



ASSOCIATION OF
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16 March 2023

Er. Koh Beng Thong

Chief Healthcare Infrastructure Project Officer

MOH Holdings Pte Ltd

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Dear Er. Koh

Review of MOHH Consultancy Service Agreement on Novation and Fit for Purpose

On behalf of the Association of Consulting Engineers Singapore, we write to share our member's feedback on the following terms under the recent MOHH Consultancy Service Agreement:

- 1) **Novation without Consent** - The Employer may assign, novate or transfer the benefits and obligations of this Agreement or part thereof without the prior consent of the Consultant.
- 2) **Fitness for Purpose** – "... any requirement which may not have been expressly stipulated in these documents but which, in the Employer's absolute discretion, are to be necessarily implied for the Project in order to achieve the Employer's intention and purpose set out in the Invitation to Tender and give full effect to the Employer's Requirements and the documents forming the Agreement,"

We do not believe that such terms are fair and reasonable for the following reasons:

Novation without Consent

- The Consultancy Services Agreement is a binding contract between the Employer and the Consultant. It is executed after a series of reviews and due diligence conducted under the circumstances at the point of evaluation where both parties become fully aware and satisfied of each other's background, risks, obligations and commitment including reviews on conflict of interest.
- Having considered the above, allowing the Employer to novate the contract to any parties without the prior consent of the Consultant would be glaringly unfair and unreasonable for the simple reason that the Consultant should be given the opportunity to review, comment and eventually decide on the consent to such novation.
- We understand that in a reversal of situation, the Consultant is not allowed to reassign the Contract to another party without the agreement of the Employer and hence it would only be fair and reasonable that the Consultant be given the same basic rights.



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Fitness for Purpose

- We believe the purpose of a Contract is to document with clarity the scope, deliverables and obligations between the Employer and Consultant. In particular a Contract with a clearly defined scope of works would avoid unnecessary misinterpretation, abuse and risks to the parties and ultimately benefit the Project delivery.
- Having Fitness for Purpose clauses at the Employer's absolute discretion goes against the spirit of clear scope and is widely regarded in the industry as being onerous and unreasonable. This is particularly concerning when contract scopes are unclear which gives rise to disputes and unfair risks to the consultancy profession.
- Professional indemnity insurance is also not available for fitness for purpose and hence it is an uninsurable risk that is not covered and its implications are not readily quantifiable.
- As a member of the Construction Industry Joint Committee (CIJC), we noted that BCA has started reviewing the Standard Consultancy Agreement (SCA) with the need for clearer definition of consultancy scope including Fitness for Purpose being the first agenda

While we appreciate that MOHH may have your unique reasons in specifying these requirements, we wish to seek MOHH's review on the said contract clauses. In doing so, we have preliminarily suggested the following proposals for your consideration:

- **Novation with consent**

To specify novation with the prior consent of the Consultant.

We understand MOHH may be concerned with the scenario that Consultant refuse to consent to novation for no valid reasons and ACES would be keen to understand such precedence and propose measures to mitigate them.

If it is MOHH's intent to only novate to another government agency, MOHH may wish to state the same or name the intended new Employer so that due diligence can be carried out during tender of services.



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- **Clear scope without fitness for purpose clauses**

Specifying the scope of services as clearly as possible and omitting all clauses on Fitness for purpose.

We understand it could be sometimes difficult to specify all scopes into the service document due to various uncertainties, and MOHH may consider allowing for these additional scopes as provisions. As stated before, we understand BCA have commenced their review of the SCA and has a similar approach as above.

ACES with its collective member companies would also be happy to work with MOHH to jointly review and generate a scope of services document comprising base and non-standard scopes for MOHH's use.

We thank you for the attention to above and would be happy to have a dialogue with your team to explore further.

Thank you.

Yours faithfully,

Er. Chuck Kho
President
Association of Consulting Engineers Singapore



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The Privilege of Practising Professional Engineers

Cc to

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From: Joseph Lim Jui Teck (MOHH) <joseph.lim2@mohh.com.sg>

Sent: Thursday, March 23, 2023 6:29 PM

Subject: RE: ACES Feedback - Review of MOHH Consultancy Service Agreement on Novation and Fit for Purpose

On behalf of Er Koh, we thank you for your comments.

Our response is as follows:

Novation without consent

We agree with your view and will update our consultancy agreement to remove the following sub-clause from future tenders:

“The Employer may assign, novate or transfer the benefits and obligations of this Agreement or part thereof without the prior consent of the Consultant. The Consultant shall execute such documents and perform such acts as may be required by the Employer to give effect to such assignment, novation or transfer. For the avoidance of doubt, the assignment, novation or transfer shall be on the same terms and conditions of this Agreement unless expressly stated otherwise therein.”

Fitness for Purpose

To clarify, we do not have any fitness for purpose clauses in our consultancy agreement. However, ACES is of the view of the following sub-clause gives effect to an fitness for purpose intent. We have reviewed this and agree to remove this sub-clause from future tenders to avoid any fitness for purpose intent.

“any requirements which may not have been expressly stipulated in these documents but which, in the Employer’s absolute discretion, are to be necessarily implied for the Project in order to achieve the Employer’s intention and purpose set out in the Invitation to Tender and give full effect to the Employer’s Requirements and the documents forming the Agreement including any variation or modification, and to meet the operational, functional and maintenance objectives for which it was commissioned.”

We trust this addresses ACES’s concerns. Do feel free to reach out to me if you require any further clarification. Thank you.

Best regards,
Joseph

☐ Unclassified, Non-Sensitive
☐ Restricted, Non-Sensitive
☒ Restricted, Sensitive (Normal)
☐ Restricted, Sensitive (High)

Lim Jui Teck Joseph

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27 April 2023

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Dear Er. Koh

Review of MOHH Consultancy Service Agreement on Novation and Fit for Purpose

We refer to our previous letter seeking MOHH's review of several service agreement terms relating to novation without consent and fitness for purpose, and MOHH's subsequent reply by Mr. Joseph Lim informing their decision to remove the clauses in question.

We write to express our appreciation of MOHH's response and welcome the progressive and fair approach toward a collaborative environment. We believe this will no doubt contribute to the continuing effort to invigorate and renew confidence towards the recovery of the engineering consulting industry.

We thank you for being a positive exemplar and will share this clarification notes with our members for their information.

Thank you.

Yours faithfully,

Er. Chuck Kho

President, Association of Consulting Engineers Singapore

Cc to

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