1.1 Early contractor involvement – why bother?

The majority of published standard form building contracts provide for the appointment of the main contractor and its subcontractors and suppliers at the point when construction is due to commence\(^{13}\). They are generally preceded by a single-stage procurement exercise to select a suitable contractor who has offered a price based on designs developed by other parties. But does this approach always reflect the wishes and needs of the industry and its clients, or does it instead reflect a long-established status quo in a complex and fragmented sector? Arguably, it is often the latter.

If there are benefits to be gained from earlier contractor involvement, is a contract necessary or even desirable to achieve this? Should a conditional building contract govern early project processes, particularly where design processes overlap with the procurement processes by which prices for those designs are agreed? Yet if contracts do not enter this territory, project teams will lack necessary guidance as to the nature and extent of a contractor’s early involvement, and its attendant rights, obligations and risks.

Government reports as early as Emmerson in 1962 identified the separation of the design phase from the construction phase of the 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’\(^{14}\). 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’\(^{15}\). Nearly 30 years later, Sir Michael Latham observed that many of the problems identified by Banwell had not been solved and that among these ‘the traditional

\(^{13}\) For example, JCT 2005 SBC/Q and JCT 2005 Design and Build; also NEC3.
\(^{14}\) Emmerson (1962), 9.
\(^{15}\) Banwell (1964), 4, Section 2.6.
Early Contractor Involvement – An Overview

separation of design and construction has long been a source of controversy\(^\text{16}\).

The client draws no distinction between design and construction when occupying the completed project, and is interested only in obtaining the benefit of a project completed efficiently without claims or disputes. Without a clear preconstruction contractual model there is a greater likelihood of decisions being delayed or sidestepped, thereby deferring main contractor and specialist appointments and perpetuating the problems of separating the design of a project from its construction.

It has long been recognised that design contributions should be made not only by consultants but also by contractors and specialist suppliers and fabricators to achieve a complete and functional design. For example, in respect of electrical systems and heating, ventilation and air conditioning (‘HVAC’), Smith et al. found that the split of HVAC responsibility under traditional procurement methods was often unrealistic and arbitrary. They suggested that in fact HVAC design is made up as follows:

\[
\text{‘The overall design … may be the responsibility of a design consultant, the co-ordination of M&E services may be the responsibility of the main contractor, while the detailed design of the HVAC installation may be the responsibility of a specialist supplier. The structural engineer meanwhile is responsible for the design of the building frame, although detailing may be the responsibility of the fabricator’}^{17}.
\]

Commentators have recognised that a procurement model which omits contractor and specialist design contributions can increase risk and can result in poor communications between team members, unnecessary delays to progress of the project and the creation of incorrect information that leads to claims and disputes. I will argue that the most effective way to add value and to challenge the risks of excluding contractor contributions is for clients, consultants and contractors to form a full team at an early stage in the project, establishing the roles of all parties under integrated conditional preconstruction phase agreements.

The central propositions in this book are:

1. A significant number of construction projects suffer from inefficiencies, claims and disputes for reasons that can be traced to the late appointment of the main contractor and key subcontractors

\(^{16}\)Trust and Money (1993), 7.
\(^{17}\)Smith et al. (2006), 14.
Early Contractor Involvement in Building Procurement

and suppliers, and to the consequent inadequacy of preparatory and planning activities that need to be undertaken during the pre-construction phase;

(2) That neglected preparatory and planning activities include insufficient involvement of the main contractor (and to some extent its subcontractors and suppliers) in joint working alongside the client and its consultants on design development, the finalisation of works and supply packages and their costs, the analysis and management of project risks and their costs, and the agreement of a construction phase programme;

(3) That conditional preconstruction phase agreements (whether bespoke or forming part of a standard form building contract) have a greater role to play in governing these preparatory and planning activities, and that such agreements, by setting out these activities as a series of interlinked processes, can operate as a valuable tool for project managers, particularly if they are subject to agreed pre-construction phase programmes and to the systems of open communication and collaboration known as ‘partnering’.

