Contracting Out In The Mining Industry:
Contracting Out Core And Non-Core Business Activities

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You have made the decision to enter into some form of alliance or joint enterprise and you have determined the principle objectives which you wish to achieve from this process.

The nature of the ongoing relationship which you want to have with your alliance or joint venture partners should determine the way you establish and manage that relationship in your contractual arrangements with them. While factors such as tax advantages, liability and risk management and the type of business or enterprise will determine the basic structure of any contractual arrangements, these arrangements should also effectively establish and manage a relationship which satisfies your strategic needs.

Following is a discussion of some alternative types of contractual arrangements and the legal implications of such arrangements.

There has been a substantial increase in the extent to which mining companies are contracting out mining and ancillary operations. Contracting out gives rise to a number of significant legal issues such as the terms of the contract and insurance issues.

1. CORE AND NON-CORE FUNCTIONS

In the mining context, a range of core and non-core functions can be contracted out. Core functions usually include actual mining and processing operations, while non-core functions may include, for example, transport and catering.

The importance of core functions usually means that the principal prefers to retain a greater degree of control over the activities of the contractor than is the case with non-core functions. Therefore it is important that the contract reflects the nature of the function being contracted out and the importance of that function to the principal's business.

1.1 The Contract

Contracting out in the resources sector is not new. For years mining companies have been outsourcing work in many areas including mining operations and maintenance. However, too often mining companies and contractors use a standard form contract such as Australian Standard General Conditions of Contract AS2124 without considering the contractual issues. When these are considered it becomes apparent that standard form contracts such as AS2124 are not, without significant amendment, appropriate for at least some transactions of this kind.

The contractual issues fall into the following categories:

- Scope of work
- Timing and term
- Resources
- Payment
- Termination
- Other matters

Scope of work

By and large, the work will involve providing a service rather than constructing a building or other works. It is critical to define the work with certainty (e.g. by reference to qualities and quantities of output or a mine plan) or, if the work involves providing a service on demand, by describing the type of work which the principal can require be performed.

It will also be necessary to consider what rights of variation the principal will have and how variations will affect pricing, timing and warranties given as to quality.

Timing and term

The timing of the delivery of the service and the term of the contract must be agreed. Consideration should also be given to whether the term should be renewable and, if so, on what terms.

The term of the contract may be a calendar period or it may end when a certain quantity of services has been provided.

AS2124 provides for the works to be brought to the stage of practical completion by the Date for Practical Completion. It focuses on the completion of the works (i.e. the physical structure) rather than the expiration of a calendar period. It is not a services contract and so does not provide for the agreement to come to an end after a calendar period, which is a requirement of most of these contracts.

Resources

The contractor may require access to and use of the principal's land, fixtures and fittings, plant and equipment and staff. The contractor may acquire or take over some of these. The contractor may also use some of its own plant and equipment and staff.

Issues such as the ownership and care of land, fixtures and fittings, and plant and equipment must be addressed; as must their maintenance, repair, operation and insurance.

Disputes can arise in circumstances where the contractor is unable to perform its obligations as a result of the failure of equipment supplied by the principal. In this situation, the contract should clearly provide that the contractor's obligations under the contract are not limited or qualified.

Employees

The contract should provide that the contractor's employees are required to hold appropriate qualifications and possess relevant experience. In certain situations, it may be appropriate to require the contractor's employees to undergo further training. It is critical that the principal has the right to require the contractor to remove a particular employee from the performance of the works or services. The contract should also provide that the contractor remains responsible for the payment of the salary and other entitlements of its employees.

Payment

The calculation of payment and the procedure for payment require careful consideration. Traditionally, contracts have been: lump sum; cost-plus; schedule of rates, or a combination of these.

Nowadays, payments are better if they encompass some form of incentive, and promote cost savings and improved service. Because many of these contracts are based on standard forms like AS2124 they often provide for a principal's representative to issue payment certificates. The courts treat these certificates as warrants for payment and generally speaking require the principal to pay the amount certified (regardless of claims it may have against the contractor) unless the principal can avail itself of a very well-worded set off, deduction or withholding clause.

