Bevan Brittan

CONSTRUCTING EXCELLENCE
in the built environment

COMPARISON OF EXISTING FORMS OF CONSTRUCTION CONTRACT
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Fleet Place House, 2 Fleet Place, Holborn Viaduct, London EC4M 7RF
T +44(0)870 194 1000 F +44(0)870 194 7800

Kings Orchard, 1 Queen Street, Bristol BS2 0HQ
T +44(0)870 194 1000 F +44(0)870 194 1001

Interchange Place, Edmund Street, Birmingham B3 2TA
T +44(0)870 194 1000 F +44(0)870 194 5001

www.bevanbrittan.com

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	JCT Standard Building Contract (2005)	The NEC 3-Engineering & Construction Contract – Option C: Target contract with activity schedule with the NEC Partnering Agreement (Option X12)	Association of Consultant Architects Project Partnering Contract (PPC 2000)	JCT – Constructing Excellence Contract (2006)
1 Fit with a collaborative culture	The contract contains no express partnering obligations and is entirely traditional in its approach.	The requirement for the parties to act "*in a spirit of mutual trust and cooperation*" appeared radical when launched in 1992 but is now accepted as mainstream. The new Partnering Agreement (Option X12) seeks to convert existing ECC contracts into separate partnering contracts. However, only *"Partners"* (i.e. those whose contract is subject to a Partnering Agreement) are eligible to form the *"Core Group"* to guide the progress of the project. Only Partners must share information with each other and may agree key performance indicators in relation to their performance.	This is a multi-party contract between client, design team, *"Constructor"* and any specialist sub-contractors involved from the outset. The partnering obligations are very long and probably unnecessarily so. Clause 1.3 provides that the parties to the PPC contract (the *"Partnering Team members"*) *"shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Project, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents".* Clause 4.1 goes on to provide that the *"Partnering Team members shall establish, develop and implement their partnering relationships in accordance with the Partnering Documents, with the objectives of achieving for the benefit of the Project and for the mutual benefits of Partnering Team members:-* *(i) trust, fairness, dedication to common goals and an understanding of each other's expectations and values;* *(ii) finalisation of the required designs, timetables, prices and supply chain for the Project;*	This introduces the concept of the "*Overriding Principle*": *"The Overriding Principle guiding the Purchaser and the Supplier in the operation of this Contract is that of collaboration. It is their intention to work together with each other and with all other Project Participants in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect. To this end the Purchaser and the Supplier agree that they shall give to, and welcome from, the other, and the other Project Participants, feedback on performance and shall draw each other's attention to any difficulties and shall share information openly, at the earliest practicable time. They shall support collaborative behaviour and address behaviour that does not comply with the Overriding Principle".* Failure to observe this Overriding Principle can be taken into account by any Adjudicator or Judge when considering any dispute under the Contract. A "*Project Team*" comprising of the Client, the Lead Designer, the Lead Supplier and those suppliers who are considered by the Client to be of key importance for the successful design, construction and management of the delivery of the Project should be formed. There is a separate, optional, form

			(iii) innovation, improved efficiency, cost-effectiveness, lean production and reduction or elimination of waste; *(iv) completion of the Project within the agreed time and price and the agreed quality;* *(v) measurable continuous improvement by reference to the targets described in clause 4.2 and the KPIs;* *(vi) commitment to people including staff and the users of the Project."* Clause 4.2 then goes on to set out 10 partnering targets and provides that each Partnering Team member *"undertakes to the others to do all that it can, within its agreed role, expertise and responsibilities and in accordance with the Partnering Documents, to implement the recommendations identified by the Construction Task Force in their July 1998 Report "Rethinking Construction" and to pursue for the benefit of the Project and for the mutual benefit of Partnering Team members the targets stated in the KPIs for:-* *(i) reduced capital cost and whole life cost;* *(ii) reduced design, supply and construction time; …* *(vii) increased turnover and Profit; . . ."* It is quite possible that the above	of Project Team Agreement. This provides greater detail regarding the way in which the Project Team will work together and also contains an optional risk and reward sharing arrangement between the members of the Project Team. This arrangement allows the sharing of risks and rewards across the whole Project Team with any appropriate caps on risk and reward. Under clause 2.6, the members of the Project Team are to give "<u>*serious consideration*</u> *to drawing up and adopting a project protocol setting out the aims and objectives of the Project Team with regards to the delivery of the Project and the development of their working relationships*". Under clause 2.8 of the Project Team Agreement, the parties to the Project Team Agreement are <u>obliged</u> to draw up and adopt a similar project protocol. In either case, the parties will draw up a project protocol in their own words with the intention that, by doing so, they will share a sense of commitment to the success of the project having themselves contributed to the wording of their objectives. Any project protocol was expressly made <u>non</u>-legally binding in order to prevent any conflict with the contract terms.

