

CLIENT PRACTICE NOTE

DESIGN AND BUILD: NOVATION OR CONSULTANT-SWITCH?

A Client Practice Note by Eugenie Lip, Head of KPK Contracts Support Group

INTRODUCTION

“Successful integration of construction activities can take place only when there is a conscious decision to do so right from the start of the project. Here, the role of owners and developers in initiating integration and good practices is crucial.”

- Construction 21 Report

A clear message to the industry indeed as it basks in a phase of growth and construction activity amidst improving business optimism! As everyone knows, getting a building built involves an amalgam of activities and the prioritisation of these key factors – timing, risk allocation, cost certainty and quality. Those entrusted with the task of advising on the best procurement path know that no one method is best in all circumstances – yet the choice is arguably the most fundamental and important decision a client has to make before selecting the right people who can add value, not cost, on the project. An inappropriate procurement method can set back a client's development programme and may even lead to a re-think on whether or not to proceed.

While a lot has been said on how good (or sometimes controversial) the integration of design and construction processes is in preference to the divisive and fragmented relationship characteristic of traditional and conventional delivery methods, there is not much written about the front-end task of procuring consultancy services for architectural, civil and structural (C&S) and mechanical and electrical (M&E) work in design-build projects.

Against this backdrop, this practice note examines the typical methods used in the appointment of architects and engineers, and explores the possible alternative approaches that can be considered in the procurement of such consultancy services.

TYPICAL CONSULTANCY PROCUREMENT ARRANGEMENTS

Since the early days of design-build, various shades and permutations of the originally conceived system of design-build have emerged not only in the appointment of the Design-Build Contractor but also in the approaches for procuring consultancy services for the project.

Typically, the Employer engages the Architect and Engineers to prepare and make necessary submissions to the Urban Redevelopment Authority and for purposes of planning permission and building plan approval and also to prepare concept and scheme designs supplemented by design brief data and development parameters for formulation of the Employer's design intent and requirements.

A Design-Build Contractor develops the design and completes it and produces the necessary drawings, details and the like for construction. He may then be required through a 'novation' process to take over the Employer's professional services contracts with the Consultants.

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In novation, by a tripartite consent, the existing professional services contract between the Employer and each of the Consultants is replaced by a fresh contract between the Design-Build Contractor and the respective Consultant on the same terms. As illustrated diagrammatically in Figure 1, it can be arranged in one of the following ways.

Method 1 – Novation of Services Contracts of the Engineers

The Architect is retained as the Qualified Person (QP) for architectural works and to act as the Employer's Representative undertaking specific functions at various stages of the project from watching over the Employer's interests on aspects of administration, quality control and conformity with the contract and performance standards to preparing defects lists and carrying out final inspections at the end of the maintenance period.

OR

Method 2 – Novation of Services Contracts of the Architect and Engineers

Where the services contract of the Architect is novated, the Employer's own Project Manager employee will have to act as the Employer's Representative or sometimes, the Quantity Surveyor may be requested by the Employer to take on this role.

As regards the C&S Engineer and M&E Engineer, the Employer may either novate their services contracts to the Design-Build Contractor, or the Design-Build Contractor can appoint such Engineers of his choice subject to the approval of the Employer.

