PARTNERING AND PPP: A WAY FORWARD?

Introduction

This paper discusses partnering and PPP. It examines two separate but overlapping topics. First, partnering agreements as a form of PPP and second the use of partnering arrangements, binding or non-binding, to govern the behaviours of the parties to conventional PFI contracts, or insofar as it is realistic to talk of a conventional PPP contract, conventional PPP contracts.

Concerns have been expressed about partnering agreements as a form of PPP. It is rumoured that there is disquiet in the Treasury about the increasing use of partnering. "PFI: meeting the investment challenge"[1] the Treasury's most recent statement of PFI policy, published in July 2003, introduces a presumption against the use of PFI in future IT projects, an area in which partnering has been particularly prevalent in the past. It refers to partnering only as an alternative to PFI for IT projects. Yet, partnering is used on many PPP and PFI projects. And complex defence projects increasingly incorporate partnering elements, with the focus on joint working and the management of complex interfaces. In many cases the intention is to provide a platform for incremental PFI procurement. At the other end of the spectrum, the NHS Local Improvement Finance Trust (**NHS LIFT**) initiative, discussed in more detail later, and Partnerships for Church of England Schools (**PfCS**) allow the introduction of private sector skills and finance to projects too small and diverse to be the subject of a conventional PFI.

This paper considers how the concerns that have surfaced about partnering can be addressed, what partnering can and should mean in a PPP and PFI context and what it should not mean, what partnering might offer and at what cost and, finally, the risks it can give rise to.

Is there a way forward for partnering in the PPP and PFI market? If this paper cannot answer that question it may at least serve to advance the debate.

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1 HM Treasury, *PFI: meeting the investment challenge* (HMSO, July 2003) (available at http://www.hm-treasury.gov.uk).

What does partnering mean?

Partnering is a generic term embracing a range of arrangements each aimed at establishing joint working and co-operation at varying degrees of formality. In a legal context it can take one of a number of forms. First the agreed partnering behaviours may be embodied by an arrangement intended to be non-binding and recorded in a charter or partnering principles document.

These may include:

- a general statement of commitment to abide by partnering principles;
- the key objectives or goals jointly defined for project success;
- procedures for information exchange and joint working;
- procedures for monitoring progress and building on lessons learned;
- a commitment to discuss problems as soon as they arise and to work to resolve them jointly in a no-blame culture;
- procedures for referral of disputes to more senior levels of management if not resolved at site level.

Such partnering arrangements in the form of charters or non-binding statements are the most usual form of partnering seen on PFI projects. They may be adopted as an adjunct to the principal agreement with the authority and additionally between the members of the consortium and at sub contractor/supplier level. Indeed the National Audit Office (**NAO**) recommends adopting a partnership approach to PFI projects based on a common vision of how the parties will work together to achieve a mutually successful outcome.[2]

More recently we are seeing the use of partnering agreements emerging as an integral part of PPP arrangements in the form of a strategic partnering agreement with a single partner as an umbrella to subcontracts covering a wide range of services. Such

[2] National Audit Office, *Managing the relationship to secure a successful partnership in PFI projects* Report by the Comptroller and Auditor General HC 375 Session 2001-2002, (29 November 2001) (available at http://www.nao.gov.uk/publications/nao_reports/01-02/0102375.pdf).

partnering arrangements are particularly suitable where the precise specification of services or output cannot be defined at the outset but depends on collaborative working over time to identify requirements and to meet those requirements. In offering a degree of exclusivity to the private sector partner it provides an incentive for investment. Long term relationships are intended to generate benefits associated with repeat working, continuous improvement and standardisation. The length of the relationship may also create opportunities to effect a cultural change and overcome initial resistance or lack of experience.

In some cases a joint venture company may be established to embody the partnership between public sector stakeholders and the private sector investor.[3] (Partnership is used in a general sense here, not as a reference to a legal partnership under the Partnership Act 1890. Care needs to be taken to ensure such a partnership is not created unintentionally as partners will have joint and unlimited liability for partnership debts.)

A soft option?

Partnering has sometimes been seen as a soft option, amounting to ill-defined general expressions of intent with little clarity as to how it will operate in practice. It is sometimes thought that partnering can fill the gaps left in a contract which is general in its approach. In our view, however, detailed contracts are as essential a part of partnering arrangements as any traditional procurement – perhaps even more so, as parties often have differing understanding of what partnering involves in different contexts. This is consistent with NAO guidance: "A partnership approach is required supported by the right contractual framework".[4]

A rigorous definition of roles and responsibilities and a clear allocation of risks is critical. Such risk allocation may be underpinned by target cost/gainshare arrangements to provide for incentivisation. Issues to address when devising such arrangements include:

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3 See generally HM Treasury and Partnerships UK, *A Guidance Note for Public Sector Bodies forming Joint Venture Companies with the Private Sector* (December 2001) (available at http://www.hm-treasury.gov.uk).

