**Drawing upon experience**

Collaborative contracting and alliancing for infrastructure projects

**Our expertise**

Our global front-end construction and engineering team advise on some of the largest building and infrastructure projects in the UK and around the world. Our services include advising on procurement, contract strategy, risk allocation, contract drafting and negotiation.

Our lawyers advise on the full range of legal issues arising on one off major projects, major frameworks, long term programmes of work, and collaborative contracting. We advise on suitable contractual arrangements to protect your interests and address long-term construction liabilities, whilst not jeopardising commercial deal making with unnecessary requirements.

Our in depth and cross-sector experience gives us a commercial awareness of the issues faced which enables us to advise at a strategic level as well as on a project specific basis. We want to use our specialist knowledge and significant expertise to help you with the successful delivery and operation of your major infrastructure projects.

**Collaborative contracting and alliancing**

In addition to contracts reflecting conventional ‘Client’ and ‘Contractor’ relationships we are market leaders in advising on collaborative contracts and alliancing contracts. In recent years we have concluded collaborative contracts, including alliancing contracts, worth in excess of £10 billion in the gas, electricity, railway, water, gas, highways, telecoms, nuclear and renewables industries encompassing the full range of contracting models. This cross-sector perspective enables to bring to bear examples of best practice across the industry.
What is collaborative contracting and alliancing?
The European Construction Institute describes alliancing as:

“... a form of long term partnering on a project [or programme] in which a financial incentive scheme links the rewards of each of the alliance members to agreed overall outcomes.”

However, whilst this is a useful starting point, in reality there is no fixed definition of either ‘collaborative contracting’ or ‘alliancing’. These phrases encompass a range of contract models representing varying levels of collaboration and risk sharing, from basic commitments for the parties to ‘partner’ through to fully integrated ‘pure’ alliancing models. The following diagram summarises some key models currently used in the market on a sliding scale illustrating the degree of collaborative working and risk sharing.

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### The contract

A contract cannot of itself create new collaborative behaviours or change existing behaviours if the willingness on the part of the parties is not there in the first place. However, the contract documents are nonetheless a fundamental part of the formation and operation of any collaborative relationship. Properly drafted its provisions will underpin the behavioural and commercial incentives necessary to align the interests of all the parties.

### How are we effective?

We use our extensive and cross-sector experience to jointly identify with our client their project requirements and how we can best work together. Through this we help develop realistic objectives which can be achieved from the implementation of different model options and facilitate decision making on overall contracting strategy. We do this by:

- undertaking initial start-up meetings with key individuals;
- agreeing up front the working arrangements with project teams including communication protocols;
- establishing a clear timeline for the stage of development of contract documents to tie in directly with the wider procurement programme;
- and running strategic workshops with the relevant members of the in-house legal, procurement and commercial teams, technical advisers and other key stakeholders.

### Case study 1: Water and sewerage companies – Asset Management Plans (AMP)

We have acted for many of the UK’s water and sewerage companies in relation to their AMP3, AMP4, AMP5 and AMP6 capital investment programmes including Anglian Water, Dwr Cymru Welsh Water, Severn Trent Water, United Utilities and Yorkshire Water. Many use alliancing and collaborative frameworks for the delivery of those programmes structured around the regulatory requirements from OFWAT to achieve price and efficiency savings.

For example, we advised Dwr Cymru Welsh Water on its alliance agreements for its £1.5 billion AMP6 programme for 2015 to 2020. Over a period of 18 months, we advised on all elements of the procurement, drafting and negotiation of the alliancing agreements.

Working closely with Dwr Cymru’s in-house teams, we: developed and agreed contract strategies; assisted in the development of the Request for Proposals, evaluation and selection criteria; prepared contract documents in line with Dwr Cymru’s risk requirements, incentive mechanisms and performance measures, payment procedures, and completion procedures; managed a matrix of key contract issues to enable our client to keep track of the decision-making process; and closed the various contract documents.
Case study 2: Network Rail

We’ve supported Network Rail in the development of a range of collaborative contracting models representing varying levels of collaboration and risk sharing with its supply chain. These include the collaborative frameworks used for its Control Period 5 Southern IP Multifunctional Framework Contracts and its ‘pure’ alliance contracts used for flagship projects such as the Wessex Capacity Programme and Northern Hub and Electrification Alliance.

CP5 Multifunctional Framework: In 2014 Network Rail awarded five year bespoke framework contracts to four Multifunctional Framework Contractors covering over 500 projects across South East England totalling £1.2 billion. They permit Network Rail to enter into contracts with individual contractors for those projects based on the NEC3 form of contract. Key features include:

- Early contractor involvement to ensure safety, methodology, innovation and technology are considered and optimised during the design phase for a project; and
- Using whole project target cost principles enabling all project costs (Network Rail and contractor) to be captured within a single target cost.

Five key principles

There is no “one-size fits all” alliance agreement. There are many variables to be balanced depending on the requirements of the individual project. The following are examples of the types of key issue to be considered.

Good faith: Almost every collaborative contract will seek to place an obligation on the parties to act in good faith. Whilst historically there has been no established general concept of good faith in English law (in a commercial context the starting point is each party looks to its own interests) it is now clear that in certain circumstances the courts are prepared to enforce some limited express good faith obligations insofar as they relate to the actual performance of a specified obligation. See Eversheds’ detailed briefing on Good Faith available on eversheds.com here.

Best for project: Parties often commit to Best for Project decision making, particularly in an alliancing context. It is important that this obligation is wider than making decisions which achieve the lowest price or maximise gain-share. Rather, the objectives of the alliance (and therefore what is ‘Best for Project’) must be aligned to the outcomes of the whole project. The definition of Best for Project has to be wide enough to capture all the ‘Client’s’ objectives, for example as captured in its project business case or output specification.

Risk or reward: In any contract model there will generally be three broad categories of risk allocation: ‘Client’ risk, ‘Shared’ risk, and ‘Contractor’ risk. If a Client risk occurs a change in price is usually allowed to compensate the Contractor. If a Contractor risk occurs the Contractor bears the cost. If a Shared risk occurs then the costs are shared, for example in a target cost contract the cost of dealing with those risks may be paid as actual cost but the target cost is not adjusted. Broadly speaking the further along the collaborative sliding scale the contract model sits, the greater the ‘Shared risks’. The terms and conditions of the contract must dovetail with the commercial model in order to achieve the intended outcomes.

Joint delivery risk: In a joint delivery model contractually there is no distinction between performance of works by the Client or the Contractor. So, for example, a delay in the work will not result in liquidated damages and defective work will not generally entitle the employer to bring a claim. On a pure alliancing model, the costs arising from those events are dealt with through the commercial model. Again, the terms and conditions must reflect this position.

Wessex Capacity Programme Alliance: This £400 million project will increase train and passenger capacity at London Waterloo Station and across the Wessex Route. The alliance agreement provides for the delivery of that works programme by an alliance of NR, contractors and designers in a ‘pure’ alliance model underpinned by a complex incentive model. We used our experience of drafting £multi-billion alliances in relation to other major infrastructure programmes to work with NR to develop the most appropriate legal and commercial models. We drafted the agreement and negotiated it with the bidders.
**Client training**
We have given a broad spectrum of training to our clients on the full range of collaborative contracting options. Recent training includes:

- collaborative contracting in infrastructure projects
- current trends in alliancing
- collaborative frameworks and long term partnering arrangements
- NEC3 an introduction
- NEC3 and the contractual management of risk.

We can tailor training to your needs where required. Contact us for more information.

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