

1. Definitions & Purposes

- Partnering is a **commitment** between two or more organizations to achieve common & specific business objectives by maximizing the effectiveness of each party's capability through cooperation.
- A process to improve communication & relationships among those involved on a construction project to the benefit of all.
- Establish long-term contractual and cooperative relationships among all parties under a formal project charter based on spirit of trust and cooperation. It is also a moral agreement.
- Recognize the interest of all parties and balance sought between the competing interests.

→ i.e. win-win

- **Better project management**
 - ✓ Lower project costs, reduce project time and improve quality & buildability
 - ✓ Better project documentation and communication, thus improving site management methods, project coordination, leading to improvement in safety, design and purchasing.
 - ✓ Encourage innovation, waste reduction and better long-term profitability.
 - ✓ More effective use of resources, achieve high level of efficiency and result in savings
 - ✓ Reduce risks and uncertainties, & aim at equitable risk allocation.
- **Resolving disputes**
 - ✓ It is not a contract but a covenant of good faith.
 - ✓ Decision made in a partnering meeting can either be informal or legally binding, documents part of the contractual regime. The presence of good faith or equivalent procedures as a situation in which equity will give a remedy on breach. To that extent, the words can produce an enforceable agreement.
 - ✓ Provide resolution process to settle disputes.
- **Problem solving**
 - ✓ Encourage parties to openly address any problem, creatively and collaboratively search for solutions when problems arise.

2. Types of partnering(a) Project Partnering

It is a process to establish productive working relationship among all parties on a project. The partnering process establishes working relationships through a mutually developed, formal strategy based on cooperation.

(b) Strategic Partnering

It is a long-term relationship between two or more organizations. Improvements are driven by benchmarking and "gain share" arrangements in preference to competitive tendering.

3. Forms of partnering:

- between client and MC
- between MC and supplier
- between client and consultant
- among subsidiaries / divisions of a company

4. Reasons for uncommon of Partnering in HK

- Both developers and MC hesitate to apply partnering
 - ∴ they don't understand the functions and purposes of partnering and lack experience in it.
- Adversarial industry culture and conditions of contract
- The selection of lowest tenders with decision based on price rather than value which discourage partnering
- The fragmented system of multi-layer subcontracting system
- A lack of commitment from the management structure will result in the charter failing.
- Mistrust attitude and lack of communication
- Confidentiality can be lost with the possibility of sensitive information being passed onto competitors
- It is difficult to apply in some project situations, e.g. where an employer passes as much risk as possible onto the MC whilst expecting and forcing lower contract sum
- Decisions made in partnering meeting may not be legally binding
- Parties are not willing to pay for the cost of implementing, maintaining and complying with the procedures as stated in the partnering charter
- Erosion of competition in public sector contracts
- Parties need to commit high caliber person for long periods to ensure that efforts of partnering team move towards the agreed objectives
- Low investment in training and improvement

Solutions:

Therefore, cultural change is needed to make partnering a success. The key is open & trustworthy communication from both sides.

Partnering
(A.) /

5. Most suitable types of organization for partnering

Public sectors like MTRC, KCRC, Housing Authority, CLP and HKE, because they are **undertaking a series of projects with similar nature**, either new development or maintenance contracts.

6. Partnering Workshops (training process)

Aims

- Facilitate participants to **understand better project objectives**
- Focus on **creative co-operation**
- **Avoid adversarial confrontation**
- **Build working relationships** based on mutual respect, trust and integrity
- **Establish** a more dynamic project organizational structure and clear **line of communication**.
- Develop a formal problem solving and **dispute avoidance** mechanism

First Partnering Workshop

- To **establish mutual objectives** that give all members by requiring everyone to be totally open about their own interests. Once all interests have been stated, they are openly discussed and prioritize them.
- To **establish how problems will be resolved** quickly without attempting **to allocate blame** at a technical, managerial or political level so that they do not lead to disputes.
- All outcomes of the first partnering workshop should be **recorded in a Partnering Charter** signed by everyone to indicate their commitment to what has been agreed.
- Some standard forms of contract used with partnering incorporate the Partnering Charter in formal contracts.

Follow-up Workshops

- To be held throughout the project to ensure partnering is being well used to **achieve the agreed mutual objectives and performance improvement**.

Final Workshop

- To **capture the lessons that benefit future projects** and celebrate a successful project.

7. Suggested provisions to be included in a Partnering Charter

7.1 Good faith

- There is an **implied positive duty** to perform a contract in good faith under common law.
- However, to avoid doubt, it is suggested to **incorporate express provision** in the charter.

7.2 Estoppel and waiver

- During the partnering process, the contracting parties may make representations to each other which will not be consistent with the contract provisions, but upon which they will rely.
- Parties in dispute may find that they are unable to enforce their strict contractual rights because of the operation of the doctrines of waiver or estoppel.
- By incorporating a procedure in the partnering charter, a party's right to **insist on performance** in accordance with the contract arising from arrangements which may **attract the operation of the doctrines of waiver or estoppel shall be denied**.

7.3 Privileged discussions

- **Statements made** in the course of the partnering process are **not privileged**, and could lead as evidence in subsequent adversarial proceedings.
- To **ensure that good faith disclosures & concessions (讓步) do not become limited** because of concerns that the statements may be used in future proceedings
→ the partnering charter should expressly address the issue.
- If discussions between the participants result in a variation to their contract or a discharge of an obligation under the contract
→ the parties should **ensure** that the variation or discharge is **appropriately documented**.
- The partnering charter should **provide a procedure for recording such variations**.

7.4 Misleading and deceptive (欺詐) conduct

- Under the **Misrepresentation Ordinance**, parties to partnering may **assert (堅持) that representations made in the course of the process amount to misrepresentation conduct**.
- So, participants should be fully aware of the importance of their conduct and any statements made during the development and conclusion of any partnering arrangement.

7.5 Confidentiality

- It may involve **disclosure of confidential information** in the partnering process.
- A **confidentiality clause** should be contained in the partnering charter
→ **to protect confidential information disclosed**
→ by participants by prohibiting it from being disclosed to parties other than the participants, and for purposes other than the partnering process.

享有特權的

7.6 Fiduciary (信託) relations

- Courts may **impose fiduciary obligations** upon parties to a contract if the relationship between them shows that they are putting themselves in a position where they are **placing reliance upon each other to act in each other's interests**.
- In case of **JV**, the parties to a partnering arrangement owe **fiduciary obligations** to each other which **impinge (侵犯) upon their freedom** to act in their own self-interest.
- To avoid the consequences of fiduciary obligations, express provisions should be included in the partnering charter.
 - A provision could be inserted which **purports to totally exclude the possibility of those obligations from arising**, or define the scope of the obligations for the purpose of the partnering process.