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Critical Analysis of Case Law: Are Partnering Charters Binding?

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Abstract
Construction project partnering in the United States has been used successfully for nearly 30 years in reducing disputes. Most partnered projects are characterized by the joint development of a nonbinding partnering charter between the owner and the contractor, which encapsulates the project's goals and lays out the desired process for resolving issues at the lowest level. This paper explores the outcomes when partnered projects fail and the parties involved must turn to the courts to settle their disputes. The paper evaluates the case law for 16 partnered projects through content analysis and cross-case comparison. The paper explores the question of whether the *good faith and fair dealing* (GFFD) doctrine applies to partnering charters, potentially rendering them binding. The paper finds that while the courts have not yet directly applied GFFD to make a charter binding, there is sufficient cause to consider giving it the force of the contract.

Keywords
Partnering, claims, alliancing, disputes

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Comments
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CRITICAL ANALYSIS OF CASE LAW RELATING TO PARTNERING CHARTERS: BINDING OR NOT?

By Milagros Pinto-Nunez[1] and Douglas D. Gransberg, PhD, P.E., M. ASCE[2]

ABSTRACT

Construction project partnering in the US has been in use for nearly 30 years and has been found to be successful in reducing the need to seek recourse in the courts for disputes that cannot be resolved on the project. Most partnered projects are characterized by the joint development of a nonbinding partnering charter between the owner and the contractor, which encapsulates the project's goals and lays out the desired process for resolving issues at the lowest level. This paper explores the outcomes when partnered projects fail and must turn to the courts to settle their disputes. The paper evaluates the case law for 20 partnered projects in 16 states through content analysis and cross-case comparison. The paper explores the question of whether *good faith and fair dealing* (GFFD) doctrine applies to partnering charters, potentially rendering them binding. It also compares the US nonbinding partnering process with similar binding processes in use internationally. The paper finds that while the courts have not yet directly applied GFFD to make a charter binding, that there is sufficient cause to consider giving it the force of the contract. The international experience with binding partnering agreements in public works contracts is excellent and may serve as a decent example for the US industry to emulate.

KEYWORDS: Partnering, claims, alliancing, disputes.

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INTRODUCTION

The literature touts partnering as remedy for disputes and claims (CII 1991; Weston and Gibson 1993; Ernzen et al. 2000; Eriksson 2010), and while it also shows that partnering indeed reduces the number of disputes that find themselves into the legal system for resolution (Gransberg et al. 1999), it is not a remedy for issues that transcend the impact of interpersonal and interinstitutional relationships. As will be seen in this paper, unresolved disputes on partnered projects do end up in court. Project specific aspects such as differing site conditions, design errors and omissions, and *force majeure* events are to be expected on most construction projects in varying degrees of impact (West et al. 2012). Partnering, by definition, is a tool for developing a mutually agreed approach to how each party in the construction contract will act/react when things do not go according to plan (Nyström 2008). The inclusion of alternative dispute resolution methods in design, design-build, and construction contracts are intended to provide a mechanism for extralegal resolution and a means to elevate the disagreement off the project to a level where a business decision can be made by those vested with the authority to do so (CII 1991). When all these efforts fail, a disagreement becomes a formal dispute as the contractor files a claim for additional compensation and/or time to make itself whole from damages suffered as a result of the disputed issue (Eriksson 2010).

Once litigation is initiated, the situation leaves the control of the parties to the contract and proceeds through the stages of litigation. After the suit has been filed and the defendant has responded, the discovery phase begins for both sides. The discovery phase's purpose is "to preserve evidence of witnesses who may not be available at trial; to reveal facts; and, to aid in formulating the issues to be litigated; … obtain access to documents and other items not in their possession." (FindLaw 2017). One of the documents that can be found during discovery is the

owner-contractor partnering charter (hereafter referred to as the OCPC). A typical OCPC will carry the term "nonbinding" in its heading in accordance current partnering practice (AASHTO 2005, Dyer 2011) and will memorialize the project-specific mutual agreements made by the parties to the project's contract. While the document is not intended to modify the terms of the underlying contract, OCPCs have been included in construction litigation and purported to be written evidence of an agreement by the parties to deal with each other fairly and in good faith.