4 M*anaging the relationship to secure a successful partnership in PFI projects* op. cit. para. 1.1.

- suitable service levels/cost targets against which gainshare is to be calculated;
- addressing caps and percentage entitlements: are savings/overruns to be jointly shared or in unequal/sliding proportions?
- identifying any schedule targets;
- where the contractor is a consortium vehicle a question for the consortium to address in its shareholder arrangements is the treatment of liabilities inter se for loss of an opportunity to win gainshare due to poor performance.

Critical to any long term partnering arrangement where there is any degree of exclusivity are methods for market testing and benchmarking to ensure value for money is being achieved. Generally there will be provision for market testing of the costs of providing the services and/or sub contractor and supplier arrangements after a period of 5 years. Where it is not possible to market test for new services, the authority and contractor need to have an agreed pricing system set out in the contract.[5] Benchmarking is required against the external market both in terms of price and quality against market comparators, or through market testing to obtain pricing from the market. The existing contractors/suppliers must then match such prices or the principal contractor must go out to tender to obtain competitive bids.

The demonstration of value for money is essential for the arrangements as a whole as well as any individual procurement conducted under the umbrella of a strategic partnering agreement. The NAO also identifies incentivisation arrangements, open book accounting and the sharing of refinancing benefits as appropriate VFM mechanisms.[6]

Any partnering agreement will need to address sanctions for performance failures by, for example, sharing of costs above the target cost threshold, liquidated damage regimes linked to percentage failures against performance targets, with the ultimate sanction of termination of the arrangements in respect of part or all of the services.

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[5] *Managing the relationship to secure a successful partnership in PFI projects* op. cit. at para. 1.24.

[6] Op. cit. para. 1.24 et seq and figure 8.

The risk of insolvency will need to be addressed as part of the finance arrangements for the project. Partnering does not overcome the ordinary steps required to be taken. Bonding and parent company guarantees should be addressed in the same way as with any traditional procurement. Change of control provisions should also be included in any strategic partnering agreement together with material adverse change provisions focussed on protecting the client entity against significant changes in the business of the private sector partner which may impact on the provision of services.

Another issue which requires careful definition is the scope of the strategic partnering arrangements generally and specifically any commitment to contract exclusively with the private sector partner. Where the public sector's requirements cannot be defined with precision at the outset there may be difficulties in identifying with clarity the projects and services intended to fall within the umbrella of the partnering arrangement.

Some examples of partnering in PFI/PPP projects

Tarmac is reported to have used partnering successfully on PFI hospital and prisons projects both within its own group of companies and across its joint venture partners. On the Fazakerley Prison project, completed in 1997, capital cost is said to have been reduced by 35% and reductions in operational costs are estimated at between 10 and 14%.[7]

The NHS LIFT initiative

The NHS Local Improvement Finance Trust initiative provides an example of the use of long term strategic partnering in the form of an umbrella or integrator agreement for the procurement of primary healthcare services[8]. The structure involves a joint venture at national level, Partnerships for Health, between the Department of Health and Partnerships UK, to provide guidance in terms of procurement strategies, including EU compliance, standardisation of documentation, to provide investment and to attract additional funding. At a local level public private partnerships are

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7 *See* Bennett, J. Jayes, S. and Reading Construction Forum, *The Seven Pillars of Partnering: a guide to second generation partnering* (1998) at pp.86-87.

8 Department of Health and Partnerships UK, *Public Private Partnership in the NHS: Modernising primary Care in the NHS – NHS Local Improvement Finance Trust (NHS LIFT) Prospectus* (July 2001); see generally http://www.doh.gov.uk.

formed as a limited company with the local NHS and relevant health providers, Partnerships for Health and the selected private sector partner. The local LIFT will be responsible for establishing the long term planning and liaison relationship in relation to the primary care facilities for the area, providing an integrated and coordinated health strategy across a range of primary health care services, for example GP services, dental services and community care.

Minimum standards for services and facilities are set with arrangements for monitoring the services actually delivered. Any initial investments will be identified including methods for pricing, timescales and standards to be satisfied. In relation to future projects, the basis on which pricing will be agreed needs to be defined. Critically for the private sector partner, there is an exclusive right to be the development partner as new investment requirements are identified and developed as long as they can be delivered to the standards, pricing and payment defined in the contract. The benefits for the public sector lie in the bundling together of batches of small individual projects which would not otherwise be suitable for a PPP/PFI treatment. Private sector investment, alternative sources of funding and private sector skills are harnessed to deliver the Government's commitment to a programme of sustained investment in primary healthcare and social care facilities.

