



THE STRENGTHS OF EARLY CONTRACTOR PROCUREMENT

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When speaking on the potential for change in construction procurement, I used to ask delegates to raise their hands in response to the following three questions:

- Who has worked on a partnering project?
- Who has worked on a project with early contractor procurement?
- Who remembers the rock band ‘Mott the Hoople’?

As this band had its hits in the early 1970s, I suggested that those who kept their hands up in response to all three questions were living proof that you can teach an old dog new tricks. Yet I am surprised by the difficulties that many in the construction industry still have in mastering and applying the trick of early contractor procurement. This gave rise to the research on which this paper is based, linked to my conviction that early contractor procurement is fundamental to successful partnering; and that both require the support of new forms of building contract.

This paper is taken from the doctoral thesis that I submitted to King’s College London in 2007 with the title *Process Contracting and Early Contractor Appointments: The potential of the conditional pre-construction phase agreement to support procurement, partnering and project management*. This is now published under the (slightly) snappier title of *Early Contractor Involvement in Building Procurement*.¹

The preparatory processes for building and civil engineering projects are the subject of considerable client investment in design consultants’ fees. But what about the involvement in these processes of the main contractor who is expected to build the project, and of its subcontractors and suppliers, with design or cost-saving ideas to offer? Their input is often commoditised in design and build projects, or negligible under single-stage, lowest price bids.

Against this background, is there merit in conditional building contracts governing an earlier role for contractors in all or part of the pre-construction phase? Could this more structured two-stage model help to tackle the causes of disputes, and could an earlier building contract be used to require or encourage efficient procurement and project management practices?

To start with the basics, if the building contract governs only the construction phase of the project, then by the time it is signed up all the creative stages are

¹ David Mosey, *Early Contractor Involvement in Building Procurement* (Wiley-Blackwell, 2009).

largely complete and everyone just wants to get the job finished with minimum hassle. Yet when disputes do arise and the building contract comes out of the drawer, the origins of those disputes are often in the early stages of the project – when the contractor was not on board, and over which the construction phase building contract has no control.²

Over recent years, clients have worked more closely with contractors through a team-based approach to projects known as ‘partnering’. Yet despite many successful partnering projects and widespread government and industry endorsements,³ there remains confusion as to what partnering actually means and what it requires from project team members. Barlow, Cohen, Jashapara and Simpson describe it as ‘a generic term for a range of practices designed to promote greater cooperation between organisations’,⁴ whereas Smith, Merna and Jobling refer to it as ‘a structured management approach to facilitate team-working across contractual boundaries’.⁵ Both of these are vague definitions.

More helpfully, in the context of project processes rather than just collaborative relationships, Bennett and Pearce make the crucial point that ‘Partnering works by making careful plans at the start of projects and then relentlessly putting them into effect’.⁶ However, the frequent failure to pin down a set of clear rules of engagement for partnering has slowed its progress, allowing cynics to suggest that it is at best no more than hot air, and at worst a non-commercial basis for engagement between clients, consultants and contractors that is open to exploitation at the first sign of trouble.

Yet partnering has also been claimed capable of generating benefits without the need for clear contractual or commercial disciplines. Bennett describes it as ‘an almost automatic way of working’;⁷ and I have heard some clients, contractors and consultants claim (although less so recently) that if you are partnering you do not need a contract at all. This optimistic view does not recognise the legitimate differing commercial interests of the members of any partnering team, and the unpleasant surprises and consequent tensions that can arise during the course of any construction project. To expect partnering to work automatically is easily open to challenge, and I prefer the honest recognition by Williamson that to succeed it requires ‘cooperative adaptation’,

2 For example, inaccurate design, inadequate design and inadequate site investigation: Mohan M Kumaraswamy, ‘Common categories and causes of construction claims’ (1997) 13 Const LJ 21.

3 See for example the 2005 National Audit Office report, *Improving Public Services through Better Construction* (downloadable from www.nao.gov.uk), also numerous Constructing Excellence and Housing Forum demonstration projects, downloadable from www.constructingexcellence.org.uk and www.housingforum.org.uk.

4 James Barlow, Michael Cohen, Ashok Jashapara and Simpson Yvonne, *Towards positive partnering: Revealing the realities in the construction industry* (The Policy Press, Bristol 1997), page 1.