Much reliance by partnering facilitators and institutions that promote partnering is placed on the term nonbinding as a means to develop voluntary adherence to the project goals expressed in the OCPC and to avoid the legalistic wrangling that is assumed to accompany a similar binding document. According to Cowan et al. (1992): "The symbolic act of signing the charter represents an oath of allegiance to the principles of partnering. This public gesture reinforces individual commitment as well as providing a superordinate goal for all the parties involved." Furthermore, the Construction Industry Council (2010) maintains that the charter "does not change the terms of contract or the contractual relationships between the parties… The partnering charter and commitments to it evidence a moral commitment by all parties to act in the best interests of the project and work together to meet the goal and objectives of the project without dispute." (CIC 2010). Lastly Phillips (2008) posits that achieving the objectives cited in the OCPC "depends on all those involved in the project team; hence a consensus agreement on the project objectives is of vital significance."

Without rejecting all the reasons cited above for a nonbinding OCPC, one must ask the following rhetorical questions:

- If the parties to the OCPC are willing to sign the document when its contents are thought to be noncontractual, why would they not be willing bind themselves to the objectives and behaviors codified in the OCPC?
- Additionally, if partnering fails and the two parties must face each other in court, does the fact that they signed a document promising to partner create the potential for a party to raise claims of bad faith or unfair dealing if the circumstances warrant it?

The objective of this paper is to answer both of the above questions based on an analysis of partnered project failures found in the US construction contract case law. Its primary contribution is to highlight for the first time the potential legal issue that a nonbinding OCPC has may be used to support a breach of the legal principal of "good faith and fair dealing" (GFFD), essentially rendering the document as binding to some degree, regardless of the intent of the parties that drafted and signed it. It will also argue that given the success reported about international contractual partnering agreements and the advent of relational contract instruments, such as integrated project delivery (IPD) and alliancing, that the US industry may benefit by codifying a project's OCPC as binding on both parties.

Partnering Background

The US partnering program originated "as a means to avoid disputes and, consequently, reduce the ultimate cost of delivering public facilities" (Gransberg et al. 1999) and remains a management practice to build teams, facilitate communications, and avoid disputes by seeking to increase the level of trust between the owner and its construction contractors (Weston and Gibson 1993; Murdough et al. 2007). The Construction Industry Institute maintains that partnering is an *enhanced business process* that promotes collaboration by mutual agreement to achieve "common

objectives on the basis of trust and the understanding of each other's values and expectations" (CII 1991). On the other hand, owners in the United Kingdom (UK), Denmark, Australia, and New Zealand, to name a few, have treated partnering as contractual relationship rather than a business management process (Tvarnø 2015). A standard contract form was developed in the UK called PPC2000 that details the terms of the partnership in order to regulate the relationships between contracting parties through "express good faith" contract clauses (Lahdenperä 2012).

PPC2000 is described as a "conditional two stage contract" (Mosey 2009) in which partnering is defined as a "strategic alliance in which the partners recognize the potential benefits for the project of developing a strategic alliance relationship and pursuing joint initiatives" (Tvarnø 2015). Its ultimate goal is to transform the conventional contractual relationship of two individual parties into a true partnership through a "binding legal framework that aims to optimize the transactions among the parties as a whole, instead of having two parties aiming to optimize their own utility" (Tvarnø 2015). The notion that the relationship is changed and then made binding is important to understanding the fundamental theoretical basis of international relational contracts. In the words of the Danish Construction Authority (2002), a partnering contract "focuses on the parties' transformation from a self-centered, 'contract based' attitude to a relation-based, joint optimization and collaboration."

