

Early involvement trumps partnering

Some clients are said to be showing their true colours by abandoning partnering in favour of lowest price tendering while market prices are low in the recession. **David Mosey** of **Trowers & Hamlin** argues that early contractor involvement is a better way forward for clients and the industry.

KEY POINTS

- **Does single stage tendering meet the client's commercial objectives in the current economic climate**
- **'Early contractor involvement' is a more structured and robust approach to procurement than the largely 'relational' approach that has been adopted in the name of partnering**
- **Single stage tendering excludes the contractor, subcontractors and suppliers from any contribution to design, risk management, programming or achievement of cost savings until the very last minute**
- **There is no incentive in a single stage tender for the bidders to notify errors or omissions – on the contrary these are 'money in the bank' as a basis for future claims**
- **A full examination of underlying costs through early contractor involvement is a vastly superior way of achieving savings**

Times are tough and everybody is sharpening their pencils, so is it time to go back to the pre-partnering approach? We have been in recession before in the early 1990s and, for those of us who are old enough, the claims and insolvencies of that era are what led to the reforms recommended by the 1994 Latham Report. That report and the intervening 15 years brought us a wealth of new construction initiatives, ranging from new contract forms to the near

universal advocacy of partnering as a means to deliver good value.

Yet, somehow when our backs are once more against the wall, partnering is offered up as the first sacrifice and there is an unseemly rush back to lowest price bidding under a 'take it or leave it' set of single stage tender documents. Whether or not this is a backward step, the more important question is whether single stage tendering meets the client's commercial objectives in the current economic climate – or whether instead we should think more carefully about what we mean by 'partnering' and whether it can evolve into something with harder edges.

What is wrong with single stage tendering?

The answer is that it excludes the contractor, and thereby its subcontractors and suppliers, from any contribution to design, risk management, programming or achievement of cost savings until the very last minute. If contractors are presented with a pile of documents against which to submit prices within a limited timeframe (only 40 days, even under EU Procurement Regulations), there is little opportunity for bidders to offer the added value proposals that most clients want. Indeed the pressure in the current climate to force costs down will mean that bidders are low-balling their prices at the expense of pretty much everything else.

So the client sees an attractive price and appoints a contractor desperate for work, but nevertheless a contractor that needs to make a profit. This leads to the inevitable exploitation of errors and omissions in the client's brief, designs and pricing documents – and yet the client when appointing the contractor has no way of knowing whether its consultants have made these errors or omissions or not. There is no incentive in a single

stage tender for the bidders to notify errors or omissions, on the contrary these are 'money in the bank' as a basis for future claims for extension of time and loss/expense, giving rise to costs that the client did not expect when it accepted a low bid.

The top 10

But is it true that claims and related disputes originate from problems in tender documents under a strategy that excludes contractors and their supply chain? Kumaraswamy, in 1997, identified his top ten causes of claims (as perceived by contractors, clients and consultants) as including, in descending order of significance: (1) Inaccurate design information; (2) Inadequate design information; (3) Inadequate site investigations; (4) Slow client responses; (5) Poor communications; (6) Unrealistic time targets; (7) Inadequate contract administration; (8) Uncontrollable external events; (9) Incomplete tender information; and (10) Unclear risk allocation. It is arguable that all of these grounds for claims are at least in part attributable to problems in the planning stage of the project and that all of them would be less likely to arise if the client and its main contractor (with consultants, subcontractors and suppliers involved as appropriate) entered into an early relationship to ensure that the following preconstruction phase activities occur: Joint design development (claims 1 and 2); Two stage tendering (claim 9); Joint risk management (claims 2, 8 and 10); Advance agreement of a construction phase programme (claims 4 and 6); Development and implementation of a communications strategy (claim 5); Closer client involvement with its project team (claim 7).

All of these joint activities could be built into an 'early contractor involvement' procurement and contractual model. Where this has occurred, the results have been remarkable. For example, as far back as 1975, an NEDO report confirmed that of all procurement methods two stage tendering was the most likely to produce predictable results, namely 82 per cent of projects successfully completed within plus or minus 5 per cent of the contract price – whereas single stage tendering had the worst results with only 56 per cent of projects completed within plus or minus 5 per cent of the contract price. Meanwhile, for those who are concerned that a two stage approach extends the duration of the project, the findings of the 2007 Nichols Report examined the Highways Agency early contractor involvement model – and found that it can reduce project preparation time by 30 to 40 per cent.

Why is early contractor involvement not fully embedded?

So why is early contractor involvement not fully embedded as a mainstream procurement option? One answer is that it is counter-intuitive for clients because it involves appointing a contractor before securing a fixed price. However, for contractors to bid for a first stage appointment against a notified budget, in relation to which they declare profit and overhead (plus rates for those items that can be identified against the current state of designs), secures a full understanding of how the contractor runs its business and how it will seek to benefit from the project.