5 Nigel J Smith, Tony Merna and Paul Jobling, *Managing risk in construction projects*, (Blackwell, Oxford 2006), page 144.

6 John Bennett and Sarah Peace, *Partnering in the construction industry: A code of practice for strategic collaborative working* (Butterworth-Heinemann, Oxford 2006), page 83.

7 John Bennett, *Construction – The third way* (Butterworth-Heinemann, Oxford 2000), page 106.

by way of deliberate and careful efforts necessary to align the contractual positions of the parties and to establish common processes so as to ‘fill gaps in project information’.⁸

Is it possible that earlier building contracts can describe the processes whereby a team fills these gaps, and can thereby help to resolve the paradox that partnering appears to work but still lacks clear definition? Can a team describe in writing the key features of their partnering relationship without losing its magic, and is it possible for contracts to underpin those relationships?

I will argue that ‘early contractor procurement’, under conditional contracts containing agreed team-based processes and programmes, can greatly assist the management of risk, the avoidance of disputes and the establishment of successful partnering relationships. This requires on the one hand an adjustment in the traditional view of what a contract can achieve, and on the other hand acceptance of more commercial contract wording than some partnering enthusiasts will think appropriate. However, the evidence shows that when the links are properly made between early contractor procurement and partnering, the benefits to the client and the construction industry can be significant.⁹

Partnering in the recession

Construction is now going through a turbulent era. There is less money and less confidence, and that breeds a measure of cynicism and suspicion as to the value of good practice. In these circumstances, contractors are tempted to offer dangerously low tenders; and clients are tempted to accept them.

When times are tough, money is tight and everybody is sharpening their pencils, is it easier to make savings by going back to a simpler pre-partnering approach? We have been in recession before, last in the early 1990s; for those of us old enough to remember, it was the claims and insolvencies of that era that led directly to the reforms recommended by the 1994 Latham Report.¹⁰ Initiatives with their origin in Latham’s work have generated many improved construction practices, ranging from new contract forms to the widespread advocacy of partnering as a means to deliver good value.

Yet, when our backs are once more against the wall, there is an instinctive withdrawal to lowest price bidding under a ‘take it or leave it’ set of single-stage tender documents. Whether or not this is a backward step, the more important question is whether reverting to single-stage tendering actually meets the client’s commercial objectives to achieve real savings in the current economic climate – or whether ‘partnering’ can do this better, if it evolves into something with harder edges.

8 Oliver E Williamson, ‘The evolving science of organisations’, [1993] *Journal of Institutional and Theoretical Economics* 48.

9 See twelve project case studies in Appendix A of *Early Contractor Involvement in Building Procurement*: note 1.

10 Sir Michael Latham, *Constructing The Team*, Final Report (HMSO, July 1994).

My recommendation is that the next stage of evolution should take the form of recognising and standardising ‘early contractor procurement’ as a more structured and robust procurement option than the largely ‘relational’ approach that has been adopted in the name of partnering. Early contractor procurement for this purpose comprises a set of closely programmed commercial systems designed to achieve the closer integration of procurement, contract formation and project management processes. By this means, main contractors, subcontractors and suppliers join the project team in an orderly manner as early as possible along a clearly defined route map, and participate in appropriate stages of:

- design review and specialist design contributions, including added value proposals on issues such as sustainability;
- risk management and value engineering to reduce costs;
- price finalisation through second-tier tenders or supplemental works package business cases;
- construction phase programming, to establish deadlines for the key deliverables of all parties.

What is wrong with single-stage tendering?

MacNeil describes this process as ‘short and sharp consent’ and as ‘a process heavily laden with conflict’.¹¹ We all recognise the value of fixed price quotes, but if these are based on incomplete information in the hands of the client or desperation in the mind of the bidder, this creates both a false sense of security and an environment where each party seeks to exploit apparent weaknesses on the part of the other. Robert Smith calls this ‘legalised gambling’ and suggests that despite its attractions in terms of apparent cost certainty and transfer of risk, ‘as a practical matter, things seldom work out this way’.¹²

The single-stage approach also excludes the contractor, its subcontractors and suppliers from any contributions to design, risk management, programming or achievement of cost savings, until it is too late for these contributions to benefit the client. If contractors are presented with a pile of documents against which to submit prices within a limited timeframe (for example, 40 days for public sector projects procured under the EU Restricted Procedure), there is little opportunity for bidders to offer the added value proposals that most clients want. Indeed the pressure in the current climate to force costs down will mean that bidders are low-balling their prices at the expense of pretty much everything else.