Tvarnø (2015) proposes a game theory analogy to describe the desired transformation when a partnering agreement is negotiated. The "Prisoner's Dilemma" game offers players (analogous to the parties in a construction contract) an option to either cooperate to achieve a joint gain or refuse to cooperate with the chance of a larger individual gain (Rapoport and Chammah 1965). The essence of the dilemma revolves around human nature, self-interest, and the risk that if one side agrees to cooperate the other will not and therefore undeservedly profit at the expense of the

cooperator. Thus, given a voluntary choice between individual or joint action, the choice will always be self-interested out of fear that the other party will take advantage of the first one (Cooter and Ulen, 2011). Tvarnø (2015) uses this outcome to argue that partnering agreements should be binding because a nonbinding agreement is susceptible to the self-centered outcomes of the Prisoner's Dilemma. This author posits that "the partnering contract must on one side make the parties prefer to cooperate instead of self-optimize, while on the other hand, bind the parties to joint-optimize through cooperation." The paper also makes a convincing case that the partnering contract should include incentives for collaboration and share in the benefits achieved through collaboration.

Alliance contracting as practiced in Australia and New Zealand takes the concept of binding collaboration to another level by including "painshare/gainshare" schemes to create the incentives and a clause that forbids taking disputes to the courts (Tamburro and Wood 2014; Gransberg and Scheepbouwer 2015). "Project alliancing can be considered a highly evolved form of partnering which is enshrined in a contract" (Manley 2002). The research on alliance contract performance shows truly impressive results. According to Wood and Duffield (2009), the 324 alliances included in the study involved delivering over AUS$60 billion worth of infrastructure in Australia and New Zealand with an average cost savings of 3.5% and time savings that ranged between 2% and 7%. While those outcomes are certainly desirable, the fact that only one of the 324 alliances failed to resolve all disputes internally is the key take-away with regard to whether or not partnering agreements should be binding. In Tvarnø's words (2015), the partnering contract "must change the parties' behavior by creating incentives through a written and explicit contract, which oblige the parties to reward collaboration in the interest of both parties."

Given the above discussion, the assertion that a nonbinding OCPC is necessary to demonstrate "a moral commitment by all parties to act in the best interests of the project" is called into question. Therefore, turning from the theoretical to the practical, the remainder of the paper will explore the more pragmatic aspects of the US partnering program and determine whether or not the nonbinding OCPC is truly nonbinding when the partnering effort fails and the parties to the construction contract face each other in court. The salient issue is whether the OCPC constitutes an express covenant, versus what might otherwise be an implied covenant, to deal fairly and in good faith.

Good Faith and Fair Dealing Doctrine

GFFD is a well-known principle of contract law, which is intended to protect a party to a contract from being damaged actions of the other party in the contract that are either unfair or in bad faith. In US law, binding contracts can be either written or oral (Hill and Hill 2007). In layman's terms, the principle is "a general assumption of the law of contracts, that people will act in good faith and deal fairly without breaking their word, using shifty means to avoid obligations or denying what the other party obviously understood" (Hill and Hill 2007). According to MacMahon (2014), in all contracts each party has a duty to act in good faith and deal fairly in its performance and its enforcement on the terms of the contract. "The duty of good faith and fair dealing is well established in most American jurisdictions" (MacMahon 2014).

Some contracts expressly call for the parties to deal with each other in good faith. However, for those contracts that are silent on this subject, courts have long read the duty into contract relationship, creating implied obligations of the parties to treat each other fairly and in

