

TPC2005

THE ACA STANDARD FORM OF CONTRACT FOR TERM PARTNERING

INTRODUCTION AND EXPLANATORY NOTES

WHAT IS TPC2005?

TPC2005 is the first standard form Term Partnering Contract and has been developed in response to considerable demand for a new approach to the procurement of term works and services. Launched by Sir Michael Latham, it uses the radical ideas formulated in the successful PPC2000 Standard Form of Contract for Project Partnering, and applies these to the creation of a single multi-party contract that provides a foundation and route map for term partnering.

TPC2005 can be used for any type of term works and services in any jurisdiction. It was drafted by David Mosey and Andrew Vickery of law firm Trowers & Hamlins, both of whom are experienced partnering advisers, and is published by the Association of Consultant Architects (“ACA”). Prior to its launch, TPC2005 has been extensively trialled by Partnering Teams engaged on a range of term works and services, of which a full list can be accessed on the PPC2000 web site at www.ppc2000.co.uk. Trowers & Hamlins and the ACA are particularly grateful to these clients, service providers and consultants who have contributed substantially to ensuring that TPC2005 provides a practical and versatile basis for successful term partnering.

WHY A NEW FORM OF CONTRACT?

Term works and services offer the ideal opportunity for integrated team-working and measurable continuous improvement. TPC2005 provides for the first time a clear set of contractual provisions and processes that directly assist and support achievement of these objectives.

Matters dealt with in TPC2005 that are not covered in other standard form term contracts include:-

- An integrated multi-party team;
- A full communications strategy;
- Processes for continuous improvement;
- Measures of improvement and related incentives;
- A partnering timetable for key activities;
- Mobilisation provisions linked where necessary to TUPE, pensions and client assets;
- Development of more open pricing over the life of the term programme;
- Supply chain partnering;
- Proactive change and risk management, including use of a risk register;
- Problem-solving and alternative dispute resolution.

Each of the above is dealt with in plain English, with options to allow the Partnering Team to utilise those parts of TPC2005 that are relevant to their particular requirements.

TERM PROGRAMME, ORDERS AND TASKS

TPC2005 governs implementation of a Term Programme of works and/or services and/or supplies by means of the issue of Orders for one or more Tasks. The scope of any Order and Task can comprise day to day activities or a fuller range of works/services/supplies. Each Order describes the Task or Tasks, its agreed Date/Time for Completion and its agreed Task Price – and only the issue of an Order gives rise to a payment obligation (clauses 6.2 and 6.3).

PARTNERING TEAM

The Partnering Team under TPC2005 includes the Client who commissions the Term Programme under a Term Brief, and the Service Provider who submits Term Proposals for achieving the Term Brief and who performs the required Tasks. The Partnering Team also includes a Client Representative whose role is to facilitate and monitor implementation of the Term Programme and to fulfil stated project management functions, exercising any discretion fairly and constructively (clause 3.1).

As a multi-party contract, TPC2005 also provides for additional Partnering Team members to be appointed through

the use of Joining Agreements, whether as Consultants providing services to the Client or as Specialists providing works or services or supplies to the Service Provider (clause 1.9).

STRUCTURE AND PARTNERING DOCUMENTS

TPC2005 comprises the following:-

- Term Partnering Agreement stating all details specific to the Partnering Team and the Term Programme;
- Partnering Terms setting out the terms and conditions supporting the Term Partnering Agreement;
- Definitions (Appendix 1);
- Form of Joining Agreement (Appendix 2);
- Agreed KPIs, Targets and Incentives (Appendix 3);
- Agreed Partnering Timetable (Appendix 4);
- Any agreed Risk Register (Appendix 5);
- Form of Order (Appendix 6);
- Procedures for conciliation and adjudication (Appendix 7).

The Partnering Terms comprise 14 pages of text and the Appendices are simple forms which can be developed by the Partnering Team according to their particular requirements.

The other Partnering Documents required to complete TPC2005 are:-

- The Term Brief setting out the Client's requirements;
- The Term Proposals submitted by the Service Provider for meeting the Client's requirements;
- The Price Framework setting out the method of calculating Task Prices and the terms of payment;
- The Consultant Services Schedule and Consultant Payment Terms for the Client Representative.

