Issues arising from collaborative working--an introduction

24/06/2014

Construction analysis: What are the key issues to consider when approaching collaborative working? Ben Mullard, an associate at Beale & Company, explores the challenges of collaborative working.

What has led to the development of collaborative working?

Over the last several years we have seen increased attention on various collaborative working methods, although their use remains the exception, rather than the rule.

Collaborative working covers a wide range of working practices, both contractual and non-contractual. Many of these, such as joint ventures and partnering, will already be familiar to parties in the construction industry, whereas others are more recent developments or are not yet widely adopted.

The push towards greater collaboration comes partially from government initiatives (including the Construction Strategy, Construction 2025 and the adoption of BIM/Government Soft Landings (GSL)), as well as from the adoption by major industry clients of new forms of procurement such as alliances and collaborative framework arrangements. A key feature of many of these is the greater involvement of the client in the development and delivery of the project than has traditionally been the case. This greater client involvement brings a number of potential benefits. For example, the client is more likely to get exactly the project it wants, potentially significant time and cost savings may be possible and risks and rewards can be shared between more parties.

What are the main approaches being taken to collaborative working?

Construction contracts are traditionally adversarial, with very little, if any, alignment between the client and the contractor's or consultant's interests. However, collaborative working methods represent a break with this tradition and have the potential to benefit all parties involved.

Collaborative working can take various forms. For example, at the more traditional end of the collaborative working spectrum, parties may include contractual commitments to act in a collaborative manner or in good faith. These may be provisions which are 'bolted-on' to existing forms of contract, or which are included as standard. For example, the NEC 3 suite of contracts includes an obligation on the parties to act in a 'spirit of mutual trust and cooperation', while the JCT Constructing Excellence contract states that it is the parties' intention to 'work together with each other and with all other Project Participants in a co-operative and collaborative manner in good faith and in the spirit of trust and respect'.

Beyond this more traditional approach, there are a number of more innovative contracting structures intended to facilitate greater collaboration. For example, the PPC2000 contract is a multi-party contract (unlike traditional adversarial contracts) and allows the project team to sign up to the same commitments and values under a single project agreement.
In addition, the government has been running a number of trial projects making use of various more collaborative procurement and project approaches. These include 'cost led procurement', under which the client puts in place a framework agreement with a number of integrated supply chain teams, selected for their ability to work in a collaborative environment (including designers, contractors, specialist suppliers and manufacturers). These teams have the opportunity to work closely with the client team with the aim of beating a cost ceiling established for the project and achieving cost reductions on subsequent projects.

Other collaborative approaches being adopted by the government are independent of the form of procurement or contract adopted. These include the use of BIM (which the government aims to have implemented at Level 2 on all government procured projects by 2016, regardless of size) and the introduction of the Soft Landings initiative. Both of these approaches require greater collaboration between the various parties involved in projects than is traditionally the case, and will also bring a number of new challenges to overcome.

At the most collaborative end of the spectrum are forms of procurement which represent the greatest break from tradition. For example, another government trial makes use of the integrated project insurance model. An integrated project team is appointed to deliver the works under a new form of insurance which covers cost overruns up to an agreed liability cap. The project is also supported by an assurance team, which reports to the insurer in relation to various key risks, including the cost plan for the project and the levels of integration achieved by the team.

In addition, alliance type arrangements have recently been adopted by a number of clients for the delivery of various major projects and programmes of work. For example, Network Rail is delivering various major infrastructure upgrades on an alliance basis, while both the Highways Agency and Thames Water have adopted alliance type frameworks for the delivery of future programmes of work.

Under the form of alliance adopted by Network Rail (previously adopted widely by the Australian state authorities and sometimes referred to as a ‘pure’ alliance approach) the project is delivered by an integrated alliance team, which includes the client.

Typically the parties are reimbursed during the course of the project on an actual cost basis, with adjustments made on a gain or pain-share basis, depending on the alliance's performance against a single target cost which applies to the project as a whole. In addition, there are a number of features of an alliance arrangement which are unfamiliar. These are typically recorded in an ‘alliance charter’ and govern the behaviour of the parties. These alliance principles include the adoption of a ‘win together/lose together’ approach, with decisions being taken on a ‘best for project’ basis (rather than in the interests of any individual party). The parties also adopt a ‘no blame/no claim’ culture, minimising or even eliminating disputes between the participants. The alliance is managed by leadership and management teams who ensure the alliance delivers in line with the alliance principles.