158 good faith. Unfortunately, there are no precise definitions of the terms good faith and fair
159 dealing, leaving the courts to develop their own definitions on a case-by-case basis (White 2001).
160 Typical construction partnering processes result in the drafting of the OCPC at the end of
161 the partnering workshop. In most cases, all workshop participants sign that document indicating
162 their commitment to abide by the document's contents. The charter's contents often describe how
163 the owner and the contractor will collaborate during the project and sometimes even specify the
164 remedy if an irresolvable disagreement arises at the project-level. This remedy is commonly called
165 a "dispute resolution ladder" (Ernzen et al. 2000). Hence, in spite of the use of the term
166 "nonbinding" in the charter's title, the fact that the GFFD principle does not require a written
167 agreement to be enforceable makes the charter appear to be written evidence of an agreement upon
168 which both parties intended to rely during the execution of the project. As a result, it seems prudent
169 to attempt to verify if this is how the US courts are ruling in disputes involving partnered
170 construction contracts.
171
172 **METHODOLOGY**
173 As a result of the above, a review of the state and federal case law related to partnering conducted.
174 The search was conducted using the Google Scholar® case law search engine with search terms
175 such as partnering, construction, charter, etc. found in the coding structure used for the technical
176 literature review. A content analysis was then conducted to ferret out the elements of each case
177 that related to the partnering process, regardless if it was formal or informal.
178 Table 1 lists the information on the 20 construction cases between 1997 and 2014 found
179 the review. Each referenced some form of partnering in their textual content. The cases came from
180 16 different states and involved 10 state departments of transportation (DOT), 6 federal agencies,

4 municipalities, and 2 non-transportation state agencies. Fourteen of the cases involved heavy civil or transportation projects. One was a DB project. Each of the 20 cases referenced in some fashion a formal or informal agreement to collaborate during the delivery of a design and/or construction project in accordance with the "principles of partnering" (CII 1991). The cases were categorized into the following four types:

- Change order/delay claim: 9 cases.
- Personal injury: 5 cases.
- Right of way/environmental/permitting issues: 4 cases.
- Breach of an implied covenant: 2 cases.

Table 1: Summary of Legal Case Law Review

Year	Case	State	Agency
1997	Lakes Regional Legal Defense Fund, Inc. v. Slater, 986 F. Sl.pp. 1169- Dist. Court, ND Iowa	IA	Iowa DOT
2000	ABT Associates, Inc. v. JH Piego Corp., 104 F. Supp. 2d 523- Dist Court, D. Maryland	MD	US Agency for International Development
2000	Holy Cross Neighborhood Assn v. Julich, 106 F. Supp. 2d 876- Dist. Court, ED LA	LA	US Army Corps of Engineers
2001	Tosco Corp. v. Dept. of Transp., 766 A 2d 831- NJ: Appl. Div.	NJ	New Jersey DOT
2002	Sierra Club v. US Army Corps of Engineers, 295 F. 3d 1209- Court of Appeals, 11th Circuit	FL	US Army Corps of Engineers - Florida DOT
2005	LaChance v. Michael Baker Corp., 869 A 2d 1054- PA: Commonwealth Court	PA	Pennsylvania DOT
2007	Hubbard v. Pike, 962 So. 2d 1094 - La: Court of Appeals, 2nd Circuit	LA	US Army Corps of Engineers
2007	King v. US, 491 F. Supp. 2d 286 - Dist. Court, D. Connecticut	CT	Naval Facility Engineering Command
2008	Koch Industries, Inc. And Subsidiaries v. US, 564 F. Supp. 2d 1276- Dist. Court, D. Kansas	NM	Federal Highway Administration -New Mexico DOT
2009	Fisher v. Elmo Greer And Sons, LLC., Dist Court, ED Kentucky	KY	Kentucky Transportation Cabinet
2010	Austin Traffic Signal Construction Co., LP. V. Transdyn Controls, Inc., Tex: Court of Appeals, 3rd Dist.	TX	City of Austin
2011	Bell v. US, Court of Appeals, Federal Circuit	NH	Federal Bureau of Prisons
2011	Costello Industries, Inc. V. Eagle Grooving, 707 SE 2d 168- Ga: Court of Appeals	SC	South Carolina DOT
2011	Fahs Constr. Group, Inc. v. Gray, Dist. Court, ND NY	NY	New York State DOT

