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# Practical Difficulties with the new forms of Alliance Contracts

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# Introduction

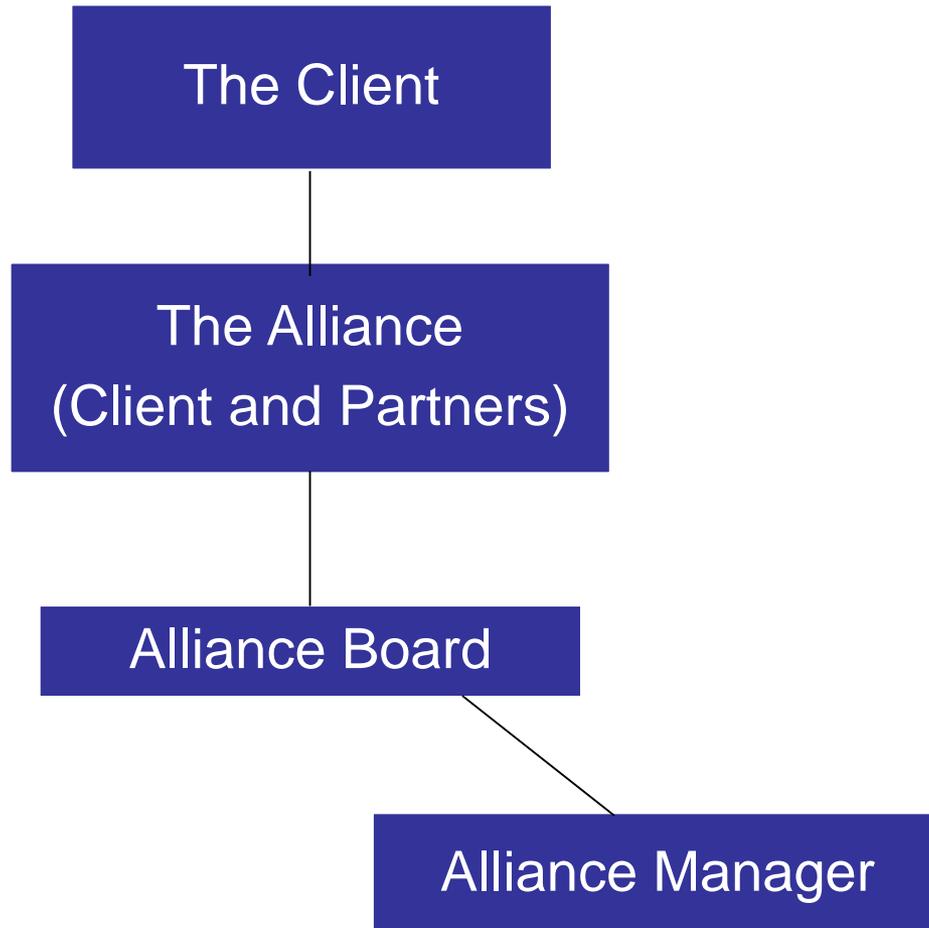
- NEC 4 alliance contract
- Structure and people
- No claims and latent defects
- FAC-1
- Measuring performance
- Supply chain engagement
- Surrey County Council case study



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# NEC Alliance Contract

## Structure



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# The Structure and Issues

## The Board:-

- Sets the strategy for the achievement of the Alliance objectives.
- Agrees the allocation of work amongst the Alliance.
- Makes unanimous decisions.
- Is a board deadlock a dispute between members of the alliance for the purpose of clause 95.2?



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# Alliance Manager

- Is appointed by the Board.
- Has many of the responsibilities of a project manager under the other NEC forms.
- There is no contractual link between the Client and the Alliance Manager.



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# Role of the Client

- The alliance contract fetters the client's ability to instruct.
- The logic?
- The board decides on Scope Change, Compensation Events, Termination.
- Client's protection is refusing to agree points at board level (Unanimous decisions).



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# Best for Project

- What does Best for Project mean?
- There needs to be full alignment of interest for this to work.
- Integration is key – common systems and processes.
- Create an integrated alliance team, sharing knowledge, information and best practice.



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# Basis of Remuneration

- Cost reimbursable.
- Little or no disallowed cost.
- Each partner is paid a percentage fee on their Defined Cost.
- There can be a range of performance measure of which beating budget is only one.
- Potential ability to link performance measures to performance specification (clause 43.1).



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# Clause 43.1

“If a Defect is a failure to achieve an Alliance objective, the Alliance does not correct the Defect”.

- Clause 53.1.

“If part of the works does not meet a target stated for an Alliance objective . . . the Partners pay the amount stated in the Performance Table”.