If costs are then built up after contractor selection by means of business cases or second tier subcontractor/supplier tendering, there is a strong argument that this will produce better bids that can be fully assessed. Subcontractors and suppliers bidding to a pre-appointed main contractor will be more likely to offer their best prices (as they are going to be one of three or four bidders to a pre-appointed contractor as opposed to one of 18 or 24 if they are bidding to a main contractor who is itself one of 6 bidding for the overall project). The client and its consultants can sit in on interviews with subcontractors and suppliers, can extract added value proposals/value engineering at the point of selection and can operate all the commercial levers of teambuilding. These are the ways to achieve real cost savings based on analysis of each works package, as opposed to the illusory cost savings of a lowball main contractor bid not supported by accurate subcontractor/supplier cost information.

Client protection

So how does the client protect itself against unexpected cost increases or against general main contractor laziness once its feet are under the table? The answer lies in a conditional first stage appointment with the ability of the client to pull out (and indeed procure an alternative main contractor) if a series of preconditions are not satisfied – including the achievement of a price within budget and a set of designs compliant with the project brief. This keeps all parties on their toes, with unconditional appointment given for the contractor to proceed with the construction phase only once all the preconditions have been satisfied.

It is important to adopt this conditional approach for other reasons, such as EU compliance. If a contract has been awarded only for the preconstruction phase of

the project (for example, under a separate freestanding consultancy appointment of the main contractor), then there is an argument in EU terms that the subsequent award of a separate construction phase contract should be the subject of a second later EU procurement process – that would of course remove all the commercial drivers for early contractor involvement. On the other hand, a conditional contract pursuant to which conditions are progressively satisfied is a single award, and the process of satisfying those conditions is a contractual mechanism rather than the creation of a second contract.

Another benefit of a conditional set of contract mechanisms is to ensure that the early appointment does not degenerate into negotiation and brinkmanship in the run-up to the unconditional construction phase appointment. A contract which depends on post-award negotiation will only be an agreement to agree, whereas a contract that has clear design and subcontract tendering processes against an agreed programme removes negotiation from the picture and avoids the contract stalling.

This ‘process contracting’ concept is a departure from the conventional categorisation of contracts as relational, neoclassical or classical – it does not seek to treat the contract as a done deal (in ‘classical’ terms), but recognises that there are some features that remain to be finalised (under a ‘neoclassical’ model). It also recognises a partial reliance on reasonableness and team-working that are familiar from project partnering (and that are best described as ‘relational’ contracting). However, under a conditional/unconditional two stage contract, the ‘relational’ behaviour is motivated by processes and deadlines to reach a clear commercial goal, namely getting the job on site in line with the client’s original expectations.

Where is this approach to be found?

Inevitably, I mention PPC2000 as the only published two stage form of project partnering contract that addresses the EU procurement concern mentioned above. The PPC structure was born of partnering, but in tougher times operates as an early contractor involvement model with or without the ‘warm glow’ of partnering. Another model is been the bespoke contract based on NEC3 used by the Highways Agency, and a recent arrival has been the JCT 2008 Pre-Construction Agreement. Comparing the merits of the different contracts is, however, secondary to mapping out a clear

contractual programme under which each of the team members (client, consultants and main contractor – with additional key subcontractors/suppliers coming on board) meets deadlines for all its preconstruction phase activities leading up to start on site. Having advised on a whole variety of early contractor involvement projects, it is this timetable that proves the most difficult document to create, yet is the most valuable means of ensuring a clear route from early contractor involvement through to prompt commencement of construction.

Will the model work?

So will this model really work in the depths of a recession compared to the temptation of simple lowest cost? Time will tell, but logically a harsh economic climate demands savings, and a full examination of underlying costs through early contractor involvement is a vastly superior way of achieving savings. In 1998 the Construction Industry Research Information Association report ‘Selecting Contractors by Value’ concluded that two stage tendering results in improvements to teamwork, programming, design, specification, care of the environment, budgeting and management of risk and value. By way of illustration, National Audit Office case studies in 2005 including the Milton Keynes Treatment Centre where three months of early joint working between the client, its design consultants and its contractor reduced a £15m budget to a £12m outturn cost without compromising design or causing delays.

And for the doubters who still believe that single stage tendering represents a more effective approach, Sir Michael Latham offers these observations:

‘Returning to the old ways of adversarial behaviour will lead to more conflict between client and contractor, with variations and claims working up the original tender price, as contractors look to make money that was not in the original tender. If clients go back to the bad ways, the industry will do the same. Instead of focusing on project outcomes, their concentration will be on preparing for costly legal claims in court’.

So we have been warned, and this article gives an indication of how a more forensic approach to convert partnering into early contractor involvement can help clients, consultants and contractors to hold their nerve in preserving the benefits of modern best practice. **CL**