The attractions of investing in a local LIFT are stated to include:

- Long term stable cash flows generated by a stream of transactions with a common client on common terms creating low transaction costs when aggregated;

- Low risk investment within the prospect of returns comparable to a property development type investment, backed by Government commitments to provide significant investment.

The LIFT model is being used for the Partnerships for Church of England Schools programme, to procure a private sector partner for a local joint venture company to deliver refurbishment of existing schools in a geographic area by means of a strategic partnering agreement.[9]

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[9] Stringer J, *Transforming Church Schools* PfI Journal, Summer 2003 p.64.

Royal Navy Recruiting and Training Agency's agreement with Flagship

The NRTA agreement with flagship is another example of a strategic partnering arrangement under the auspices of a PPP structure.[10] In this case there are three separate agreements with the private sector partner, one to manage and administer the marketing of naval training courses commercially, the second to provide facilities management services in respect of naval training premises and the third to provide for individual PFI schemes for specific projects to meet the requirements over the long term.

What partnering might offer?

Against this background, what might partnering offer either as a distinct form of PPP or as an approach adopted in conjunction with conventional PFI or PPP contracts?

Where partnering forms a platform for incremental procurement, reducing the length and cost of the procurement process is often a key driver, as with the NHS LIFT and PfCS initiatives. As identified in "PFI: meeting the investment challenge" procurement costs and timescales are disproportionately large in smaller projects and streamlining the procurement process is essential if such projects are to obtain value for money.

In complex projects, the driver is more likely to be the need to introduce a private sector partner to drive out inefficiencies and to contribute expertise and innovation at an early stage, while retaining flexibility as to the solution and an ability to move forward incrementally to take account of, for example, the expiry of existing services and support contracts. Often there is perceived to be a need for an integrator for a series of projects which are operationally linked. The extent to which the partner/integrator can undertake the individual projects will be for discussion. This has been touched on earlier. At a minimum, benchmarking or market testing will be required. The authority may wish to see competition for high value packages or those outside the partner's main area of expertise.

This type of approach may also assist in managing uncertainty and interface risk. The authority may ask its partner/integrator to manage contracts between the authority and

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10 http://www.royal-navy.mod.uk/static/pages/2200.html.

existing service providers, incentivising efficiencies through a gainshare mechanism or incentive fee. Joint working at the integrator level should also help to optimise the overall procurement strategy. The authority may retain the option to procure some packages conventionally itself or via the partner, if it becomes clear that private finance will not offer value for money, for example because of the levels of risk involved.

In some ways this approach is similar, through on a much larger scale, to the two-stage process adopted in pure partnering contracts such as PPC 2000[11]. It is too early to say to what extent it will add value. But published literature on partnering and alliancing[12] suggest that early participation by designers and contractors is one of the key ways in which partnering and alliancing add value. This type of partnering approach allows the private sector partner to work with the authority from an early stage and provides a framework to incentivise him to deliver a high-quality, low-cost solution.

The fact that, in such a structure, key project elements may be competed at the second stage, offers additional potential for innovation. And in projects where technology is changing rapidly, or which must respond to changing external circumstances, solutions can be defined when they are needed. They are not driven by the need to achieve financial close on the initial procurement.

The Public Accounts Committee in its report "Delivering better value for money from the Private Finance Initiative"[13] makes it very clear that authorities should concern themselves with value for money in procurement. Affordability and balance sheet treatment should not drive evaluation. However, the conventional PFI structure with a fixed price and fully committed funding, assumes that the bulk of capital expenditure will take place shortly after financial close. Deferring capital expenditure

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11 Association of Consultant Architects and Trowers & Hamlins, *PPC 2000 ACA Standard Form of Contract for Project Partnering,* (ACA, 2000).

12 See for example, Scott, B., *Partnering in Europe, Incentive based alliancing for projects*, (ECI), (Thomas Telford Publishing Ltd, 2001) at p.55 and Construction Industry Council, *A Guide to Project Team Partnering* (2002, 2nd ed.) at p.4.

13 House of Commons Committee of Public Accounts, *Delivering better value for money from the Private Finance Initiative Twenty-eighth Report of Session 2002–03*, (19 June 2003) (available at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmpubacc/764/764.pdf).

creates risk for the contractor because he is bound to a fixed cost, involves commitment fees for undrawn facilities and delays the date when full service payments come on stream. This is not ideal from an affordability perspective, and it may not offer best value when compared with an incremental (as opposed to a similarly structured) solution.