Termination

In addition to termination at the end of the term or completion of the services, the contract may contain one or more of the following rights of termination:

- termination for breach or insolvency of a party;
- termination for convenience;
- termination for force majeure or frustration;
- termination based on economic grounds (e.g. where it is no longer economic to keep mining).

The consequences associated with each type of termination are likely to be different. However, the following matters may be relevant depending on the basis of termination:

- removal of equipment, etc from the site, and demobilisation;
- sale of equipment to (or back to) the principal;
- cancellation or assignment of subcontract and supply contracts;
- assistance and co-operation following termination;
- payment for:
  - work done;
  - materials ordered;
  - expenses incurred in contemplation of completing the contract;
  - demobilisation;
  - costs of cancelling subcontracts and supply contracts; and
  - lost profit.

Other matters

There are many other matters which should be considered and if necessary dealt with in the documentation. These include:

- transitional arrangements:
- quality of work or services;
- key performance indicators, bonuses and liquidated damages;
- compliance with laws;
- qualifications and accreditation:
- quality assurance plans:
- environmental issues;
- safety issues;
- intellectual property;
- indemnity and insurance (discussed below);
- subcontracting and assignment;
- confidentiality;
- audit rights;
- security for performance;
- dispute resolution.

Partnering

"Partnering" is one of the buzz-words in these types of transactions. It means different things to different people. Whatever the decision as to what it means, it is important for the contract to clearly spell out its role and its relationship to the parties' other rights and obligations.

To suggest (as is often done) that it is a process which can sit outside the contract and not affect the parties' rights under or in connection with the contract is incorrect.

This is particularly so if the parties agree to observe a partnering charter (i.e. a statement of objectives that the parties have agreed in relation to the project) which is fundamentally inconsistent with the contractual terms.

1.2 Insurance

As with contracts, there is no such thing as a standard insurance policy. Policies must be tailored to sit comfortably with the obligations and rights which arise out of the contract.

From the principal's point of view, there are clear advantages if it controls the insurance. This gives a seamless approach to insurance and premiums may be able to be reduced because of the principal's buying power.

Getting the insurance right offers financial security for the parties and creates an environment where claims can be handled with minimum disruption. This allows parties to concentrate on the performance of the contract.

The insurance issues raised by contracting out are as follows:

- What risks are involved and what insurance should be in place to protect against those risks?
- Who should effect the insurances?
- Who should be covered by the insurances?
- What particular issues need to be addressed in the contract documents or the insurance policies?

What risks are involved?

The major risks fall into three general categories:

- material or property damage to the principal's property;
- liability to third parties for property damage or personal injury arising out of the performance of the contract;
- liability for death or injury to employees of the principal or the contractor arising out of the work.

Who is to effect the insurance?

From the principal's point of view, principal controlled insurance is the preferred option. The main reasons for this are that it remains in force throughout the project even though there may be a change in the individual contractors, there is a single policy document which covers the whole project to its completion, and the management of the policy and claims is under the control of the principal.

Who should be covered by the insurance?

If possible, the policy should cover minor contractors or subcontractors as well as the principal and the contractor.

Tailoring the insurance provisions

The contract should contain express provisions dealing with:

- waiver and subrogation;
- notice sent to and received from the insureds;
- who is liable for excesses or deductibles;
- settlement of claims and an obligation to comply with insurance conditions.

2. PERIOD CONTRACTS

2.1 What is a period contract

This is where a person enters into a contract with a contractor to perform a specified task over a specified period of time. This is more common where one party is in effect contracting out a part of its business rather than entering into a joint venture type enterprise with another party.

The relationship between the parties is formal. All of the rights and obligations of each party are expressly provided for in the contract: in a period contract, the relationship of the parties is governed only by the terms and conditions of the contract.

Period contracts may be with a single services supplier, multiple services suppliers or with a prime contractor. In all cases however, the essential feature of such contracts is that they operate for a specified time only.

2.2 Advantages & disadvantages of period contracts

For the party contracting out a part of its business (the "Client"), there are several advantages in period contracts:

(a) Set timetable

The contractor's work is clearly timetabled and the Client is able to set a budget at the start of the contract.

