



Australian
Institute of
Architects

Code of Novation

February 2022



Cover Images: Ian Potter Southbank Centre
Photographer: Trevor Mein

Architect: John Wardle Architects
Client: University of Melbourne
Contractor: Lendlease, Design and Construction Services
Contract: Design and Construct, Novation
Point of Novation: 90% Construction Documentation
Project Duration: 2015–2019

Selected Awards:

Australian Institute of Architects, National Architecture Awards 2020, Daryl Jackson Award for Educational Architecture
Australian Institute of Architects, Victorian Architecture Awards 2020, Marion Mahony Award for Interior Architecture
Australian Institute of Architects, Victorian Architecture Awards 2020, Award for Educational Architecture

Tendered at 90% complete Contract Documentation project stage, the Ian Potter Southbank Centre was procured under a modified Design and Construct form of Contract with a Guaranteed Maximum Price and share of savings provision.

EXECUTIVE SUMMARY

This document is prepared by the Australian Institute of Architects (the Institute) to establish sector-wide principles to guide the procurement of projects using novation. For the purposes of this code, novation means the transfer to the Head Contractor of the Consultant's obligations under an original consultancy agreement with the Principal.

The Code of Novation promotes holistic improvements to the industry-wide practice of novation to provide a 'best value' approach to safer environments and creating quality built outcomes. This work is an important step towards addressing the loss of public confidence in the construction industry resulting from recent high-profile incidents across Australia and globally.

This document has been prepared from the evidence gained from 262 practices nationally in the Institute's 2019 Architects' Novation Survey, which systematically interrogated 480 case study novated projects carried out by these practices. The results of this initially architecturally focused work were then distilled into a 'draft' code of novation, which focused on the key areas where broader industry wide change could be addressed. The Draft Code was then refined and enhanced through an extensive process of stakeholder engagement and consultation with developers, consultants, contractors, project managers, government and industry bodies and legal experts.

The Code of Novation is an industry-wide framework, defining standards of conduct that promote good design, safety and quality standards throughout the entire procurement process, thereby mitigating project risk and resulting in significant benefits to the built environment and broader community.

INFORMATION ABOUT THE AUTHOR

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 12,000 members across Australia and overseas.

The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture.

The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

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INTRODUCTION

There are a number of standard methods of procurement for architectural consultancy services.

This document specifically examines the novation procurement method in line with the Institute's role in providing guidance and advice to government agencies, members, clients and consultants.

In April 2019, the Institute undertook a national survey of its members to gain information on the outcomes of novated projects.

Novation is utilised in many sectors including commercial, government and university projects. The survey found that over 64% of member practices derived over 50% of their revenue through design and construct contracts that have been novated. This is a significant part of Australia's overall construction sector which represents 9% of our national economy or over \$360b in GDP. While some large public projects (such as public private partnerships) use non-novated structures, much of the guidance in this document is still relevant to those projects, including the importance of transparency, collaboration, and ensuring that those who superintend and inspect construction work have the skills and powers required to do so vigilantly and effectively.

A novation procurement strategy can provide positive built outcomes and is generally supported by the architectural profession. Many benefits can be delivered through novation including improved buildability, time and cost outcomes, design resolution and access to subcontractor expertise. The survey also identified areas of risk and potential contractual scope conflicts. This document considers these issues and provides discussion and advice in order to facilitate an industry wide approach to reducing these risks and providing appropriate settings to facilitate the benefits of this procurement method.

Overwhelmingly, the survey supported the need for a mutually agreed approach to novation to provide the best outcomes for clients, consultants, head contractors, and the end building users with 83% of respondents supporting the development of a Code of Novation (the Code). The following Code is based on the results of the survey and in consultation with 262 large¹, medium and small architectural practices nationally and the systematically gathered findings of 480 novated projects undertaken by these practices.

The Code is intended to be a guideline document covering many matters including the level of completeness of documentation at the novation point, input into the Principal's Project Requirements (PPR), head contractor selection, timely access to cost plans and construction program for consultants, protocols for product substitution, and transparency of the scope of service for all consultants. It discusses communications protocols, value management, client relationships and the independence of the superintendent role during the construction phase.

In this document, the term *design and construct* refers only to the procurement model where consultants are engaged for design under an original consultancy agreement with the principal, and subsequently novated to the head contractor for the remainder of the project – it does not refer to design and construct without novation.