Where partnering is adopted, either on a binding or a non-binding basis, in conjunction with a conventional PFI or PPP contract, the parties are very often seeking better relationships and may also wish to incentivise continuous improvement. In PFI, as in traditional contracting, assessment has shown that relationships are critical to success. The need for an effective partnership relationship over a long period is a particular feature of PFI and PPP contracts and are explicitly recognised in "Managing the relationship to secure a successful partnership in PFI projects" published by the NAO in November 2001 as well as in "PFI: Meeting the investment challenge".

Many PFI and PPP projects now use partnering techniques to foster such a relationship, both between the authority and the PFI/PPP contractor and between the contractor and its sub-contractors. Alliancing between sub-contractors is also used in some cases. Some PFI and PPP arrangements use management or partnering boards with representation from the authority and contractor as well as in some cases sub-contractors and other stakeholders. Integrated team working may also be used, and is sometimes encouraged by co-location of the staff concerned. Other behaviours which may be encouraged by a partnering charter (or in some cases mandated by the PFI or PPP contract) include:

- open communication
- co-operative working
- open book costing
- early warning procedures, and
- partnering with key stakeholders/the supply chain.

Continuous improvement is seen as one of the objectives and benefits of a partnering relationship and is often separately incentivised. A continuous improvement programme will be expected to capture, systematically review and where appropriate implement proposals for continuous improvement. It would also include review and feedback mechanisms to building upon lessons learned. Often the incentive is a gainshare mechanism, where specific initiatives to achieve cost savings are identified. In some cases the contractor's progress will be measured against key performance indicators (**KPIs**) and attract an incentive fee. Sub-contracts may also include continuous improvement and incentive mechanisms. And, in some cases, incentives are available to teams or individuals within the contractor or sub-contractor organisation.

What might it cost?

If partnering offers benefits, do these have costs attached and, if so, what are they?

Incremental procurement, in particular, raises a number of issues. Value for money cannot readily be assessed when the initial agreement is entered into. Risk transfer and pricing will only be finalised when an individual package is procured. Funders' due diligence will also take place at that stage and so may contribute little by way of optimisation of the initial partnering arrangement. The need to ensure that inter-creditor issues do not inhibit funding of individual packages may limit risk transfer options and make it difficult effectively to incentivise the integrator role.

There is also a risk that the expected flexibility will not be achieved. Where the partner expects to carry out a significant part of the package work, benchmarking and market testing should secure value for money but may not facilitate an innovative approach. Existing funders are also likely to be highly risk averse if there is any prospect that changes in risk profile could be to the detriment of their security.

Interface risks may also be an issue. An integrator structured along traditional PFI lines would not be well placed to take integration risk and any willingness to do so would be an issue for funders, unless it is clear that the risk is fully underwritten by a robust parent.

Even where partnering is used in the context of a conventional PFI or PPP structure, it may raise issues. Integrated team work may blur responsibilities and undermine risk allocation. Project insurance which in principle could overcome this, is currently very difficult if not impossible to obtain in respect of professional negligence.

There is also a risk that, over time, incentives are not seen to result in a measurable benefit to the authority. Careful structuring at the outset should help avoid this problem as may mechanisms allowing review and re-alignment of incentive targets.

Successful partnering is heavily dependent on individuals and relationships. The NAO has recognized that: “To build a successful long term partnership with PFI contractors authorities will need trained staff with relevant skills”.[14] It has indicated that “Authorities will need to give careful thought while the project is being developed about the staff they will deploy to manage the contract after it has been let and the skills those staff will require”.[15]

One of the key benefits of partnering is that it enables the parties to work together over the life of the contract. This is likely to involve a significantly greater level of staff resource than a conventional approach. If the benefits are to be realized, the staff concerned will also need training and the right approach. The NAO identifies the need for staff skills to be fully developed and kept up to date. It also notes that, where staff are performing their duties well, there tends to be a good relationship between the authority and contractor.[16]

In the partnering context, a number of approaches have been adopted to train staff in partnering techniques and to encourage them to acquire the attributes required for partnering. The example set by senior staff is seen as a key element in this process.

Where partnering is to be adopted on a particular PPP or PFI project, the parties may undertake joint team building exercises. These may be formal seminars or workshops, sometimes employing external facilitators, or simply informal social events. They may also involve co-location of staff, as discussed above, or use of joint

[14] *Managing the relationship to secure a successful partnership in PFI projects* op. cit. at para. 2.1.

[15] ibid at para. 2.3.

[16] ibid para. 2.13 and para. 2.14.

facilities. The need to make staff available for training and team building exercises has to be taken into account when planning the resourcing of the contract and its management.