1.2 Early contractor involvement and project pricing

One commercial issue that needs to be addressed from the outset is the fact that an early contractor appointment to participate in design development, risk management and construction phase programming is unlikely to be on the basis of a fixed price. If 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 start on site, then logically there will be insufficient information available for detailed or accurate pricing to be undertaken prior to commencement of such work. It is therefore relevant to consider the implications of this in terms of criteria for early contractor selection and the means by which preconstruction phase processes involving the contractor can lead the parties to achieve the required level of cost certainty after early conditional contractor appointment, but prior to unconditional contractor appointment.

I will consider whether there are weaknesses in the system of single-stage fixed price tendering in a marketplace where main contractors obtain many of their specialist skills and supplies from subcontractors and suppliers 18. In order to provide an accurate price in a single-stage tender, each bidding main contractor would in theory need to present the client’s proposed requirements to each of its subcontractors and suppliers.

---

18 See for example Chapter 4, Section 4.3 (Preconstruction pricing processes).
suppliers so as to obtain subdivided 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 in preparation for every tender are prohibitive for most main contractors, subcontractors and suppliers on most projects.

This is due in part to time constraints set by the client for the main contract tender process and in part to the cost and difficulty for the main contractor of subdividing the client’s tender documentation so as to obtain separate quotes from each subcontractor and supplier. This practical challenge is exacerbated by the large number of tenders sent out by clients to prospective main contractors and the even greater number of subdivided subcontract tenders that would have to be sent out by each tendering main contractor to a range of prospective subcontractors and suppliers. The resources required for subcontract tenderers to compile their bids with accuracy, even if the main contract tender period was sufficiently long, would give rise to considerable costs. Hence, main contractors and their subcontractors and suppliers are likely to make judgements as to the level of detail and accuracy required in their enquiry documents and responses, according to the importance of each project element, and to allow additional amounts to cover the risk of inaccurate pricing.

It has been recognised that any contractor will be at risk if it is obliged to provide a fixed price quotation to a client based only on budget estimates received from its subcontractors when those subcontractors are not in a position themselves to give a fixed quotation, for example because suitably detailed drawings are not made available. In single-stage fixed price tendering, 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 sufficient to compile an accurate total price. Although many clients and consultants remain uncomfortable with the appointment of a main contractor in advance of agreeing a fixed price, I will challenge whether a fixed price quote obtained at arm’s length is likely to be accurate or reliable except in limited circumstances. I will also explore the means by which a conditional preconstruction phase agreement can offer the client ways to achieve better control over costs, for example through open-book agreement of profit, through joint evaluation and approval of supply chain prices and other cost components, and through incentives for contractor and consultants to bring costs down at all stages of the project.

---

19 See for example Burke (2002), 85, as to the risks of single-stage pricing.
1.3 Early contractor involvement and risk transfer

Another commercial issue that needs to be tackled is the fact that, as additional information is built up following an early contractor appointment, it will not be possible for the client to transfer risks that emerge later in the preconstruction phase of the project if the contractor is not willing to accept them.

Risk management is not an orderly sequential process comparable to other preconstruction activities and it is not possible to guarantee in advance that joint risk management involving the contractor will lead to a risk and cost position acceptable to all parties. However, for the client and its advisers to seek fixed prices from a main contractor without recognising the scope for it to contribute to early risk management is to draw a veil over important commercial factors. Specifically, under a traditional single-stage contractor appointment, if risks arise during construction which the main contractor has not foreseen at the time of its tender or if a risk contingency allowed by the main contractor proves to be insufficient, it is unlikely that the main contractor will allow a profitable job to become loss-making simply because it accepted those risks within its fixed price. Instead, this situation is likely to give rise to manoeuvring and claims by the main contractor to try to recoup any loss deriving from its miscalculation. This in turn can be prejudicial to the quality of the project, for example if the main contractor looks for ways of cutting costs that may not be in the interests of the client and may not be declared to the client.

In one case study of successful risk management, it was noted that the risks allocated to the contractor were those that it was able to manage. Such risks should not be allocated on the basis of expediency, which can be the result of a priced-based single-stage tender. In the long run it is better value for a client to pay for risks that actually occur during the construction phase of a project rather than to agree a price based on what a contractor thinks might occur. In the latter case, risk is transferred arbitrarily and both the client and the contractor are gambling on whether that risk has been accurately costed.

