be more tangible from a cost/benefit point of view.⁹ Time is also required to build the relationships and trust required within the alliancing chain and that means that alliancing is more likely to suit longer-term projects.

What standard alliancing contract options are already available?

For high value construction projects a bespoke alliancing contract may well be used. Indeed in the 2012 Effectiveness of Frameworks Report, it was found that the absence of a suitable standard form is impeding progress in the use of alliancing etc.¹⁰

Other standard form alliancing contracts do exist including the recently published TAC-1 (Term Alliance Contract) published by the ACA¹¹ in conjunction with King’s College London.¹² The same group also publish the FAC-1 or Framework Alliance Contract which came out in 2016. The FAC-1 can be set up between one or more clients and other alliance members. These alliance members can include contractors, consultants and specialists as required. An Alliance Manager leads the agreed procedures and makes sure the FAC-1 is adhered to by the parties.¹³

The TAC-1 contract is described in detail on the ACA and King's College joint website, Alliance Forms, as follows:

"TAC-1 is a versatile standard form term alliance contract which:

- enables a client and its team to obtain better results from any term contract
- helps to integrate a team into an alliance
- helps to obtain improved value through building information modelling
- is designed for use in any sector and in any jurisdiction.

TAC-1 supports and integrates the provision of any type or scale of works and/or services and/or supplies. It is endorsed by the Construction Industry Council and by Constructing Excellence.

TAC-1 sets out:

- the "Alliance Members" including the "Client", the "Provider", and an in-house or external "Alliance Manager" with the facility to add "Additional Alliance Members"
- why the term alliance is being created, stating agreed "Objectives, Success Measures, Targets" and "Incentives"
- mobilisation and handover procedures and improved engagement with Stakeholders
- a clear "Order Procedure" for simple or complex "Orders", supported by "Template Order Documents"....
- what the Alliance Members will do to seek "Improved Value", working together through "Supply Chain Collaboration" and other agreed "Alliance Activities" in accordance with an agreed "Timetable"....
- how the Alliance Members will manage risks and avoid disputes using a shared "Risk Register", "Core Group" governance and "Early Warning" with options for an "Independent Adviser" and alternative dispute resolution
- flexibility to include particular "Legal Requirements" and

"Special Terms" required for any sector and in any jurisdiction....."

The same website also provides a very helpful description of the FAC-1.¹⁴

How does the NEC4 Alliance Contract work?

As can be seen from the above, the options for standard form alliance contracts are not very wide.¹⁵ In that sense the arrival of the NEC4 Alliance Contract is a welcome one. The contract also has familiar provisions, management processes and terminology which are an advantage for those who are used to working with NEC form contracts.

So how does the NEC4 Alliance Contract work?

The NEC4 Alliance Contract describes itself as a "true alliancing contract" because all the parties involved sign up to the same single contract.¹⁶ If a subcontractor is a member of the alliance then they become a partner with the same standing as other members. If they are not a member then the Guidance Notes make it clear they will need to be contracted to a member of the alliance in the traditional way. However, the Alliance Manager (see further below) would have to approve the subcontractor first.

The Alliance, Alliance Board and Alliance Manager

The Alliance itself consists of all of the parties who have joined together to deliver the project (potentially but not necessarily excluding subcontractors). The Alliance includes the Client. Members of the Alliance have an obligation to:

- Collaborate with each other to achieve the objectives of the alliance as well as the objective of the individual "partners" to the alliance;
- Work collectively to support the delivery of the contract on a "best for project basis";
- Develop and use common systems and processes as set out

in the Implementation Plan;

- Give advice, information and opinion "fully, openly and objectively" to the Alliance Board and others in alliance generally; and
- Establish an integrated alliance delivery team.¹⁷

As such they have more detailed and specific obligations to work together than the woollier "good faith" obligations seen in other forms of NEC4 contracts.