(b) Defined contractor responsibilities and liabilities

All of the obligations and responsibilities of the contractor are set out in the contract and there should be little ambiguity as to where the risks and liabilities lie (provided of course that the contract is clear and comprehensive).

(c) Business relationship

The relationship of the parties is formal and based only on the contract terms. This may be an advantage in cases where a party wants to maintain a degree of control over its business operations and wants to ensure the confidentiality of its business dealings.

(d) Predetermined dispute resolution process

Dispute resolution mechanisms and remedies are structured and determined at the start of the contract.

The standard period contract also has some disadvantages for parties wanting to contract out:

(e) Inflexibility

The parties may not be able to adequately adjust to and take advantage of changed circumstances.

(f) Contract interpretation disputes

Disputes arising from an interpretation of terms in the contract may focus the parties' energies on minor issues at the expense of major ones.

(g) Complex contract administration

The parties may spend a considerable amount of time on administering the contract.

(h) Lack of communication

A formal relationship resulting only from the terms of a contract may stifle communications between the parties and hinder the development of a mutually beneficial relationship.

(i) Low morale

An us & them mentality may develop with low morale amongst staff and little interaction and teamwork between the parties.

3. PARTNERING

3.1 What is Partnering?

Much has been written in recent years on partnering, particularly since the New South Wales Royal Commission Into Productivity In The Building Industry (the Gyles Report) recommended that the public sector construction authorities trial partnering as one method of better procuring projects.

Originating in the United States, partnering is becoming more prevalent in Australia. Partnering is based on principles of better communication between the parties, agreed and mutual objectives and the minimisation of disputes between the parties.

A well known Australian advocate of the partnership process, Associate Professor Tom Uher of The School of Building at the University of New South Wales has noted that:

> *"Partnering is a process of establishing a moral contract or charter among the project team members which will bind each party to act in the best interest of the project and the project team members. The main aim is to meet the project objectives by working together rather than by confrontation."*

Partnering involves, initially, a commitment on behalf of the principle; attendance by all relevant parties at a workshop for the purpose of identifying common goals and objectives; the drafting and signing of a partnership charter which expresses those goals and objectives and subsequently the establishment and maintenance of communication links and procedures through the course of the project to ensure that the goals are achieved.

Whilst partnering as a process must be commended for the efficiency and objectives it has achieved, there is a fear (with respect, legitimately) amongst many users that the process leaves many established contractual rights and remedies uncertain.

In the New South Wales Government's Partnering Guidelines is stated the following:

> *"Partnering is not a contractual agreement nor does it create any legally enforceable rights or duty. It is the contract that provides the legal relationship, with partnering establishing the working relationships among the stakeholders ..."*

Alan Patching in his book entitled "Partnering and Personal Skills for Project Management Mastering" notes:

> *"Successful partnering recognises that the contract document correctly and properly details the responsibilities, rights and privileges of the parties to the contract."*

Most (reported) partnering projects to date have been in the construction industry and have proceeded on the basis of using a relatively standard form contract supplemented by an agreed set of partnering procedures and the necessary partnering charter. There is no reason, however, why the construction contract should not attempt better to express the parties partnering aims and objectives. Put another way, if the project is to be partnered, those responsible for the preparation of the key project documentation should try to ensure that it not only represents, but importantly facilitates, all of the various partnership procedures.

Issues which need to be addressed in a partnering style contract are as follows:

(a) Good faith

The debate surrounding a partnering approach to the procurement of construction projects has also put the spotlight on the doctrine of good faith, which underpins contracting in the American legal system. Partnering is being imported into Australia from the USA, but into a related, but different, legal framework.

In many ways the principles of partnering - better communication; agreed, mutual objectives; minimising disputes - may be seen as derivatives of the good faith doctrine.

Good faith may also be the necessary "bridge" - both legally and conceptually - between our current, common law set of contract rules and the "non-contractual" principles of partnering.