Where contracts continue to focus only on the transfer of risk and not on its management, it has been observed that this will usually give rise to a risk premium charged by the party accepting the transferred risk. It is possible that the risk premium charged by the contractor (or by a subcontractor or supplier) is insufficient to cover the cost of the required remedial action if and when that risk materialises. In those circumstances, it is likely that the contractor, subcontractor or supplier will be unwilling to incur the additional costs necessary to cover the

---

20 See the case study of successful risk management described by Smith et al. (2006) at 75, 76.
risk as this will erode its profit. As a result, the project will suffer from the claims and counter-claims that arise as the client seeks to impose the risk transfer provision and as the contractor, subcontractor or supplier seeks to resist incurring costs that make the project unprofitable. In these circumstances, the client and its project are likely to suffer more adverse consequences than the cost of the client retaining the risk or agreeing a joint strategy with the contractor for managing it\textsuperscript{21}. I will therefore consider whether the early appointment of a contractor, so that it participates in joint risk management with the client and consultants, can give rise to tangible benefits. For example joint risk management may avoid or reduce contractor risk premiums normally invisible to the client, but nevertheless payable under single-stage construction phase contracts that have no such facility.

1.4 Early contractor involvement and payment

A third commercial issue that is fundamental to early contractor appointment is money. How should the contractor be remunerated for the activities that it undertakes during the preconstruction phase?

If clients hope to obtain contractor contributions at no cost, they risk first, the contractor not applying sufficient resources to the required tasks, and second, a loss of contractor objectivity and professionalism\textsuperscript{22}. A 1975 National Economic Development Office (NEDO) Report contained a county borough housing case study that recognised cause for concern where early client/main contractor collaborative working can tempt the client to seek design enhancements without recognising their cost consequences. It found that involvement of the main contractor at the design stage ‘led to numerous small disputes on detail where the client wanted more expensive solutions to the specification’ and where the resultant increased costs ‘fall entirely on the contractor’s profit margin if the price is already fixed’. It is interesting that in this case study it was assumed that early contractor involvement in design could somehow be achieved after a fixed price had already been established, inferring that the contractor would make a price commitment on limited design information and would then be expected to take the cost risk of client enhancements that emerged in later detailed design development. This seems commercially unrealistic and unlikely to generate successful joint working. It also fails to recognise the benefits identified by Banwell of appointing the contractor to work as part of the team, not only in finalising the details of the project but also in establishing its cost\textsuperscript{23}.

\textsuperscript{21}See for example Smith \textit{et al.} (2006), 62, 63, as to premiums charged for the arbitrary transfer of risk.

\textsuperscript{22}NEDO (1975), 116, Table B1.

\textsuperscript{23}See also Chapter 4, Section 4.3.4 (Prices and contractor selection).
Early Contractor Involvement in Building Procurement

If the main contractor will only be paid if the project goes ahead, then surely commercial logic dictates that its first priority is likely to be ensuring that the project goes ahead whatever the cost to the client. Also, where construction phase profit and consultant fees are calculated as a percentage of cost, a cynic might suggest that contractor’s interests and those of the consultants are best served by persuading the client to build its project on the largest possible scale, particularly if they can expect no other reward for offering the client cheaper options through value management or value engineering that would have the effect of reducing their percentage take.

A 1998 report by the Construction Industry Research and Information Association (CIRIA) stated that ‘contractors must be appropriately rewarded for contributions made to the project’, and also that project contracts should be structured so as to ‘recognise all the contributions being made, and the related risks, responsibilities and rewards, particularly during project development’. The Housing Forum (2000) report How to Survive Partnering – It Won’t Bite recorded in its survey findings the suggestion from client/consultant/contractor respondents ‘that the contractor should be paid as a consultant during the lead-in period before the contract is signed’ (i.e. during the preconstruction phase). A 2005 National Audit Office (NAO) report pointed to case studies that include a Milton Keynes Treatment Centre where ‘For three months, the principal supply chain partner worked on a fee basis, developing options for the hospital to consider’.

In order for the client to obtain added value from a contractor’s preconstruction phase contributions, is it not preferable for the contractor to join the consultants as part of the professional team and to provide its early services for an appropriate reward? I will argue that this is more likely to secure value for the client than an extended period of speculative endeavour where any contractor reward is entirely contingent on the construction phase of the project proceeding.