So the client sees an attractive price and appoints a contractor desperate for work; nevertheless, that contractor needs to make a profit. This leads to the exploitation of errors and omissions in the client’s brief, designs and pricing

11 Ian J MacNeil, ‘The many futures of contracts’, (1974) 47 Southern California Law Review 691-816, page 777.

12 Robert J Smith, ‘Risk identification and allocation: saving money by improving contracts and contracting practices’, (1995) 12 ICLR 40, page 44.

documents – yet the client, when appointing the contractor, has no way of knowing whether its consultants have made these errors or omissions or not. There is no incentive in a single-stage tender for the bidders to notify consultant errors or omissions. On the contrary, these are ‘money in the bank’ as a basis for future claims for extension of time and loss/expense, giving rise to costs that the client did not expect when it accepted a low bid.

Origins of claims

But is it true that claims and related disputes originate from problems in tender documents, under a strategy that excludes contractors and their supply chain? Judge Anthony Thornton QC in his 2004 Michael Brown Lecture at King’s College London commented that claims and disputes originate primarily from poor planning, inadequate identification of work scope and unsatisfactory design, detailing and specifications.¹³ All of these have their origins in pre-construction processes that need to be addressed before a construction phase building contract is entered into.

In 1997, Mohan Kumaraswamy identified his top ten causes of claims (as perceived by contractors, clients and consultants), in descending order of significance:

1. Inaccurate design information;
2. Inadequate design information;
3. Inadequate site investigations;
4. Slow client responses;
5. Poor communications;
6. Unrealistic time targets;
7. Inadequate contract administration;
8. Uncontrollable external events;
9. Incomplete tender information; and
10. Unclear risk allocation.¹⁴

These findings suggest that claims and disputes arise primarily not because other team members are villains, but because designs and risks are not well communicated. If the parties going into any important contract do not take the trouble to find out each other’s views and assumptions, but instead choose to remain at arm’s length, then it is no surprise that they will take a cynical assessment of each other’s errors or omissions.

Banwell noted in 1964 that:

‘To call in a contractor to the site on which a complicated scheme – the planning of which may have taken many months or even years – is to be

¹³ Judge Anthony Thornton QC, ‘Ethics and Construction Law: Where to Start?’ SCL Paper 117 (April 2004), <www.scl.org.uk> and [2004] TECBAR Review 3.

¹⁴ Kumaraswamy: note 2.

executed, and to expect him to be able to make himself thoroughly familiar with his task and to settle a right way in which to do it, when the work must start within a few weeks or days, is unreasonable.¹⁵

It is arguable that all Kumaraswamy's listed grounds for claims above are at least in part attributable to problems in the planning stage of the project. All of them would be less likely to arise if the client and its main contractor (with consultants, subcontractors and suppliers involved, as appropriate) entered into an early relationship to ensure that the following pre-construction phase activities occur:

- Joint design review and development, whereby there is an opportunity for the main contractor and its specialists to comment on buildability and affordability and to offer alternative solutions (grounds 1 and 2);
- Second-stage supply chain tendering to encourage the main contractor, after first-stage selection, to price or re-price works packages by means of subcontractor or supplier tenders, working jointly with the client so as to iron out errors or omissions in the brief and achieve accuracy in the flow-down of risk (ground 9);
- Joint risk management, whereby the main contractor can make proposals for early risk reduction actions rather than just quoting risk contingencies (grounds 3, 8 and 10);
- Advance agreement of a construction phase programme, identifying contractual deadlines for key client, consultant and contractor activities (grounds 4 and 6);
- Development and implementation of a communications strategy during the pre-construction phase, with clear delegated authority, early warning mechanisms and advance notification of the cost of variations (ground 5);
- Closer client involvement with its project team, for example by attendance at key meetings, commencing during the pre-construction phase, so as to ensure access to information other than only via the contract administrator (ground 7).