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# Allocation of Work & Risk

- The Board allocates work amongst the Alliance.
- There is the risk that less volume is allocated to one Partner than was envisaged at tender stage.
- There is a joint and several liability. But does this matter?



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# No Claims

The Contract is radical on dispute resolution:

“The members of the Alliance agree that any failure by a member of the Alliance to comply with their obligations stated in these conditions of contract does not give rise to any enforceable right or obligation at Law except for an event which is a Client’s or Partner’s Liability . . . .”



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# Issues from the No Claims Clause

- In clause 80 payment is not a Client liability.
- The contract similarly does not provide for recovery of payments through performance measures in clause 53.
- A key will be filling in additional client / partner liabilities in the Contract Data.
- What about latent defects?
- The “wilful default” head of liability.



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# Latent Defects

- Clause 43.3

“The client’s rights in respect of a Defect which the Alliance Manager has not found or notified are not affected by the issue of the Defects Certificate”.

- Does the no claims clause bite on clause 43.3?
- There is no X15 – so fit for purpose applies and no requirement to maintain PI insurance.



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# Liability Cap

- There can be a cap on liability but . . .
- The Performance Table is not included in the cap.



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# FAC - 1

- A flexible framework alliance contract.
- Drafted and developed by Dr David Mosey of King's College London Centre for Construction Law and Dispute Resolution.
- Published 2016 and beginning to get significant traction. CCS Framework.



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# FAC – 1 Key Features

- Alliance created on a framework basis between alliance members according to their agreed roles expertise and responsibilities.
- Can include more than one from each discipline.
- Direct Award of project contacts or
- Competitive Awards.



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# Core Group

- Establishment of a Core Group, supporting the implementation of the framework agreement.
- Alliance Manager, engaged by client, chairs meeting.
- Decisions of Core Group by consensus.



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# Measuring Performance

- Agreement is brief and key issues will be drafted in other documents/schedules.
- Framework comprises:-
  - Objectives
  - Success measures: the agreed basis for determining the achievement of the objectives and incentives.



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# Measuring Performance II

- Target for each success measure including reporting of relevant data and which alliance member is responsible.
- Incentives: Suggestions include:
  - Savings through supply chain collaboration.
  - Adjustment of any rights of exclusivity in award of project contracts.
  - Extension of scope or duration of the framework.



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# Issues for incentives

- How is the framework incentive pot generated?
- Savings will be made at project contract level. Should alliance member keep all of its gain on the project or pool part of it?
- Where there are a number of alliance members of the same discipline, the key is to create a lean framework structure and share the opportunities.
- Can consultants generate similar sized savings and share in the same pot?



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# Supply Chain

- A key provision is encouraging supply chain collaboration.
- This aligns with the objective of improving value and forms the basis for funding incentives.
- How? Framework can create longer term, larger scale supply chain contracts.



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# Value Achieved by:-

- Sharing information by members on their supply chain.
- Reviewing value offered by proposed supply chain.
- Review the potential for more consistent longer term larger scale, supply chain contracts and improved working practices.
- Ability to renegotiate or undertake joint supply chain tender process through procedures approved by Core Group.



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# Case Study 1

## Surrey County Council FAC-1 prototype

- Surrey County Council with Kier, Aggregate Industries and Marshall Surfacing <https://www.gov.uk/government/publications/procurement-trial-case-study-report-highways-maintenance>
- Team motivated by prospect of contract extension, plus client offer of £100m of additional work subject to demonstrable delivery of £120m of value.
- Agreed cost savings included breakdown offered by Tier 2/3 subcontractors/suppliers (against previously quoted rates) in return for:
  - Greater involvement in planning work and developing continuity of work - 2%
  - Agreed minimum annual volume of work - 5%
  - Agreed minimum size of individual works orders -2%
  - Prompt(er) payment by Tier 1 Contractor -1%
  - Storage facilities in available space at Client depot -2%



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# Case Study 1

## Supply Chain Collaboration improved value

- *Supply Chain Collaboration* on Project Horizon also enabled:
  - *‘Improved whole life value, including agreement of ten-year warranty for material and pavement design*
  - *Improved quality control through joint risk assessments and integrated team agreement of appropriate surface treatments and monitoring work on site*
  - *Improved apprentice commitments*
  - *Lean programming of individual tasks leading to time savings*
  - *Innovation through collaborative working, for example to increase recycling and reduce landfill’*
- Kier Highways and Surrey County Council follow up **FAC-1** on £54 million contractor-led, supply chain alliance – **8%** savings and supply chain ECI, extended warranties, local business opportunities, apprenticeships , recycling initiatives



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Thank you for listening  
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