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CONSTRUCTION ENGINEERING & INFRASTRUCTURE

Alliancing and NEC4

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Introductions

- + Will Buckby
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Webinar Outline

- + What is alliancing?
- + Why is alliancing relevant?
- + Uptake of alliancing
- + “Pure” alliancing
- + Standard forms
- + NEC4 Alliance Contract – “the nuts and bolts”
- + NEC4 Alliance Contract – key concerns
- + Conclusions



Any questions?

- + Please raise these as we go along and following the webinar at w.buckby@beale-law.com or a.croft@beale-law.com



What is Alliancing (1)?

- + An Alliance is more than just:
 - a consortium
 - a joint venture
 - partnering

- + NEC4 10.2/Option X12, ICC Partnering Addendum, PPC 2000:
 - Collaboration/partnering but not alliancing

- + There are some similarities between the above and an Alliance



What is Alliancing (2)?

- + Collaborative and integrated team – brought together from across extended supply chain
- + Team shares common goals which meet client requirements and work under common incentives
- + Client, partners, supply chain and stakeholder involvement
- + Risks and commercial return shared

“Alliancing is a form of long term partnership on a project [or programme of works] in which a financial incentive scheme links the rewards of each of the alliance members to specific and agreed overall outcomes and in which all aspects of the arrangement are incorporated in legal binding contracts”

European Construction Institute



Why Alliancing?

“The benefits of an alliancing approach to the collaborative delivery of significant construction projects are now clear. In the right environments the benefits alliancing delivers are considerable”

Infrastructure Client Group, Alliancing Best Practice

+ Where beneficial?

- Environment is complex, with multiple stakeholders, competing interests and challenging goals
- Performance improvement and change is a business requirement
- Access to extended supply chain is important performance enabler
- Larger and longer programmes or projects