			targets may be contradictory in that, for example, capital cost and whole life cost may not both reduce together and there may be a small increase in capital costs in order to achieve substantial whole life costs. The contract makes passing references to a partnering charter that may be drawn up by the Partnering Team members. A *"Core Group"* comprising representatives of the signatories to the PPC 2000 Contract drives the delivery of the project with provision to change membership as the project progresses.	
2 Allowing adequate time for preparation by early engagement of contractor and any key specialists	The JCT Contract is intended to be used for the construction phase only and contains no provisions dealing with early engagement prior to construction.	The NEC Contract is also drafted on the basis that it deals with the construction period but not with any pre-construction period.	The PPC Contract is drafted on the basis of distinct pre-construction and construction stages with the commencement of the construction stage being conditional upon the prior satisfaction of 12 pre-conditions set out in clause 14. The contract does therefore envisage early engagement of contractor and key specialist sub-contractors prior to commencement on site so as to allow adequate time for pre-planning of the construction stage.	The Articles of Agreement for the Contract can be used for both the appointment of a contractor under a pre-construction stage and a subsequent construction stage simply by choosing different options from the existing wording. The Constructing Excellence Contract guidance recommends proper planning of the construction period by early engagement of key suppliers.
3 Allocation of risks and risk management	The JCT Contract sets out a number of separate *"Relevant Events"* which entitle the contractor to apply for an extension of time and "*Relevant Matters*" which entitle the contractor to claim *"direct loss and/or expense"*. This allocation of risks is fixed.	The NEC Contract sets out a list of risks borne by the client, with provision to add to this list by agreement. All other risks are the responsibility of the contractor and each party indemnifies the other against *"claims, proceedings, compensation and costs due to an event which is at his risk"*. In addition, the contract sets out 19	The PPC Contract requires the contract parties *"together and individually"* to work through risk management exercises to identify risks and their likely cost, eliminate or reduce risks, insure risks wherever affordable and appropriate and to share or apportion risks *"according to which one or more Partnering Team members are most able to manage such risk"*.	The allocation of risks between the parties to each contract should be agreed on a project by project basis and set out in the *"Risk Allocation Schedule".* The parties have complete flexibility as to the allocation of both the cost and time consequences of each identified risk between them on a percentage basis. There are 2 alternative methods of dealing with Risk

	There are no provisions requiring the parties to carry out any active risk management in relation to the project.	*"compensation events"* (which include the occurrence of one of the client's risks referred to above) which entitle the contractor to apply for an extension of time and/or additional payment. The *"Project Manager"* decides the contractor's entitlement to additional time or cost based either on a quotation he has received from the contractor (which he accepts) or from his own assessment. In NEC3 there is now mention of a "Risk Register". In part 1 of the Contract Data there is space to specify "*The following matters will be included in the Risk Register*". Otherwise, following any early warning notices in accordance with clause 16, either the Project Manager or the Contractor can instruct the other to attend a "*risk reduction meeting*" following which the "*Project Manager revises the Risk Register to record decisions made . . . and issues the revised Risk Register to the Contractor.*" The drafting does not set out a procedure for proactive review of potential risks to anticipate and avoid the need for "*early warning notices*". Rather, it appears to set out a reactive procedure which focuses more on reviewing and dealing with the consequences of risks as they occur.	However, the contract does not appear to reflect any sharing or apportioning of risks. Rather, clause 18.3 sets out a list of 15 fixed risks which entitle the contractor to an extension of time. As with the NEC contract, there is provision for additional risks to be specified. From the date of commencement of the Works, the contractor is responsible for managing all the risks associated with Project (unless otherwise stated by an amendment to the PPC Contract) there is no clear responsibility for managing risks prior to the commencement on site.	Allocation: either on a line by line basis with separate, standalone, risk allowances in respect of each identified risk or, alternatively, by pooling the allowances in respect of all the listed risks. The completion of the Risk Allocation Schedule brings into clear focus: • what the risks to the project as a whole are; • what can be done to remove or mitigate those risks; and • a relatively scientific allocation of the costs associated with those risks, either as part of the contractor's target cost or as part of the client's budget contingency. The contractor is entitled to apply for an extension of time and/or additional payment to compensate for the effect of any *"Relief Events"* which comprise: • variations to the works; • client breaches of the contract; • the occurrence of risks referred to in the Risk Allocation Schedule to the extent that the consequences of the occurrence of those risks are not already allocated to the contractor under the Risk Allocation Schedule; and • risks not referred to in the Risk Allocation Schedule and which