1.5 The role of building contracts

Building contracts, like other contracts, assume differing commercial interests of the parties who enter into them, and need to protect those interests while also reconciling them through the prospect of agreed payments. R.J. Smith identifies three roles for building contracts:

- To set out rights, responsibilities and procedures;
- To identify, assign and transfer risk;

Early Contractor Involvement – An Overview

- To act as a ‘planning tool’ so that there are ‘fewer surprises and dilemmas during construction’\(^27\).

By the time that work commences on site, all the planning has already been done. Hence, in order to be an effective planning tool, a building contract needs to exist at the time when the parties are doing the planning and to describe the systems by which the planning takes place. Yet the earlier it is created in the project processes, the more conditional its terms are likely to be.

N.J. Smith described a building contract as a means to ‘formalise a set of risks, rules and relationships into one set of words which will govern all dealings between the parties while carrying out that contract’\(^28\). If there is a need for preconstruction phase dealings between the client and main contractor, clearly a building contract will not govern all dealings if it omits that phase.

Standard form building contracts have evolved to reflect changes in procurement practices\(^29\). This book will examine what is arguably the latest stage of that evolution, namely the role of the building contract and in particular the preconstruction phase agreement as a ‘procurement system’\(^30\), assisting the client, consultants, main contractor and specialist subcontractors in moving from incomplete to complete information through interrelated design processes, procurement processes, risk management processes and programming processes.

A practical illustration of the move towards a greater focus on preconstruction phase activities is given by the National Audit Office in relation to development of the procurement and contractual systems used by the University of Cambridge\(^31\).

Such evolution may justify a shift away from the unconditional and transactional functions of a building contract towards reliance on planning systems set out in the contract itself. It will be argued that a conditional preconstruction agreement as a procurement system has many of the features of a ‘neo-classical’ contract, an incomplete

\(^{27}\) Smith (1995), 41 and 42.

\(^{28}\) Smith (2002), 178.

\(^{29}\) For example, the Joint Contracts Tribunal (JCT) published its first design and build contract in 1981 (JCT WCD), its first management contract in 1986 (JCT Management Contract), its first construction management suite of contracts in 2002 (JCT CM) and its first partnering contract in 2007 (JCT CE).

\(^{30}\) Arup, in their report to the Office of Government Commerce (OGC), describe PPC2000 as ‘a procurement system that provides the processes and mechanisms for planning, procurement and delivery of construction works. The system is based on the application of a number of processes and it is essential that the processes stated are applied.’ Arup, 2008, 37.

### NAO (2005) University of Cambridge Case Studies

|------------------|------------------|------------------|
| Traditional single-stage tender awarded on lowest price.  
No contractor involvement in design.  
Cost and time overruns, with buildings containing many defects and relationships with the contractor strained.  
Cost: +2%  
Time: eight weeks late  
Client satisfaction: 6/10  
(post-project completion review six months after practical completion) | Two-stage tendering process (JCT98 contract).  
Contractor involved in design.  
Effective teamwork.  
New contractor, so limited lessons learnt from repeat work.  
Cost: +0%  
Time: on time  
Client satisfaction: 7/10 | Two-stage contract (New Engineering Contract), with a professional services contract used for the first stage, and the contractor and principal subcontractor involved in the design.  
Selection on transparent criteria (30% quality: 70% price balance), with the original contractor re-engaged and so lessons brought to bear along with effective teamwork.  
Changed user move dates successfully met.  
Cost: −3%  
Time: On time  
Client satisfaction: 9/10 |

Agreement containing machinery for dealing with matters that remain to be resolved between the parties.\(^{32}\)

In Chapter 2, I will examine the features and contractual types that make up a conditional preconstruction phase agreement and the features of contract law that may affect its efficiency as a contract, including the extent to which the parties are dependent on their relationship as well as their specific contractual obligations. I will consider whether there is a risk of a conditional preconstruction phase agreement being unenforceable for reasons of uncertainty or incompleteness and whether such an agreement can offer a clear path through the ‘relational’ activities that are features of the approach to project management known as partnering.

