

TERMS OF ENGAGEMENT

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Introduction

When preparing the design consultancy agreement for the development of the new Hong Kong airport terminal some years ago, I was severely done over by the design consortium's contract representative (a large, heavily perfumed engineer with a penchant for loud stripy suits and pocket handkerchiefs). He was a force to be reckoned with.

He lead me through my drafting, page by page angrily pointing out split infinitives (I looked blank) and other transgressions. His *coupe de grace* was that I was presenting them with a *contract*, like some nasty commercial arrangement, and not an *agreement* which gentlemen and trusted friends would enter into. I felt times had changed, but did not have the courage to enlighten the formidable gentleman.

The international move away from the traditional split role of the professional architect, owner's agent and independent contract adviser (complete with Superman suit, as discussed in an earlier article) towards a more clearly defined role as designer was gathering momentum.

Design and construct contracts were growing in popularity. This has lead some to consider joint venturing with other consultants and/or contractors, and taking an equity position in the project. The rewards in such an approach can be considerable, as can be the risks. A joint venture across disciplines will not only strengthen the bid, but would also ensure that risk is spread across the whole design team. Then again, is the design team the right place for project risk?

When entering into joint venture arrangements for large projects, a number of issues need to be considered:

- the contractual arrangement with the client
- the relationship between members of the bidding consortium
- joint venture split on project implementation

Design-Build Arrangements

By their nature, design and build contracts are (or should be) single point responsibility contracts, where the owner passes on design risk, completion delay and many other risks normally managed for the owner by the architect as contract administrator.

Not surprisingly, design-build contracts are viewed as being more onerous when compared to traditional forms of contracting and they usually attract a premium which would make them suitable only for larger projects. Where there is good competition between bidders, and a well run tender, that need not always be the case.

The practice in New Zealand has been for the design team to work with the owner to develop plans for consenting purposes and to a point where the project can be tendered. Where the plans and specifications aren't definitive as to design, the pricing is on a guaranteed maximum price, which is then converted to a fixed price during design development.

With the award of the contract, the design team is *novated* to the contractor. Under this arrangement, the contractor replaces the owner under the appointment agreement. The terms of the appointment agreement remain unaffected by the novation and the owner continues to be liable, unless there is an express release. Similarly, the warranties from the designer to the owner remain in place with the contractor taking responsibility for paying for and delivery of designs after novation. It is also worth noting that, unlike the assignment of a benefit under a contract, novation (ie the assignment of obligations under a contract) can only occur with the consent of the other party.

The curious result of this is that the traditional relationships of owner/architect are turned on their heads, with the architect frequently looking uncomfortable following novation. It follows that the traditional form of appointment needs considerable modification to deal with the consequences of a decision to novate.

From the perspective of the architect, with the rest of the design team, it is important to get a clear understanding at the outset if novation is to be the approach to be taken, and get the form of novation agreement agreed at the outset. Key issues are to ensure that there is a single line of responsibility for design and that your insurance covers you for this. You should resist a release of liability for the owner following novation, if you can.

Joint Venture Agreement

An alternative to the novated appointment under a design and build contract is for the owner to call for tenders based on a pure performance based contract, and for the entire contracting team, including designers, to enter into a joint venture arrangement. Clearly, some design will be necessary prior to tender in order to obtain consents, but this need not prevent the design build contractor from varying the consents for innovation.

During the tender phase, typically a heads of agreement between the joint venture members is all that is required. This heads need only cover exclusivity for the tender process, confidentiality, tender costs, a tender management team and a framework for how management tasks, equity, risks, liabilities and responsibilities are to be allocated if the tender is successful.

Most joint venture bidders then find themselves in the position of having joint and several liability with their joint venture parties following award, either as a result of being in an unincorporated joint venture or parent company guarantees when an incorporated joint venture is set up. This effectively means that each individual member of the joint venture is liable for the entirety of the debts and liabilities under the contract. This is something

which can be covered with indemnities between the respective parties, but as between each joint venture member and the owner, there is little opportunity if any to avoid this exposure. It could be said that this is the price of equity participation.

It is certainly something which contractors have traditionally been more comfortable with, understanding as they do, managing all risk across a project.

Design Team Appointments

Whichever structure is adopted, you would normally expect a formal contracts and appointments to be put in place between the joint venture partners, which set out the scope of work, payment and defined the timing of deliverables.

Two forms of appointment are frequently used, whether on their own or as a basis for a modified form of appointment:

- Agreement for Architect Services (NZIA AAS 2, 3rd Edn 2000)
- Conditions of Contract for Consultancy Services, published by ALGENZ, Transit, ACENZ and IPENZ (February 2000)

Both forms of contract preserve the independent role of the architect when certifying issues between the owner and the contractor under the contract. This would need to be modified.

The limitation of liability under the NZIA form of appointment is set at \$250,000 in aggregate and a limitation period of 6 years from the date of the appointment, whereas under the ALGENZ form of appointment, these limitations are set in the special conditions. Neither form adequately excludes claims for loss of profits and other forms of pure economic loss (what used to be referred to as consequential losses).

Copyright and ownership of intellectual property in deliverables under the contracts is subtly but significantly different under each of the forms of contract. Under the NZIA form, property in all deliverables rests with the architect, with the client being entitled to retain one set as a record. Deliverables in which intellectual property rights exist also stay with the architect under the ALGENZ form, but once paid for the client has the right to use or copy the deliverables for the purposes set out in the scope.

Both agreements provide for termination by either party, however the ALGENZ agreement provides that the consultant can only terminate with cause, ie for breach by the client.

The payment and alternative dispute resolution provisions will both need revision to ensure they reflect the parties' needs and intentions. Generally, however, the balance of the clauses are relatively standard.

Some modification will be inevitable. The trick will be to agree any modifications while still retaining the level of professionalism inherent in the role of architect, unless of course the architect has descended into the world of commercialism and become an equity participant, in which case the gentlemanly language will be harder to defend.