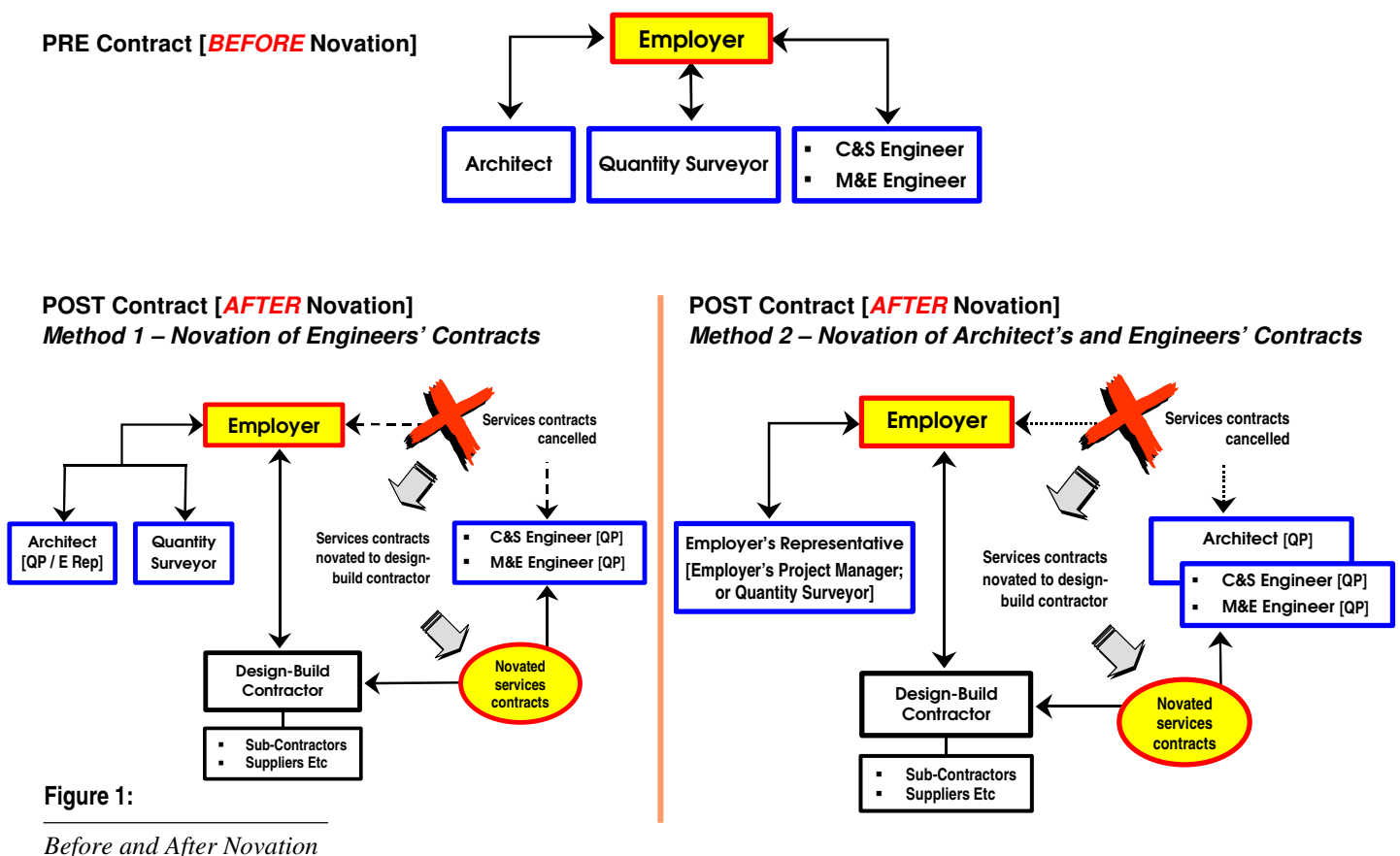


Figure 1:

Before and After Novation

Contractual Liabilities

During the pre-contract stage, the Consultants owe a duty to the Employer to take reasonable skill and care in preparing the concept and scheme designs, design brief data and development parameters. After novation, the Design-Build Contractor takes the place of the Employer in the original services contract. Whilst the Consultants

may still have the same design obligations and liabilities, these are now owed to a different party, the Design-Build Contractor.

Interestingly, in a Scottish legal case some 6 years ago, a Design-Build Contractor was denied recovery of losses arising from the novated Engineer's breach of duties for pre-novation services rendered as the Employer to whom such duties were owed at pre-novation stage suffered no losses. Whilst the judicial ruling was decided on the facts of the case, it is prudent to seek professional advice on the appropriate wordings to be incorporated in a novation agreement to protect against pre-novation losses arising from early design carried out for the Employer.

