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CONSTRUCTION ENGINEERING & INFRASTRUCTURE

# New CIC and RIBA Forms

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## Webinar Outline

1. New CIC Novation Agreement and Collateral Warranties
  - a) New Suite
  - b) Key Changes
  - c) New Forms
  
2. New RIBA Professional Services Contract
  - a) New Suite
  - b) Key Changes
  - c) New Principle Designer Professional Services Contract 2018
  - d) Using RIBA Professional Services Contract 2018
  
3. Our views



## New CIC novation agreements and collateral warranties

NEW FORMS	PUBLICATION DATE
Collateral Warranty Consultant – Funder (second edition)	November 2018
Collateral Warranty Consultant – Purchaser/Tenant (second edition)	
<b>Collateral Warranty Sub-consultant – Client (first edition)</b>	
Collateral Warranty Consultant – Employer (third edition)	
<b>Novation Agreement - Ab Initio (first edition)</b>	
“Switch” Novation and Collateral Warranty	TBC



## Key Changes

- + Core of majority of forms unchanged (and reasonable)
- + Updates to reflect:
  - Legislation and case law; and
  - Industry changes.
- + Key changes in respect of liability
- + New forms:
  - Novation Agreement – Ab Initio.
  - Collateral Warranty – Sub-Consultant Client.



## Liability (1)

+ New “no greater or longer lasting” liability clause:

*“4. Under or in connection with this Agreement (including without limitation in respect of any duty or liability arising independently of this Agreement):*

- (i) The Consultant shall have no greater or longer lasting duty or liability than it would have had; and*
- (ii) Any loss and/or damage payable by the Consultant shall be no greater or longer lasting than it would have been.*

*if the Purchaser/Tenant been named as joint client (with the Client) under the Appointment.”*

+ Reflects common PI insurance arrangements.

+ Justified by case law.



## Liability (2)

- + Other liability protections remain, e.g.:
  - Equivalent rights of defence clause.
  - Net contribution clause.
  - Limit to reasonable cost of repair (Purchaser/Tenant).

- + Clause 2(d) removed:

*“the obligations of the Consultant under or pursuant to this Agreement shall not be released or diminished by the appointment of any person by the Purchaser/Tenant to carry out any independent enquiry into any relevant matter.”*

- + Could have limited defences available to Consultant.
- + Helpful change.



## CIC Novation Agreement – ab initio

- + For use when a consultant engaged by a building owner or developer is novated to a new client, who may be a design and build contractor, or another developer or other organisation.
- + Effect as if the consultant had been appointed by the new client from the outset.
- + “*Legal fiction*”.
- + Conflict of interest.
- + But – now very common.



## CIC Novation Agreement – ab initio (continued)

- + Includes drafting to help mitigate risks, e.g.:
  - “the Consultant shall have no greater or longer liability to the Contractor/New Client hereunder than it would have owed to the Client under the Appointment” (Clause 1)
  - “the parties acknowledge that the Consultant in carrying out its obligations under the Appointment prior to the date of this Novation Agreement was acting for the benefit of and solely on the instructions of the Client” (Clause 4)
- + Although note, “no loss” provision
- + Employer/Consultant Collateral Warranty can be used with “ab initio” novation.
- + Switch form to be updated.





## Using CIC Collateral Warranties and Novation

- + CIC Collateral Warranties remain very reasonable.
- + Resist/limit collateral warranties and novation if possible
- + CIC documents a useful starting point if collateral warranties/ab initio novation cannot be avoided.
- + Good examples of reasonable collateral warranties and novation agreement.
- + Good reference points when negotiating collateral warranties and novation agreements.

## New RIBA Suite

PREVIOUS FORMS	NEW FORMS (November 2018)
RIBA Standard Agreement 2010 (2012 revision): Architect	RIBA Standard Professional Services Contract 2018 : Architectural Services
Concise Conditions of Appointment for an Architect 2010 (2012 revision)	RIBA Concise Professional Services Contract 2018 : Architectural Services
RIBA Domestic Project Agreement 2010 (2012 revision): Architect	RIBA Domestic Professional Services Contract 2018: Architectural Services
RIBA Sub-consultant Agreement 2010 (2012 revision)	RIBA Sub-consultant Professional Services Contract 2018
	RIBA Principal Designer Professional Services Contract 2018



## Changes

- + Core of conditions very similar.
- + Updates to reflect:
  - Legislation (e.g. GDPR)
  - Changes in market
  - Clarifications to 2012 forms
- + Key changes:
  - Liability
  - Duty of Care
  - Payment
  - Novation
  - Collateral Warranties
  - Intellectual Property and BIM
  - Termination



## New Suite - Key Documents

- + Agreement is divided into four main parts:
  - The Agreement
  - The Contract Details (former Project Data)
  - The Schedule of Services
  - The Contract Conditions
    - Definition of Terms
    - Main Clauses



## Liability

- + Limitation of liability unchanged.
- + Liability limited to amount of PI insurance specified (clause 7.2.1).
- + Contract Details requires PI insurance on an each and every claim basis.
- + Aggregate liability remains unlimited.
- + Net contribution clause remains (and in Concise & Domestic).
- + No exclusion of indirect or consequential loss.



