Alliancing still to be tested

Ben Mullard and Pasquale Pisanelli of Beale and Company review the development of the alliancing model and consider some of the ongoing issues that might need to be addressed. Can the traditional contracting mindset be completely left behind?

KEY POINTS

- Alliancing remains a popular procurement method for major projects and the participants’ approaches are developing
- A number of issues arise from adopting an alliancing approach – it remains to be seen to what extent parties are willing to embrace a true alliancing type approach and let go of more traditional approaches
- Some of the risks associated with the alliancing model are now better understood, while others still need to be tested on ‘live’ projects
- The ‘no blame/no claim’ principle of alliancing remains largely untested – will it survive when the going gets tough?
- Alliances can approach sub-contracting in various ways – from a traditional ‘straight’ subcontract to an integrated, alliance focused approach – what works best will depend on each project

In April 2013 our colleagues looked at some of the key principles behind alliancing type procurement (‘Alliancing – it’s all for one and one for all’ (2013) 24 CL 3). In summary, alliancing is different from ‘traditional’ contracting and is a way for two or more parties to work together to achieve a common goal. As well as including consultants and contractors, a key feature is that the client is also a participant, which differs from more traditional joint venture type arrangements. The alliance is underpinned by the idea that all alliance members ‘win together and lose together’.

Over the past year various public bodies and major industry clients have continued the ongoing trend towards procuring infrastructure projects using some form of alliancing model. Various approaches have been taken to some of the key features of alliancing, including dispute resolution mechanisms, division of liability and sub-contracting.

Participant shares

The participants will need to consider their relative shares in the alliance. Depending on the nature of the project, the participants may have substantially different shares in a project (if for example, design makes up only a small percentage of the overall work, while construction activities are extensive). Generally, a core principle of alliancing is that decisions are made by representatives of each participant on an equal footing and must be unanimous. The alliancing principles, whereby the needs of the project are effectively put before those of the participants, should mean that the project comes first and there is no ‘tactical’ voting. However, the imbalance in participants’ shares may lead to perceived risks for individual participants. For example, participants with larger shares may be exposed as a result of other participants having equal voting power and thereby wielding greater influence than their share. On the other hand, while enjoying enhanced voting power, those participants with smaller shares may be exposed to liabilities far greater than their share would indicate they would accept.
Liability
Notwithstanding the central ‘no blame/no claim’ culture, the liability of the participants must also be considered, together with any caps on liability. We have seen different approaches adopted, according to the needs of the project. One approach is that the participants are jointly and severally liable to the client for any breach and bear all losses equally (which would reflect the ‘win together/lose together’ principle). However, in our experience, this approach may be qualified with liability being further apportioned in accordance with the participants’ shares. Another approach is for each participant to be severally liable to the client, with a clearly defined scope for each party. Such provisions could include some form of apportionment and separate caps on liability commensurate with each participant’s share. In our experience, neither approach truly reflects a pure ‘win together/lose together’ philosophy and it will be interesting to see whether a purer alliance approach can be adopted as parties become more familiar with these arrangements.

Decision making/disputes
In line with the ‘win together/lose together’ principle, alliancing contracts usually provide for the establishment of some form of senior alliance leadership team, comprising representatives from each of the alliance participants. The alliance leadership team is generally responsible for making all key decisions on behalf of the alliance, including determination of adjustment events, of payments due (including any pain or gain share), and setting the overall direction for the project. Typically, unanimous agreement of this team is required for all decisions. On occasion, reaching a unanimous decision may be problematic, particularly given the number of parties involved with potentially competing interests. Although it could be argued that no issues should arise, provided that the parties fully embrace the spirit of alliancing, this may be too idealistic and not reflect reality. We have seen two different approaches taken to this issue. In line with the ‘win together/lose together’ principle, one approach is to simply rely on the team reaching a unanimous decision and not to provide for any form of deadlock mechanism or dispute resolution in respect of such decisions.

Practically, there remains a risk that a unanimous decision will not be reached and this could have a direct impact on delivery of the project. We have recently seen an increased willingness to consider the inclusion of an appropriate deadlock mechanism in the agreement. This could take the form of a tiered dispute resolution process, including a meeting of senior representatives with subsequent referral to expert determination or even litigation. One school of thought is that inclusion of such escalation provisions moves away from the core principles of an alliance, including ‘no blame/no claim’ and ‘win together/lose together’.

No blame/no claim
A key element of the alliancing approach is a ‘no blame/no claim’ culture, whereby the participants agree that no legally enforceable rights will arise under the agreement and that there will be no litigation, arbitration or adjudication between them (although generally, this broad position is subject to specific exclusions, including in respect of a breach of the underlying alliance principles and certain statutory provisions).