¹ The Victorian Chapter Large Practice Forum Ambassador Group members, Architectus, ARM Architecture, Bates Smart, Cox, Denton Corker Marshall, Elenberg Fraser, Hassell, John Wardle Architects, Lyons and Woods Bagot were major contributors to the project.

Construction is widely understood to have three fundamental variables that can be weighted and adjusted: time, cost and quality. These can be used as levers to manage financial and construction risk within the design and construct procurement models.

In this context, *time* is the total construction program, *cost* refers to the total construction budget and *quality* includes durability, safety, maintainability, workmanship, spatial layout, coordination of works.

The Code of Novation attempts to establish a clear set of expected standards of conduct, and methods to better manage risk and maintain quality, resulting in improved outcomes for all parties and the built environment. The format of the Code sets out numbered principles with explanatory guides and notes in italics beneath each principle. It is intended to open a conversation with all parties to agree and manage the novation & construction process specific to each project early in the process.

The key aims of the Code of Novation are:

- To provide guidance on the fair and proper negotiation and performance of contractual arrangements for all parties in a novated consultancy agreement.
- To provide advice to principals on best practice in the procurement of building works under a consultancy agreement that uses novation.
- To provide an industry-wide framework, defining expected standards of conduct to promote good design, safety and quality standards throughout the entire procurement process, thereby mitigating project risk and resulting in significant benefits to the built environment and broader community.

The Code of Novation has been revised and refined through an extended consultation period with a broad range of both government and industry stakeholders.

The Institute will continue with ongoing consultation following the release of the Code with government agencies and the wider construction industry including federal and state government ministers, Property Council Australia, Master Builders Association, Engineers Australia, Australian Institute of Landscape Architects, quantity surveyors, lawyers and project management to assist its communication, implementation and review. This will help ensure it becomes a widely used industry code.

DEFINITIONS

The following defined terms are used in this document:

Architect: means the architectural consultant.

Consultants: means architects, engineers, landscape architects, quantity surveyors and others providing professional industry design and advice services.

Consultancy Agreement: (or original consultancy agreement) means the contract between the Principal and the Consultant, which will be novated to the Head Contractor.

Design and Construct (D&C): means (for the purposes of this document) a procurement model in which the Consultants are engaged for design under an original contract with the Principal, and subsequently novated to the Head Contractor for the remainder of the project. *(Other design and construct procurement models which do not include novation are outside the scope of this document.)*

Design and Construct Contract: means the contract for design and construction between the Principal and the Head Contractor.

Lead Consultant: means the Consultant responsible for coordinating the work of the consultant team (usually the architect).

Head Contractor: means the party responsible for the physical construction works on the project site, including the coordination of all Subcontractors' inputs for design, documentation and physical construction of the works on the project site. Post novation the Head Contractor becomes responsible to the Principal for design and manages the Consultants' design services.

The Institute: means the Australian Institute of Architects

Novation / Novated: means the process of effectively transferring the Consultant's obligations under an original contract with the Principal to another party, in this case a Head Contractor, as part of a design and construct procurement model.

Novation Deed: means the legal instrument between the Principal, Head Contractor and Consultant which implements novation.

Principal: means the party that formed the original contract with the Consultants who are subsequently novated to the Head Contractor. The Principal may either own the site / project or represent the owner/s of the site project.

Principal's Project Requirements (PPRs): means the documents that form part of the design and construct contract that embody the Principal's brief up to the point of novation and against which the final built form will be assessed. The Head Contractor must deliver what is documented in the PPRs, which can only be varied by agreement with the Principal.

Subcontractor: means a contracting party for a part of the physical construction of the works on the project site, directly engaged by the Head Contractor.

Superintendent: means the superintendent who administers the design and construct contract.

CODE OF NOVATION

Novation

1. **Brief, scope and contract terms:** The full consultant team should be engaged with aligned scope of services prior to novation, for example: Access Consultant; Facade Engineer; Vertical Transport; Acoustic; Geotechnical, Traffic and Sustainability consultants in addition to architectural and traditional engineering services..

If these are not engaged early on to save costs on consultant fees and presumed to be part of the Head Contractor's responsibility, their inputs are then not able to be fully considered and integrated resulting in gaps of the delivered outcome and possibly a built outcome that is less or not aligned with the Principal's expectations.

2. **Terms of consultancy:** The original terms of the consultancy agreement which formed the basis of the agreed contract and scope of work between the Principal and the design team should remain in place after novation.

