



Avoiding Vicarious Liability from Subpar Subconsultants

Very few architects or engineers acting as the lead designer can complete a project without subconsultants. Typically, one or more subconsultants are needed for their technical expertise, whether it be structural engineers, civil engineers, mechanical engineers, electrical engineers, landscapers, or other design specialists.

The ability to find and hire subconsultants is a critical skill. Design firms must carefully match the needs of the client and the project to the skills of the team of subconsultants. Not only does the success of the project depend on it, design firms will be vicariously liable for any errors or omissions those subconsultants make.

"Vicarious liability" is a form of strict liability that arises under the common law doctrine of "agency law." Basically, this means that someone acting in a superior or controlling role is responsible for the acts of their subordinates or agents. The most common example: an employer is liable for the acts of its employees. Similarly, a lead designer is responsible for the acts of the subconsultants or subcontractors it directly hires, or any third party it has the right, ability and duty to control on the job.

In rare situations, design firms have attempted to have all design disciplines contract directly with the client as a preferable option from a liability standpoint. Unfortunately, this can create more problems (and liabilities) than it eliminates. Not only does the firm lose the ability to select and manage the design team, but the lack of coordination could lead to increased design errors and omissions, and all firms could be drawn into the dispute regardless of who contracts with whom.

A more common trend is for design firms to bring specific disciplines (e.g. structural, civil, mechanical, electrical, and plumbing) 'in-house'. The 'in-house' approach has the potential to maximize coordination efforts between disciplines, but also eliminates the transfer of risk for prime designers who traditionally transfer those liabilities to a downstream party – and their insurance policy.

So, what can a design firm do to minimize vicarious liability? Develop a comprehensive and coordinated program of managing subconsultants. Consider these important steps.

DEVELOP A SUBCONSULTANT ROSTER

Work with your staff to develop a roster of design subconsultants to consider for future projects. Involve everyone within the firm who works with subconsultants and would have valuable input to a strategic selection process. Then, develop a subconsultant matrix. For example, for each subconsultant, list the company name, design discipline, years in business, size (number of employees and annual revenues), geographic territory, principals, licensed designers, technical qualifications, specialties, past project partnering history, client references, industry reputation, and history of known claims/litigation.

Next, gather information about their client service philosophy, quality control procedures, and risk management philosophy. If first-hand experience is limited, view their website, check their references, or schedule an introductory meeting.

MATCH SUBCONSULTANTS TO THE PROJECT

Once the roster is compiled, match the subconsultants' profiles to the needs of a potential project. Again, this qualification-based selection process should be a team activity. Introduce staff to the project parameters and get their recommendations for the key disciplines. It's typically best to have three project candidates for each discipline in the event top picks aren't available.

Once the project team is selected, schedule a design team meeting. This should occur before the project begins to allow team members to introduce themselves and share further details regarding the project and the client. As a team, discuss any potential pitfalls such as challenging geography on the jobsite or complex electrical and plumbing. Hold preliminary discussions on how those challenges will be tackled. Gather information that will help develop a quality design with detailed specifications.

By the end of this meeting, each subconsultant should be able to provide a general scope of services, projected staffing size, and a project schedule and fee. This will prove invaluable when developing the overall project proposal to the client.

Establish clear communication lines so each subconsultant knows where to go with their questions and concerns throughout the life of the project. Schedule regular meetings to discuss project progress, coordinate upcoming work of team members, and pinpoint potential problems. Carefully document meeting minutes and action items assigned. Follow up to ensure critical matters are being promptly addressed.

DRAFT INTEGRATED CONTRACTS

Once a project is secured, the relationship with each subconsultant should be defined in a detailed, written contract. These contracts must not only cover key contracts with individual subconsultant(s), they must be carefully coordinated within the prime contract.

If possible, it is typically best to start with the standard form agreements of the American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC). This will provide consistency among the various contracts while allowing for customization to fit the specific details of the project in question.

If a client insists on using its own nonstandard contract forms, make sure subconsultants contracts are consistent regarding each party's rights and obligations as well as other key project requirements. For instance, when client contracts call for certain deadlines, milestones, payment terms, etc., those will need to be passed through to the subconsultants through their individual contracts.

A lack of a 'pass-through' clause of the prime contract terms and conditions to the subconsultant contract is an exacerbating factor in professional liability claims. Failure to do so could leave the prime design firms footing the bill for an onerous indemnity clause or as the only party to client arbitration because the subconsultants are not required to joinder in the dispute process. Ultimately, no design firm will feel more frustrated than knowing it is sheltering the loss of a subconsultant through their own insurance program and paying corresponding deductibles and future premiums.

Similarly, if the prime contract includes protections in the form of a limitation of liability clause, a waiver of consequential damages, or a sensible indemnity clause, these provisions will need to be individually evaluated before passing through to subconsultants.