## Duty of Care (1)

- + Standard Agreement 2010 (2012):

*“reasonable skill and care and diligence in accordance with normal standards of the Architect’s profession”* (clause 2.1)

- + Professional Services Contract (2018):

*“the reasonable skill, care and diligence to be expected of an Architect/Consultant experienced in the provision of such services for projects of a similar size, nature and complexity to the Project”* (clause 3.1)

- + Slight increase.
- + Reflects standard market approach.

## Duty of Care (2)

- + Duty of care is now an “overriding” duty:

*“Notwithstanding anything that may appear elsewhere to the contrary, whether under this Contract or otherwise, **the Architect/Consultant’s duties and obligations shall be deemed to be subject to the exercise of such reasonable skill, care and diligence and nothing** contained in this Agreement or elsewhere shall be construed as imposing on the Architect/Consultant **any greater duty** than the exercise of such reasonable skill, care and diligence”.*

- + Seeks to qualify strict obligations.
- + Reflects recent case law (MT Højgaard A/S v E.ON).
- + Very positive change.

## Payment

- + Payment frequency options have been expanded at clause 5.
- + Additional option of using a draw-down schedule allows greater flexibility.
- + Entitlement to additional payment remains robust:

*If the Architect/Consultant is involved in extra work or incurs extra expense for reasons beyond the Architect/Consultant's reasonable control.*

- + Useful limit on right to withhold:

*The Client shall not withhold any amount due to the Architect/Consultant under the Contract unless the amount has been agreed with the Architect/Consultant or has been decided by any tribunal to which the matter is referred as not being due to the Architect/Consultant.*





## Collateral Warranties

- + To be selected in item M of the Contract Details.
- + If selected required within 14 days (clause 4.4).
- + Beneficiaries: 1) Client on novation, 2) first purchaser of freehold/leasehold, 3) financier
- + Ensure form of collateral warranty clearly stated
- + Consider cap on beneficiaries
- + RIBA recommends the use of the CIC Novation Agreement: Ab Initio (2018) and CIC Collateral Warranties.
- + Third party rights can also be required.



## Novation

- + Client may novate to D&B Contractor (clause 4.5)
- + Novation must be on specified terms (clause 4.6-4.7):
  - As if Architect had been appointed by Contractor from the outset
  - That include an acknowledgement that prior to novation Architect was performing services solely for Client
- + Ab initio novation therefore required in similar form to CIC Ab Initio Novation Agreement 2018 (which is recommended by RIBA)
- + However, Architect “*under no obligation to agree to novation*” .....
- + .....can terminate on at least 7 days’ notice (clause 4.8)
- + Useful “get out” from novation
- + Needs to be managed carefully, consider impact on fee

## Intellectual Property Rights

- + Licence similar but wider.
- + Right to revoke for non-payment remains.
- + Note - limit on client using documents after termination, deleted.
- + Architect liable for reasonably foreseeable and fully mitigates losses as a result of breach of copyright (clause 6.6).
- + Akin to a limited indemnity.
- + Still a reasonable position.



## BIM

- + Documents to be provided to the Client in PDF format only, unless BIM or an alternative format has been agreed and set out in item L of the Contract Details.
- + No warranty re integrity of electronic data delivered in accordance with Item L.
- + No liability for data corruption.
- + Use CIC Protocol if BIM a contractual requirement



## Termination

- + New specific circumstances in which Architect/Consultant can terminate:
  - non-payment;
  - Material or persistent breach
  - If prevented from or impeded in performing the Services for reasons beyond control
  - If novation is not agreed
  - Force majeure
  - Any other reasonable grounds
- + Still open ended but useful to have some clear additional grounds
- + Note:
  - Client wider right to terminate for any reason
  - Obligation to provide documents on termination



## New Principal Designer Professional Services Contract 2018

- + For appointment of Principal Designer under the CDM Regulations 2015.
- + RIBA recommend that the default choice for the Principal Designer should be the Architect/Lead Designer.
- + Architectural Services to be under a separate and distinct Professional Services Contract.
- + Very similar to Standard Professional Services Contract.
- + Services – qualify PD obligations by “so far as reasonably practicable”
- + Useful addition
- + Preferable to APS form/passing reference to PD role in services



## Using the RIBA Professional Services Contract

- + Forms intended to be easier to use.
- + Contract Details and Schedule of Services need to be completed.
- + Contract Checklist is included for consideration before signing the Contract.
- + If referring to RIBA PSC in fee proposal include Contract Details and Services.
- + Consider amendments (including in respect of liability).



## Concluding Thoughts...

- + Reasonable standard forms.
- + Pleased to have contributed to the documents.
- + Useful to have CIC forms referred to in RIBA.
- + CIC forms useful reference point when negotiating collateral warranties and novation agreements.
- + RIBA Professional Service Contracts 2018 include useful drafting, including the overriding duty of care...
- + ...but consider amending liability position.



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## Upcoming Webinars

- + Alliancing and NEC4, 29 May 2019
- + An introduction to arbitration, 13 June 2019
- + A practical perspective on arbitration, 27 June 2019
- + Managing payment from developers, 4 July 2019
- + Details [here](#)