Modifications can create scope of works and responsibility conflicts and gaps. Any changes should be individually negotiated with the design team against the original consultancy scope.

The novation deed should provide for a clean transfer of the Consultant's liability from the Principal to the Head Contractor, without imposing on the consultant duplicated or additional liability and therefore risk to the project during both construction and throughout the life of the finished outcome.

3. **Completeness of design:** A level appropriate to allow for a well-articulated design scope and coordination suitable for the complexity of the project should be established and defined prior to novation:

- 3.1 A significant proportion of the design development phase should be completed prior to novation. Depending on scale and complexity, it may be appropriate to complete construction documentation of major parts or all elements.

- 3.2 The Principal and Consultants should agree and define the required level of completion for key packages of design work prior to novation.

The experience of the profession is that quality is generally improved if novation occurs when certain aspects of the design are substantially developed/detailed/resolved.

For the purposes of this document, the end of design development (100% DD) is considered to be when the design scope has been articulated in accordance with the agreed brief and/or PPR.

A common complaint from Subcontractors is that the partial design development information they are tendering on does not have sufficient detail and is not properly coordinated. They may then increase their price to cover potential risk. This leaves them to price the project based on prior experience, expectations for comparable projects and even their relationships with those Consultants involved in the project, not the project specific information. The Subcontractors' assumptions may not align with the Principal's project expectations and/or the PPR. Setting a later point of novation reduces this risk as it allows for greater levels of co-ordination, more detailed specifications, and further refinement of construction detailing to allow the Subcontractor greater insight into their tender price and expected deliverables.

On the other hand, the increased level of documentation needs to be carefully balanced as it can be more costly and time consuming to alter highly or fully progressed documentation should the Head Contractor and Subcontractor prefer an alternative method of construction, material selection or detailing. Alternatives may be desired by the Principal or Head Contractor to improve the ease of construction, risk mitigation or for cost savings.

Clear definition of completion levels is crucial to all parties' understanding of what is being tendered and how 'shovel ready' a project is once a Head Contractor is engaged.

4. PPR : The Consultants should be provided with access to review and provide input to the Principal's Project Requirements (PPRs) and or agreement for lease (AFL):

4.1 prior to issue for tender;

4.2 prior to inclusion in the construction contract;

The PPRs form part of the Head Contractor's contractual obligations, and if a functional brief for the project is included, the Consultants should actively contribute in consultation and review of this document with the Principal to avoid conflicts of information between 'drawn', 'specified' and 'briefed' documents.

5. Product substitutions: Protocols and scope of service for product substitution should be established prior to novation. These protocols should include:

5.1 recognition of the additional time and expense necessary for proper review by the Consultants;

5.2 clarity of expectation for reviews by the Consultants, for example design intent, performance, compliance and/or appearance of any proposed product substitutions.

The experience of the profession is that quality is generally improved if product substitution is reduced or controlled by the Principal via scope and contractual provisions to ensure like for like performance and appearance.

Suggested protocols include:

- *All substitutions should be identified by the Head Contractor and Subcontractors to the design team in writing.*
- *The Head Contractor should submit full and complete information for review of the specified and suggested substitution including manufacturer's literature, certificates of compliance and physical sample selections to allow for a holistic review of performance, compliance and appearance.*
- *Submissions for substitutions should specifically be reviewed by the Head Contractor for compliance with the performance and intent of the originally specified materials.*
- *Sufficient time and additional fees for review of substitutions should be allowed for in the consultancy agreements to permit the Consultants to perform proper reviews.*

Consultant Team

- 6. Consultant Scope:** The Architect should be provided access to the scope of service for all other Consultants to deliver the project:
- 6.1 This is particularly important if they are appointed as the Lead Consultant or otherwise involved in the coordination of other Consultants' work.
 - 6.2 All Consultants' scope of work has an impact on the Architect and therefore requires an understanding of their scope and responsibilities.
 - 6.3 This includes when other Consultants' scope of services is limited or excluded.

Coordinating the inputs of many disciplines is often a key role of the Architect. This is compromised if they do not have visibility of the full or limited scope of services for all Consultants. This transparency is required to identify what is and is not in scope for each Consultant and identify conflicts and gaps between them.

- 7. Lead or Coordinating Architect:** The Architect (particularly if appointed as Lead Consultant) is to be provided with full access to all key Consultants involved in the design, documentation and delivery process for consultation on issues that relate to the design and documentation for the duration of the works, pre and post novation.