Other aspects of partnering also have resource implications. Incremental procurement assumes continuing development work after the initial partnering agreement is entered into. The authority may need to commit skilled and possibly scarce resource on a long term basis if the individual package solutions are to best meet its needs. Even where this requirement is not present, however, a partnering approach is likely to require more resource on the part of both the authority and the contractor than a conventional contract management structure. Examples are:

- joint management or partnering boards, which are likely to include senior representation from both parties
- early warning procedures, which require a more pro-active approach from the contractor and an authority response
- greater involvement for the supply chain, which is likely to result in a higher level of communication up and down the chain.

Attempts at partnering which are not adequately or appropriately resourced may be less likely to succeed than a conventional approach. It is therefore critical to success that the project is properly resourced at the right level, that there is continuity in representation on both sides and that the resource commitment can be sustained over the whole life of the project.

Perhaps the most difficult issue raised by partnering in PPP and PFI (and partnering generally) is demonstrating best value. Any doubts within the Treasury appear to be focused in this area. The assessment reflected in "PFI: meeting the investment challenge" appears to suggest that PFI has been particularly successful in fixed price, high capital value projects which have benefited from close scrutiny by funders during the procurement phase. But "PFI: meeting the investment challenge" also recognizes that some projects cannot successfully be delivered under this approach. The NHS LIFT initiative is designed as an answer to this problem. "PFI: meeting the investment challenge" also recognizes that approaches such as NHS LIFT require a high level of procurement skills within the public sector.

Even where partnering co-exists with a fixed price contract, it is likely to require a higher level of investment in staff time, and perhaps in premises or IT to facilitate joint working, than would be needed in a conventional contract management structure. Quantifying the benefits is not straightforward. So far as evaluation is concerned, some progress has been made, with the development of assessment tools like MOD's SIBET.[17] One of the issues is the extent to which broader benefits, for example potential efficiencies from integration or innovation can reliably be evaluated at the outset. It may be necessary for quantitative assessment to be supplemented by qualitative assessment where reliable quantitative data cannot be captured. Assessment may also take account of mechanisms designed to ensure value for money over the long term: competition for elements of the procurement, benchmarking, market testing and incentives. Such an approach is consistent with the view now espoused both by Government and by the European Commission, that value for money should not be equated with lowest price. Perhaps more importantly, for any authority which expects to enter into PPP or PFI contracts in the future, and for the public sector generally, a continuing programme of post-award assessment should help to indicate over time the extent to which partnering is delivering the promised benefits.

Legal restraints: Public procurement

OGC guidance favours the use of the negotiated procedure for PFI/PPP projects.[18] The open or restricted procedures do not permit negotiation following submission of tenders on any fundamental aspects of contracts or variations which may distort competition and in particular on price.

The negotiated procedure is, however, not available as a matter of choice. It may only be used on limited circumstances where the nature of works or the risk attaching to

17 Ministry of Defence, *Soft Issue Bid Evaluation Tool*, (28 June 2002) (available at http://www.ams.mod.uk/ams/content/docs/toolkit/ams/policy/other_guidance/sibet/sibet_user_manual_ver2_001.pdf).

18 Treasury Taskforce, *Technical Note No.2: How to follow EC Procurement Procedure and Advertise in the OJEC* (HM Treasury, June 1998) (available at http://www.ogc.gov.uk/SDToolkit/reference/ogc_library/PFI/series_3/main3.htm).

them do not permit prior pricing overall or in the case of services contracts, where the specification cannot be defined with sufficient precision to permit the open or restricted procedures to be used.

The NHS LIFT initiative uses a pro forma OJEC notice, adopting the negotiated procedure to advertise the proposed award of contract for partnering services. By way of example, the notice for the Doncaster LIFT envisages a 25 year term for the provision of partnering services with construction and FM services for projects arising in the initial 5 year period.[19]

Framework agreements or a qualification system may facilitate multi-project partnering whereby the client entity appoints one or more contractors or service providers as partners for the provision of individual projects in the future, under call-off style arrangements. The public sector Directives and implementing Regulations, are silent on the use of framework agreements and accordingly there is a doubt whether such arrangements can be adopted in the public sector although Treasury Guidance suggests that it is considered that if the conditions under which utilities may use such agreements are complied with the risk of a successful challenge is slight. [20]

The Utilities Regulations provide that framework agreements must not be used to "hinder, limit or distort competition"[21]. Although existing rules do not include a specific time-limit, draft guidance issued by the Commission[22] confirms that framework agreements may not be of indeterminate duration, ruling out their use for "evergreen" partnering.

Proposals for reform

Proposals for reform are currently in conciliation proceedings between the EC Commission, Council and European Parliament with a view to adoption early next

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19 OJEC Journal number 41/2003, document number ND:35506 – 2003, published 27 February 2003.

