

OPINION



Subconsultants and risk

Since firms are liable for the work performed by their subs, it's imperative that a comprehensive plan be in place before selection and work begins.



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Well-run design firms focus significant attention on managing risk. Besides issues involving an architect's or engineer's interaction with the owner, active risk management also calls for addressing exposures associated with any subconsultants or subcontractors (e.g., a driller taking soil borings), utilized on a project. In effect, design firms are legally responsible for services provided by their subs.

WHAT CAN GO WRONG? Consider a recent claim involving a parking garage project. An architect retained an MEP engineer to design a retainage structure and pumping system for storm-water control. The MEP specified pumps to empty a holding tank which separates sediment from storm water before it enters the municipal storm water drainage system. The MEP decided to install two 2-1/2 inch pumps for this task, even though there were four 8-inch drain pipes funneling run-off water into the holding tank.

During the first big thunderstorm, the tank overflowed, flooding the garage. The "fix" required replacing the pumps and piping with larger capacity models and cutting new holes in the concrete decks and cost more than \$90,000.

Although the MEP clearly was responsible for the

error, the project owner also sought to hold the architect accountable; noting that the architect's responsibilities included choosing qualified subconsultants, overseeing their work, and ensuring its correct completion. This "vicarious liability" can create substantial financial risk for firms retaining subconsultants and needs to be carefully managed.

ESTABLISHING SOUND SUBCONSULTANT PRACTICES. Design firms need a thorough process for selecting and retaining subconsultants/subcontractors. The objective: Ensure client satisfaction while insulating your firm (and your insurance program) from losses caused by the subconsultant. Key aspects of a subconsultant risk management plan include:

- **Choose qualified firms.** This is a vital first step in controlling subconsultant risk. Check each firm's

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credentials and seek references if you've not worked with them. Find out if the firm has been involved with troubled projects and examine its financial health. Firms in financial difficulty might over-reach to get work or cut corners to improve profitability.

- **Clarify the scope of work.** Claims often arise from a lack of clarity about who is responsible for what on a project. Have a clearly defined scope of work and require subconsultants to follow through, fill their intended role, and complete all assigned tasks.
- **Have a signed contract.** The first line of defense when problems or claims arise is the contract between the subconsultant and the prime engineer or architect. Design firms should have a standard subconsultant agreement that has been reviewed by legal counsel. It should address scope of work, standard of care, indemnification, ownership of documents, etc. Equally important is the fair allocation of risk and clearly defined insurance requirements (see below).
- **Require subconsultant insurance.** Your subconsultant agreement should detail the minimum insurances for your subconsultants to carry. The goal is to have their insurance respond first to pay any loss, with your firm's insurance responding only if their insurance policy limits are insufficient to satisfy the full amount of the loss. Insurance coverages typically required include:
 - Commercial General Liability
 - Business Auto (or hired and non-owned auto as part of the CGL)
 - Worker's Compensation and Employer's Liability
 - Umbrella/Excess Liability (if appropriate to provide increased limits)
 - Architect/Engineers Professional Liability (including pollution liability)

Depending on the project, it may be appropriate to require additional coverages (e.g., builder's risk, if the design firm is responsible for construction as well), or to modify the minimum limit requirements to account for project size and complexity.

You should also establish minimum limits of insurance by policy type. While such limits should account for the project scope, complexity, and risk profile of the sub's work, here are some recommended minimums:

- Commercial General Liability: \$1 million per occurrence/aggregate

- Business Automobile Liability: \$1 million per occurrence/aggregate
- Employer's Liability: \$500,000 per disease/injury
- Professional Liability: \$1 million per claim/aggregate

Larger or more complex undertakings should also require umbrella/excess liability with a minimum limit of \$3 million to \$5 million.

INSURANCE POLICY ENDORSEMENTS ENHANCE PROTECTION. Include details in your subcontract insurance specifications on coverage extensions that can further protect your firm. For example, your firm should be listed as an "additional insured" on the subcontractor or subconsultant's commercial general liability, business auto liability and, if applicable, contractors' pollution liability policies. This coverage should be denoted as "primary and non-contributory." Also, confirm the presence of a "waiver of subrogation" (by endorsement, if need be), in each policy, including commercial general liability, workers' compensation, business auto liability and, if applicable, contractors' pollution liability. The waiver prevents the sub's insurer from seeking indemnification from you (and your own insurer), for losses it pays.

HAVE SUBS "FLOW DOWN" YOUR REQUIREMENTS. Be sure your subconsultant agreement stipulates that provisions (including all insurance requirements), in your agreement with the owner or manager must "flow down" to subconsultants and subcontractors of the sub you hire. We've seen losses arise from uninsured or underinsured subs of an A/E's subconsultants or subcontractors.

While there may be valid reasons to use subs that do not meet your minimum insurance requirements, you should have a formal approval process for any exceptions. Determine who within your firm can approve an exception and under what circumstances.

Risk management requires formal processes and continual attention. Along with having the appropriate framework and tools up front, it's important to maintain an open dialogue and good communications with your subconsultants. Finding out about problems early allows you to take action to correct any errors or mitigate any risk to the project or your firm. ▀

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