An Alliance Board is also set up, with each member of the Alliance (including the Client) nominating someone to sit on it.¹⁸ The Alliance Board is tasked with:

- Setting the strategy for achieving the Alliance's objectives and the partner objectives;
- Agreeing the work within the Alliance;
- Making decisions as stated in the contract;
- Appointing and instructing the Alliance Manager;
- Resolving any disputes between the Alliance.¹⁹

The Alliance Board also has the power to alter the scope and add partners to the Alliance as required. If the Client's Requirements are changed then that is a Compensation Event as would be expected. However, the Client is on the Alliance Board meaning their requirements can't be changed without their agreement.

The Alliance Manager has a similar role to the project manager in a standard NEC contract save for in one crucial respect. This is, namely, that he or she is acting on behalf of the Alliance Board NOT the Client. The Alliance Manager must act in accordance with instructions from the Alliance Board and also the Implementation Plan more generally.²⁰ The NEC Guidance Notes state that for major projects the Alliance Manager will no doubt have staff to assist them in carrying out their duties.²¹ This is perhaps to be expected given that projects using alliancing tend to be higher value.

The Implementation Plan and the Programme

There are two key documents which govern the project as a whole. These are:

1. The Implementation Plan; and
2. The Programme.

The Implementation Plan sets out the management structure for the Alliance, roles and responsibilities, delegation by the Alliance Board, the use of common systems and processes²² and (rather widely!) “any other information which the Alliance Board requires to be included” which is either in the documents referred to in the Contract Data or in an instruction.

The provisions in respect of the Programme, as you might expect for NEC contracts, require detailed provisions for float, time risks, health and safety requirements and procedures within the contract generally. Access dates, information deadlines and breakdowns of operations are also required.²³ If the Programme is set up properly (and updated regularly as per the intervals provided for in the Contract Data²⁴) then it will obviously be a powerful project management tool.

Dispute Resolution Provisions

As discussed above, alliancing contracts do sometimes restrict the extent to which parties can engage the classic dispute resolution processes should problems arise. Unlike the FAC-1, which contains relatively standard dispute escalation provisions,²⁵ the NEC4 Alliancing Contract limits both what can constitute a “dispute” and also what methods of dispute resolution can be used to resolve them.

Clause 94 provides as follows:

“The members of the Alliance Agree that any failure by a member of the Alliance to comply with their obligations stated in these conditions of contract does not give rise to any enforceable right of obligation at law except for an event which is a Client’s or Partners’ liability. Any disputes

between the members of the Alliance arising out of or in connection with the contract are only resolved in accordance with these conditions of contract.” [Emphasis added]

There are broadly speaking four categories of Client Liabilities. These are:

1. An intention act or omission to not comply with an obligation (e.g. wilful default);
2. A liability which the Client takes on from takeover (and the guidance notes make a point of emphasising that any liabilities for the Alliance are likely to be very small post-takeover and almost disappear after the Defects Certificate is issued);²⁶
3. Loss or damage to property owned and occupied by the Client;
4. Any other categories listed in the Contract Data.

The Partners’ liabilities are similarly limited and include (broadly speaking) wilful default, a breach of intellectual rights, death or bodily injury caused to an employee and any other liabilities stated in the Contract Data.²⁷

As such, very real limitations are placed on what Alliance members can raise claims for.

In terms of Dispute Resolution options provided for, the main options are referring a dispute to an independent expert for “an opinion” (not a decision) and referring the dispute to Senior Representatives of each member of the Alliance. They in turn can decide to mediate. Adjudication is an additional option although there is a query as to how useful this would be to run given the limitations on what is a “dispute” in the first place. There is no provision for the resolution of disputes by court or arbitration.

It goes without saying that parties entering into the NEC4 Alliancing Contract need to be aware that their rights to seek redress if disputes arise are severely curtailed. They either need to take this on board or amend the dispute resolution provisions accordingly to amend the risk profile being taken on. Their insurance position also needs to be carefully

considered.

Additional Options

As well as these core provisions, the Contract also gives options for early alliance involvement (a two- stage process) and Project Bank Accounts amongst others.

