

SEC **GROUP** briefing

Voice of the Specialist Engineering Contractor

The members of the SEC Group are:

Association of Plumbing and Heating Contractors

British Constructional Steelwork Association

Electrical Contractors' Association

Heating and Ventilating Contractors' Association

Lift and Escalator Industry Association

SELECT

PPC2000

What are the risks associated with this contract?

Background

- 1 It is claimed (by the authors of this contract) that, currently, projects and programmes totalling over £5bn have adopted PPC2000. The largest single programme is the HM Prison Service Programme worth approximately £2bn. Government clients such as the Department for Works and Pensions and the Foreign and Commonwealth Office are using this contract. Private sector clients using PPC2000 include Virgin Trains and BAe Systems.
- 2 The authors of PPC2000 claim that it puts partnering relationships into a contractual context. In his report Rethinking Construction in July 1998, Sir John Egan strongly recommended that the industry adopt partnering throughout its supply chains. Traditional contracts tend to be adversarial and, consequently, do not promote the trust and openness that is the hallmark of partnering.
- 3 PPC2000 was launched by Sir John Egan in 2000 and published by the Association of Consultant Architects. It was amended in 2003. A sub-contract – SPC2000 – was also published in 2003.

The Greatest Risk

- 4 The key characteristic of PPC2000 is that it is a multi-party contract in which all parties - client, consultants, contractors and specialists - have rights, obligations and liabilities in respect of each other.
- 5 In fact the greatest risk in this form of contract arises from it being a multi-party agreement. Clause 22.1 of the Partnering Terms states:

"In all their activitieseach of the Partnering Team members shall use reasonable skill and care appropriate to their respective roles, expertise and responsibilities as stated in the Partnering Documents, and shall owe each other such duty of care in respect of all their agreed obligations under the Partnering Contract"



For further information on all aspects of SEC Group and its activities contact:

John Nelson

Executive Secretary

SPECIALIST ENGINEERING CONTRACTORS GROUP

34 Palace Court

London

W2 4JG

Tel: **020 7313 4819**

Fax: 020 7727 9268

E-mail: contact@secgroup.org.uk

Website: www.secgroup.org.uk

- 6 A specialist contractor will – potentially – be liable to each of the other partners – client, consultants and the constructor in respect of any breach of the Partnering Terms. This will be in addition to any collateral warranties that may be required by the client under clause 22.2.
- 7 This risk is highlighted by the fact that, in most cases, the contract will amount to an “arranged marriage” of the team members. Anyone wishing to become a part of the team will, therefore, have to make careful assessments of their ability to work with the other team members. This risk will, of course, be reduced where the team keeps together for other projects.

Other Key Risks

- 8 Under clause 23.1 the performance of each team member is kept under regular review by the Core Group by reference to the KPIs . Clause 23.¹ states:

“The Partnering Team members shall use reasonable skill and care, within the scope of their agreed roles, expertise and responsibilities and in accordance with the Partnering Documents, to achieve their respective targets as set out in the KPIs.”

- 9 There is potential here for conflict between members of the team. Clauses 13.1 and 13.2 allow for incentives and shared saving arrangements to be awarded to members of the team. These may be linked to achieving the requisite KPIs. If such incentives or shared savings are not awarded because a party has obstructed another, there could be claims for the loss of such incentives or savings.
- 10 In the *Project Partnering Agreement* there is an optional *net contribution* clause. This limits the liability of each member of the team for any loss or damage as would be “just and equitable” having regard to the relevant team member’s responsibility for such loss of damage. **It is important that prospective team members ensure that this clause is used.**
- 11 In line with the partnering ethos there is no provision for liquidated damages in PPC2000. Therefore unlimited claims for delay damages could be brought by the client and other team members against the party at fault. Such multiplicity of claims would qualify as the nightmare scenario under this contract.
- 12 A potentially onerous requirement exists in clause 2.4 of the *Partnering Terms*:

“Each Partnering Team member who prepares or contributes to any one or more Partnering Documents shall be responsible for the consequences of any error or omission in, or any discrepancy between, such Partnering Documents or its contributions to them, except to the extent of its reliance (if stated in such Partnering Documents) on any contribution or information provided by any one or more other Partnering Team member.”

- 13 The point to note about this clause is that liability attaches to a *Partnering Team member* who has prepared or contributed to one or more of the relevant documents. But, he might not have been responsible for any errors, omissions in or discrepancies between the *Partnering Documents*. Nonetheless, he will be liable for consequences of such errors etc. The only escape from such liability would be if he had relied on any contribution or information from one or more other *Partnering Team members*².

¹ The overall responsibility of this Core Group - made up of Partnering Team members - is to keep the project under review to ensure that the contract is being carried out and that the aspirations for the project are being achieved.

² Such reliance must be stated in the Partnering Documents.

- 14 In the *Partnering Project Agreement* there is an optional clause requiring the constructor to warrant that the completed project will be fit for its intended purposes as described in the Project Brief. If such provision was used the constructor will, no doubt, want to ensure that it was passed onto the specialist. The interesting point to note about this optional provision is that it **does not** place such responsibility on all team members. Other members of the team such as consultants will only be bound by clause 22.1 to “use **reasonable skill and care appropriate to their respective roles, expertise and responsibilities as stated in the Partnering Documents**” (emphasis added).
- 15 A related problem is created by the case of **Co-operative Insurance Society Ltd v Henry Boot (Scotland) Ltd** [1 July 2002]. This case decided that a contractor engaged to complete a design already developed by others could be liable for the whole of the design if it proves defective or deficient. The implications of this case are fully discussed in the September 2003 SEC Group Briefing. Clause 10.2 of PPC 2000 enables a specialist contractor to join the *Partnering Team* at a later stage and, thus, become a party to the *Partnering Contract*. Before joining the specialist will need to consider the extent to which any design work relating to his trade has been carried out. If a significant amount of work has already been done he will need to consult his insurers in view of the risk created by the **Cooperative Insurance Society** case.

Summary

- 16 Whilst this Briefing has identified the major risks arising from the terms of this contract one should, of course, consider the benefits. Overall, it might be considered that such risks are acceptable because all the parties are involved in a team effort that rests upon trust and transparency.
- 17 The greatest risk in partnering is the risk of falling out. If this happens under PPC2000 any ensuing arbitration or litigation would be horrendous in view of the complexities involved in the claims and counter-claims that could be made by the team members in relation to each other. But, ironically, such prospect could prevent all team members from falling into the abyss.

HAVE YOU HAD EXPERIENCE OF WORKING UNDER PPC2000?

If your firm has worked under PPC2000 it would be helpful to have your experiences – both positive and negative. For example:

- **Did the payment processes work better?**
- **Were you appointed early in the procurement process?**
- **Were disputes resolved amicably?**

Keep your association informed of your experiences.

For further information on all aspects of SEC Group and its activities contact:

John Nelson Executive Secretary

SPECIALIST ENGINEERING CONTRACTORS GROUP

34 Palace Court London W2 4JG

Tel: **020 7313 4819** Fax: 020 7727 9268

E-mail: contact@secgroup.org.uk Website: www.secgroup.org.uk