(i) Codification by Government

There has been increasing recognition of the concept of good faith or "honesty" in legislation, notably section 13 of the *Insurance Contracts Act* 1984 (Cth), (the optional) section 22(2) of the uniform *Commercial Arbitration Act* 1984, sections 51 and 52 of the *Trade Practices Act* 1974 (Cth), section 352 of the *Industrial Relations Act* 1991 and in section 232(2) of *The Corporations Law.*

The decision in *Renard Constructions (M.E.) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 has now put more squarely at the foot of contract drafters the issue of "*good faith*" and its commercial consequences.

The Court in *Renard* held that the powers conferred by clause 44.1 of NPWC3 (1981) (to terminate the contractor's work) must be exercised reasonably. Priestley JA said this requirement had:

> *"much in common with the notions of good faith"* and *"that the time may be fast approaching when the idea [of good faith], long recognised as implicit in the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and the United States".*

The doctrine of good faith can act in two ways - in the performance of the contract or in the enforcement of the contract.

(ii) Performance

Good faith (during contract) performance can limit the exercise of the discretion conferred on one party to the contract, in determining what is proper performance. It "*protects*" the other party's reasonable expectations and gives effect to the intentions of the parties. A contractual discretion may be exercised for any purpose within the parties' reasonable contemplation at the time of contract formation. But, the discretion will be exercised in "*bad faith*" if it is used to recapture opportunities foregone at the time of contract formation.

Good faith performance is also a "gap filler" implying terms where an unforeseen circumstance has come about or a circumstance is not addressed expressly in the contract. In this way good faith acts pro-actively.

(iii) Enforcement

Good faith enforcement on the other hand is reactive. It provides a way for the courts to determine whether an enforcement mechanism is available to the enforcing party against the breaching party to secure that party's expected interest under the contract. It acts in the same way as do the remedies of damages, cancellation for material breach and restitution.

(iv) Good Faith by the parties' agreement

There are significant commercial pressures on both contract law and contract documents to:

(a) better codify the parties' relationship - the traditional *black letter* approach to contracts and their interpretation, whilst legally consistent, is often justifiably criticised by those in commerce - the users - as keeping the lawyers busy finding loopholes yet not properly representing the parties' expectations;

(b) address issues now covered by statutes such as the *Trade Practices Act* (sections 52, 53) so that the contract better expresses and regulates not only the essential terms of the bargain but also the essential aspects of the parties' conduct, which will be necessary to make the contract work.

Contracts might better meet these needs, at least in part, by expressly addressing the concept of good faith.

(v) What is needed, contractually?

There seems to be three ways to make the concept of good faith part of a commercial contract:

(1) Agreeing only to act in good faith

To agree that the parties shall act in good faith (as between each other), whilst expressing the desire, may be of limited effectiveness.

As the observations above indicate, what good faith actually means - either at contract commencement or when a particular issue arises - is partly prescribed in, say, American law by documents such as the *Restatement (Second) of Contract* (see note 10). A contract in Australia using good faith would not have the benefit of an outline or code explaining what the parties meant by the expression. The parties' expectations may be quite different. If litigation arose, a court would not be assisted by the contract (by way of expanded definition for example) nor much, if any, Australian case law.

One result might be a residual flexibility in the court to mould the concept to suit the matter in issue - to the extent it would be applicable.

(2) Good faith plus a definition

It is preferable to codify - even if only between the parties - what good faith is intended to mean. The American experience suggest that any definition should not be exhaustive or exclusionary.

Accordingly, the following definition is offered as an illustration:

Good faith includes:

- *being fair, reasonable and honest;*
- *doing all things reasonably expected by the other party and the contract.*

There could also be added, possibly, a negative restriction, such as:

> *"not acting so as to impede or restrict the other party's performance."*

(3) Good faith, a definition and a code
If good faith gathers acceptance as a desirable contractual standard, there will need to be a form of "code" - even if just between the parties - so that there is not only consistency in obligations but, more importantly, a better explanation of the way in which the good faith principle is intended to work in practice.

