

Novation of a Consultant in a Design and Build Project in Qatar

Adam Balchin

a.balchin@tamimi.com

November 2014

A novation needs to be properly documented and, if possible, the employer's initial agreement with the consultant and the contractor should require them to enter into a novation agreement if the employer later so elects.

How does it work?

A design consultant novation occurs when a consultancy agreement signed between an employer and consultant for initial design services, is replaced with a new contract on (usually) the same terms, under which the contractor engages the consultant as if the contractor had originally contracted with the consultant. A novation agreement documents this relationship change between the parties.

In a design and build procurement, it is common for an employer to appoint a consultant to prepare a design brief or concept design and then break ties with the consultant, and transfer the design and responsibility for the design to the main contractor by novation. The main contractor will be best placed to develop the design and the buildability of the design will become a natural consequence of this risk transfer.

Novation of a design consultant is often a desirable strategy for an employer, given that:

1. the employer has control of the early design and choice in the design consultant;
2. the contractor will assume a single point of contractual responsibility for construction as well as design; and
3. the transfer to the contractor of the responsibility for the design should promote a more buildable design, without undesirable document discrepancy risk being retained by the employer.

At the same time, the contractor will have the comfort that as the novation assumes that the contractor and consultant had entered into the novated consultancy agreement before any design had commenced, the contractor would have recourse against the consultant if it turned out that the consultant had made any errors in the design prepared before its engagement with the contractor.

Documenting the novation

In an ideal world the form of the novation agreement, including the agreement of the consultant (and the contractor) to any novation at the employer's discretion, will be included as an appendix to the initial agreement which appoints the consultant and the construction contract which appoints the contractor.

Articles 381 to 386 of the Qatari Civil Code deal with novation and require express approval of the parties prior to a novation taking effect. Thus, the consent of all parties is required to effect a novation of the design consultant in the scenario discussed above. The novation agreement achieves this purpose. A clause inserted in the original consultancy agreement and construction contract that requires the consultant and contractor to enter into a novation agreement, if the employer decides to pursue the novation option, will go a long way to facilitating any novation to occur in the smoothest manner possible.

If an employer does not obtain agreement to a potential novation from the consultant and contractor as part of their original agreements with the employer, there is no pre-agreement by these parties to the novation at a later stage. Ensuring that parties are 'on board' with the possibility of such a novation when they are originally engaged, will minimise the hardship that is likely to be encountered if the employer attempts to force a novation.

The drafting of the novation agreement should ensure that:

1. care is taken to avoid creating unnecessary conflicts of interest between the parties;
2. separate lists of services that the consultant will perform for the employer and the contractor are incorporated; and
3. the contractor and the employer are granted a suitable warranty by the consultant for any losses arising out of services performed pre-novation.

For an employer seeking to prepare and enter into a novation agreement, it is critical that the agreement is drafted in clear terms, as omitting obligations on the consultant or the contractor may defeat the point of the employer's intended transfer of obligations. It is also important that the novation agreement imposes only specific acceptable obligations and liabilities on the consultant and the contractor, without seeking to impose illogical duties on these parties. A clear and simple agreement will give the employer the best chance of having the agreement signed by the parties, if that is what the employer wants once the project is up and running. This article first appeared in Qatar Construction News October edition.