2011	Meadow Valley Contractors v. state, 266 P. 3d 671 - Utah Supreme Court	UT	Utah DOT
2011	Metcalf Construction Co., Inc. v. US, Court of Federal Claims	HI	Naval Facility Engineering Command
2012	J&H Reinforcing & Structural Erectors, Inc. V. Ohio School Facilities Comm., 2012 Ohio 5298 - Ohio: Court of Claims	OH	Ohio School Facility Commission
2012	Stanley Miller Constr. Co. v. Ohio School Facilities Comm., 2012 0hio 3995- Ohio: Court of Claims	OH	Ohio School Facility Commission
2014	Ginsberg v. City of Ithaca, Dist. Court, ND New York	NY	City of Ithaca
2014	Nertavich v. PPL Elec. Utilities, 100A. 3d 221- Pa: Superior Court	PA	Pennsylvania DOT

Breach of Implied Covenant

The "breach of implied covenant" cases will be discussed first because they directly address a breakdown in one of the major principles of partnering: mutual trust (Weston and Gibson 1993). It must be noted that the "breach of implied covenant" category was found in two cases as the primary grounds for the claim. However, breach of an implied covenant was also asserted in two of the change order/delay claim cases as a secondary allegation. Breach of an implied covenant is the essence of GFFD, which protects a party to a construction contract from being damaged by the bad faith or unfair conduct of the other party.

There were two cases (ABT and Hubbard) in which a "breach of an implied covenant" was directly alleged as the primary cause for the claim. Both were initiated by subcontractors against a general contractor for failure to award it the work it had been promised in an oral or written "partnering or teaming agreement." In both cases, the plaintiff subcontractor failed to prove that a binding contract had been formed before the implied covenant was made, and as such their claims were denied. Both involved a promise (one written and one oral) allegedly made by the GC to its subcontractors who were subsequently damaged. Since neither of the two cases cited an OCPC, the cases are not directly applicable to the topic at hand. However, they do illustrate the fact that GFFD can be asserted with regard to a partnering charter if a binding contract has been

consummated prior to the promises made during a formal partnering workshop, which will generally be the case in a public project.

In one of the change order/delay claim cases (Bell), the "breach of implied covenant" allegation was made as part of the primary assertion of contract changes that justified additional compensation/time, relying on express assurances made by the Federal Bureau of Prisons during the partnering meeting that it would be "treated fairly with respect to extra work" related to the administration of a specific permit required by a state environmental agency. When the Federal Bureau of Prisons ultimately rejected the claim, the design-builder sued on, among other theories, breach of the GFFD covenant. The design-builder lost, as both the trial and appellate courts concluded that GFFD claims could not override the express terms of a contract imposing permit risks on the design-builder. The courts did not discuss the liability that could be imposed from the partnering relationship.

These cases stand as cautionary points that should be considered when the owner develops an OCPC as the product of a formal partnering workshop. In laymen's terms, the owner should not make assurances it ultimately cannot keep in the "spirit of partnering," a term that was explicitly found in all of the three above cited cases and which appears to have taken on a legal definition which can and will be referenced as unresolved disputes enter the courts.

Change Order/Delay Claims

This category involves the cases that relate to the classic definition of partnering as a "claims avoidance" tool. All nine cases (Austin, Bell, Costello, Fahs, J&H, Koch, Meadow, Metcalf, and Stanley) arose as a result of an unresolved dispute over conditions that triggered a contractor to request additional compensation and/or a contract time extension and contained direct reference

to an OCPC. One case (Austin) involved a subcontractor's material supplier versus the subcontractor and its GC. The claim used a milestone schedule that was agreed during a "partnering meeting" hosted by the owner as evidence that a delayed payment caused damage to the supplier. That claim was upheld by the court, which subsequently computed the damages based on the milestone schedule. The public agency was not a party to the litigation. However, the partnering clause in the construction contract was cited as evidence that the GC had a duty to abide by the OCPC milestone schedule and that duty trickled down to its subcontractors with respect to timely payments.