The experience of the profession is that Head Contractors can at times limit direct contact between the Architect and Consultants after novation. This limits the ability of the Architect to properly develop the design and coordinate with the work of the other consultants.

- 8. Subconsultants:** The Head Contractor is responsible for the management of Subcontractors. They should facilitate, manage and provide consultants with access to liaise with appropriate Subcontractors and Subconsultants post novation to consult on issues that relate to the design, documentation and construction of the works included within the design on mutually agreed terms.

For example, once the Facade Contractor is engaged, setting up a series of multiple collaborative workshops including the Contractor, Facade Contractor, Facade Engineer, Mechanical Engineer, Acoustician and Architect to workshop the detailed resolution of facade details prior to commencement of facade shop drawings.

Communication

- 9. Communication Protocols:** Clear and transparent communication protocols should be established between the Principal, Head Contractor, Superintendent and Consultants prior to novation. This should be incorporated into the novation deed;
- 9.1 The Principal should be able to make enquiries directly to the Consultants in relation to the services and the project but not able to give instructions to the Consultants.
 - 9.2 The Consultant should be able to advise the Principal in writing, copying the Head Contractor, if they become aware of departures from the design compliance, safety and quality standards that will negatively affect the quality of any aspect of the project without penalty by the Head Contractor.

It is important that the Principal can seek and receive advice from the original design team regarding decisions that may affect quality after novation.

This is particularly important in light of safety and fit-for-purpose design documentation and materials.

If transparency of communication protocols between the Principal, Head Contractor, Superintendent and Consultants are not established and maintained then the procurement process can be manipulated to distort project risk and have a detrimental impact to the quality delivered.

- 10. Project Meetings:** In order to streamline communication and strategic decisions, the Lead Consultant should be present at project control group (PCG) meetings and be included in discussions on strategic decision-making processes pre and post novation. This should be incorporated into the novation deed.

It has become common practice that the Project Manager and Head Contractor run the PCG meetings without the Architect, despite the fact that the Architect is considered the 'Lead Consultant'. As a result, the process lacks valuable insight and strategic input from a design coordination perspective with regard to managing time, cost and quality in minimising project risk & ensuring a quality outcome and achieving the PPR.

Value Management

- 11. Construction cost:** Cost estimates and cost management processes should be made visible and available to the appropriate Consultants:

- 11.1 to allow for the provision of appropriate advice to the Principal prior to novation;
- 11.2 to allow for appropriate engagement in value management processes prior to and post novation;
- 11.3 to allow for responses to issues arising and impacting on the design quality, regulatory compliance and safety prior to and post novation.

The Architect and Certifier, among other Consultants, have a holistic view of a project, across all disciplines but also more broadly, the impact a building has on its functions, the users and public, and its context. They are well placed to provide detailed and specific advice regarding the value of different building elements, their contribution to the overall project and how best to manage these in relation to cost.

Traditionally, the Architect would work in close collaboration with the Principal and Quantity Surveyor to refine a project to an estimated budget. In recent years, both prior to and after novation, the Architect has often been removed from this process. The Architect, as Lead Consultant, is in an ideal position to provide the Principal with significant insight into value for money decisions.

Value management, if it is to be incorporated, should be integrated within the overall program with a commensurate time and cost allowance for the Architect, relevant Consultants and Principal.

In order to achieve the optimum outcome/value a Value Management process that occurs before novation ensures the client and consultant team are able to negotiate transparently with the full consultant team, quantity surveyor and possibly preferred Head Contractor to ensure expectations are aligned and clearly articulated prior to the consultant team being novated from the Principal to Head Contractor.

Head Contractor

- 12. Head Contractor Selection:** In the interests of optimum Head Contractor selection, appropriate Consultants should be involved in assisting with the Head Contractor selection process, including, but not limited to, the shortlisting of tenderers:

- 12.1 to assist with selection of Head Contractors that are appropriate to the project scale and type;
- 12.2 to comment on past relevant experience with the potential Head Contractors prior to inclusion in the tender process.

Inclusion of the Consultants in this process would benefit the Principal and the project outcome through leveraging their previous project experience with comparable projects and appropriately experienced Head Contractors.

- 13. Consultant agreements at tender:** The Head Contractor at the time of tendering for the construction work should be provided with all Consultant agreements.