---

\(^{32}\) Williamson distinguishes ‘classical’, ‘neo-classical’ and ‘relational’ contracts, as considered further in Chapter 2, Section 2.2 (Recognised categories of contract), and notes that ‘A recognition that the world is complex, that [the] agreements are incomplete, and that some contracts will never be reached unless both parties have confidence in the settlement machinery [thus] characterises neo-classical law.’ Williamson (1979), 238.
1.6 The limits of construction phase building contracts

In order to make the case for a new type of contract governing two-stage procurement, it is necessary to consider the shortcomings of single-stage construction phase contracts. The construction industry makes extensive use of published standard form construction phase building contracts, many of which appear to assume the availability of complete project information at the point when they are created. Do these forms do the whole job that a contract can and should do? I suggest that they do not.

However, the investment and effort required to adopt new contract forms that deal with preconstruction processes are considerable and can only be justified if clients and other project team members risk suffering significant loss in their absence. With this in mind, what are the predominant causes of claims and disputes on building projects? Can they be traced to failures in preparatory and planning processes, and to what extent can they be addressed by a new contractual treatment of these processes?

In Chapter 3, I will explore the implications of the fixed paradigm by which the information needed to complete and implement most standard form building contracts appears to require that when the relevant project was put out to tender there was substantially complete project information available, including designs sufficient for main contractor bidders to assess all relevant project risks and quote fixed prices. It will be argued that this assumption that project information is complete prior to creation of a building contract has been the cause of misunderstandings and failures that have led to significant inefficiencies, claims and disputes. I will also suggest that the most prevalent causes of claims and disputes are directly linked to failings in preconstruction phase activities and, arguably, the absence of the main contractor from the team while such activities are being undertaken.

1.7 Contractor contributions to design, pricing and risk management

It has been suggested that the greater opportunities for improving the parties’ performance and the overall project results are at the ‘front end’ of the project process. For example, Burke observed that the ability of the parties to influence project outcomes, including reduction of cost, creation of additional value, improvement of performance and flexibility to incorporate changes is much higher in the earlier

---

Early Contractor Involvement in Building Procurement

conceptual and design stages of the project. It is evident that by the time the construction and other aspects of project implementation are underway, the ability of any party to reduce cost or implement other changes in an efficient manner has reduced significantly. Burke was arguing the case for early project manager appointments, but the same argument can equally be used to support the case for early contractor and specialist appointments.

If problems, disputes and inefficiencies arise in the absence of contractor involvement in project preparation, the next step is to consider in more detail the ways in which contractors can contribute to such preparation and whether or not their contributions add significant benefits or give rise to other problems, disputes and inefficiencies of their own.

In Chapter 4, and using eight of the project case studies set out in Appendix A, I will illustrate the ways in which early appointment of main contractors and specialist subcontractors can improve preconstruction phase processes, including design development, finalising of supply chain members and prices, and risk management34. The eighth project case study (Project X) will illustrate circumstances where a preconstruction phase agreement was not successful in achieving its intended purposes, identifying the reasons for this and how they could be avoided35.

1.8 The client, communications and project programmes

As clients have expressed dissatisfaction with traditional models36, it is therefore important to explore the extent to which clients have a new role to play in encouraging implementation of alternative models. To quote Latham ‘Implementation begins with clients. Clients are at the core of the process and their needs must be met by the industry’37. In Chapter 5, I will review typical client roles under construction phase building contracts and will argue the need for closer client involvement under conditional preconstruction phase agreements.

Whether they are interested in early project processes or not, clients are generally the only common signatory to a series of two-party consultant appointments and a building contract38. Hence, at some stage

34 See Chapters 4 and 5 and Project case studies 1 to 7, Appendix A.
35 See Chapters 4 and 5 and Project case study 8, Appendix A.
36 See Chapter 3, Section 3.5 (Criticism of effectiveness of standard forms).
38 Exceptions to this are multi-party contracts such as PPC2000 under which the consultants, main contractor and certain subcontractors and suppliers are also in direct contractual relationships with each other. See also Appendix B.
the client is likely to be asked to make project decisions based on conflicting views and information provided by different team members in their respective roles and applying the terms of their different contracts. Chapter 5 will consider whether closer involvement earlier in the project can assist the client in dealing with such situations and will illustrate by reference to project case studies the ways in which a greater client involvement may benefit particular project processes.