I suggest that the potential benefits of these relationships and processes, in tackling the primary causes of disputes, justify greater clarity and commitment in the industry as to the best ways of achieving earlier contractor procurement.

When are contracts normally signed?

Early contractor procurement needs conclusion of an earlier building contract under which the main contractor's appointment is conditional while the pre-construction phase activities are completed. But is this realistic, when the signature of building contracts is often delayed until long after start on site? Delay in signing building contracts (not to mention subcontracts) is a

¹⁵ The Banwell Report, *The Placing and Management of Contracts for Building and Civil Engineering Work* (HMSO, 1964), page 4.

depressing convention of any construction procurement process, and may arise because:

- there is too much else to do at the point of start on site; or
- there is a lack of confidence as to whether the contract covers everything; or
- there are ongoing negotiations and brinkmanship on matters of detail.

However, there is a serious risk to all parties if a project starts on site without a supporting contract and, therefore, without clarity as to the parties' mutual commitments. This creates delays and related costs and it also allows confusion as to the dividing lines and interfaces between team members' respective roles and responsibilities.

In this environment, the widespread use of a 'letter of intent' in place of an unsigned contract offers a fig-leaf of contractual respectability which is also an interesting step towards a type of early contractor procurement. The letter of intent acts as a half-way house to get things started on site without full legal commitment; and it is a convenient way to recognise an incomplete deal while thrashing out a complete deal. But is a letter of intent a proper contract?

It is possible that letters of intent may have 'negative contractual intention', but it is also possible that the courts may 'hold the parties bound by the document'¹⁶ – particularly where the parties have relied on a letter of intent for a long time as the basis for their actions and payments.

By contrast, a conditional building contract can create a fully documented version of a letter of intent and is therefore a much more robust means of covering an interim contractual position while full project information is completed. A conditional contract can recognise outstanding matters that stop the parties concluding their deal in full, also creating detailed machinery for moving from an incomplete deal to a complete deal without delay. It can express all this in clear terms and with a contractually enforceable timetable.

Early contractor procurement and integrated processes

Government reports as early as Emmerson in 1962 identified the separation of the design phase from the construction phase of a project as a problem, and observed that, 'In no other important industry is the responsibility for the design so far removed from the responsibility for production'.¹⁷

The Banwell Report in 1964 picked up this theme and stated that 'those who continue to regard design and construction as separate fields of endeavour are mistaken ...'.¹⁸

16 Hugh Beale (general editor), *Chitty on Contracts* (30th edition, Sweet & Maxwell, 2010), paragraph 2-125, page 212.

17 The Emmerson Report (Ministry of Works), *Survey of Problems before the Construction Industries* (HMSO, 1962), page 9.

18 Banwell, note 15, page 4.

Nearly thirty years later, Sir Michael Latham observed that many of the problems identified by Banwell had not been solved and that among these ‘the traditional separation of design and construction has long been a source of controversy’.¹⁹

The client draws no distinction between design and construction when occupying a completed building, and is interested only in obtaining the benefit of a project completed efficiently and in minimising claims or disputes. But without a clear pre-construction phase contractual system, there is a greater likelihood of procurement decisions being delayed or sidestepped, deferring main contractor and specialist appointments and continuing to separate artificially the design aspects of a project from those relating to its construction.

An agreement to agree?

The majority of published standard form building contracts provide for the appointment of the main contractor and its subcontractors and suppliers only at the point when construction is just about to commence on site. But is an earlier conditional contract just an agreement to agree? It is correct that a conditional contract would be unenforceable if it lacked meaning without agreement of further terms. On the other hand, such a contract can be enforceable if it contains enforceable ‘machinery’ to achieve any required further agreement.²⁰

A conditional set of contract mechanisms can ensure that an early contractor appointment is enforceable and that the parties do not resort to negotiation and brinkmanship in the run-up to the unconditional construction phase appointment. A pre-construction phase programme can create a series of activities in place of negotiations, by which business cases are built up to demonstrate the cost and value of particular proposals. By this means, MacNeil observed that ‘allocative planning’, where activities can be fully mapped out because they are fully understood, can be merged with ‘enterprise planning’, a means of moving from incomplete to complete information without being distracted by differing commercial interests.²¹

I have described this approach as ‘process contracting’: it represents a refinement of MacNeil’s categorisation of contracts as relational, neoclassical or classical.²² It does not seek to treat the contract as a complete standalone transaction (the ‘classical’ contract model), but recognises that there are some features that remain to be finalised (the ‘neoclassical’ contract model). It also recognises partial reliance on effective communication and team working that are familiar from project partnering (the ‘relational’ contract model).

