

PPC2000 and the Arup Report

The major partnering contracts have been revised recently in the wake of the Arup report for the Office of Government Commerce. **David Mosey** and **Peter Kitson** of **Trowers & Hamlins** explain the changes made to PPC2000 in the first of two articles on partnering contracts.

KEY POINTS

- OGC Arup Report approves PPC2000
- PPC amendments published October 2008
- New template partnering timetable and risk register
- New sustainability and pre-construction agreement provisions
- Project Bank Account supplement
- Amended problem-solving and termination clauses

This article is written in the wake of two significant developments in the world of partnering contracts. The first of these was the publication on 25 September 2008 of the independent Arup Report on partnering contracts, commissioned by the Office of Government Commerce (OGC). The second was the publication in October 2008 of revised editions of the partnering contracts PPC2000, SPC2000 and TPC2005. In a second article, the authors will examine the latest developments for supply chain integration under SPC2000 and for long-term partnering under TPC2005. However, this article will focus on the findings of the Arup Report in relation to PPC2000, as well as the latest round of amendments to that contract.

The Arup Report assessed the compliance of PPC2000, NEC3 and JCT Constructing Excellence with the OGC Achieving Excellence in Construction principles. It found that each of the three contracts

reviewed 'would enable parties, using them correctly, to achieve OGC's Achieving Excellence in Construction standards' and emphasised that 'each has its own strengths and weaknesses and each is highly adaptable'. On the range of evaluation criteria utilised in the Arup Report, PPC2000 scored higher than the NEC and JCT contracts both in the overall rankings and in the category 'Leading Excellence in Construction'.

The Arup Report specifically approved of the two stage structure of the contract and its detailed provisions for early contractor involvement. The report recognised PPC as representing 'a complete procurement and delivery system that is distinct from other forms of contract available' (s 3.1.14). They noted that users need to master 'an appreciation of the interplay of its detailed procedures' (s 3.1.14) and it was with this need for additional guidance in mind that the Association of Consultant Architects commissioned a number of the 2008 revisions.

Partnering timetable

A key feature of PPC2000 is the pre-construction phase programme governing the early commitments made by the client, the main contractor (constructor) and the range of consultants comprising the project manager (client representative) as well as design consultants, CDM coordinator and cost consultants. However, previously no template form of partnering timetable was provided and in the 2008 amendments this omission has been rectified.

The new form of partnering timetable identifies the relevant activity/requirement, the clause of PPC in which it is referred to, the partnering team member(s) responsible, the deadline for that activity to be completed and any additional comments (Appendix 6 of PPC2000 refers). The template is accompanied by a

guidance note that provides a list of typical activities for which deadlines need to be agreed. These include design development submissions (PPC cl 8.3), surveys and investigations (PPC cl 8.4), updated cost estimates (PPC cl 8.7), value engineering exercises (PPC cl 8.8), submission of business cases by the constructor for single source procurement proposals (PPC cl 10.3) and obtaining by the constructor of tenders from its proposed sub-contractors and suppliers (PPC cl 10.6).

Risk register

Through early contractor involvement, PPC2000 creates a period of thinking time during which risks can be assessed jointly by all parties and mitigating actions could be agreed and implemented. In its original form, PPC2000 did not provide a template risk register, and again this omission has been corrected (PPC2000 Appendix 7).

The new template requires the parties to describe each risk, its likelihood, its impact on the project, the partnering team member(s) responsible for managing that risk, the nature of the actions they are expected to take and the deadline for such actions. Such deadlines will be linked to the partnering timetable, and if actions continue after commencement of the project on site, then they can be integrated in the construction phase programme known as the project timetable. PPC2000 provides that agreed risk management actions are a precondition to any priced risk contingency being considered for inclusion in the agreed maximum price.

Sustainability

Two stage procurement allows the client to assess the merits of proposals in respect of sustainability, and the balance between their cost and the benefits that they bring to the completed Project. A constructor commissioned under PPC2000 can ensure that its prospective sub-contractors and suppliers submit offers that include sustainability proposals, so that the client with its consultants and constructor can test the affordability of those options.

PPC2000 has now introduced in 2008 a definition of sustainability that is wide-ranging and includes 'reduced carbon emissions, reduced use of energy and of natural and manmade resources, improved waste management, improved employment and training opportunities, and any other measures intended to protect or improve the condition of the Environment or the wellbeing of people' (PPC Appendix 1). This is linked to a sustainability KPI (PPC cl 4).

Partnering and problem solving

The 2008 version of PPC2000 removes the references to the Egan Report (PPC cl 4.2), but remains a contract intended for those who wish to adopt a different approach in their dealings with each other. Arup describe PPC2000 as a contract that 'seeks to place collaborative working at its heart and incorporates processes that it has innovated to encourage users to deliver projects effectively as part of a Partnering Team' (s 3.1.1.). Arup note that the PPC approach to early contractor involvement should result in the client procuring its constructor 'at a point in the process where his specialist construction and management skills can have a great impact on the project' (s 3.1.10) – provided of course that PPC is used from the beginning of the project and its processes are properly applied.