The courts found in favor of the contractor in 5 (Costello, Fahs, J&H, Metcalf, and Stanley) of the remaining 8 cases with one case (Stanley) resulting in a split decision affirming the owner's arguments in some aspects and the contractors in all others. The Stanley claim alleged that the owner (State of Ohio) interfered with the contractor's means and methods, which had the result of making the work package milestone schedule unrealistic. The owner's defense was that the claim was made outside the contractual notice period specified in the changes clauses. One of the issues that complicated that defense was a letter from the owner that stated: "Stanley Miller is out of their claim right for this issue; however, *in the spirit of partnering* I will submit this request to the Commission." (Italics added by author). The contract contained a clause that permitted a "Field Change Order" to be unilaterally directed for work not expected to cost more than $10,000 with the cost being negotiated at a later date. The court went on to comment that "The evidence clearly demonstrates that time was of the essence on this project and that, on many occasions, the parties agreed that Stanley Miller would perform certain work and that either a change order or agreed adjustment to the contract price would be negotiated at a later date. The parties referred to the later practice as partnering." However, court found that neither a field change order clause nor the

partnering agreement supported the assertion that the owner waived the notice period specified in the changes clause. Hence, on the timely notice point, the court found for the owner.

The Stanley contract also contained a clause that required the owner's construction manager to convene a meeting within 30 days of receipt of a potential claim to "implement the job site dispute resolution procedures the parties agreed to implement as a result of the partnering arrangement." The owner failed to do so, apparently believing that since the notice of claim was untimely that there was no need to follow the procedures that were agreed in the partnering document. The court disagreed and found for Stanley allowing it to recover delay-related damages associated with the work package designated in the claim. Thus, it appears that while a partnering document does not override provisions contained in the contract for which it was developed, it may, under certain conditions, be considered as supplementing the contract by adding specificity to it.

Right Of Way/Environmental/Permitting Issues

The 4 cases (Holy Cross, Lakes, Sierra, and Tosco) found in this category do not refer to an OCPC, but rather to an interagency partnering agreement developed during the early phases of project development and preliminary engineering. It is unclear from reading the cases whether or not these arrangements are considered binding by the courts, but since they are referenced in conjunction with litigation, it is of value to mention them as a result of recent emphasis being given to stakeholder partnering during the environmental permitting process by the Federal Highway Administration's *Every Day Counts* program (FHWA 2014), as well as the increased use of inter-agency agreements as tools to better manage complex projects involving multiple public stakeholders (Gransberg et al. 2013).

Of the four, the court only ruled against the owner in Tosco. The Tosco case is incredibly convoluted but essentially deals with the process used to determine the required right of way (ROW) for a New Jersey DOT overpass and ramp project. Tosco owned a gas station and convenience store to which public access was substantially changed by the final configuration of the NJDOT project. The property in question had two points of access from public roads and as a result of the project was alleged to be rendered unusable, as both access points were eliminated by the ramp. A partnering agreement was consummated by the NJDOT with West Windsor Township, the municipality where Tosco was located. Tosco protested the proposed design to both the DOT and the township and followed up by proposing several design alternatives that allowed it to retain one entry point to its property. All eliminated a "perimeter loop road" located on an adjoining property and required the DOT to acquire ROW from that property owner. The Township engineer provided testimony that eliminating the perimeter loop road would be contrary to the municipality's policy which encourages this design approach to control traffic on commercial properties like the shopping center on the adjoining property. Without getting into the rest of the details, the court eventually found that NJDOT and the Township had deprived Tosco of its right to a hearing and remanded the decision back to the trial court.

The lesson learned in this case is that the DOT agreed in its partnering agreement with the Township to endeavor to abide by the Township's policies and regulations regarding access to properties from state highways. As a result, the partnering agreement put the DOT in a position where it was forced to decide between irreparably impacting a commercial enterprise or living up to the commitments it made in the interagency partnering agreement. In the remaining three cases, the agency prevailed. However, the issues brought to the courts were similar to Tosco: alleged failure to comply with commitments made in the interagency partnering agreement.