(b) Critical review of time bars
Notwithstanding that the courts have consistently expressed the view that clear words are required in a contract to *bar* a party's rights for failure to give a notice within a prescribed period, standard form contracts continue to contain a range of *time bar*-type provisions. Some, such as AS2124's clause 12.4 act as an effective bar:

"12.4 Time Bar
In making a valuation pursuant to Clause 12.3, regard shall not be had to the value of additional work carried out, additional Constructional Plant used or extra cost incurred more than 28 days before the date on which the Contractor gives the written notice required by the first paragraph of Clause 12.2."

Conversely, there is no barring of rights to say, as clause 35.5 (extension of time) does that a contractor must notify of delay within 28 days of it first occurring.

For a partnered project however, it must be doubted whether it is consistent with the intended spirit of the project that there be throughout the base contract an extensive range of exclusionary or limitation clauses by way of time bars. As it will be discussed in more detail below, serious and difficult issues might arise where a contractor, conscious of an impending time-related deadline, says at a Project Control Group ("PCG") meeting that he has been delayed but before making a claim wishes to discuss its possible consequences and see if some form of re-programming might be authorised, therefore, avoiding much of the need for an extension of time. If the Principal or Project Manager ("PM") participates in such a discussion with one consequence being that the contractor does not in fact meet the deadline for the claim, the principal may have waived its rights or otherwise not be able to enforce the *time bar*.

(c) Design involvement and design procedures
Partnering really brings with it the need to consider whether the traditional form of "construct only contract" - is the most appropriate form of contract strategy.

Traditional period or *hard dollar* contracts or projects generally establish a range of contractual risks and responsibilities with the contractor which are, prima facie at least, inconsistent with the concept of pledged involvement and willingness to co-operate to achieve mutual objectives that partnering requires.

Early contractor involvement in design development and the issue of *buildability* makes a lot of sense for a partnered project. Indeed, it seems to be the common view that design development should involve both contractors and subcontractors - particularly as projects are more and more heavily subcontracted.

One possible consequence of this strategy is a different form of procurement contract, such as design and construct; design document and construct or even a relatively sophisticated Project Management or Construction Management style - where the design and construction processes are managed but remain inter-related.

Accordingly, consideration of these alternative contracting structures and how they should be integrated into a partnering project is required.

(d) Key people and the organisational structure of the project
More and more *key people,* both in contractors' and principals' organisations, are being declared for projects and play increasingly important roles.

The issue becomes more important for a partnered project. Because the emphasis in partnering is on constant, frank communications, partnering is really "*people driven*". Consistency in personnel, on both sides, is therefore critical. Moreover, the relevant personnel must be appropriate. Whilst much has been written recently on techniques and procedures for partnering, the equally important aspect of choosing and training the right personnel to act as key representatives for each party does not seem to have been addressed in detail. However, it is an issue which is likely to confront a Project Manager - particularly where he is acting as the partnering facilitator. If principal or contractor nominate key personnel who are, or at least appear to be, inappropriate to honestly and openly participate in the partnering procedures, if partnering success is to be ensured, the Project Manager may well have to work with those people and *re-train* them in the ways of partnering or otherwise suggest that they be replaced.

(e) Project Control Group ("PCG") Structure and Reporting Criteria
A noticable omission from each of the standard

forms construction contracts (AS2124; NPWC3 and JCC) or the NSW Government GITEC is the establishment in the contract of a PCG reporting set of procedures. However, that is not so unexpected. Each of these contracts is derived or has evolved from a traditional form of arrangement whereby the construction contract declares the parties' respective rights.

The contracts were not written, nor have they evolved, from the perspective of facilitating projects through the establishment of general procedural issues such as non-penal communications and PCG meetings.

The relevance of these issues to partnering contracts or projects is that they are fundamental to a partnering project's success. Whether partnering parties have *formal* structures relating to PCG meetings and reporting - or whether they do it informally - matters little in real terms. However, consistent with the theme advanced here, should not the base contract on a partnering project seek to embody and facilitate that PCG/reporting process by establishing, even at a rudimentary level, a meeting and review structure without line agendas and procedures? Without that, there is no clear obligation on either party to attend or participate in meetings. Moreover, without a clear agreement on the level of representation at meetings, they could be of little real use if those who attend do not have appropriate authority.