Conclusion

The NEC4 Alliance Contract is a useful addition to standard form alliance contracts and benefits from the fact that NEC users will be familiar with its terminology. It also provides for a range of tools to ensure that collaboration can be integrated into the team from the offset. That said, as is ever the case with contracts aimed at integrating teams and fostering collaboration, it is essential that entrenched attitudes of “them and us” are tackled early on and the integrated team is educated as to how to use these tools effectively. This may take time and will undoubtedly require additional costs and investment to set up these processes at the beginning of the contract, which is why its use is likely to be confined to higher value and longer-term contracts.

Further, parties do need to take note of the dispute resolution provisions and the limitations placed on the ability to dispute certain types of claims. Whilst the reasoning behind these limitations is clear there is always a risk that these provisions are overlooked until such claims arise.

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Footnotes

1. See the introduction to the NEC4 Alliance Contract dated June 2018.
2. See Infrastructure Client Group, *Improving Infrastructure Delivery: Alliancing Best Practice in Infrastructure Delivery*, p. 5.
3. See Julian Bailey, *Construction Law*, vol. 1, 2nd edn (Informa Law from Routledge), p. 39.
4. See Andrew Chew, “Some Practical and Legal Considerations when bidding and structuring alliancing projects”, *Australian Construction Law Newsletter*, #106 January/February 2006.
5. See the Infrastructure Client Group, “Preface”, in *Improving Infrastructure Delivery: Alliancing Code of Practice* (HM Treasury, 2015).
6. See Douglas D. Gransberg, Eric Scheepbouwer and Michel C. Loulakis, *Alliance Contracting Evolving Alternative*

Project Delivery, ch. 2 (National Academies Press), for some detailed examples of alliancing as used in these countries as well as in the Netherlands.

7. The @One alliance web page notes that: "The Anglian Water @one Alliance will design and build around 800 schemes worth approximately £1.2 billion between April 2015 and March 2020, known as AMP6 – the current five year investment period, working closely with Anglian Water operations teams and other key stakeholders. We design and construct water and water recycling (waste water) treatment centres that serve more than six million people in the East of England (and Hartlepool Water) and maintain and improve the water mains and the sewerage network in the region."
8. See Tom Fitzpatrick, "Rail Phase 2 Deal", Construction News, 4 December 2015.
9. See Infrastructure Client Group, Improving Infrastructure Delivery: Alliancing Code of Practice (HM Treasury, 2015), p. 4.
10. See <http://www.allianceforms.co.uk/about-fac-1/>. For further information see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61157/Procurement-and-Lean-Client-Group-Final-Report-v2.pdf
11. Association of Consultant Architects.
12. See <http://www.allianceforms.co.uk/about-fac-1/>.
13. See "Framework Alliance Contract used on construction projects totalling £9.5 billion" posted on 11 August 2017 on the King's College website.
14. <http://www.allianceforms.co.uk/about-fac-1/>
15. Partnering contracts standard forms are more widespread and include PPC2000 and TPC2000. See also the JCT's non-binding partnering charter and the JCT Constructing Excellence contract.
16. See "Managing an alliance contract", NEC4 User Guide, vol. 4, June 2018, p. 1.
17. See Clause 20.1 [The Alliance].
18. See Clause 21 [The Alliance Board].
19. See Clause 21.5 [The Alliance Board].
20. See Clause 22 [The Alliance Manager].
21. See "Managing an Alliance Contract", NEC4, vol. 4, p. 20.
22. These may include: communication methods between partners, costs, procurement and tendering for subcontractors and suppliers, reporting, documents, resources, progressing monitoring and programme reports and risk (including risk registers). See "Preparing an Alliance Contract", NEC4, vol. 2, p. 57.
23. See Clause 32 [The Programme].
24. See Clause 33 [Revising the Programme].
25. See Clause 15 of FAC-1.
26. See "Managing an Alliance Contract", NEC4, vol. 4, section 80.1.
27. See Clause 81.1 [Partners; liabilities].

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