For a project team to work efficiently, communication is required between individuals as well as organisations. Where they are tasked with important project decisions, such individuals need guidance as to who has what authority, when they should meet, how they should reach decisions and what contractual effect those decisions will have. I will explore how in a conditional preconstruction phase agreement, where a decision-making process is part of the system for moving from incomplete to complete information, an agreed contractual system of communication can be of particular importance to facilitate such decision making.

The establishment and bedding in of a communication system is itself a preparatory process for the construction phase of the project, and it will be suggested that this will operate more effectively if the agreed individuals remain the same during the preconstruction and construction phases and operate as a ‘core group’\(^{39}\), with a duty to provide mutual ‘early warning’\(^{40}\) of problems and to seek agreed solutions. The project case studies will be used illustrate how this can work in practice.

If preconstruction phase contractual commitments are to achieve benefits over and above less formal arrangements, they need to be subject to programmes to identify who does what during the preconstruction phase, and when key activities will be completed. But should these programmes be contractually binding? It will be argued that identifying and agreeing contractual deadlines for key preconstruction phase activities is central to the success of a preconstruction phase agreement.

Chapter 5 will consider the status of programmes in published standard form consultant appointments as well as in standard form building contracts, and also the sensitivities of programming the creative processes by which designs are conceived and developed. It will be argued that there is a need to agree contractually binding deadlines for all preconstruction phase activities, including design outputs, pricing exercises and the early agreement of a construction phase programme.

\(^{39}\) The contractual status of a ‘core group’ was first recognised in PPC2000 and now also appears in NEC3 Option X12 and Perform 21.

\(^{40}\) The contractual status of ‘early warning’ was first recognised in NEC2 and also appears in PPC2000 and Perform 21.
Early Contractor Involvement in Building Procurement

The project case studies will be used to illustrate the benefits that this approach can achieve and the problems it can avert.

1.9 But do you need an early building contract?

Where contractors, subcontractors and suppliers are involved in project processes ahead of start on site, it is often through an informal arrangement such as a ‘letter of intent’ rather than a preconstruction phase agreement. A wide range of other options have also been employed to obtain early contractor input, varying from corporate joint ventures to non-binding project protocols.

In Chapter 6, I will compare the contractual and non-contractual options for describing preconstruction phase processes and will assess the pros and cons of each. I will consider the steps necessary to create preconstruction phase appointments under the published standard form building contracts GC/Works/1, NEC3, PPC2000, Perform 21, JCT 2005 and JCT CE by reference to a comparison of these forms of contract set out in Appendix B41. I will contrast the use of less formal techniques such as letters of intent and non-binding protocols, and the implications of relying on personal relationships with no contractual support at all.

Although it is possible to achieve the benefits of early involvement of the main contractor and its specialist subcontractors and suppliers in preconstruction phase processes without a legally binding preconstruction phase agreement, it will be argued that such an agreement offers a clearer and better structured approach that is more likely to be understood and adhered to, and is therefore more likely to achieve the team’s objectives.

1.10 Preconstruction commitments under framework agreements

Having examined preconstruction phase processes and relationships in relation to a single project, what differences arise if these processes and relationships are applied over a series of projects? In Chapter 7, I will look at the impact of framework agreements on the industry’s approach to preconstruction phase activities, and consider whether the performance of such activities as preconditions to the unconditional award of successive projects is relevant to the success of framework agreements in practice. Appropriate features of framework agreements

---

41 See review of standard form contracts in Appendix B.
are considered by reference to the standard form framework agreements published by JCT\textsuperscript{42} and NEC\textsuperscript{43} reviewed in Appendix C\textsuperscript{44}.

Four further project case studies will illustrate how framework agreements have been used to describe preconstruction phase processes as well as to set out the criteria for award of successive projects\textsuperscript{45}, and to identify particular benefits achieved pursuant to these framework agreements. I will also illustrate by reference to the last project case study (Project Y) the problems encountered under a framework agreement where preconstruction phase processes were not implemented, noting the reasons for these problems and suggesting how they could be avoided\textsuperscript{46}.