Without such access being provided to the Head Contractor at the time of pricing they are unable to properly account for what is envisaged for the scope of works of the Consultants.

This can result in the Consultant agreements and scope of works not being fully novated to the Head Contractor (refer to code 1), or further negotiation in price once this information is revealed during negotiation with the Head Contractor.

- 14. Order of precedence:** Consultants should be involved in the creation of order of precedence of documents included within the construction contract prior to novation. Consultants should be provided a copy of the final version prior to novation.

Without involvement in this process, the Consultants can be left to deliver a project based on an established order of precedence of documents that may not be aligned with legal precedence, or support delivery of the PPR and/or a quality outcome in line with the Principal's expectations.

Construction Phase

- 15. Superintendent Selection:** The Principal should select and engage an experienced, qualified and independent Superintendent to administer the design and construct contract.

It is important for the Principal to be aware that the Architect's role during the construction phase under novation is limited to the scope detailed in the novated consultancy agreement. This places more emphasis on the independence of the role of Superintendent and the Superintendent's ability to observe quality of construction and administer the contract.

- 16. Site access:** To facilitate the level of observation required to perform their scope of works within the consultancy agreements, all Consultants involved in the construction process should be provided with appropriate access to the site. This should be incorporated into the design and construct contract.

The Head Contractor should plan and mutually agree with the Consultants for their regular inspections throughout construction. This ensures they are able to view construction at regular intervals and at key hold points / inspections, ensuring they can provide accurate reporting, certificates and monitoring of the construction works in accordance with their agreed scope of works.

- 17. Reports and certificates:** To ensure transparency and accurate reporting of the project, the design and construct contract should require the Head Contractor to submit original versions of all reports and/or certificates prepared by the Consultants to the Principal and Superintendent. The wording of certificates must realistically represent the level of observation of the construction works agreed in the consultancy agreement and scope of works.

Alternatively, the novated Consultants can issue certificates/notices to both the Head Contractor and Principal directly if all parties agree to this direct and transparent approach to project reporting.

It is not uncommon for Consultant to be asked to certify or warrant the works through drafted design certificates that extend beyond their scope, or that they are not professionally able to comment on, or even that extends beyond their level of insurance cover.

Early agreement to the level and form of reporting and certification can ensure accurate, timely and insurable reporting that is aligned with the Consultant's scope of works.

- 18. Construction program:** To avoid unintended errors and omissions, project procedures should allow sufficient time for the activities required by the Consultants, noting:

- 18.1 The Head Contractor should provide a sequential program(s) for construction, clearly indicating the timing for submission and review of construction documentation to be prepared by the Consultants.
- 18.2 The Head Contractor should provide a sequential program(s) for submission and review for all shop drawings, samples submissions, first completed examples of and prototypes.
- 18.3 Time periods for shop drawing and sample reviews should be mutually agreed and included in the consultancy agreement between the Principal and the Architect prior to novation. This should allow adequate time for ordering of materials prior to their need for installation on site.
- 18.4 The Head Contractor should provide the Consultants with regular updated versions of the construction program as part of the material for PCG meetings.

When undue pressure is placed on the Consultant, the result is often rushed reviews which can result in errors or omissions and increased project risk which can detrimentally impact on the project's quality.

It is worth noting that late submission of information for review often leads to the need for unnecessary compromise in order to maintain the construction program on site.

- 18.5 A final and complete set of documents issued for construction should be provided by the Head Contractor to the Principal and end user in hard and/or soft copy, including all consultant drawings, scheduled and specifications at the time of construction, final reviewed shop drawings, sample reviews, and consultant advice, reviews and recommendations.

This can take the form of a digital archive of the ACONEX or similar file if used to ensure the full picture of construction process is recorded in the event of future defects not known at Final Completion.

If ACONEX or similar is not used. If ACONEX or similar is not used, a digital archive or hard copy of the complete set of documents listed above should be provided to the Principal and end users.

It is important that the full consultant team documents are included, including facade shop drawings, Fire Engineering Brief, Lighting Design, DDA report in addition to the full suite of engineering and design documents.

If an 'As-Built' set of documents are desired for a particular project, an independent sub-consultant should be engaged to reconcile the final documents issued for construction against the final reviewed shop drawings and consultant advice in order to generate a consolidated set of documents that represents more accurately the as-built outcome. This is not a standard part of the Architect's scope of works and involves significant additional work to the traditional full-services construction scope of works.



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