Personal Injury

This category is perhaps the most disturbing of the four types. It came as a surprise to the authors that an OCPC would factor into a personal injury law suit. However, the five cases (Fisher, Ginsberg, King, LaChance, and Nertavich) all directly referenced an OCPC as if it were a binding clause in the construction contract. In two cases (Fisher and Ginsberg), the suit named the GC and the owner as co-defendants, and in the Nertavich case, the court referred to the LaChance case, in which the OCPC was cited as evidence that the Pennsylvania DOT "placed all responsibility for job site safety upon the contractor." LaChance is also potentially a legal precedent as seen by the reference to it in Nertavich, with regard to an OCPC's enforceability with respect to the construction contract as follows:

> "The Estate [the plaintiff, i.e. LaChance] places undue emphasis upon this provision [the partnering clause in the contract]. First, it fails to account for the stated and limited purpose of the partnership, which is contract performance. Second, the contract itself provides that the *establishment of a partnership charter on this project will not change the legal relationship of the parties to the contract* nor relieve either party of responsibility for any of the terms of the contract. Regardless of the "partnership" description, the relationship of Baker and Penn DOT was that of parties to a contract, each with separate contractual obligations. One of Baker's express contractual obligations was the assumption of responsibility for project safety through compliance."

Hence, the court in the LaChance case did not see the OCPC as a modification to the underlying contract that required formal partnering. In Fisher, the plaintiff argued that the construction contract's partnering clause was breached because the owner and the GC failed to

undertake a formal partnering workshop and hold follow-up meetings, which allegedly would have caused a change in the project's traffic control plan. Responsibility for the injury in question revolved around whether or not a truck-mounted changeable message sign should have been installed prior to the crash in which the injuries occurred. The plaintiff alleged that the partnering workshop with the follow-up meetings between the Kentucky Transportation Cabinet personnel and the GC would have identified that the traffic control plan was faulty leading to the additional changeable message sign. This seems to the researcher to be a tenuous argument, but not as tenuous as the charge in Ginsberg that the proper execution of the project partnering agreement would have prevented a suicide that leapt from the bridge that was under construction.

SUMMARY

The major take-away from this review is that owners must ensure that they do not take the drafting of an OCPC at the end of a formal partnering workshop lightly. Regardless of the fact that the document includes the term "nonbinding" in the title, it is an official part of the contract's record and as a result, is discoverable in the legal claims process. As can be seen by the personal injury claims which attempted to create an obligation on the part of the parties to the OCPC, the document's content can and probably will be used against its signatory parties in the event of a court action. The GFFD theory does not even require that a document memorializing the commitment exist, making the dialog that occurred during formal or informal partnering subject to a potential claim of breach of implied covenant. Lastly, the increased use of interagency partnering agreements during the NEPA process should also be scrutinized to ensure that the public owner does not unintentionally create obligations that it cannot meet.

The above discussion does lead to one observation. The majority of the case law reviewed appear to support the notion that a partnering document of any sort is probably not binding and hence, no change in the current process is due. However, since it is obvious that the presence of a partnering relationship of any sort has been repeatedly referred to as evidence of an obligation of the parties to the agreement to abide by it, consideration of dropping the nonbinding appellation should be made with the idea that the OCPC be incorporated as a binding modification to the contract that regulates the behavior of the parties. While this may seem contrary the so-called "spirit of partnering" as expressed in the literature (CII 1991; Lahdenperä 2012), it is not without precedent in the private sector. The International Partnering Institute has already broached this idea in a White Paper that contained the following quotation:

> "For years we have believed that partnering must be voluntary. We believed the same thing about mediation. Recently courts have been experimenting with mandatory mediation. Low and behold they found that they had the same high percentage of resolved cases whether the parties entered into mediation voluntarily or because it was mandated. The same has shown to be true for partnering." (Dyer, 2011)