19 Sir Michael Latham, *Trust and Money – Interim Report of the Joint Government/Industry Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry* (HMSO, 1993), page 7.

20 Chitty: note 16.

21 MacNeil, note 11, page 777.

22 Ian R MacNeil, ‘Contracts: Adjustment of long-term economic relations under classical, neo-classical and relational contract law’ (1978) 72(6) North Western University Law Review 854-905.

However, under a conditional/unconditional two-stage contract, the appropriate ‘relational’ behaviour is driven by binding processes and deadlines to reach a clear commercial goal, namely getting the job on site in line with the client’s original expectations.

What is the proper role of a building contract?

But is it the role of the contract to deal with the processes necessary to fill in the blanks in the project information, in the run-up to start on site? Robert Smith envisages three roles for the contract:

1. Clarification of rights, responsibilities and procedures;
2. Identification, assignment and transfer of risk; and
3. Acting as a ‘planning tool’ so that there are ‘fewer surprises and dilemmas during construction’.²³

It is in this third role that the building contract can be of great benefit if entered into on a conditional basis during the pre-construction phase. Burke observes that greater opportunities for improving the parties’ performance and the overall project results can be achieved at the ‘front end’ of the project process than later on.²⁴

A contract supporting a programmed system of early contractor procurement influences the project through:

1. Assessing and adopting main contractor, subcontractor and supplier contributions to the buildability, affordability and appropriateness of designs;
2. Testing the scope for savings against the project budget through controlled subcontractor/supplier second-stage tenders; and
3. Assessing and deciding on the viability of new ideas in respect of energy saving, reduced carbon emissions, reduced waste and improved training and employment – and even project bank accounts.

Is it good to talk?

A conditional contract should establish at an early stage a communication strategy among all team members. Barlow *et al* caution that partnering can sometimes involve a disproportionate increase in the amount of time spent communicating, and can also generate excessive numbers of points of contact.²⁵ Nigel Smith notes the importance of linking communication to a programme in an explicit system that is ‘planned and monitored’,²⁶ and warned that otherwise information will arrive too late for required decisions. How many construction programmes have been frustrated by

23 Robert J Smith: note 12.

24 Rory Burke, *Project Management: Planning and Control Techniques* (3rd edition Wiley, 1999), page 31 (reprinted 2002).

25 Barlow *et al*, note 4, page 55.

26 Nigel J Smith (editor), *Engineering Project Management* (2nd edition Blackwell Oxford 2002), page 12.

misunderstandings as to when a design release or a client decision is due? However, if clear delegated authority is granted to a limited number of individuals, and if the interfaces and deadlines that each team member depends upon are set out in a single construction programme that all parties sign up to, then the process of communication becomes more efficient.

One of the problems in construction project communication is an excessive reliance on meetings which, Lock observes, can often result in:

‘... a set of excuses from participants as to why actions requested of them at previous meetings had been carried out late, ineffectually, or not at all.’²⁷

A more effective way to achieve commitment through communication is, as Burke observed, ‘to make the person aware of the cost of any delay to the project’ deriving from their failure to do what they have promised.²⁸ The combination of a communications strategy with an agreed programme of specific activities is a practical way to achieve this.

Early contractor procurement is also necessary to ensure that construction phase programmed activities involve all relevant parties and are agreed to by all of those parties. There is a temptation in single-stage tendering for the consultants to establish a programme that meets the client’s requirements, against which bidding contractors are invited to tender, but on which the selected contractor and its supply chain have not been consulted as to its logic or practicality. As Smith *et al* point out: ‘It is difficult to enforce a plan conceived in isolation’ and it is therefore ‘essential to involve the individuals and organisations responsible for the activities or operations as the plan is developed’.²⁹

So does early contractor procurement work?