Employer-appointed Architect as Qualified Person (Architect QP) – Key Issues for Consideration

Ideally, the appointment of the Architect QP should be by the Design-Build Contractor who is responsible for all aspects of the design underpinned by an absolute obligation of fitness for purpose, statutory submissions, approvals and clearances and statutory supervision. An Employer intending to engage the Architect to perform the role of the Employer's Representative and concurrently to act as the Architect QP once the Design-Build Contractor has been appointed, needs to be aware of certain risk exposure that can arise from such arrangement.

The concern here is that the Design-Build Contractor may contend that since the Employer's Architect has made the statutory submissions (which in order to do so, would have involved checking the designs for compliance with the Building Control Act and the Regulations) and carried out supervision and inspection, the Design-Build Contractor cannot be held liable for any statutory non-compliance. As in the case of statutory submissions, the Design-Build Contractor can advance the argument that the Architect's approval of the detailed design for the architectural works has effectively exonerated or diminished his liabilities and responsibilities.

To address these concerns and ensure that the Employer's interests are properly protected, contractual provisions have to be drafted in the tender documents with professional legal advice to ensure that the Design-Build Contractor's absolute design liabilities and obligations remain intact.

SOME ALTERNATIVE APPROACHES

Consultant-Switch

In 'consultant-switch', each of the Consultants enters into a contract with the Employer usually for pre-contract services. The contract comes to an end upon award as such services would already have been performed (Figure 2).

The Design-Build Contractor and the Consultants then enter into a completely new 'follow-on' services contract for post contract services. In so far as pre-contract work performed such as design and advisory services are concerned, the Consultants while in a contractual relationship owe a duty of care to the Employer. After the 'switch', the Consultants act for the Design-Build Contractor who now has a design responsibility to the Employer.

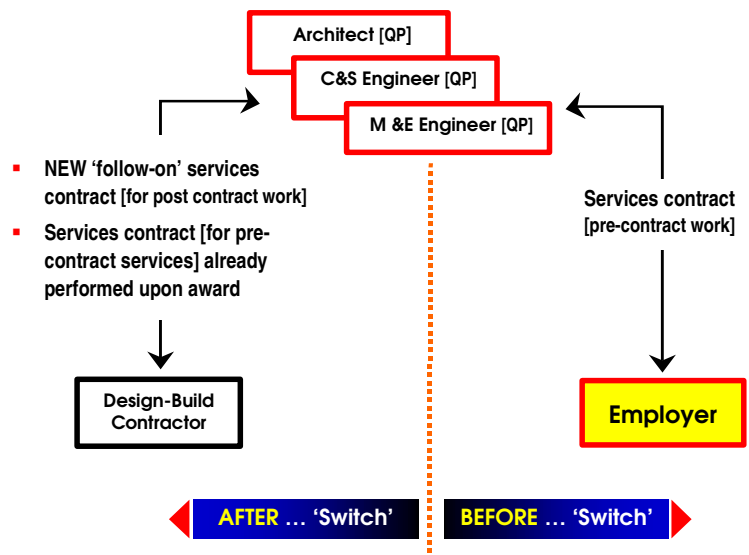


Figure 2:

Before and After 'Consultant-Switch'

Consultants in Technical Advisory Role

The C&S Engineer and M&E Engineer are commonly appointed to perform a limited role by undertaking specific functions in a consultative and advisory capacity, and typically assisting in the formulation of the design brief and performance specifications for civil and structural and mechanical and electrical works. They may also be retained during the construction phase to watch over the Employer's interests but are not usually involved in

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any aspect of the tendering process or in assessing and evaluating the Contractor's Proposals unless this task is included in the scope of services and their appointments continue into the construction phase.

