Alliancing and partnering
Forming a successful alliance

Alliancing was identified by McNulty as a key means of improving efficiency in rail. This note considers what alliancing entails, and the lessons that can be learnt from its use elsewhere in the construction industry.

What are alliancing and partnering?

Partnering and alliancing are nothing new. The partnering concept was one of the key elements to come out of the Egan Report "Rethinking Construction", back in 1998. Egan stated:

"Partnering involves two or more organisations working together to improve performance through agreeing mutual objectives, devising a way for resolving any disputes and committing themselves to continuous improvement, measuring progress and sharing gains."

However, the concept had existed long before the Egan report. The Bovis/Marks & Spencer partnering arrangement dates back to the mid 1920's and it is understood that BAA, for example, has had much success over many years with its framework agreements.

Alliancing and partnering models

Over the years, various kinds of alliancing and partnering have evolved, including:

- Project partnering
- Strategic partnering
- Framework agreements
- Alliancing

Whilst the talk in the rail sector is all of "alliancing", it is likely that in practice we will see a variety of these models adopted.

It is notable that alliancing in rail is gaining favour at a time when its popularity has been waning in the construction sector. When the credit crunch hit in 2007, other procurement models such as lowest price tendering unsurprisingly became more common. However, the government has retained its interest in partnering and alliancing, and we have seen various collaborations being formed in the utilities sector over the past two or three years.

Should alliances be contractually binding?

Over the years, this question has attracted a good degree of attention. Should the alliancing or partnering relationship be pinned down in contractual terms? Alternatively, does it overlay the contract in some way, or even replace it altogether?

The debate stems from Egan's stated position in "Rethinking Construction", that:

"Effective partnering does not rest on contracts. Contracts can add significantly to the costs of a project and often add no value for the client. If the relationship between a constructor and employer is soundly based and the parties recognise their mutual interdependence, then formal contract documents would gradually become obsolete."

This is not an approach that we would recommend. Our own experience has been that the rights of the parties are best specified in a legally binding contract, albeit a contract which is applied in the spirit of partnering. In Birse Construction Ltd v St David Ltd [1999] BLR 194, (in which Osborne Clarke acted for the successful contractor) the court considered a non-binding agreement as an aid to the construction of the formal contract when dealing with a dispute under that formal construction contract. The court found Birse were entitled to leave site as the partnering agreement was not binding and the underlying contract had not been agreed.

This lack of binding obligations leaves both parties to an alliance exposed if an insurmountable dispute were to arise. It also increases the likelihood of disputes, as each party's rights and obligations will not have been specified with enough certainty for people to know where they stand. Alongside this, the processes for regulating and governing the alliance also need to be defined clearly. Transparency is needed as to costs and profits, and each party's respective responsibilities. Without these, the client is at risk from malpractice or even fraud if its relationship with the contractor becomes too trusting.

The way in which the alliance is documented needs to be clear as to which parts of the arrangement are legally binding (milestones and payments, for example) and which are non-binding elements of the partnering relationship (e.g. acting in "good faith" – a concept the English courts have not yet treated as legally enforceable).

Alliancing contracts tend to be bespoke, and this approach is likely to be applied in rail, too, where each alliance will need to be tailored to the requirements and challenges of the routes it covers.
Advantages and disadvantages of partnering

Partnering is intended as a conscious move away from the traditional approach of the construction industry, which has been based upon arm's length commercial and contractual relationships and onerous contract terms.

The advantages and disadvantages of partnering can be summarised as follows:

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
<th>Observation</th>
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<tbody>
<tr>
<td>Active management of the project in all respects, as opposed to 'reactive' management when problems arise.</td>
<td>Success of project depends on personal commitment and trusting relationships, which may be difficult to develop.</td>
<td>'Old dogs and new tricks'. Some alliances work very well but others are paying lip service to the concept, with obvious risks. We are involved in a partnering dispute that involves a county council's refurbishment programme. The council's project manager appears to be mandated to reduce monthly payments, not to work collaboratively.</td>
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<tr>
<td>Potentially reduced costs and project durations, and improved quality of deliverables.</td>
<td>Necessary investment in developing new processes, training and team building to maximise prospects of success.</td>
<td>Ability to deliver depends on the quality of the team. The recession appears to have significantly dampened enthusiasm due to requirement to decrease budgets.</td>
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<td>Continuous and maximised input from the participants.</td>
<td>Perception that partnering is a barrier to pure market forces and competition outside of the partnering arrangements.</td>
<td>Potential problem in that the benefits of partnering are not routinely passed down to the supply chain. The contractor, as an example, seeks to cover risk by imposing onerous payment terms and design obligations. This does not fit with a collaborative approach.</td>
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<td>Improved value for money developed over a series of projects. Continuous improvement over time.</td>
<td>Risk of “cosy relationships” and complacency and/or loss of interest once initial positivity fades.</td>
<td>See comments above. We have seen examples of double payments caused by deliberate multiple invoicing, and of contractors issuing invoices that suggest that individuals were each working more than 24 hours in a day.</td>
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What are the risks of partnering or alliancing?

Some of the particular risks or issues that could occur on a partnering project include:

- Partnering or alliancing tends to need high-level management time and commitment to succeed. A small project may not justify this.