COMMUNICATIONS AND CORE GROUP

As in the case of PPC2000, it is recognised that a successful Partnering Team depends on people working together for the benefit of the Term Programme. TPC2005 provides for the Partnering Team members to establish a Core Group to review and stimulate implementation of the Term Programme (clause 1.6). The Core Group reaches its decisions by unanimous vote of those members present, and hence decisions cannot be blocked through non-attendance (clause 1.7). The Core Group also receives Early Warning by Partnering Team members of any matter adversely affecting or threatening the Term Programme or any Task or their own performance (clause 1.8). This system has proved particularly effective in resolving any problems or misunderstandings that have arisen on partnered projects under PPC2000.

OBJECTIVES, PROCESSES AND PARTNERING TIMETABLE

TPC2005 identifies agreed mutual objectives that Partnering Team members can achieve through implementing works and services over an agreed Term, focusing on continuous improvement by means of innovation, improved efficiency, cost-effectiveness, lean production and reduction/elimination of waste (clause 2.1).

In order to assist the Partnering Team in achieving these objectives, TPC2005 provides for agreement of Processes that include Value Management, Value Engineering, training and employment initiatives and the improvement of information technology/other communications between Partnering Team members and Users of the Sites (clause 2.2).

In order to establish a measured and achievable programme for implementing the agreed Processes, TPC2005 includes a form of Partnering Timetable setting out agreed periods/deadlines for these and other key activities/requirements (clause 2.3). Completion of the Partnering Timetable requires careful drafting to ensure that all activities/requirements are clearly expressed and are properly linked to any agreed pre-conditions and to matters outside Partnering Team members' control.

KPIs AND INCENTIVES

TPC2005 envisages that the continuation and possible extension of the Term Programme will depend on achievement of the agreed objectives, and that these require an objective system of measurement according to agreed Targets for achieving stated Key Performance Indicators ("KPIs"). Achievement of KPI Targets is measured by the Core Group (clause 2.5).

Achievement of KPI Targets is one basis on which TPC2005 allows Partnering Team members to offer agreed Incentives, whether by way of links to payment or to extension of the Term. Other possible Incentives include shared savings, shared added value, pain/gain shares and performance-related benefits for employees (clause 2.6).

PARTNERING ADVISER

TPC2005 provides for the appointment of a Partnering Adviser, as recommended by the Construction Industry Council, to provide fair and constructive advice to Partnering Team members as to preparation of the Partnering Documents, implementation of the improvement Processes, development of the partnering relationships, operation of the Partnering Contract and avoidance/

resolution of any problems or disputes (clause 3.5). This role can be important in sustaining the balance of the Partnering Team and their commitment to continuous improvement. The ACA has established an Association of Partnering Advisers, comprising accredited individuals with relevant experience which can be accessed on www.partneringadvisers.co.uk.

TRANSITION AND MOBILISATION

TPC2005 recognises the importance of continuity in the provision of term works and services, and the need to manage mobilisation of the Partnering Team in conjunction with transitional arrangements from any previous service provider. These are dealt with through provision for fulfilment of agreed pre-conditions prior to issue of any Orders implementing the Term Programme (clause 6.1).

IMPLEMENTATION OF TASKS

TPC2005 requires the Service Provider to comply with all Orders issued in accordance with the Partnering Contract, subject to the Service Provider's right of objection if an Order or other instruction is contrary to the Partnering Documents or is otherwise demonstrably not in the best interests of the Term Programme (clause 3.3).

Failure or delay in completion of a Task in accordance with an Order will be reflected in measurement of compliance with KPI Targets. There is also provision for agreement of additional remedies, whether linked to financial incentives or otherwise (clause 6.7).

PRICES AND PAYMENT

TPC2005 envisages that Task Prices will be calculated in accordance with a stated Price Framework, whether this comprises a schedule of rates and/or lump sum pricing system and/or a more Open-book approach, and that payments to Consultants will be in accordance with their agreed Consultant Payment Terms (clause 7.1). TPC2005 encourages the development of Open-book pricing through the separate agreement of Profit, Central Office Overheads and Site Overheads – so that the Client and the Service Provider understand clearly the areas where they can seek savings and added value without damaging each other's commercial interests (clause 7.2).

In order to build up or test Open-book Task Prices, TPC2005 provides for the Service Provider to submit a Business Case for any Direct Labour Package or Preferred Specialist – and to undertake an Open-book tender in respect of any element of the Price Framework where a Business Case is not accepted or where it is otherwise agreed that a tender is a more appropriate approach (clauses 5.5 and 5.6).

SUPPLY CHAIN PARTNERING

Term works and services offer the potential for long-term relationships not only between the Client and Service Provider, but also between the Service Provider and its Specialist sub-contractors, sub-consultants and suppliers. TPC2005 requires that Specialist appointments are complementary to the partnering relationships and demonstrate best value for the Client compliant with the Partnering Documents (clause 5.1).

