FACT SHEET

NOVATION OF DESIGNERS: COMMERCIAL DESIGN AND BUILD CONTRACTS

APS Fact Sheets address a range of key issues for construction risk management. For each topic, we provide a concise, simplified overview. Please refer to the provided sources of further information for full legal provisions and additional technical detail.
For clarity, in this fact sheet the principal designer is considered as a separate entity from the other designers. However, in practice one of the designers (and later, the D&B contractor) may take on the role of principal designer.

The contract structure for the early design phase of a D&B contract usually looks something like:

Novation means, essentially, that one of the parties to a contract (in this case, the designers’ appointments) is substituted by another party. The novation of each designer will be a short but detailed contract signed by employer, D&B contractor and the specific designer, substituting the employer with the D&B contractor and changing the contractual structure from

Novation
CAN THE PRINCIPAL DESIGNER BE NOVATED?

The position of a principal designer is more complex than that of the designers, because the CDM regulations state expressly that the principal designer must be appointed by the client. If a designer is also the principal designer and has used the same appointment document for both roles, this creates a problem if that designer's appointment is novated to the D&B contractor. The appointment could be split in two, as it were, with the designer portion being novated to the D&B contractor and the principal designer portion remaining with the employer. However, this would create a conflict of interest for the designer and the employer may not agree to the split either.

The simplest way round this is for the employer to appoint the D&B contractor in the normal way, and at the same time appoint them as the principal designer. This then satisfies the requirements of the CDM regulations for a direct appointment of the principal designer by the client/employer.

Usually the novation agreement between employer, D&B contractor and a designer who is also the principal designer, will oblige the D&B contractor will use that designer to assist them in performing the principal designer role. This is important for the employer in fulfilling their obligation to appoint a person/organisation with the necessary skills, knowledge and experience to act as the principal designer. The employer should already have made this assessment for the original principal designer before appointing them in the early phase of the project. The novated ex-principal designer will no longer be the “principal designer” and the novation agreement can state expressly that the D&B contractor is taking on this role.

The new contractual structure after novation would therefore be:

The D&B contractor will be named as the principal designer on an updated F10.

WHO HAS CDM LIABILITIES AFTER NOVATION?

The employer will still have the client duties under CDM 2015 and will be liable for breach of the regulations if they fail to perform them.

The D&B contractor will have the contractor, principal contractor and principal designer duties under CDM 2015 and will be liable for breach of the regulations if they fail to perform them.

The ex-principal designer will not have any direct duties under CDM 2015 (unless they are also a designer on the project). However, they will be liable to the D&B contractor under the novation agreement, for the principal designer functions they have agreed to carry out on behalf of the D&B contractor.

The Construction Industry Council has a Risk Management Briefing which describes novation in more detail. It is currently dated 2008 but still reflects the current law. Search online for "CIC risk management briefings" then scroll down to “Novation of consultants' appointments on design and build projects.”
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