SET INSURANCE REQUIREMENTS

One of the most common questions design professionals ask in the context of their insurance program is whether or not their professional liability insurance covers subconsultants. Subconsultants are not 'insured' under a prime design firm's policy, but the prime designer is covered for their vicarious liability (negligence of the subconsultant). If a subconsultant makes an error or omission while delivering its services on a project, the prime designer is almost assured to be named in any claim. And prime design firms can almost guarantee their professional liability (PL) insurance company will have to pay for a portion of the damages, even if a subconsultant is 100% responsible for the

mistake. What sized portion of damages, however, often depends directly on the available insurance limits of the offending subconsultant. If it has adequate limits, it will likely (and rightly) pay the bulk of the damages. If the subconsultant is underinsured, then the prime designers insurance becomes the primary target to make the claimant whole.

How much PL insurance should subconsultants carry? There is no hard and fast rule, and those requirements will undoubtedly vary from project to project and subconsultant to subconsultant. Factors that come into play include the size, construction value and complexity of the project, the scope of services of the subconsultant, the riskiness of the services performed, and the claims history and risk management practices of the subconsultant. The insurance limits the client requests will also influence what to ask from subconsultants because prime designers should avoid a large gap between their own limits versus the subconsultants.

As a rule, PL annual aggregate limit minimums for subconsultants' practice policies range from \$1,000,000 to \$2,000,000 but have trended upward in recent years. However, for a riskier discipline, such as a structural engineer working on a riskier project type, consider requiring limits of \$5,000,000, \$10,000,000, or more. It's important to note, the larger the subconsultant firm, the more their practice policy limits are spread across multiple projects. This in turn could lead to minimum insurance requirements containing a 'split-limit' (e.g. \$2,000,000 per claim, and \$4,000,000 annual aggregate). Insurance limit requirements are all negotiable, of course. Subconsultants will already have a practice policy in place, and may balk at the cost of increasing their overall limit. In such cases, a specific job excess or specific client excess policy (where a higher limit is purchased only for one project or one client) might be an affordable option. Have a system in place to formally approve and document any deviations from stated minimum limits.

Design firms may also look into alternative insurance products for high risk, high value projects such as Owners Protective, or Project Insurance, which are not covered in this article.

Always look beyond professional liability when setting insurance requirements. Confirm subconsultants carry adequate general liability, workers compensation, employer's liability, automobile liability, umbrella liability, pollution liability, and other coverages that fit their services and the client's demands (e.g. network security liability) for the project. We suggest firms at a minimum consider:

- ▶ Ask to be named as an "additional insured" on their general liability and automobile liability policies.
- ▶ Place a "primary and noncontributory" requirement on general liability, auto liability and umbrella liability policies, ensuring the subconsultants insurers pay out first for any loss.
- ▶ Request lower tiered subconsultants waive subrogation of rights for all coverages including any property or equipment brought on site.
- ▶ Include a "schedule of insurance" in each subconsultant's contract, specifying the types of insurance expected for the subconsultant to carry as well as the per claim and aggregate limits of each. Whenever possible consider a 'pass-through' of the prime contract insurance requirements so no coverage gap exists.
- ▶ Collect certificates of insurance as evidence that the coverages are in place throughout the life of the project.

PUSH FOR MEDIATION

The ultimate goal is to prevent errors and omissions in the design services delivered by the entire team. Should a dispute arise among the design team, all parties should want to resolve that dispute efficiently, effectively and rationally.

To that end, push for a mediation clause in the prime contract and then include the same clause in all subconsultants' contracts. Mediation has shown to be an effective means of finding common ground during a dispute and resolving issues amicably for all parties; and, it's a nonbinding process. If a client insists on having an arbitration clause, or calls for another form of dispute resolution, then subconsultant contracts should call for the same so that all parties agree to be at the negotiation table.

CONDUCT POST-PROJECT REVIEWS

Following substantial completion of the project, consider holding a post-project review meeting. Invite an owner's representative, the contractor, all subconsultants and key members of staff involved in the project. Focus on what went right with the project, but address how the project might have been better managed. This is not a time to bring up new grievances or re-hash disputes that have already been addressed.

Have a separate internal post-project review of the subconsultants. Staff should discuss the pros and cons of each subconsultant and whether its performance enhanced its reputation or gave a reason for pause. Always make sure to update profiles in the subconsultant roster.

FINAL WORD OF WARNING

There may come a time when a client suggests or even insists the prime designer hire a particular subconsultant on its project. Such a demand should set off alarm bells. But, that doesn't mean design firms always have to deny the client's request.

If a client asks for a specific subconsultant, explain the need to perform due diligence before responding to such a request. Investigate the recommended subconsultant thoroughly. It could be that the client made this request because it has had great success working with this subconsultant on past projects. Or, it could be that the subconsultant is the client's son-in-law, and this would be his first big job. Design firms need to determine why the request was made and whether the subconsultant is truly qualified for the project.

While it is atypical, a prime designer may hire the geotechnical or survey engineer depending on the type of project and/or client, particularly if the firm is able to manage the risk. Design firms can consider turning down the request, but if the client insists, a business decision must be made. Is the risk so great to turn the project down? Is the client willing to contract directly with subconsultant, or provide an indemnity for the subconsultant's actions and/or limitation of liability for their negligence? What about a design firm's own management skills to take on this risky proposition? We suggest erring on the side of caution, but this is a decision each firm must address.

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