To date, we have not seen any reported cases arising from the recent uptake of alliancing. Provided that participants continue to embrace the philosophy and choose to live and die by the ‘win together/lose together’ approach, this will hopefully remain the case. However, there are some dispute related issues which need to be borne in mind by participants.

Given the major infrastructure projects for which alliances arrangements are typically used, at least some of the agreement will be a ‘construction contract’ for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996). ‘Construction contract’ is widely defined in relation to the carrying out of construction operations (including both design and build elements) and the operation of the HGCRA 1996 would mean that certain statutory provisions would apply, including those relating to adjudication, payment and suspension. Given the participants’ agreement that there shall be no litigation, arbitration or adjudication between them, issues may arise on a project in relation to dispute resolution, given that the parties cannot exclude rights to adjudicate.

Alliance agreements typically govern all aspects of the relationship between the parties, including both the traditional construction elements and the collaboration and joint venture type provisions. The HGCRA 1996 applies only to construction operations and its application is limited where a contract relates partially to construction operations and partially to other elements.
It will be interesting to see whether participants are willing to test the application of the *HGCRA 1996* in this manner. For example, would a right to adjudicate be pursued in respect of the collaboration type provisions (including, for example, unanimous decision-making and pain/gain share provisions)? To what extent should the participants maintain PI insurance? Maintaining PI insurance may be considered to be inconsistent with the ‘no blame/no claim’ culture, particularly given that most alliancing contracts typically do not contain a requirement to maintain such cover. However, participants may consider it prudent to maintain PI insurance in any event given that there are usually extensive carve outs to the no claim provisions (for example, in respect of wilful default and in respect of certain statutory requirements). In addition, participants may incur defence costs in respect of issues even if they do not fall within one of the carve outs. On this basis, participants should ensure they do not sign up to provisions under the alliance agreement which might prejudice this cover, including fitness for purpose type obligations.

**Sub-contracting**

There are a number of approaches that an alliance can take when appointing sub-contractors. It is important that the participants consider these issues at the outset, at the same time as the alliance agreement is being negotiated, as the approach adopted in the agreement may have knock-on effects on the supply chain or constrain the participants to contract in a particular, perhaps unintended manner (this is particularly the case in circumstances in which the participants have separately defined obligations under the alliance agreement). There is no single ‘best’ solution, and what is most appropriate will depend in each case on the nature of the particular project, the identity of the participants (and their existing supply chain relationships), and the nature of the sub-contracted work. The participants will also need to consider whether they will jointly appoint sub-contractors (which would require provisions to deal with the practicalities of payment and instruction, while providing some comfort to the sub-contractors that they could recover fees from any of the participants), or whether particular sub-contractors will be appointed by individual participants, perhaps on terms already agreed by the alliance.

One approach would be for an alliance to adopt a traditional contracting approach, with no allowance made for an employer governed by alliance principles. Although this has a number of attractions, not least that the supply chain would be comfortable with such arrangements and likely to be well placed to tender on that basis, there may also be some downsides. The supply chain would not be ‘buying in’ to the alliancing principles, including adoption of a ‘no blame/no claim’ culture and would not be incentivised in the same way as the participants. Alliance agreements typically operate on a reimbursable cost basis and the performance of sub-contractors can have a direct effect on the performance of the alliance. The sub-contractor costs are likely to feed into the pain/gain mechanism and may reduce the gainshare available to the participants.

An alternative at the opposite end of the spectrum would be to include the supply chain (or at least the most significant sub-contractors) within the general principles governing the alliance. This may take the form of a ‘sub-alliance’ type contract, or be achieved by including certain alliance principles and obligations in the sub-contract. The participants would need to consider to what extent they wish to incentivise the supply chain through the use of pain/gain mechanisms and the extent, if any, to which the ‘no blame/no claim’ culture would be extended down the supply chain. The aim would be to create a fully-aligned supply chain, which would be well placed to deliver in accordance with the alliance principles and thereby maximise the benefits to the alliance as a whole.

Ultimately, it is likely that, given the increased use of alliancing type arrangements, major suppliers will need to understand and embrace alliancing principles if they are to take part in these significant projects – doing things the ‘old’ way may only get them so far. However, what will work well for major industry sub-contractors may not work for smaller suppliers, who might be hesitant to sign up to the principles of alliancing.

The most practical solution is likely to be a sliding scale approach, with major suppliers signing up to key alliancing principles and contributing to and sharing in the success of the alliance, with smaller suppliers taking more limited or traditional roles. Such an approach would help the alliance, working with the supply chain, to achieve the best outcome for the project as a whole – a fundamental driver behind alliancing.  

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