20 HM Treasury, *CUP Guidance Note No 51 Introduction to the EC Procurement Rules* (1995) at para. 5.11 (available at http://www.ogc.gov.uk).

21 Utilities are permitted under the procurement rules to award framework agreements following use of the open restricted or negotiated procedure and then to place contracts under it without a further call for competition. Article 5(4) of Directive 93/38/EEC and reg 11(2) of the Utilities Contracts Regulations 1996.

22 Draft Policy guidelines on framework agreements under Directive 90/531/EEC (utilities) dated 18 December 1992.

year, leading to implementation in Member States in 2005. The new proposed public sector directive includes provision for the use of framework agreements albeit on a more prescriptive basis than in the utilities sector.

The maximum term of a framework agreement will be four years[23] and where a framework agreement is concluded with a number of contractors, allowing for limited competition between them, at least three contractors must be parties to it. This does not exclude a framework agreement with a single contractor, and limited competition for individual projects is optional.

The draft Directive also introduces a new procedure known as competitive dialogue for exceptionally complex projects where it is not possible to define the means of satisfying an objective or to assess what the market can offer by way of technical, financial or legal solutions[24].

The procedure will permit a dialogue, following a call for competition and pre-qualification, with selected candidates. The dialogue is intended to identify and define the best means of satisfying the tenderer’s objectives and will be followed by tenders on the basis of the identified solution or solutions. No negotiation is permitted, however, on fundamental terms following tender submission and, further, solutions proposed by one tenderer may not be disclosed to others without consent. It is not clear that this procedure will greatly assist in PPP projects where the flexibility to negotiate with tenderers following receipt of tenders is seen to be the key benefit associated with the procedure. Moreover it is questionable whether funders will be willing to conduct all of the necessary due diligence to establish the financing arrangements prior to submission of tenders, which is what the procedure would require.

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[23] Article 32(2) of the draft Directive.

[24] Article 29 of the draft Directive.

Interpretation of partnering arrangements

Effect of a non-binding arrangement

Where the PFI/PPP project adopts a partnering approach on a non-binding basis[25], the parties cannot be completely confident that it will have no legal effect.

First, the Court may treat the charter as part of the factual matrix or relevant background against which the binding contractual terms are to be construed.[26] The contractual documentation is not to be construed in a vacuum but rather having regard to "all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[27] "

The existence of a non-binding charter which includes a joint commitment to co-operate and to act in good faith, may encourage the Court to imply such obligations into the contract. It is unclear, however, whether any such implied obligation would go beyond an obligation to act fairly and reasonably and not to impede or prevent performance by the other party (or parties).

There is no general obligation of explicit good faith in English contract law.[28] Where English Courts have accepted an implied term of good faith it has been narrowly construed, as one restricting opportunistic conduct - effectively a negative requirement not to act in bad faith.[29] Elsewhere the obligation has been treated as no more than a requirement to act fairly and reasonably[30] in the exercise of a party's discretion.

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25 Government guidance stipulates that the charter should not create a contract or a legal partnership. *Procurement Guidance No. 4: Teamworking Partnering and Incentives (available at http://www.ogc.gov.uk/sdtkrev/working%20version/reference/achieving/guide4.html*)

26 In accordance with the test laid down by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896.

27 Ibid at p.912.

28 *Merton London Borough v Stanley Hugh Leach Limited* [1985] 32 BLR 51 at p.80. See also Interfoto *Picture Library Limited v Stiletto Visual Programmes Limited* [1988] 1 All ER 348 at p.353.

29 See for example, *Philips Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR 472; Timeload Limited v British telecommunications Plc [1995] EMLR 459; Zockoll Group Ltd v Mercury Communications Ltd [1998] FSR 354

30 *Balfour Beatty v Docklands Light Railway [1996]* 78 BLR 42 at p.57 Lord Bingham MR.

The Courts are, in many cases, prepared to imply into a contract a term that neither party shall prevent the other from performing it and, where performance cannot take place without the co-operation of both parties, a term that co-operation will be forthcoming.[31]

The precise formulation of this type of implied term depends upon the particular contract: "the degree of co-operation will depend upon the express terms of any contract which the parties may have made".[32]

A non-binding partnering charter was considered by the Court at first in instance *Birse Construction Ltd v St David Ltd*.[33] The charter, which was signed by the parties following a team building seminar, included commitments to achieve completion within the agreed time frame, at least cost, and enhancing the parties' reputations through mutual co-operation and trust. Further objectives included completion of the entire project by mutual support, enhancing the ethos of Partnering and building long term profitable relationships with all parties.

