International Federation of Consulting Engineers
The Global Voice of Consulting Engineers

Partnering, how it works, its risks and its benefits

FIDIC Briefing Note

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Background

The international engineering federation FIDIC (the International Federation of Consulting Engineers) believes that its member associations and their members should strive to achieve the highest degree of quality and standards.

FIDIC has always had policy statements that it expects its members to follow to ensure high standards of service in the infrastructure industry. These standards are reflected in FIDICs contracts, policy work, events and committees.

Partnering, how it works, its risks and its benefits

Partnering is becoming an increasingly popular mechanism for project delivery within the construction industry world-wide. There are many definitions of partnering, and many descriptive titles for the style of contracting that it encompasses - partnering, alliancing, integrated teams, etc.

For this reason this document explores the key features of projects that operate on a true partnering basis. These include:

- early stage involvement of the key participants in the project definition and design;
- the creation of an integrated team that includes the owner, with each member of the team having clearly-defined roles and responsibilities;
- an alignment of the commercial interests of all members of the partnering team;
- transparency of the costing process;
- managerial commitment to the partnering concept from all members of the team;
- an equitable contractual relationship and a fair allocation of project risk;
- increased project certainty and more cost-effective and innovative project solutions.

However, not all partnering projects achieve these goals in practice. The key aspects of an effective partnering project are:

- the contractual arrangements that surround it, including high quality documentation and a comprehensive and well-defined scope of services;
- a rational and fair allocation of risk with a "no-blame" environment;
- a distinction between those members of the partnering team who are best able to manage the risks inherent in the construction process and those best able to finance those risks;
- an achievable end goal.

Since there is no single definition of partnering, this document examines a range of practical partnering arrangements, from relatively simple "call out" arrangements to contracts that operate on a fully integrated team basis.

Partnering arrangements

1. Long-term alliancing

In its narrowest sense, long-term alliancing or partnering can operate simply on the basis of a framework arrangement between a client and a consultant (or contractor) or a panel of consultants. Normally such arrangements are put in place for between three and five years and enable the client to call upon the consultant(s) to provide services according to specified rates.

There is usually no obligation on the client to award any work under the framework agreement, although the consultants involved, with some exceptions, are obliged to accept any services required by the client and which fall within the scope of the framework agreement.

Framework arrangements fall within the broad definition of partnering in that, at least to some degree, the interests of client and consultant are brought together as:

- at least in theory, the consultants involved have a guaranteed flow of work and income;
- in return for which the client receives better performance, enhanced project delivery and lower cost. The client also benefits form the continuity of the institutional knowledge and experience of the consultant.

However, many framework arrangements or strategic alliances have at their core traditional adversarial contracts. Project risks are turned into contractual liabilities which consultants (or contractors) are obliged to insure, or fund through other mechanisms, to the extent that they are able so to do.

Adversarial contracts are at odds with the aims and aspirations of partnering and of working as integrated teams. Contracts of this nature encourage each party separately to look to maximise the aims and objectives defined in their own contract rather than the wider aims and objectives of the project as a whole. The individual aims of the members of the project team rarely coincide in such circumstances. This can result in conflicts of interests, with the client looking for innovative solutions and best value for money and suppliers in the supply chain looking to provide the minimum level of defined contractual services at the lowest possible cost and, therefore, maximum total profit.

When difficulties arise on contracts established on an adversarial basis the parties involved invariably look to protect their respective positions. This clearly must prevent the project team from creating solutions to project problems.

The concept of insuring project risk via the medium of contractual liabilities and professional liability insurance is also equally flawed, for a number of reasons:

- it is entirely inefficient - in some countries the ratio between damages awarded and legal and forensic costs can be as low as 1:5
- it is uncertain as professional liability insurance only responds once liability is established
- it acts as a break on team working
- it prevents any positive feedback – professional liability insurers look to protect the position of their insureds and do not act as a free information service for the benefit of society as a whole

2. Partnering pacts

In a number of areas ancillary partnering contracts have been introduced and are frequently referred to as "partnering pacts". The purpose of these partnering pacts is to establish agreed patterns of behaviour as between the members of the project team. They will invariably cover such aspects as:

- a duty to act in good faith
- an obligation to share information with the project team
- a definition of the aims of the partnering pact
- agreement as to the project aims and objectives
- in some circumstances, confirmation that each member of the team owes a duty of care to every other member of the team

It is invariably the intention that partnering pacts:

- are not binding in the sense that they have no legal effect
- act as a veneer and sit over and above traditional adversarial contracts

Partnering pacts have, in limited ways, had a positive effect in allowing project teams to manage relatively low-level disputes quickly and cost effectively. However, as soon as the financial implications of any project-related problems start to escalate the parties involved tend to revert to type and reach for their traditional adversarial contracts. Consultants working on projects to which partnering pacts attach are still obliged to carry professional liability insurance, which brings with it the difficulties set out above.

Courts in a number of jurisdictions are struggling to interpret roles, responsibilities and liabilities in relation to projects that have encountered significant financial difficulties and on which conflicts exist between the terms of legally-binding partnering pacts and underlying adversarial contracts.

3. Holistic partnering

If partnering is to work in its wider sense a more holistic approach needs to be taken, centered on a co-alignment of the strategic, financial and cultural interests of all the project team members. This can be achieved by putting in place mechanisms by which the team as a whole enjoy financial benefits if the project is delivered successfully, but equally the team bear a degree of financial pain if the project is not delivered on time and to budget.

If this pain/gain share structure is made to operate according to a pre-agreed formula irrespective of blame and the project is sourced and costed through open-book accounting the commercial and financial interests of all of the team - including the client - will be co-aligned throughout the course of the project and beyond.

An approach such as this has been successfully adopted on projects such as Terminal 5 at London Heathrow and the Sydney Waste Water Project.

A holistic approach to partnering as a mechanism for project delivery is not without its difficulties in that:

- radical new forms of contract are required
- an equally radical approach to the financing of project risk is required
- The first concern is less problematic as a number of multi-party, blame-free partnering contracts are already in existence.

The issue of funding project losses in a blame-free environment is more difficult. An allocation of project financial loss irrespective of "Liability", according to a pre-agreed formula is a laudable objective. However, each party to the loss-bearing formula must be able to fund their proportion of any loss. Allocation of loss to a party unable to fund that loss achieves neither effective risk transfer nor effective risk management. It is important, therefore, that the loss-sharing mechanism be subject to an upper limit, particularly as consultants' professional liability insurance arrangements are unlikely to respond to losses which are not linked to liability or blame.

In theory, the balance of risk over and above the pain-share ceiling reverts to the client. In practice, it would be preferable if this balance of risk were to be transferred to the risk-bearing partner in the partnering team - a professional risk taker or insurer. The insurance market is to be encouraged to introduce new products to match the new and evolving methods of procurement within construction.

FIDIC recommends:

- Members and member associations engage constructively with construction clients consider when procuring projects on the basis of holistic partnering teams in order to create improved contract certainty and improved and more innovative project delivery and project sustainability
- Members put in place and have ensured that any risks that can be mitigated have been done so in a way which is responsible and follows best practice.
- Engage with FIDIC where poor contractual or behavioural practice takes place so that FIDIC can build such lessons into its contracts and policy workstreams

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Endnotes