- Initial enthusiasm and commitment may be followed by a lack of interest. The appointment of consultants/team members who encourage and emphasise the advantages of a collaborative approach may be of assistance in overcoming such problems. Disillusionment, if disputes follow a successful partnering project.
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- If there are no mutually beneficial outcomes and mutual risks and rewards, as this becomes apparent to the parties, the project must either adapt or may fail.

- Long term collaborative relationships may struggle to survive a change in senior personnel. There is a risk that projects will return to a confrontational approach.

- A lack of alignment in objectives causes problems. The issue of aligning the incentives applicable to TOCs and Network Rail are considered in our other paper for this forum. However, there are also wider issues around aligning the interests of the broader supply chain with those of Network Rail and the TOCs. Traditionally there has been significant discrepancy in bargaining power caused by Network Rail's monopolistic position. This causes unfair allocation of risk and a lack of transparent, objective analysis in solving problems and disputes. Will this change, simply because a TOC is now sitting alongside Network Rail?

- A lack of familiarity with partnering also adds to the perception that disputes will arise. Training is therefore important.

- Cost reduction measures can lead to pressure to reduce the number of parties involved, which can eliminate smaller potentially innovative or specialist companies from participating in future partnerships. This will create barriers to entry for newcomers.

- Reputational issues are also important. Does a participating organisation have a track record of partnering or a reputation as being confrontational?

Key processes in successful partnering or alliancing

Successful partnering requires the parties to:

- Believe in the partnering relationship and be prepared to change any old habits which are inconsistent with the partnering ethos; and

- Agree objectives that are mutually beneficial to all parties and that involve truly shared risks / gains.

Many successful partnering relationships require external training to assist the parties in developing the necessary frame of mind.

As any partnering project progresses, other processes key to its success include:

- Managing behavioural change within the parties’ organisations.

For example, there should be a move away from the parties using claims to maximise recovery on projects and the underlying blame culture, which does not serve to identify solutions to problems.

We are presently instructed on a multi-project partnering agreement that has failed due to all parties being of an adversarial mind-set. The relationships on the project have broken down and resulted in:

- claims for increased cost caused by delay;
- a counterclaim for increased consultant fees (our client is a multi-discipline practice);
- an alleged settlement agreement;
- attempts by the client to prepare further claims notwithstanding the existence of the settlement agreement and partnering arrangement.

- Effective communication (internally within organisations and externally between organisations) in order to form an effective and efficient partnering team.

- Encouraging innovation and acceptance or rejection of new ideas clearly and openly within reasonable time limits.

- Effective teamwork based on the foundations of mutual goals, respect, openness and honesty, with the support and encouragement of senior management teams. External training can help deliver effective teamwork across separate organisations.

- Development of mutual understanding between the parties. For example, one extra process by one party may allow another party to eliminate a complex stage of the project process. This may save the project time and money, with the rewards for that cost saving shared by all parties. In a more traditional, adversarial contract, there would be no reward for one party to carry out an additional process: just an additional cost and additional recovery to them.

- Trust. Where parties trust each other, they are more likely to share their strengths and also disclose perceived weaknesses or the threats to the project. If these weaknesses and threats can be eliminated or mitigated, the project will benefit. Trust is also more likely to have other advantages such as improved staff morale and retention, improved stability, a lower emphasis on paperwork and bureaucracy, and ultimately fewer disputes.

- Genuine open book accounting, so that accurate figures for forecasts, costs, expenses and profits are freely available to all parties, without question. This requires trust and confidentiality.
Dispute resolution

An essential ingredient in the partnering arrangement is an appropriate dispute resolution procedure which should operate as a problem-solving framework, as opposed to an adversarial environment.

If they are to encourage non-adversarial relationships, partnering projects should have layered dispute resolution processes. Examples which have been used in construction partnering arrangements are as follows:

- An agreement to "act in a spirit of mutual trust and cooperation".
- Risk registers as a risk management (not blame apportioning) tool for the early identification of threats to the success of the project.
- Early warning meetings to discuss, reduce and/or eliminate risks. A collaborative approach to such meetings should be encouraged with "lessons learnt" sessions to identify problems which may have occurred and to identify appropriate solutions which can be employed to avoid/mitigate the effect of such problems, should they arise again in the future.
- Tiered management called upon to consider any residual issues. For example, at site level, then middle management, escalating to senior management if needed.
- Alternative dispute resolution, for example mediation.

We have worked on partnering projects which have not been successful as the arrangements:

- Include a ban on disputes in the underlying agreement. For example, we have seen clauses where participating parties have been expected to:
  "undertake to each other not to make or pursue any claims for costs, losses, expenses, or damage whatsoever or howsoever arising out of or relating to the performance or delivery of the Project."

  This is unrealistic and can create antagonism. Provisions like this risk leading to the collapse of the partnering relationship, as opposed to focussing on resolving problems if they do arise.
- Have conflicting approaches to dispute resolution in the partnering arrangement and the underlying terms and conditions.
- Encourage the parties to protect their own commercial positions, as opposed to resolving disputes for the benefit of the project as a whole.

Conclusion

There is a great deal of enthusiasm in the rail sector for the benefits of alliancing and the role that it can play in achieving the levels of cost savings identified in the McNulty report. For these benefits to be realised, careful thought needs to be given to the objectives of the alliance, the manner in which it is to operate and where the dividing line between legally binding and non-binding responsibilities should be placed.

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