One option to develop and implement a binding partnering agreement is found in the Alliance contracts in use in Australia and New Zealand for the past two decades. In alliance contracting, the owner, the designer, and the contractor execute an agreement to jointly "share the pain and share the gain." Alliance contracts contain a mechanism for resolving disagreements at the project level by elevating them to a governing board made up of the principals of the entities in the alliance for a final decision in much the same manner as a US "dispute escalation ladder." (Gransberg and Scheepbouwer 2015). Lastly, the agreement is based on the principle that decisions should be made on a "best for project" basis and to secure that level of willing

collaboration, alliances depend of the founding principle that: "we all win or we all lose." (Ross 2006). A separate study of 217 Australian public infrastructure alliance contracts executed between 1996 and 2006 revealed that in no case was there an instance where the alliance members resorted to the courts to resolve a dispute (Noble 2010; McDonald 2011). From the US perspective, the idea of going two decades without the need to resort to the courts for relief must be attractive to both owners and their partners in the design and construction industries.

CONCLUSIONS AND RECOMMENDATIONS

This paper reviewed the US case law regarding partnered construction projects through the lens of whether the OCPC was in fact nonbinding. The conclusion reached from the review of 20 cases heard over the past three decades is that the document itself is truly nonbinding and that no changes to the present system are required to accommodate the instrument to the doctrine of GFFD. Therefore, the answer to the second rhetorical question in the paper's first section is: no, the OCPC is not a binding document.

However, those cases clearly show that the OCPC is a part of the partnered project's discoverable record and that clever lawyers have used it to try and prove that it represents a body of details on which the parties to the OCPC agreed and to which they "intended" to comply. The fact that reference to the OCPC has been made in personal injury claims shows the extent to which that document can be put to use to try to prove that a covenant was made in writing. One must remember that the OCPC's purpose is to avoid disputes and as such, it is not crafted in a manner that contemplates it as a potential piece of evidence if partnering fails. Therefore, it seems that some care must be given to the drafting of the OCPC to ensure that it can't be used against its authors in a third party personal injury suit or some other action that was not contemplated at the

time it was signed. Additionally, when viewed through the GFFD lens, there is little question that at the time OCPC was signed that both parties intended deal fairly in good faith with each other. Thus, if one party fails to live up to the expectations set forth in the OCPC and the matter ends up in court, the combination of the signed OCPC and the GFFD doctrine might be a very powerful argument that could sway the jury/judge/arbitrator's view of the dispute to the complainant's side and certainly influence the final decision. The split decision found in the Stanley case where the court found for the contractor and awarded delay damages based on the OCPC milestone schedule is an example of the situation. Therefore, the inference is not merely hypothetical.

This issue speaks to answering the first rhetorical question. Given that the "spirit of partnering" is about trust, collaboration, and open communication, having both parties make a "moral commitment" and "swear an oath of allegiance" to the project's goals makes the notion that codifying those mutually agreed details of organizational behavior seem logical. Negotiated contracts of all types have been successfully used throughout the history of the US construction industry. If both parties are *truly morally committed* to the point where they are willing to sign an OCPC that details how they will do business together on a given project, then giving that agreement the same force as the remainder of the contract to which it refers is not illogical. It also seems prudent to draft it in the same light with an eye to minimize the potential misuse of its contents by parties outside the construction contract itself. Therefore, the answer to the first rhetorical question is: if they are honestly committed to the nonbinding charter, they should be willing to incorporate the OCPC's details in a binding manner – an idea supported by the International Partnering Institute for some time (Dyer 2011).

Multi-party relational contracts are gaining traction in the US construction market and these already contain the verbiage regarding joint decision-making, maximizing joint utility and

416 the sharing of both gain and pain. Given the long-term success of these kinds of contracts seen in
417 the international market, it seems that the time is right to develop US versions that institutionalize
418 the principles of partnering, like shared risk and reward, in their construction contract boilerplate.
419

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423

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