				were not reasonably foreseeable and are beyond the control of the contractor (excluding sub-contractor defaults). In addition, all parties are required to join in the identification and management of risks by way of a *"Risk Register"*. Either they may be specifically asked to contribute or if they have relevant information to contribute they are directed to do so. One party will be made responsible for actually preparing and updating the Risk Register throughout the period of the contract.
4 Requirement for open book accounting	The contract is based on a lump sum price with payment by monthly valuations made by the "*Quantity Surveyor*" and issued by the "*Architect/Contract Administrator*". There are no provisions for payment by reference to a target cost on an open book basis.	Option C provides for payment by reference to a target cost, the contractor being paid by reference to his *"Defined Costs"*, which are set out in a "*Schedule of Cost Components*" or "*Shorter Schedule of Cost Components*".	The Constructor is required to indicate separately the amounts of its "*Profit"*, "*Central Office Overheads"* and "*Site Overheads"*. To these amounts are then added the "prices" obtained in relation to all relevant work packages. The Constructor is to let all packages of work on an "*Open-book"* basis "*to the maximum achievable extent"*. ("*Open-book"* is defined as involving the declaration of all price components, including profit, central and site overheads and the cost of materials, goods, equipment, work and services). The intention is to provide as much information as possible of the breakdown of individual lump sum prices but the contract is nevertheless based on a lump sum price comprising the Constructor's profit, central and site overheads together with the aggregate of the sub-contractor prices. Subject to any arrangements for shared savings that may be agreed, and to any increases or decreases in accordance with the contract, this	The Constructing Excellence Contract has alternative payment provisions, either by reference to a lump sum price or by reference to a target cost. Under the Target cost option: • the Supplier should identify the overheads it needs to recover and the profit it wishes to make (the "Supplier's Margin"); • the Supplier should seek to identify and manage risks through the Risk Register and Risk Allocation Schedule; and • by identifying and quantifying the risks to provide a risk allowance within the Target Cost, both parties are motivated to manage those risks within the risk allowance in order to end up with an Actual Cost below the Target Cost, creating a saving they can share. The contract guidance includes a draft protocol for financial

			lump sum will constitute the "*Agreed Maximum Price"*. All the details of the makeup of the Agreed Maximum Price are to be set out in a separate "*Price Framework"*. Clause 13 of the contract requires the Core Group to consider "*such incentives, additional to any described in the Partnering Documents, as may be appropriate to encourage Partnering Team members to maximise their efforts pursuant to the Partnering Contract for the benefit of the Project"*.	management of the project using the target cost option.
5 Incentives	The contract does not contain any express incentives. The implicit incentive will be for the Contractor to maximise his return by minimising his cost to improve his return from the fixed lump sum price. Historically, attempts to minimise cost have taken the form of price competition with sub-contractors rather than general collaboration with them.	The Contractor is incentivised to reduce capital costs by virtue of the target cost arrangement. The requirement for the giving of early warning notices (clause 16) is incentivised by the provisions of clause 63.4 under which the compensation that the Contractor is entitled to receive as a result of a *"compensation event"* is based on notice having been given at the time *"an experienced contractor"* could have given the notice. This provision is useful for discouraging the storage of claims. It can however lead to the service of unnecessary notices as a means of protecting the Contractor from the possible operation of clause 63.4.	Clause 13.1 requires that the Core Group *"shall consider and seek to agree such incentives, additional to any described in the Partnering Documents, as may be appropriate to encourage Partnering Team members to maximise their efforts pursuant to Partnering Contract for the benefit of the Project".* Clause 13.2 further provides that the Partnering Team members *"shall implement any shared saving arrangements and added value incentives described in the Project Partnering Agreement and otherwise recommended by the Core Group and approved by the Client".* Drafting the Price Framework to provide for a target cost arrangement would obviously provide an incentive to reduce the capital cost of the project. Otherwise, the parties are free to agree whatever *"shared savings arrangements and/or added value incentives"* they consider appropriate.	The target cost option provides an incentive to reduce construction costs (see above).

			Clause 11 requires that if any Partnering Team member enters into, or has entered into, any *"Volume Supply Agreement"* (namely an agreement under which materials, goods or equipment are offered on preferential terms as to price, warranty, availability of parts, maintenance or otherwise) this must be notified to the Client Representative. The Client Representative and the Core Group are to review and, hopefully, approve the Volume Supply Agreement, in which case the Constructor shall enter into a "Specialist Contract" (presumably with the Specialist offering the preferential terms) adopting the prices and terms of the Volume Supply Agreement.	
6 Involvement of a contactor's supply chain	The JCT Contract has no provisions dealing with the involvement of sub-contractors in managing the project. The contract contemplates a traditional "linear" chain of management (client (or its *"Architect/Contract Administrator"*) to contractor to first tier sub-contractors and so on). This differs from the more collaborative approach of a project team/core group (comprising the client, designers and contractors) managing a project as a team.	The NEC Contract contains no specific provisions regarding the involvement of the contractor's supply chain. The Partnering Option (X12) does however recognise the involvement of those engaged with this Option and includes working together as a "Core Group" to manage the project.	The PPC Contract does recognise the importance of supply chain involvement at least to the extent that key specialist sub-contractors are contemplated as signatories to the main contract and any sub-contracts entered into subsequently are to be on an open book basis *"to the maximum achievable extent"*.	The Constructing Excellence Contract is intended to be used for the engagement of all members of the supply chain including professional consultants. All project participants can generally be engaged on the same basic terms. Part 4 of the contract enables the contractor's supply chain to be identified and recorded in the contract. There is a separate optional Project Team Agreement so that members of the Project Team can enter into a simple multi-party agreement which records in greater detail their respective obligations to work together as a team. This is intended to supplement rather than override the bi-party contracts.