The potential for early contractor procurement has been clear for a long time. A NEDO report back in 1975 confirmed that of all procurement methods two-stage tendering was the most likely to produce predictable cost results, namely 82% of projects successfully completed within plus or minus 5% of the contract price. Single-stage tendering had the worst results, with only 56% of projects completed within plus or minus 5% of the contract price.³⁰

The 1998 CIRIA report ‘Selecting Contractors by Value’ concluded that a properly structured two-stage approach results in improvements to teamwork, programming, design, specification, care of the environment, budgeting and management of risk and value.³¹

27 Dennis Lock, *Project Management* (9th edition Gower, Aldershot 2007), page 401.

28 Burke, note 24, page 200.

29 Smith, Merna and Jobling, note 5, page 6.

30 National Economic Development Office, *The Public Client and the Construction Industry* (1975), page 43.

31 Construction Industry Research and Information Association (CIRIA), *Selecting Contractors by Value* (1998), page 14.

As for the concern that early contractor procurement creates delay by reason of the time required for joint pre-construction activities, the findings of the 2007 Nichols report examined the Highways Agency version of this model and found that it can reduce project preparation time by 30-40%.³²

So why is early contractor involvement not fully embedded as a mainstream procurement option? One answer is that it is counter-intuitive for clients, because it involves appointing a contractor before securing a fixed price.

Early contractor procurement and pricing

The central commercial issue that needs to be addressed in early contractor procurement is the fact that for a contractor to participate in design development, risk management and construction phase programming, its conditional appointment is unlikely to be on the basis of a fixed price. Instead, the contractor is appointed to work alongside the client and its consultants in developing additional information in these areas and in finalising an acceptable price prior to being authorised to start on site. It is relevant to consider the implications of this, firstly in terms of criteria for early contractor selection, and secondly in terms of the means by which pre-construction phase processes can ensure that the client obtains cost certainty prior to an unconditional contractor appointment.

To start with the traditional approach: in order to provide an accurate price in a single-stage tender, each bidding main contractor needs to present the client's proposed requirements to each of its subcontractors and suppliers and to obtain sub-divided fixed price quotes prior to each main contract bidder, then submitting its own fixed price quote to the client. The time and cost of conducting such procedures in a structured and thorough manner are prohibitive for most main contractors, subcontractors and suppliers on most projects, due in part to time constraints set by the client for the main contract tender process and in part to the cost and difficulty of bidders sub-dividing the client's tender documentation.

This practical challenge is exacerbated by the number of tenders sent out by clients to prospective main contractors and the greater number of sub-divided subcontract tenders that would need to be sent out by each tendering main contractor to a range of prospective subcontractors and suppliers. Hence, main contractors and their subcontractors and suppliers are likely to make value judgments as to the level of detail and accuracy in their subcontractor enquiry documents and responses, and to allow additional amounts to cover the risk of inaccurate pricing.

Any contractor will also be at risk if obliged to provide a fixed price quotation to a client based only on budget estimates received from its subcontractors, because those subcontractors are not in a position themselves to give a fixed quotation, for example because suitably detailed drawings are not made

32 Mike Nichols, *Review of Highways Agency's Major Roads Programme*, (Department for Transport, 2007; downloadable from www.dft.gov.uk), pages 32-33.

available.³³ Yet in a single-stage tender, bidding contractors may not be allowed the opportunity to comment on whether the designs forming part of the invitation to tender are sufficiently detailed for them to obtain fixed price quotations from their subcontractors and suppliers.

By contrast, under early contractor procurement, if fixed prices are built up after main contractor selection by means of business cases and second tier subcontractor/supplier tendering, there is a strong argument that this will produce better bids that can be fully be assessed for value, and can be analysed to achieve further savings. Subcontractors and suppliers bidding to a pre-appointed main contractor will be more likely to offer their best prices as they will be one of three or four bidders, as opposed to one of 18 or 24 if they are bidding to a main contractor that is itself one of, say, six still bidding for the overall project. The client and its consultants can sit in on interviews with subcontractors and suppliers, can extract added value proposals and value engineering at the point of selection and can operate all the commercial levers of teambuilding. These are ways to achieve real cost savings based on analysis of each works package, as opposed to the illusory cost savings of a lowball main contract bid unsupported by accurate subcontractor/supplier cost information.