1.11 The influence of project managers and project partnering

The provisions of a preconstruction phase agreement merge contractual processes with the project management of design, procurement, risk and start up on site. It is therefore important to consider the responsibilities of the project manager, particularly during the preconstruction phase, and how fulfilment of these responsibilities could be affected by the creation of a preconstruction phase agreement. In Chapter 8, I will look at the purposes of project management and the role of the project manager during the preparatory and planning stages of a project.

I will also consider the influence of project managers over the choice of procurement strategy and their role in organising communications and the integration of the team, highlighting the need for objectivity if the project manager is to be credible to all team members. It will be argued that a strong project manager is not a substitute for a conditional preconstruction phase agreement, and that project managers should welcome the additional clarity created by such an agreement.

Chapter 8 will then review the functions and features of partnering, and will categorise it as a type of project management underpinned by teamwork between different organisations. Focusing on partnering as applied to implementation of a single project, I will argue that the collaborative activities that together comprise partnering should be undertaken throughout all stages of a project, but that they are particularly important during the preconstruction phase for the following reasons:

\textsuperscript{42} JCT 2005 Framework Agreement.
\textsuperscript{43} NEC3 Framework Contract.
\textsuperscript{44} See review of the JCT Framework Agreement and NEC Framework Contract in Appendix C.
\textsuperscript{45} Project case studies 9 to 11 inclusive, Appendix A.
\textsuperscript{46} Project case study 12, Appendix A.
• This is when new relationships are being formed and there is still thinking time during which teamwork can be applied in the search for new or improved designs, sources of supply and construction techniques.
• This is when the composition of the team and their collaborative working methods can be trialled without unconditional commitment and can be altered if unsuccessful.

I will propose that the development of successful partnering relationships and working methods on a conditional basis benefit from the clarity and discipline of contractual terms. I will suggest that a conditional preconstruction phase agreement is, therefore, directly relevant to the success of project partnering, and that by describing agreed partnering processes as features of project management such an agreement can complete a missing link that otherwise separates partnering from building contracts.

I will also consider the risks that arise in partnering if the parties focus only on collaborative values and teamwork without creating team-based contractual systems to deal with problems or without agreeing deadlines to drive their project partnering processes forward. I will consider the impact of potential challenges to the success of partnering, such as varying organisational cultures, changing business conditions, uneven levels of commitment and lack of momentum and will address whether each of these challenges can be overcome through appropriate provisions set out in a preconstruction phase agreement.

1.12 So what is stopping us?

If conditional agreements exist that can govern preconstruction phase activities, why are they not used more widely? Are there good reasons for resistance to a two-stage contractual approach and are there particular types of project for which it is inappropriate?

In Chapter 9, I will seek to identify those types of projects that may not be suitable for the early appointment of the main contractor and its specialist subcontractors and suppliers. I will consider whether preconstruction phase agreements may also be inappropriate for other reasons, and will seek to identify where by contrast they may fail to fulfil their intended purposes because they are not properly implemented by the parties.

Reasons for resistance reviewed in this way will include project-specific, procedural, cultural and personal obstacles to the use of preconstruction phase agreements, noting on the one hand where the reasons for such resistance are logical and on the other hand where
they may result from misunderstandings or from the difficulty of changing a long-established status quo until such time as decision makers are otherwise influenced by training and education.

### 1.13 Government and industry support

Notwithstanding the apparent benefits that can be obtained through the wider use of preconstruction phase agreements, and in addition to training and education as to the way they can work, sustained and influential support will be required for such agreements to be carried into the wider construction marketplace.

In Chapter 10, I will review how the future increased use of such agreements may be influenced by powerful groups of public and private sector clients and government and industry best practice bodies according to the extent that they identify, encourage, implement and benefit from early contractor, subcontractor and supplier appointments as a means to ensure improved project processes. In addition to the demonstrable benefits accruing to clients, Chapter 10 also illustrates how contractors are benefiting from early appointments by obtaining the ability to influence project designs and programming and thereby to reduce their risks and secure increased profits. It will also consider the increasing importance of properly structured early contractor appointments in an economic downturn.