(f) An alerting or warning procedure

Most modern contracts now recognise the need for - and indeed the advantages of - an early warning or alerting process.

The objective of such a procedure is to encourage the contractor, or indeed both parties if need be, to raise issues with the other which may effect the party's performance adversely but which, constructively, should be addressed by both parties to the project.

The essence of alerts or warnings is early, constructive communication. It is difficult to imagine a partnering project being successful without a willingness on both sides to discuss events which may effect time, cost or quality or either party's ability to carry out its obligations.

(g) Dispute Resolution

Disputes on most outsourced projects particularly construction projects will always arise. How they are addressed and resolved is likely to be a key issue for PMs in the course of establishing, documenting and thereafter administering a partnering project.

It is fair to say that today the construction industry approaches dispute resolution in a sophisticated and knowledgeable way. The traditional format of *arbitrate or litigate* has been replaced with a range of possible procedures including meetings of senior executives; mediation; third party neutral appraisal; expert determination (both binding and non-binding); and structured/assisted negotiation. There remain, of course, traditional court and arbitration procedures.

In preparing a set of dispute resolution provisions for a partnering contract it is important that the Project Manager consider each of these issues and tailor a dispute resolution scheme which best suits both the project and, particularly, the parties.

3.2 Advantages & disadvantages of partnering

For the party contracting out, there are a number of advantages in implementing a partnering type arrangement:

(a) Less disputes

Less disputes with a faster resolution of those disputes and less arbitration and litigation as the parties adopt a joint problem-solving approach.

(b) Mutual objectives

A willingness by the parties to identify and pursue mutual goals rather than concentrate on their personal objectives.

(c) Increased co-operation

Greater co-operation and communication between the parties which may result in the more effective delivery of services under the contract.

(d) Future projects

It is possible for the parties to contract today for unknown projects in the future where an open-book approach to project management is adopted.

(e) Morale

Higher levels of morale and enthusiasm amongst the persons directly involved in the administration of the contract.

(f) Reduced costs

Less cost overruns, less time extensions and fewer claims for time extensions.

(g) Risk sharing

Parties are jointly responsible for ensuring that the project is a success.

The disadvantages of partnering may be:

(h) Poaching:

If the parties become too familiar with each other then the Client may lose staff and other resources to the contractor (and vice versa).

(i) Voluntary arrangement

The partnership charter is not enforceable and relies on the co-operation of the parties to maintain. If this co-operation wanes then a party will be without recourse unless the parties have executed a comprehensive contract in addition to the charter.

(j) Uncertainty

There may be a degree of uncertainty as to the contractual rights and remedies of the parties and the allocation of liability under the charter and how these relate to the contract between the parties (if there is one).

(k) Timewasting

There may be a degree of time wasting as parties discuss problems in a less structured environment.

4. JOINT VENTURES

4.1 What is a joint venture

The High Court of Australia has defined a joint venture as an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Joint ventures are structures which usually involve the participation of several persons to carry out a single project and not a continuing business.

Joint ventures can be incorporated (where a special purpose company is formed by the joint venture participants as shareholders to carry out a project), or unincorporated (where the joint venture participants contract together to carry out a project and where each participant is entitled to account for its own expenditure on an individual basis, independent from the other participants. Unless care is taken in the drafting of unincorporated joint ventures, they may be held to be partnerships and the participants in the joint venture will be agents of each other and liable for the actions of each other.

The mining and petroleum industry commonly uses unincorporated joint venture structures for the exploration and exploitation of mineral resources. As joint venture participants, the parties will not be agents of each other and, therefore, not able to impose liability on each other and each party will be treated as an independent taxpayer and not as a member of a partnership for the purposes of the *Income Tax Assessment Act*.

Taxation planning requirements are usually the key determining factor in choosing the type of joint venture structure. If a joint venture is risky, then the parties may want to minimise their losses by incorporating a joint venture company and thereby limiting the liability of the individual shareholders or participants in the joint venture. If the joint venture is likely to make losses for several years, then participants may want to take advantage of these tax losses individually and, therefore, would not want to incorporate any joint venture arrangement.

