

The Be Collaborative Contract

The 'Be' Collaborative Contract and its Guide to Use were launched on 12 September 2003. They were produced by the Reading Construction Forum and the Design & Build Forum who have merged to form Be (Collaborating for the Built Environment).

An underlying theme of this brand new contract is working together which is demonstrated by Clause 1.1:-

"The Overriding Principle guiding the Purchaser and the Supplier in the operation of the Contract is that of collaboration: it is their intention to work together with each other and all other project participants in a co-operative manner in good faith and in a spirit of mutual trust and respect. To this end the Purchaser and the Supplier agree they will give to, and welcome from, the other, and the other Project Participants, feedback on performance and will draw each other's attention to any difficulties and will share information openly, at the earliest practicable time. They will support collaborative behaviour and confront behaviour that does not comply with the Overriding Principle".

Paragraph 2.1.1 of the guide to the 'Be' contract states that the above 'Overriding Principle' is:-

"analogous to the 'overriding objective' to be found in Rule 1.1 of the new Civil Procedure Rules (which provides that, in the interpretation of the Rules, the overriding objective will be to enable the courts to deal with cases justly). The Overriding Principle is intended to sit above all the other contractual obligations and, in the event of any dispute, any court or adjudicator or other forum to which the dispute is referred shall take account of the Overriding Principle and of the parties' adherence to it when making any award".

Clause 1.1 would therefore seem to be another 'good faith' clause which the writer considers to be more robust and possibly more legally binding than either the PPC 2000 '*spirit of trust fairness and mutual co-operation*' clause or the NEC '*spirit of mutual trust and co-operation*' clause. It will be interesting to see how this clause will be tested over the next few years as it has already been reported that this contract is in use on several projects including a £15m maternity suite for the Royal Devon and Exeter Health Care NHS Trust.

At the heart of this contract is its proactive approach to risk management. No other standard form of contract goes as far as this by including a risk register and trying to get parties to a contract to follow the principle of '*risks should be allocated to the party best able to manage them*'. It is intended that the parties should make the subject of risk more transparent and work together identifying risks. If the risk cannot be covered by insurance it should be

allocated to the party who is best able to manage them. One commentator has suggested that is where this document will succeed or fail.

Other interesting features include use of key performance indicators, supply chain information and bonus provisions for early completion. It is not a contract for the untrained and requires an emphasis on having advanced the design significantly at the point when the contract is entered into.

Clause 6 of the contract provides two payment options; a lump sum or the target cost option. The target cost option is not dissimilar to Option C or Option D of the NEC contract.

The 'Be' system for dispute resolution is a stepped system not entirely dissimilar to that of PPC 2000 but it has less stages. It calls for early notification of potential disputes followed by direct negotiations between senior executives. If this stage of the dispute resolution system fails, "*serious consideration*" is to be given to any request by the other party to refer the dispute to mediation. Although this clause may have extra weight due to the implications of the new Civil Procedure Rules it is suggested that these provisions do not comply with section 108 of the Housing Grants, Construction and Regeneration Act 1996.

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