His Honour Judge Humphrey Lloyd, while noting that the charter was "clearly not legally binding", nevertheless noted the importance of its terms as they were "clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured". He observed that:

> "an arbitrator (or Court) would undoubtedly take such adherence to the charter into account in exercising the wide discretion to open up, review and revise, etc. which is given under the JCT Conditions."[34]

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31 The principle has been expressed in the following terms: "Where in a written contract it appears that both parties have agreed that something should be which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done; on his part for the carrying out of that thing although there may be no express words to that effect." Lord Blackburn in Mackay v Dick [1881] 6 AC 251 at p.263.

32 Martin Grant & Co Limited v Sir Lindsay Parkinson & Co Limited [1984] 1 Const LJ 220; see also *The World Navigator* [1991] 2 Lloyd's Rep 23 at p 34

33 [1999] BLR 194. The decision was appealed but there was no discussion on the effect of the charter in the Court of Appeal.

34 Ibid at p.203.

He also observed that where a charter is in place the parties are unlikely to adopt a rigid attitude to formation of a contract or to be concerned with compliance with contractual notice procedures for the pursuit of claims. This comment raises interesting questions concerning the operation of doctrines of estoppel and waiver.

Waiver and Estoppel

Parties may agree as part of their partnering arrangements not to enforce or insist upon compliance with certain provisions within the works contract. An obvious example is the requirement to give notice of claims and to submit full and detailed particulars to support a claim within a given timeframe. Indeed avoiding the time and cost associated with the preparation and review of claims materials is seen as one of the benefits of adopting partnering arrangements. What happens, however, when the partnering arrangement falters and the parties resort to claims pursuant to the terms of the contract? Ideally the contract would make express provision for such circumstance and the consequences of termination of the partnering arrangements. If they do not, the authority may argue that a contractor is out of time to pursue claims which arise in respect of circumstances during an early part of the project when the partnering arrangements were in place.

In such circumstances the contractor may be able to demonstrate that the authority has waived its right to receive such notices and particulars on the grounds that the parties were voluntarily following the partnering arrangements. The arrangements may, because of the manner in which they are documented, stop short of a formal variation of the contract and accordingly the contractor may then resort to an argument based on waiver by estoppel which is analogous to estoppel by forbearance or "promissory estoppel".[35]

Parties may wish to provide that, if the partnering arrangements are terminated, the contractor may then have a specified period of time which is, in all the circumstances, a reasonable period, to provide particulars of any claims in relation to events which have taken place during the currency of the partnering arrangements. Alternatively, if the partnering arrangements also embody risk sharing mechanisms, increased costs

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35 See *Prosper Homes v Hambro Bank Executor Trustee Co.* [1979] P&CR 395 at p.401 where it was said that "waiver" and "promissory estoppel" are "two ways of saying exactly the same thing".

and delays sustained during the currency of the arrangements may be taken into account when calculating an "exit fee" or payment for release from the partnering arrangements.

Effect of binding arrangements

Binding partnering arrangements will sometimes include an express general obligation on the parties to act in good faith. How should such express obligations be interpreted in the absence of a uniform statutory or common law definition of good faith under English law?[36]

Case law provides limited guidance as to the likely approach of a Court when construing express or implied obligations to use good faith and to co-operate in the context of a partnering arrangement. As yet there are no reported decisions on the requirement in PPC 2000 for the parties to "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".[37]

In certain circumstances the obligation may act as a fetter on the authority's rights to terminate the contract.[38] It is likely also to involve a requirement to act fairly and reasonably when negotiating with a view to agreeing consequences of changes, including a force majeure event or a material adverse change.

The question for a Court when attempting to construe such language would be to determine to what extent the parties are entitled to look after their own interests or when they are required to override such interests when they conflict with those of their partners.

[36] Civil law jurisdictions recognise and enforce positive obligations of fair and open dealing including full disclosure in commercial negotiations. In the United States the doctrine of good faith has a statutory basis by virtue of the Uniform Commercial Code (the "UCC").

[37] See also GC/Works/1 (1998) Contract clause lA which provides an express obligation to "deal fairly, in good faith and in mutual co-operation, with one another and the Contractor shall deal fairly, in good faith and in mutual co-operation, with all his sub-Contractors and suppliers". See also clause 10.1 of the NEC's Engineering and Construction Contract which provides: "The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation".

[38] See for example *Timeload Limited v. British Telecommunications Plc* op. cit.

A further question is whether an obligation to co-operate "for the benefit of the project" would provide sufficiently objective criteria to enable the Courts to interpret and enforce the obligation.[39] It is suggested that this is doubtful in the absence of additional provisions defining the hierarchy of priorities jointly agreed and the circumstances in which a party is entitled to have regard to its own commercial interests.

