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8 Steps to Successful Subconsultant Relationships



Streamline the design-build process with a solid strategy for choosing partners

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Prime design consultants often have a great deal of project control and leverage. Unfortunately, such responsibilities increase the potential for significant risk. This is especially true if errors or omissions committed by subconsultants cause damage to the client or project. Under such circumstances, the prime will most likely be held liable as if they committed the negligent acts themselves.

Given the risks and responsibilities, it's surprising how many times prime consultants retain subconsultants without thoroughly vetting their skills and backgrounds. Many even fail to hold written contracts with their subs or only move forward with brief agreement letters and/or the subconsultant's proposal. But consider this: if problems occur and the prime has no contract with the subconsultant, or if the contract is inadequate or ambiguous, the prime could end up paying for the client's entire loss.

Another problem is that primes often neglect to require insurance—or an adequate amount—from their subs which places their own deductible and policy limits at risk.

As a result, here are eight steps Berkley Design Professional recommends for helping to prepare against issues before they arise, while also protecting against costly and time-consuming delays.

1: Establish a Rigorous Subconsultant Selection Process

The first step is the most important and involves the thorough review of subconsultant work histories, experience and backgrounds. This often includes the development of a checklist that covers:

- Technical qualifications
- Experience with specific project types & sizes
- Staff capability and availability
- Financial viability
- Claims and litigation history
- Internal management structure
- Leadership and project management ability
- Quality control and coordination procedures
- Risk management approach
- Digital compatibility (especially building information modeling—BIM)
- References

2: Start the Process Early

Subconsultants should join the design/build process right from the start to become familiar with the owner's project requirements and expectations. Early engagement promotes commitment and encourages a spirit of collaboration. If possible, determine the sub's dedication to the project's staff, scope, schedule and fee before committing to their services.

3: Negotiate Well-Drafted, Coordinated Contracts

Subconsultant contracts are just as important as the prime agreement with clients. They must be consistent and coordinated with the prime agreement. To help avoid discrepancies, use standard form design and construction documents, such as those published by the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC), which are carefully integrated, cross-referenced and coordinated with the agreements used on similar projects.

If the client chooses a non-standard agreement, the prime and its attorney should make certain the subconsulting agreement "fits" the project needs and its role is consistent with everyone's understanding. The following are also several considerations for future agreements:

- *Scope of services*—Subconsultant agreements should define the services performed at a basic fee and those considered additional. Be clear about the subconsultant's responsibility for construction site visits and RFI responses.
- *Schedule*—The subconsultant should submit a schedule for services and deliverables that is consistent with owner agreements. This includes a reasonable amount of time to review, coordinate and respond to design progress documents and CA phase submittals.
- *Responsibility for design coordination*—The subconsultant should coordinate its own work, along with the prime and other consultants, and be solely responsible for the technical content and coordination of its documents.

- *Right to rely*—The right to rely on the accuracy and completeness of services and information furnished by the subconsultant should be specified. Written notice should be supplied by either party who becomes aware of errors, omissions or inconsistencies during the course of the project.
- *Billing and payment*—Billing and payment issues are major sources of dispute. Typically, primes require subconsultants to accept a pay-when-paid or pay-if-paid provision to align payment obligations with the prime consultant's receipt of payment from the owner.
- *Dispute Resolution*—Dispute resolution terms, including venue and binding resolution methods, must be clearly stipulated within the prime agreement. There should be confidence in the entire design team working together to defend claims with subconsultants contractually responsible for their design disciplines.
- *Limitation of Liability (LoL)*—Never give an LoL subconsultant unless they are included in the prime agreement. If there's a \$5 million claim arising from the sub's negligence, but the sub is only liable for \$500,000 because of the LoL, the prime will be responsible for the balance.
- *Indemnities*—Indemnities should be mutual and based on comparative fault. The prime and subconsultant should agree that each party will reimburse the other "to the extent that each party is responsible for such damages, liabilities or costs to the extent caused by such party's negligent errors, omissions," or breach of the agreement.
- *Time limit for legal action*—This should be consistent with the prime agreement with the owner. Don't give the owner 5 years to file a claim, while limiting the subconsultant's liability to 3 years.
- *Ownership of instruments of service*—Who will retain copyright and ownership of the subconsultant's plans and specifications? This is a matter of negotiation between the prime and sub—and should be in alignment with the requirements of the prime agreement.
- *Confidentiality requirements/non-disclosure agreements (NDAs)*—NDAs should be consistent with the owner-prime agreement. Owners have become increasingly protective regarding access to their confidential and proprietary information and may require protection by consultants.

4: Insist on Appropriate & Adequate insurance

Contractually require subconsultants to carry adequate insurance, including professional liability, commercial general liability, excess liability, commercial auto and workers' compensation based on the scope and complexity of the project and the subconsultant's services. If the client requires a certain specific coverage (for example, cyber liability), then this same requirement should be passed downstream onto the subs.

Ensure that your subconsultants provide current certificates of insurance. Continue to verify that they maintain coverage at least until the project's statute of limitations runs out. Remember, due to the nature of claims-made insurance, the professional liability policy in force when the claim is made is responsible for handling the claim.

5: Institute a Comprehensive Approach to Project Planning & Design Coordination

A well-developed project plan will orient the entire design team to the known conditions, goals and requirements of the project. Conduct a comprehensive project initiation meeting so the entire design team understands project expectations before it begins.

Before schematic design starts, establish a design coordination plan and institute regular coordination meetings. Develop a BIM execution plan as well as digital data agreements that delineate the roles and responsibilities of each party.

6: Implement Communication & Documentation Protocols

Prepare a written communication plan with ground rules that define what information is communicated to whom, by whom and how often. Be careful to establish a clear protocol if direct lines of communication are allowed between subconsultants and/or between subconsultants, owners and contractors.

While sharing relevant information directly can be efficient, it is critical for the prime consultant to stay fully informed of all client and contractor communications. Encourage subs to document their design processes, particularly for the systems and material selections that impact quality, schedules, compliance and costs.

7: Watch for Signs of Trouble

Watch for warning signs like communication breakdowns or the failure to follow agreed-upon procedures. Take note if the subconsultant doesn't keep pace with the design team's schedule for progress deliverables. Be wary if key staff is assigned to other projects. During construction, look for excessive requests for information (RFIs) and/or change orders arising from the sub's services.

Never wait to address any of these issues. The ability to overcome any problem without costly delays is dependent on the prompt resolution of challenges.

8: Conduct Post-Project Assessments of Your Subconsultants

Carefully assess performance throughout the project. Regularly review responsiveness, communication skills, technical expertise, teamwork, timeliness, quality of service and other project delivery factors. Analyzing performance over a number of projects will enable the prime to determine a subconsultant's best fit for future work.

The selection of subconsultants should be a rigorous process. But the payoffs—successful projects, repeat clients, fewer disputes, profitable and challenging work, and a well-functioning design team that trusts and values each other—are well worth the time and effort.

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