All Specialist appointments and any replacement of a Specialist remain subject to prior Client approval according to which Specialist offers the best available warranties and support, the maximum innovation and the maximum contributions to the Term Programme (clause 5.1). Volume Supply Agreements are encouraged where these could be of benefit to the Term Programme (clause 5.7).

CHANGE AND RISK MANAGEMENT

TPC2005 provides for Changes only where these will be of benefit to the Term Programme. It provides that the cost and time effects of any proposed Change will be agreed in advance unless the Client Representative instructs otherwise (clause 8.3).

TPC2005 also recognises that improved working relationships and added efficiencies can be achieved through joint Risk Management (clause 8.1). It offers a template Risk Register in which the Partnering Team members can identify perceived risks and can agree Risk Management activities (clause 8.2). The Risk Register should provide for agreed arrangements in respect of its future amendment/ development, and agreed actions in the Risk Register should be linked to the periods/ deadlines set out in the Partnering Timetable.

EMPLOYEES AND ASSETS

TPC2005 recognises that the award of a new Term Partnering Contract is likely to have implications as regards the TUPE and pensions rights of any previous service providers, and also regarding the status of goods, equipment, premises and other assets made available by the Client. These arrangements are specifically allowed for, with details to be included in the Term Partnering Agreement (clauses 11.2 and 11.3).

TERM AND TERMINATION

TPC2005 envisages that the Partnering Team will wish to extend the duration of the Term if they are achieving their agreed objectives. It provides the option to review the Term on a regular basis according to performance against KPI Targets (clause 13.2).

Additionally, TPC2005 provides for termination in the event of breach or insolvency and also offers the option of termination by notice in agreed circumstances (clauses 13.3, 13.4, 13.5 and 13.6).

For local government clients, TPC2005 provides specifically for termination in the event of breach of the Local Government Act 1972 (clause 13.7).

PROBLEM-SOLVING AND DISPUTE AVOIDANCE/RESOLUTION

TPC2005 reflects the problem-solving provisions that are now well established under PPC2000, allowing the Partnering Team members to avoid adjudication or litigation. The Term Partnering Agreement sets out a Problem-Solving Hierarchy of increasingly senior individuals, following which an unresolved difference or dispute can be referred to the Core Group and then to conciliation or mediation or other alternative dispute resolution (clauses 14.1, 14.2 and 14.3).

SPECIAL TERMS AND SPECIALIST ADVICE

TPC2005 allows for the incorporation of Special Terms to reflect particular requirements of Partnering Team members. Not all Term Programme arrangements will require Special Terms and the majority of issues can be covered by correct completion of the Term Partnering Agreement and the Partnering Documents. Examples of possible Special Terms include provisions to deal with the Data Protection Act 1998, the Freedom of Information Act 2000 and other current and future legislation.

TPC2005 is designed for a wide range of Term Programme arrangements. On major Term Programmes where more is at stake or where, for example, a more complex ordering system is required or there are preparatory steps to be undertaken before Orders are implemented on Site, it will be important to develop fully the detail of TPC2005 and the Partnering Documents in order to get the best out of term partnering. In these instances, the Partnering Team should seek the benefit of specialist contractual/partnering advice from a suitable Partnering Adviser and/or the respective Partnering Team members' own advisers.

The areas where the legal and commercial implications are likely to justify careful consideration and where specialist support and advice will be of benefit include:-

- Description of the agreed Processes for more efficient delivery of Tasks (clause 2.2);
- Preparation of the Partnering Timetable (clause 2.3 and Appendix 4);
- Identify agreed KPIs and Targets (clause 2.5 and Appendix 3 Part 1) and related agreed Incentives (clause 2.6 and Appendix 3 Part 2);
- Agreed limits on the authority of the Client Representative (clause 3.1);
- Statement of the pre-conditions to implementation of the Term Programme (clause 6.1);
- Agreed remedies for failure/delay in the completion of particular Tasks (clause 6.7);
- Agreed constraints, procedures and arrangements governing access to and possession of the Sites (clause 6.9);
- Preparation of the Risk Register (clause 8.2 and Appendix 5);
- Any amendments to the agreed duty of care collateral warranties and third party rights (clauses 9.1, 9.2 and 9.3);
- Clarification of Partnering Team members' responsibilities in respect of TUPE and pensions (clause 11.2);
- Agreed treatment of goods, equipment, premises and other assets made available by the Client (clause 11.3);
- Procedures governing review of the Term according to performance by Partnering Team members (clause 13.2).

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