**What issues arise from collaborative working?**

A key question that parties will need to consider in any collaborative environment is how well they are equipped to work in the collaborative manner envisaged at the outset. Although various forms of contract may be adopted to facilitate and encourage collaboration, 'forcing' parties to collaborate is unlikely to get the best from the participants. Collaboration requires a different mindset to more traditional contracting approaches in order to be truly successful and maximise the potential benefits. Parties must therefore be willing, certainly at the more innovative end of the spectrum, to embrace new ways of working at all levels. For example, making decisions on a ‘best for project’ basis is unlikely to be something that comes naturally to those used to working in a traditional construction environment. Similarly, adopting a ‘no blame/no claim’ culture will not be easy, particularly if there is a history of disputes and difficult projects between participants.

Greater collaboration also brings a number of practical issues. Some are likely to already be familiar to parties from the long history of more traditional construction projects, while others arise from the new approaches being adopted and some may not become obvious for some time.

The issues faced by parties will depend on the experience and mindset of the parties, the nature of the project and collaboration they are entering into as well as any external factors, such as the use of BIM or the adoption of GSL. However, common themes are likely to include:
Ownership of and responsibility for design

This is particularly relevant in a BIM environment, where more parties will be involved in producing, handling and manipulating design information. Some contracts, such as the latest editions of the PPC2000 suite, provide for the use of BIM from the outset, while these issues can be addressed in other contracts through the use of suitable drafting (such as that included in the CIC BIM Protocol, co-authored by John Henderson and Andrew Croft of Beale & Company).

Forms of insurance

Including, for example, whether traditional forms of insurance such as professional indemnity policies are appropriate in collaborative environments (particularly given that claims arising from projects may not arise until some time after procurement and delivery of the project). We are already seeing an increase in the use of project PI policies tailored to the needs of particular projects, and we expect further developments in this area as parties and their advisors consider how best to utilise such policies alongside existing insurances.

Dispute resolution

Including, whether traditional forms of dispute resolution are appropriate (or even necessary) in a collaborative environment, or whether less adversarial approaches should be adopted. For example, an alliance may exclude all claims and require all decisions to be made on a unanimous basis. Does the alliance agreement then need to provide any dispute resolution or ‘deadlock’ provisions, or are these contrary to the ‘spirit’ of the alliance? In addition, any construction activities will be subject to the Housing Grants Construction and Regeneration Act 1996, such that the parties' rights to adjudicate cannot be excluded.

Collaboration with the supply chain

Including consideration of the extent, if any, to which collaboration should be extended to others involved in delivering a project. For example, should subcontractors and subconsultants be incentivised through a painshare/gainshare mechanism and should they be entitled to benefit from any no claim type provisions present in the main contract? If a project successfully delivers time and cost savings, this may have the effect of reducing or limiting the amount payable to the supply chain. Although this helps deliver the cost saving, the suppliers are likely to consider that they are losing out and that they should be entitled to a share of the gain achieved (which is arguably a more collaborative way of working).

Many of the examples of collaborative working seen to date involve significant projects or are being pursued by government clients. However, that is not to say that only the largest projects will be procured on a collaborative basis and only the largest parties will sign up to work in a collaborative manner. At least some features of collaborative working are likely to have an impact on those further down the supply chain and involved on smaller projects. As more projects are procured on a collaborative basis, it is increasingly likely that smaller suppliers and subcontractors will be working on projects which include collaborative working at some level, whether in the form of a collaborative main contract or through the adoption of BIM and GSL.

This move towards increased collaboration at all levels, combined with significant client involvement, has the potential to bring great benefits to all involved. The greater alignment between the interests of all parties can help deliver the project that the client wants more quickly and cheaply than might otherwise be the case. In addition, collaborative working allows potential rewards to be shared between all parties to further incentivise performance, while the risks are similarly shared between those delivering the project, rather than resting largely with the client or contractor as can otherwise be the case.

*Interviewed by Sarah Harvie.*

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.