And how does the client protect itself against unexpected cost increases or against main contractor laziness, once its feet are under the early procurement table? The answer lies in a conditional first-stage appointment with the ability of the client to pull out, and to procure an alternative main contractor, if a series of stated preconditions are not satisfied – including the achievement of a price within budget and a set of designs compliant with the project brief. This keeps all parties on their toes, with an unconditional client appointment (in pre-agreed terms) for the contractor to proceed with the construction phase only concluded once all the preconditions have been satisfied.

Is early contractor procurement EU-compliant?

It is important to adopt a structured conditional approach for public sector projects to achieve EU compliance. If an early contract is awarded only for the pre-construction phase of the project (for example, under a separate freestanding consultancy appointment of the main contractor), then there is an argument in EU terms that the subsequent award of a separate construction phase contract should be the subject of a second later EU procurement process.

That would of course remove the main commercial drivers for early contractor procurement. On the other hand, a conditional contract pursuant to which conditions are progressively satisfied is a single award, and the process of satisfying those conditions is a contractual mechanism rather than the creation of a second contract.

³³ On the risks of single-stage pricing, see for example Burke, note 24, page 85.

Is there an ‘early contractor procurement’ contract?

Inevitably, I mention PPC2000 as the only published two-stage form of project partnering contract which sets out early contractor procurement mechanisms in a way that addresses the EU procurement concern mentioned above.³⁴ The PPC structure was born of partnering, but in tougher times provides the machinery of early contractor involvement with or without the warm glow of partnering. Another model is a bespoke two-stage contract based on NEC3,³⁵ used by the Highways Agency; and more recently the published JCT 2008 Pre-Construction Agreement.³⁶ Comparing the merits of the different contracts is, however, secondary to combining the contract with a clear contractual programme under which each of the team members (client, consultants and main contractor – plus key subcontractors/suppliers) meets deadlines for all its pre-construction phase activities leading up to start on site and for interfaces between them during the construction phase. Having advised on over 150 early contractor procurement projects in many sectors and jurisdictions, I have found that it is always this timetable that proves the most demanding document to create – but also the most useful in practice.

Conclusions

Does the early contractor procurement model really deliver savings, when compared to the temptation of single-stage lowest price? Logically, a full examination of underlying costs through early contractor involvement is a superior way of achieving savings, compared with waiting to see whether the market alone drives down overall tenders.

Contractors can bid for a first-stage appointment against a notified budget, in relation to which they declare profit and overhead (plus rates for those items that can be identified against the current state of designs); and the client can secure a full understanding of how the contractor approaches the pricing of the project and how exactly it expects to benefit. All other costs are then open for the contractor, with the rest of the team, to examine and revisit in order to help the client make savings.

By way of illustration, National Audit Office case studies in 2005 included the Milton Keynes Treatment Centre, where three months of early joint working between the client, its design consultants and its contractor reduced a £15m budget to a £12m outturn cost, without compromising design or causing delays.³⁷

And for the doubters who still believe that driving down prices through single-stage tendering represents the safe option, Sir Michael Latham offers these observations:

34 Association of Consulting Architects, PPC2000, obtainable via www.ppc2000.co.uk.

35 Institution of Civil Engineers, *NEC3: Engineering and Construction Contract* (Thomas Telford, London 2005).

36 JCT, *Pre Construction Services Agreement: General Contractor (PCSA)* (2011 edition forthcoming).

37 National Audit Office report, note 3, page 33.

‘Returning to the old ways of adversarial behaviour will lead to more conflict between client and contractor, with variations and claims working up the original tender price, as contractors look to make money that was not in the original tender. If clients go back to the bad ways, the industry will do the same. Instead of focusing on project outcomes, their concentration will be on preparing for costly legal claims in court’.³⁸

I hope that this paper gives an indication of how a more forensic adaptation of partnering by way of early contractor procurement can create a flexible model for procurement, contracting and project management that will assist clients, consultants and contractors in avoiding disputes and in achieving measurable savings and added value. If this model is brought into the mainstream of procurement options, then to quote Ian Hunter of Mott the Hoople ‘You’ve got a surefire hit there’³⁹ – which should persuade even the old cynics.

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³⁸ Email to the author, November 2008.

³⁹ Ian Hunter website, www.ianhunter.com, ‘The horse’s mouth’ (April 2009).

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is to promote the study and understanding of
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in the construction industry’*

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