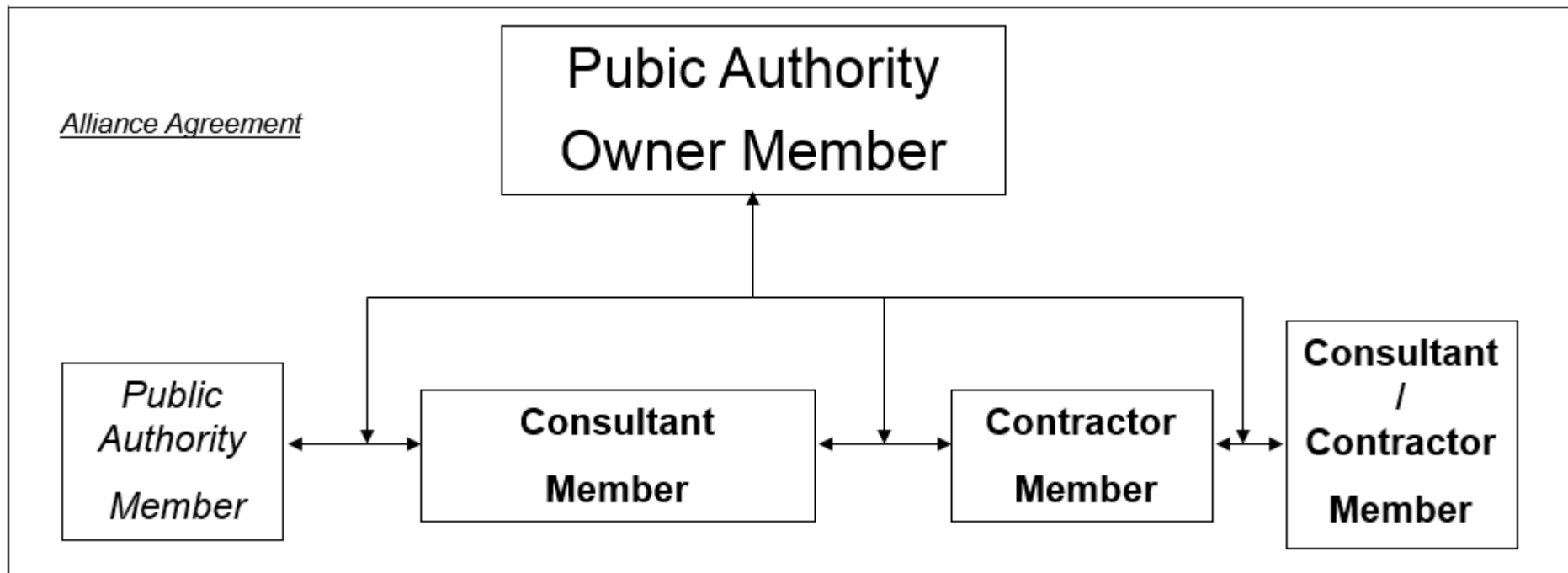


Uptake of Alliancing

- + BP – Project Andrew, early 1990s
- + Alliancing subsequently adopted in Australia, initially in oil and gas projects
- + Now common on UK infrastructure projects:
 - National Grid
 - Network Rail
 - Water industry (e.g. Anglian Water One Alliance)
 - Local authorities (e.g. Midland Highways Alliance)
 - Highways England (e.g. Smart Motorways)
- + *“There is now an industry wide track record that supports the business case for alliances”*
Infrastructure Client Group, Alliancing Best Practice



What is “pure alliancing”? (1)



What is “pure alliancing”? (2)



- + Agreement between the client, the contractor(s) and consultant to deliver a particular project or projects, as ONE TEAM
- + Agreement deals with obligations and liabilities as between consultant(s) and contractor(s) (“members”) and as between the members and the client
- + Two or more parties working together to achieve a common goal
- + Share liability
- + Shared decision making
- + Typically gainshare/painshare mechanisms
- + No blame/claim culture
- + Obligations in relation to good faith and alliance charter

Standard forms

- + NEC4 Alliance Contract
- + FAC-1 Framework Alliance Contract
- + TAC-1 Term Alliance Contract
- + Network Rail standard form, and others



Introduction to NEC4 Alliance Contract



+ A long time in the making!

Working in collaboration, the Institution of Civil Engineers and Government are considering adding a new form of alliance contract to the NEC3 suite of contracts

HM Treasury's Infrastructure Cost Review Implementation Plan (March 2011)

+ Consultation version published June 2017

+ Final version published June 2018

+ Already being used:

- Smart Motorways Alliance
- Hinkley Point C Services

Contractual Structure

+ Familiar NEC structure:

- Core Clauses
- Secondary Options
- Schedule of Cost Components
- Contract Data Part One and Two

+ Core NEC mechanisms remain, e.g.:

- Spirit of mutual trust and co-operation
- Detailed programme obligations
- Defects obligation
- Early Warning regime
- Compensation Event regime

+ Although, note, the above have been amended



Key Alliance Obligations



- + Alliance – the *Client* and the Partners
- + Alliance must (clause 20):
 - collaborate to achieve Alliance Objectives and *partner objectives*
 - Provide the Works in accordance with the Scope, Alliance Objectives and Implementation Plan
 - Support delivery of the contract on a “best for project” basis
 - Give advice, information and opinion “fully, openly and objectively”

Alliance Board

- + Representative from each member Alliance
- + Role (clause 21):
 - set strategy for achievement of objectives
 - allocate work
 - make decisions (e.g. defects, compensation event assessment)
 - appoint and instruct Alliance Manager
 - resolve disputes
- + Save where stated in contract decisions require agreement of all members



Payment



- + Defined Cost plus Fee
- + Note – Disallowed Cost and open book
- + Performance Measurements (clause 53):
 - Target for Alliance Objective
 - Budget saving or overspend
- + Sums paid to Partners if Alliance Objective met or Budget Saving achieved....
- + if not, Partners pay sum.
- + As set out in Performance Table

Liability (clauses 80-81)

