

Novation to a design/build contractor

Why is the CIC Novation Agreement the correct basis for the novation of a consultant

Rachel Barnes, May 2009

There are two basic forms of novation agreement. The "*ab initio*" form (produced by the CLLS and often by clients) and the "*switch*" (produced by the CIC).

The "*ab initio*" form is based on the traditional form where the first client transfers his interest in the project to a second client, and the second client steps into the shoes of the first client as far as the consultant's appointment is concerned and is treated as if he was always a party to that contract in place of the first client.

Under a switch form of novation, the consultant switches from acting for one client – the original client – to acting for another client – the design/build contractor - at the point of novation. The same result can be achieved by bringing to an end the original appointment by the client, comprising the services to be performed up to novation, and then having a new appointment between the design/build contractor and the consultant comprising the services the consultant is to perform thereafter.

The two forms have very different liability implications and the reasons we strongly recommend the use of the CIC form are as follows:

- 1 The "*ab initio*" form is based on a fiction - the consultant is to become liable to the contractor for services carried out for the client prior to the novation on the basis that the consultant's client has been the contractor from the beginning. How can a consultant agree to this? Up until novation the consultant is working for his client, and he should have only his interests in mind. As he was not employed by the contractor at that time, the consultant was under no duty to advise the contractor, for example as to the sufficiency of his tender price, nor as to what contingencies and allowances he should provide for in that price.
- 2 The reason why contractors look for "*ab initio*" novation agreements is that if the consultant agrees to this retrospective duty of care, the contractor may have a remedy against the consultant if he can show that if he had been properly advised by the consultant, on the basis of the fiction that the consultant was acting for him at the time, the contractor would not, for example, have got his tender price wrong.
- 3 Neither form of novation agreement affects the position the client wishes to achieve – whichever is used, one point responsibility for design and construction can still be imposed through the building contract.
- 4 If the consultant accepts an "*ab initio*" novation the only way he can discharge the retrospective duty of care to the contractor which will be imposed on him is to advise the contractor (or contractors if there are several tenderers) as if he were his client from the moment the contractor comes on board and before the contractor is actually novated to him. This advice could include matters in relation to the design and how the contractor prices that design in his tender. However, such advice is:
 - adverse to the interests of the client;
 - puts the consultant in a position of conflict of interest;

Beale and Company Solicitors LLP

London: Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474

Bristol: Venturers House · King Street · Bristol · BS1 4PB · T: 0117 915 4021

Dublin: 92/93 St Stephen's Green · Dublin 2 · Republic of Ireland · T: +00 353 (0) 1428 3450

- could well increase the tender price(s);

It also raises issues of confidentiality – a consultant should reveal information which is material to his client's interests and if that client is now the contractor there may be confidential information relating to the consultant's original employer that he should give to the contractor, but cannot because of his duty of confidentiality to his original client.

If the consultant is not allowed access to the contractor before novation he cannot accept such a basis (even if these matters can be resolved) as there is no way he could discharge the requisite duty of care.

- 5 The CIC novation agreement does not leave the contractor without a remedy in respect of the design carried out prior to novation – the consultant gives a warranty in respect of that design previously carried out for the client and as a result the consultant will be liable to the contractor if he would have been liable to his original client.
- 6 The CIC novation agreement could leave the contractor without a remedy against the consultant if he has got his tender price wrong, for example because he did not make sufficient allowance for completing the design or made assumptions about the design which were not correct. However, a prudent contractor should take his own advice from his own consultants as to the way he should price the design and if that advice is negligent he will have a remedy against those consultants.

Alternatively, he can decide not to incur these costs and take the risk that he has got his tender price wrong.

The essential questions arising out of the "*ab initio*" form of novation are:

- Is the consultant prepared to accept the conflict of interest inherent in this form? Many consultants will not and the courts look harshly on professionals who act for two clients with different interests. No-one would suggest that the clients' solicitors should act for the client and the contractor when negotiating the building contract, which is a comparable situation.
- Is the client prepared to accept the potential conflict of interest and allow his consultant full access to the contractor prior to the building contract being completed?
- Is the client prepared for the consultant to release information belonging to the client to the contractor in order that the consultant can properly advise the contractor prior to the building contract being completed?

The same situation arises and the same questions apply when, having been novated to the design/build contractor, the client requires the consultant to continue to perform some duties for him, for example to report on the progress of the works or whether they comply generally with the consultant's design intent.

The CIC novation agreement recognises the reality of the design/build situation. The consultant works for his client at the outset and then from a certain stage works for the contractor.

For further information contact Rachel Barnes on 020 7420 8702 or r.barnes@beale-law.com.

1 May 2009