Worse than useless  
Rachel Barnes, June 2005

It may indeed be sensible to have a form of appointment for all consultants, and scheduled third party rights may be administratively more convenient than collateral warranties. But, in the end, it is the content rather than the form of a document that counts, and in this respect the consultancy agreement produced by the British Property Federation is a depressing affair. This is a pity, because, apart from the awful novation agreement (of which more in a moment), I have seen worse.

The first problem is with liability. The services are to be provided to a standard of reasonable skill and care, but this is heavily slanted towards the standard of a specialist rather than that of the ordinary competent consultant that applies in claims of negligence. Strict liabilities are then added. The consultant must also comply with the employer's brief, which could itself contain strict or fitness for purpose or other uninsurable provisions. If that's not bad enough, the brief may also be amended by the employer.

Maybe, on a proper interpretation of the agreement as a whole, none of these sorts of provisions in fact impose a higher duty than to exercise reasonable skill and care, but it would have been reassuring to have this expressly stated.

The consultant must also comply at all times with the employer's 'lawful instructions', which can mean just about anything. The consultant's engagement can be terminated at any time forthwith for no particular reason, and no termination shall render the employer liable for losses suffered by the consultant, even if the termination is the employer's fault.

The fee envisaged is a lump sum. The right to additional payment for additional services is narrow. There will be no right to additional payment for modifying designs unless these are finally agreed, although they will still have to be done if requested. There will be no additional payment for preparing alternative designs, although a request to do this will presumably be a lawful instruction. There is potential here for large amounts of unpaid work. There is also no provision for additional fees in the event of disruption or prolongation.

There are occasional glimpses of a more balanced approach. The licence of copyright and other intellectual property rights is subject to fees having been tendered or paid, although only if agreed as properly due. The third party rights are subject to defences that the consultant would have been able to raise against the employer, which should mean that these rights do not have the effect of enlarging or altering the scope of the consultant's duty. This qualification, however, is significantly omitted in respect of the duty to the contractor that the novation agreement purports to set up.

Anne Minogue, in her column two weeks ago, seems to approve of the fact that there was no cap on liability, although much of the industry is coming round to the fairness of having a cap that is reasonable for the project in question. There is in fact provision for a cap in the third party rights for purchasers and tenants, although the BPF has rather torn the heart out of the traditional compromise whereby, in return for giving a collateral warranty, the consultant's liability would be limited to cost of repairs. The third party rights are subject to a net contribution clause, although the drafting of this could create problems.

The worst part of the agreement is the scheduled novation agreement. If the BPF really wanted to do the industry a favour, it would have advised abandoning this bizarre form of procurement altogether. Instead, it has endorsed a 'model form' that magnifies a hundredfold the conflicts of interest and related problems inherent in this process. Consultants should avoid the novation agreement like the plague (and anyone else would be foolish to assume it would protect their interests).
This consultancy agreement reflects the interests and concerns of one side only, which, in fairness, may have been all that was intended. It is to be hoped that an agreement that addresses the concerns of both sides will come along soon.

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