However, in difficult times there is a greater risk of claims and disputes. The new version of PPC2000 seeks to address this by introducing a problem-solving hierarchy from the signature of the original project partnering agreement rather than from execution of the commencement agreement authorising start on site. Under the problem-solving hierarchy, named individuals from each member of the team work together to resolve a notified problem within a specified period. Failing agreement, the problem is referred to the next named individuals in the sequence (PPC, cl 26.8).

The Arup Report particularly notes the mechanisms in PPC2000 to 'find methods to resolve points of difference in the interests of the delivery of the Project' (s 3.1.5). It recognises the role of the core group and the partnering adviser in identifying and containing disputes so as to ensure that they can be resolved and 'can re-focus the Partnering Team on the delivery of the project' (s 3.1.6). Arup observe that through the PPC processes 'it is expected that the parties will find that the terms of the contract provide a swifter and more cost effective way of resolving points of difference than they might obtain from other dispute resolution mechanisms available, such as adjudication or litigation' (s 3.1.6).

Pre-construction agreement

Confusion had arisen under PPC2000 surrounding the use of the document originally known as the 'pre-possession agreement'. This was intended to govern only limited activities prior to start on site if these had not already been agreed and programmed under the PPC project partnering agreement.

In practice, some teams were using a pre-possession agreement for significant on-site work when the parties may not have finalised insurance of the project and site, or the development of a CDM construction phase plan. Activities undertaken pursuant to a pre-possession agreement were also not subject to the PPC regime under cl 18 governing extensions of time and claims for related costs, as this is effective only from execution of a commencement agreement.

The 2008 version renames the pre-possession agreement as the 'pre-construction agreement' and includes a guidance note as to when it is suitable for such document to be used, distinguishing the circumstances in which the parties should instead complete a commencement agreement to authorise the relevant part of the project (PPC Appendix 3, Pt 1).

The Arup Report observed that the PPC pre-possession agreement 'is a well thought out method of allowing works to be carried out whilst the documentation for the project is being developed. Providing a document to commence the project which is coordinated with the main contract processes and that prompts the parties to continue with developing the main contract documentation is superior to a stand-alone letter of intent' (s 3.2.2.1).

Project Bank Accounts

In line with guidance from OGC, the 2008 version of PPC2000 has introduced a set of optional provisions to facilitate the use of Project Bank Accounts (PPC Appendix 9). Where specified in the project partnering agreement, there is provision for the client, the constructor and any designated specialists (ie sub-contractors or suppliers) to enter into a Bank Account Agreement in a form to be specified by the relevant bank or otherwise as agreed. Thereafter, the client is required to make payments into the designated account of amounts that are certified as due to the relevant specialist. The Project Bank Account provisions take effect on signature of the commencement agreement, namely at the time when the parties commit unconditionally to commencement of the project on site.

Change and risk management

Turning to points of detail, there are some revisions to PPC timescales, for example allowing the Constructor five working days rather than two working days to object to instructions from the client representative (PPC cl 8.11). An equivalent extension from two to five working days is also allowed for the client repre-

sentative to object to suggested mitigation measures put forward by the constructor to overcome risk events justifying an extension of time (PPC cl 18.4(i)).

As regards information to be provided by the constructor to substantiate a time and money claim, clarification is provided that such a claim should in the first instance be accompanied by 'all evidence and cost information then available to the Constructor', in order to encourage constructors not to withhold cost and time information because particular details are not then available (PPC cl 18.4(i)).

Termination

The Arup Report identified that PPC2000 through its two stage process can 'focus on value at all material points' and 'still enable the parties to withdraw if the value profile is not satisfactory' (s 3.1.3).

In the 2008 version, PPC2000 create further flexibility in respect of termination, allowing the client to give notice to all or any of the other partnering team members terminating their appointments if any of the preconditions to start on site are not satisfied or if, for any reason not reasonably foreseeable by the client prior to the commencement agreement, the client no longer wishes to proceed with the project. There remains provision in PPC2000 in such circumstances for all partnering team members to be paid agreed amounts up-to-date (PPC cl 26.1).

An additional termination clause has been introduced in the 2008 version of PPC2000 for the benefit of local authority clients, providing for the client to terminate the appointment of any other partnering team member if that member gives any payment or other reward that would be an offence under the *Local Government Act 1972*.

Conclusion

The 2008 amendments to PPC2000 do not alter the basic structure, language and intent of the contract. They are intended to clarify and fine tune a contract that has been widely used in the UK and more recently in the Arabian Gulf (see PPC website <http://www.ppc2000.co.uk/home.htm> for a range of projects and users). The amendments should help PPC users take full advantage of the planning stage of the project in accordance with its provisions. As Arup states 'if they do, then they increase their prospects of realising a successful project'. **CL**