The Design-Build Contractor appoints Engineers of his choice subject to the approval of the Employer. The Contractor-appointed Engineers then come under the control of the Design-Build Contractor when performing their statutory functions (Figure 3).

As regards the Architect, the Employer may either consider novating the services contract to the Design-Build Contractor, or explore a 'consultant-switch', or alternatively for continuity, retaining him as the Employer's Representative.

NOVATE OR 'SWITCH'?

The Employer may choose to novate the services contract with the Architect to the Design-Build Contractor upon award whilst appointing the Engineers on a technical advisory and consultative role to formulate the Employer's Requirements, and as a further option, retaining the Engineers during the construction phase to provide continuity throughout the whole of the project delivery process.

In lieu of novation, the Architect can also be appointed by the Design-Build Contractor through a 'consultant-switch'. With the recent amendments made to the Building Control legislation, the Architects Act and the Professional Engineers Act in September 2003 to promote design flexibility and encourage design-build procurement methods, a builder is allowed to appoint their own architect and/or engineer as the QPs in a design-build contract.

The Employer must however accept that under a 'consultant-switch' approach, he can no longer rely on the Consultants for advice at post contract stage. The task of watching over the Employer's interests in respect of architectural, civil and structural and mechanical and electrical works during the construction phase inevitably falls upon his own project management team to provide the necessary expertise and capabilities as the Consultants' contracts for pre-contract services would already have been performed after the tendering process is complete.

CONCLUSION

Each project demands individual consideration and professional advice when contemplating the best arrangement for procuring consultancy services for design-build projects.

While the prospect of continuing with the same design team appears alluring, clarity is the keyword when articulating with legal advice the roles and responsibilities of the various parties in the tripartite arrangement. Whether it is about putting together the new terms of engagement under a 'consultant-switch' regime or crafting a novation agreement, the understanding of the intent of the chosen arrangement to be entered into by the parties must be clearly expounded if obligations and liabilities are to fall where they should or ought to be.

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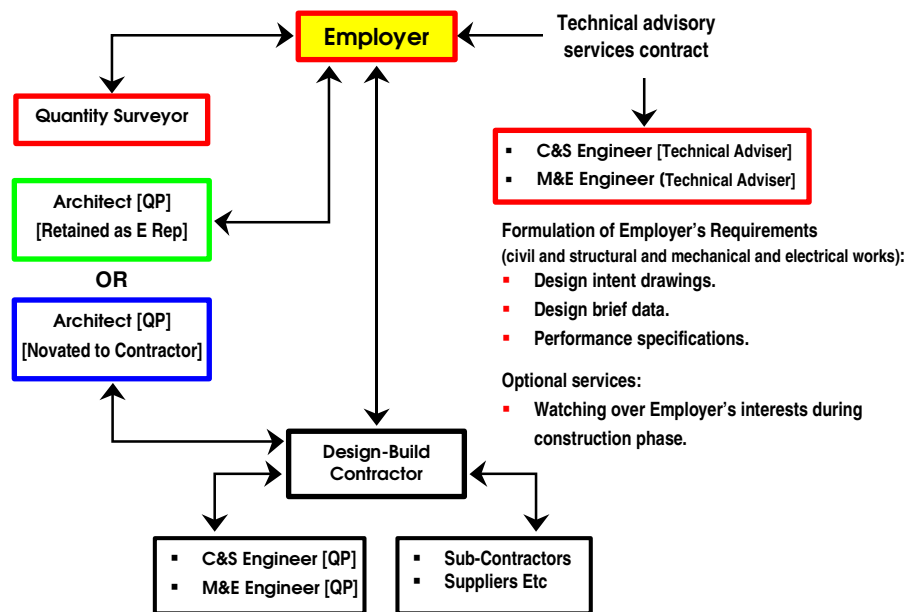


Figure 3:

Consultants in Technical Advisory Role