- + Client and Partner Liabilities include third party claims due to wilful default...
 - ...“an intentional act or omission to not comply with”
 - ...their obligations
- + Client liabilities:
 - loss or damage after take over
 - damage to Client property other than the works (unless caused by the Works)
- + Partner’s liabilities:
 - breach of third party intellectual property; and
 - death and personal injury to employees.
- + Scope of liabilities narrow, although wilful default wide and unclear



Insurance



- + Contractors All Risks, Public Liability and Employer's Liability (clause 84)
- + No requirement for Professional Indemnity Insurance
- + Unless Contract Data includes as an additional insurance
- + Policies must include waiver of subrogation (clause 87.1)
- + Liabilities recovered from insurers not an Alliance Cost (clause 82)

Dispute Resolution (clauses 94-97)

*“The members of the Alliance agree that any failure by a member of the Alliance to comply with their obligations **does not give rise to any enforceable right or obligation except for an event which is a Clients’ or Partners’ liability. Any disputes are only resolved in accordance with these conditions of contract.**”*

Clause 94

- + Disputes referred to 1) Alliance Board, 2) independent expert and 3) *Senior Representatives*.
- + Equivalent of “No Claim culture”. Effective?
- + Dispute can be referred to adjudication at any time (Y(UK)2). Conflict?



Risks – 1) Alliance Board



- + Decisions must be unanimous (clause 21.3)
- + No deadlock mechanism
- + If decision cannot be made could delay:
 - progress of Works
 - acceptance defects certificate (and final payment)
 - resolution of compensation event
- + Common risk of “pure alliancing”
- + Consider including mechanism to resolve deadlock

Risks – 2) Fitness for Purpose

- + Obligations to comply with Alliance Objectives/Scope (clause 20)
- + Likely to contain purposes or performance requirements, e.g. for water treatment plant:
 - minimum volume of water from treatment plant
 - quality of water

NEC4 User Guide Preparing an Alliance Contract

- + May be fitness for purpose obligations
- + No NEC Option X15
- + Request exclusion of fitness for purpose



Risks – 3) Design Liability



- + Design necessary to Provide the Works must be “carried out” (clause 23.1)
- + Unclear and wide responsibility
- + No duty of care
- + No standard NEC limit of liability for defects in design
- + Risk of design obligations being inconsistent with professional indemnity insurance

Risks - 4) Compensation Events

- + Limited Compensation Events:
 - limited instructed changes to Client Requirements or Scope
 - access
 - instruction to stop or start work
 - *Client* liability
 - correcting assumption
 - prevention
- + Does not include standard NEC CEs, e.g. failure to comply with programme, physical conditions, breach of Contract
- + Limited variation entitlement common in Alliance Contracts
- + Consider expanding CEs in Contract Data



Risks - 5) Liability



- + Unless X18 included:
 - liability unlimited
 - no *end of liability date*
- + If selected must be in Contract Data Part Two
- + X18 does not limit liability for:
 - payments in Performance Table
 - indirect loss
 - Defects in design not in Defects Certificate
 - damage to *Client* property
- + Liability is several. No aggregate limit on all Partners' liability
- + Partners reimburse for responsible liability

Risks – 6) Performance Measurements

- + “Pain” in Performance Table only payable by Members
- + Typical for pain/gain to be shared by Alliance as a whole (inc. *Client*)
- + Important to consider Performance Table carefully
- + Sums payable should not require all “pain” is to be paid by Members
- + No limit on liability under Performance Table
- + Typically “pain” capped at Fee



Our Views



- + Alliancing is here to stay
- + NEC4 Alliancing is a positive addition to suite
- + Embodies much of the “pure” alliancing approach
- + However requires right team, project and approach
- + Dispute resolution position unclear
- + Key risks under NEC4 Alliance Contract:
 - Deadlock
 - Fitness for purpose
 - Design liability
 - Compensation events
 - Liability
- + Consider amendments and handle with care

Upcoming Webinars

- + An Introduction to Arbitration, 13 June 2019
 - + A Practical Perspective on Arbitration, 27 June 2019
 - + Managing Payment from Developers, 4 July 2019
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- + Register at – webinars@beale-law.com

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