If parties do wish to include an express obligation of good faith in the contract they may wish to consider a provision allowing for the severance of any clause in the contract which is held to be unenforceable. An alternative is to include obligations of good faith in a non-binding partnering charter. This, however, is not necessarily a complete solution as we have seen from the discussion above

Agreements to agree

Partnering arrangements often include provision for the parties to discuss with a view to agreeing solutions in the face of changes or problems affecting the works. It is inherent in partnering relationships that the parties expect to benefit from joint decision making and creativity in achieving cost savings when developing the design, building out the works or providing services in the long term.

The House of Lords in *Walford v Miles*[40] concluded that agreements to agree are unenforceable because they lack necessary certainty. A Court cannot decide by reference to any objective considerations or criteria whether subjectively a proper reason exists for the termination of negotiations. Where a contract does, however, contain sufficient indication of objective criteria to enable that which has to be agreed or calculated, to be arrived at by the parties, or, if they are unable to agree, by a Court or arbitrator, the provision may be treated as enforceable.[41]

[39] See clause 1.3 of PCC 2000.

[40] [1992] 2 AC 128.

[41] *Didymi Corp. v Atlantic Lines & Navigation Co Inc.* [1988] 2 Lloyd's Rep 108, *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329.

In *Phillips v Enron (Europe) Limited*[42] the Court of Appeal by a majority decided that an obligation in a long term gas sale agreement to use reasonable endeavours to agree on a commissioning date was unenforceable.

It was argued for Phillips that the contract construed as a whole contained sufficient identifiable objective criteria against which to police the obligation to use reasonable endeavours to agree. The Court of Appeal, by a majority, decided that the requirement to coordinate the commissioning of the facilities did not impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed, everything else other than technical or operational practicalities. In other words, the Court of Appeal concluded that the buyer was entitled to take into account its own financial and technical interest when operating these provisions.

Potter LJ stated[43]:

> "I see no reason to suppose that it was the expectation, let alone the obligation, of the parties that, in any area of activity in which room was left for manoeuvre or further negotiation, they were not at liberty to take into account their own financial position and act in the manner most beneficial to them, short of bad faith or breach of an express term of the contract".

Again the question of the extent to which a party is allowed to take account of its own interests arises. Such uncertainties increase risks in the overall contracting arrangements which can best be mitigated by the precise definition of the manner in which the parties intend good faith obligations should be given effect to and the fall back criteria which shall apply if the parties are unable to agree any gaps in the contract or the consequences of any changes to performance obligations, payment or any other terms of the contract in the future.

A way forward?

So what role does partnering have in PFI/PPP projects in the future? We have seen that the use of behavioural partnering is now well established and endorsed by the OGC and NAO. The NHS LIFT initiative, which is being adapted for use in the PfCS

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[42] Op. cit.

[43] Ibid at p.342

projects, provides an example of the use of strategic partnering arrangements including use of an incorporated joint venture between public and private sector participants. It would appear, therefore, that despite rumours to the contrary, that the Government continues to see partnering as a valuable tool for use on PFI and PPP projects. In this context the risks that it gives rise to should be seen as challenges to be managed rather than reason to abandon the philosophies and practices.

Both the public and private sector can usefully learn by experience and by reference to successes and failures on other projects. The NAO has identified procurement units of major government departments as having an important role to play in disseminating best practice.[44] There is also valuable guidance issued by the OGC and Treasury Taskforce[45] which highlights how important it is to manage the relationship with service providers and suppliers. The OGC is also to facilitate forums that enable authorities to network and learn from each other[46].

The fundamental test for the success of partnering is whether it can be shown to provide value for money. Use of the techniques identified above, market testing, benchmarking, incentivisation and effective exit strategies are essential to provide checks during the life of the long term contracts. Further controls down the supply chain should be included to preserve competition and innovation below the main partnering relationship. It is to be hoped that in this way partnering can shed its "soft" image and be given effective teeth.

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[44] *Managing the relationship to secure a successful partnership in PFI projects* op. cit. at para. 2.13.

[45] Office of Government Commerce, *Best Practice: How Major Service Contracts Can Go Wrong* (available at www.ogc.gov.uk/sdtoolkit/reference/ogc_library/bpbriefings/s_contracts.pdf); Treasury Taskforce, *Technical Note No.6: How to Manage the Delivery of Long Term PFI Contracts* (available at www.ogc.gov.uk/sdtoolkit/reference/ogc_library/PFI/series_3/technote6/technote6.pdf).

[46] *Managing the relationship to secure a successful partnership in PFI projects* op. cit. at para. 2.25