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Avoiding Vicarious Liability from Subpar Subconsultants

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

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

The ability to find and hire subconsultants, then, is a critical skill. You must carefully match the needs of the client and the project to the skills of your team of subconsultants. Not only does the success of the project depend on it, you 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.

You might think that avoiding hiring subconsultants, e.g., having all design firms contract directly with your client, might be a preferable option from a liability standpoint. Unfortunately, that typically creates more problems (and liabilities) than it eliminates. You would likely lose your ability to select and manage your design team. The lack of coordination would likely lead to increased design errors and omissions, and you'd be drawn into the disputes regardless of who contracts with whom.

So, what can a design firm do to minimize vicarious liabilities? 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 who you would consider for your future projects. Involve everyone within your firm who works with subconsultants and would have valuable input to a strategic selection process.

Develop a subconsultant matrix that fits your needs. 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, history with your firm, client references, industry reputation, and history of claims/litigation.

You'll also want to gather information about their client service philosophy, quality control procedures, and risk management philosophy. If you don't have

first-hand experience regarding this information, view their Websites, check their references, or schedule an introductory meeting. This roster building should be an ongoing process.

Match Subconsultants to the Project

Once your roster is compiled, you can match the subconsultants' profiles to the needs of a potential project. Again, this qualification-based selection process should be a team activity. Introduce your 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 your top picks aren't available. Beginning with your top pick for the most important discipline, schedule separate meetings with your potential subconsultants. Give each sufficient project details so you both can determine whether this is a good fit for achieving project requirements and meeting client expectations.

Once you have selected your preferred subconsultants, schedule a design team meeting. This should occur before the project begins. Allow team members to introduce themselves. Then 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 you 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 your overall project proposal to the client.

Draft Integrated Contracts

Once a project is secured, your relationship with each subconsultant should be defined in a detailed written

contract. These contracts must not only cover your key agreements with each individual subconsultant, they must be carefully coordinated with your master client contract.

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 your various contracts, while allowing for customization to fit the specific details of the project in question.

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

Similarly, if you have negotiated protections for your firm in the form of a limitation of liability, a waiver of consequential damages or an indemnity clause, you should strive to pass those through to your subconsultants as well. Often, this can be established by including a clause in your master contract, whereby the client agrees to pass through those protections.

Set Your Insurance Requirements

If a subconsultant makes an error or omission while delivering its services on one of your projects, you are almost assured to be named in any claim. And you can almost guarantee you and your 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'll likely (and rightly) pay the bulk of the damages. If it is underinsured, then your insurance becomes the primary target to make the claimant whole.

How much PL insurance should you require your subconsultants to 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 sub, the riskiness of the services performed, and the claims history and risk management practices of the subconsultant. The insurance limits your client asks of you will also influence what you ask from your subs, as you don't want a large gap between the limits you carry versus what they carry.

As a rule, PL annual aggregate limit minimums for subconsultants' practice policies range from \$1 million to \$2 million. But for a riskier discipline, such as a structural engineer, working on a riskier project type, such as a large condominium project on a challenging jobsite, you might require limits of \$5 million or even \$10 million. These are all negotiable, of course. Your 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 your stated minimum limits.

You might also look into project policies for high risk, high value projects. These policies cover the entire design team on a single project and premiums are paid in full or in part, by the client. Unfortunately, the cost can be high and availability limited with project policies.

You'll want to look beyond professional liability when setting insurance requirements. Make sure your 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 for the project. We suggest that you:

- Ask to be named an "additional insured" on their general liability and other policies where it makes sense.
- Place a "primary and noncontributory" requirement on general liability and umbrella liability policies, ensuring the sub's insurer pays out first for any loss.
- Include a "schedule of insurance" in each subconsultant's contract, specifying the types of insurance you expect the subconsultant to carry as well as the per claim and aggregate limits of each.
- Collect certificates of insurance as evidence that the coverages are in place throughout the life of the project.

Push for Mediation

Your ultimate goal is to prevent errors and omissions in the design services you and your team of subconsultants deliver. But should a dispute arise among the design team, you'll want to resolve that dispute efficiently, effectively and rationally.

To that end, you'll want to push for a mediation clause in your client contract and then include the same clause in all of your contracts with subs. 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 your client insists on having an arbitration clause, or calls for another form of dispute resolution, then your contracts with your subconsultants should call for the same so that all parties agree to be at the negotiation table.

Focus on Project Management

The greater the role your team of subconsultants has on a project, the greater the need for proactive project management. Design planning and coordination become extremely important. Your role as design team leader and primary contact point with the client demands your full attention.

Establish clear communication lines so each subconsultant knows where to go with their questions and concerns, and how best to alert you of a project upset. 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.

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 your 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. If this was a particularly cantankerous group, you might want to skip this step to avoid reopening old wounds and generating further bad feelings.

Have a separate internal post-project review of the subconsultants. You and your staff should discuss the pros and cons of each subconsultant and whether its performance enhanced its reputation or gave you reason not to want to use its services again. Update profiles in your subconsultant roster.

Final Word of Warning

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

If a client asks you to use a subconsultant, explain that you will need to perform due diligence before you can respond to such a request. Investigate the recommended subconsultant thoroughly. It could be the client made this request because it has had great

success working with this sub on past projects. Or it could be that the subconsultant is the client's son-in-law and this is his first big job. You need to determine why the request was made and whether the subconsultant is truly qualified for the project.

If the recommended sub is indeed unqualified for the job or otherwise risky, then you should consider turning down the request. If the client insists, then you have a business decision to make. Is the risk so great that you need to turn the project down? Is the client willing to contract directly with the sketchy subconsultant, indemnify you from its actions and/or limit your liability for the subconsultant's negligence through protective contract language? Are you confident enough in your own management skills to take on this risky proposition? We suggest erroring on the side of caution, but this is a decision only you can make.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.