In choosing either an incorporated or unincorporated joint venture, the contracting out party will have to consider issues such as taxation, duty on transferring interests, the effect of the fiduciary relationship between the parties, whether the unincorporated joint venture is in fact a partnership and, therefore, whether the contracting out party is liable for the actions and debts incurred by the contractor.

4.2 Advantages & disadvantages of joint ventures

For the contracting out party, the benefits of a joint venture arrangement are as follows:

(a) Reduced risks

Risks of the project are shared between the parties.

(b) More co-operation

Increased co-operation between the parties to meet mutual goals with the effect that tasks are performed more efficiently and costs are reduced.

(c) Idea generation

A shared commercial interest can often lead to innovative idea sharing.

(d) Limited liability

Liability should be borne by the joint venture company or, if unincorporated, should be allocated amongst the parties in the joint venture agreement.

(e) Increased resources

Parties with complementary skills and resources can have the benefit of these without the attendant cost or risk.

There are also several disadvantages in entering into a joint venture arrangement.

(f) Fiduciary Relationships

The parties have fiduciary relationship.

(g) Joint participation

Both parties to a joint venture are usually required to participate in some form; it may be that a contractor does not wish to share the risk of the project with the contracting out party.

(h) Consensus required

Workable joint ventures depend on consensus of the parties; consensus may have to be regulated by the contract in the form of dispute resolution mechanisms, such a compulsory buy-out/sell-out, Russian roulette dilution and liquidation provisions.

(i) Cost of establishing
There are costs in establishing this relationship, especially if a special purpose company established and risk of cost if the relationship is not properly structured.

(j) Instability
Joint ventures are inherently unstable.

5. STRATEGIC ALLIANCES

5.1 What are strategic alliances

Strategic alliance relationships describe a business relationship between two or more parties which is mutually beneficial. Strategic alliances do not have to be formally documented in a contract; they are usually a statement (to the market) that certain companies prefer to transact with each other and use each others' products and services.

Strategic alliances are commonly found in emerging industries such as media, IT and telecommunications and amongst vertically aligned market players.

5.2 Advantages & disadvantages of strategic alliances

The advantages of a strategic alliance may include:

(a) Most favoured customer status
The parties should be receiving the best deal possible.

(b) Goodwill
The association of a party with a well known brand or corporation will enhance their products and name and thereby boost competitiveness and assist in the development of goodwill.

The disadvantages of strategic alliances include:

(c) Reputation
Damage to the reputation of one alliance party may affect the other party.

(d) Future
Termination of the alliance may damage the overall relationship of the parties.

6. PERFORMANCE BASED CONTRACTS

Any of the above types of contractual arrangements can provide a payment mechanism whereby the contractor is paid a fixed sum, or a sum determined on its performance and the meeting of designated milestones.

In relation to performance based contracts, the advantages of these for the Client include:

(a) Flexibility
They are flexible enough to cope with an over or underestimation of the work involved in any particular project.

(b) Contractor incentive
They act as an incentive to the contractor to perform duties on time.

(c) Goal setting
They enable the Client to set milestones/goals at the start of the contract which act as a measure of the contractor's progress at every stage of the project.

The disadvantages of a performance based contract include:

(d) Cost blow-out
There may be a blowout of costs unless costs are capped or regularly reviewed.

7. FIXED PRICE CONTRACTS

The advantages of a fixed price contract for the Client include:

(a) Known cost
The cost of the project is fixed at the start which will enable the Client to successfully plan and budget expenditure.

(b) Comparison
If tendering, it is easier to compare the competing tenders.

The disadvantages of fixed price contracts include:

(c) No incentive
There is less incentive for the contractor to perform as they are guaranteed a sum at the end of the project.

(d) Quality concerns
A quantity over quality approach may mean that the quality of the project suffers.

(e) Lack of flexibility
The contract is less flexible in dealing with situations where there has been an over or underestimation of future needs and the amount of work to be performed by the contractor.

CONCLUSION

The legal issues to consider are numerous in establishing any alliance relationship. However, the nature of the desired relationship between the parties and the desired results should influence the decision on the way the relationship is documented. There is no right or wrong approach, only a more or less effective one.