

A/E RISK REVIEW

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Reducing Risks of Multiple-Prime Projects

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Sometimes it seems as if the traditional method of design-bid-build project delivery has gone the way of the dinosaur. With design-build, construction management, fast track and innumerable combinations and hybrids of these and other alternate techniques, architects and engineers often find themselves working simultaneously with various forms of project delivery.

One method of project delivery gaining popularity is the multiple-prime project. Multiple-prime projects are those in which a client contracts with all or most of the consultants directly, rather than using the more traditional hierarchical method of contracting – owner to prime consultant to subconsultants.

Why is this project delivery method gaining favor among some project owners? As projects become more complex and specialized engineering and architectural systems become increasingly critical, more is demanded of the design consultants. Sophisticated clients who build multiple projects of the same or similar type often wish to retain the best specialists in a given field -- ones with whom they have worked successfully before. These clients may choose to contract with their consultants of choice directly, bypassing the traditional technique of the prime designer selecting the subconsultants.

Benefits of Multi-Prime Projects

Architects and engineers who typically operate as subconsultants hired by a prime consultant are often pleased to have an opportunity to report directly to the project client. They feel they have a more prominent role in the design process and better communication with their ultimate client. They often have the opportunity to get involved in the project at its earliest stage and hear the owner's desires and needs firsthand, rather than filtered through the prime. In addition, because they don't have to transmit their invoices through the prime designer, they see the chance of getting paid more promptly – and they may even enhance their profitability by negotiating their fees directly with the owner.

Some prime designers resent the fact that multiple engineers who traditionally report to them now have the client's ear. However, others who don't put as much emphasis on being the single source of design control find the multiple-prime design projects a refreshing change. With this contracting arrangement, administrative duties can be greatly reduced. The designer who is typically the prime is no longer responsible for selecting, paying and managing a team of subconsultants. Also, the designer's liability is reduced somewhat, and the cost of professional liability insurance is typically lower because subconsultant fees are not included in their revenues.

The Typical Drawbacks

Not all is rosy with multiple prime projects, however. Some project owners choose this method of contracting not to enhance design quality and communication, but to find the lowest cost consultants and avoid the administrative fees paid to the prime consultant for coordinating the design work. Such attempts to save costs are rarely successful. Whether there are separate

contracts or not, the work of the various consultants must still be coordinated and managed. This coordination requires time and expertise. Often the owner has to retain a full-time employee to adequately fill this role.

And what happens if the owner tries to complete a project without a qualified person to coordinate the work? If it is not provided for in the contract, no one takes the lead in synchronizing the overall design. The work scope of each consultant, therefore, must become exceptionally detailed and coordinated with that of every other consultant – a very time-consuming and difficult task without a prime lead.

In such a scenario, there is confusion among the various consultants and cooperation typically breaks down. More times than not, this lack of design leadership results in inconsistencies and errors, which in turn leads to a very unhappy client. And who pays for this unhappiness in the end? If something goes wrong, chances are all of the consultants will be named in a claim and they all spend a great deal of time and money extracting themselves from a volatile situation, regardless of who – if anyone – is at fault.

Workable Options

Fortunately, multiple-prime projects need not be such a hornet's nest of hostility and confusion. Sophisticated owners often have design coordination expertise on staff. Before accepting a consulting engagement on a multiple-prime project, find out the client's level of expertise with this project-delivery method:

- How often has the owner used the multiple-prime method?
- Does the owner have a history of success with these projects?
- How has design coordination been handled with these projects?
- Has there been a history of claims associated with these projects?
- Are the other multiple-prime designers experienced with this project delivery method?
- What is their record of success with such projects?

Consultant As Project Coordinator

When the client is experienced in managing projects under this project-delivery method, then it can

coordinate the overall project. It can place the responsibility on each consultant to coordinate his or her designs with the owner representative serving as project coordinator. For less experienced clients, it is better to designate someone – perhaps whoever would traditionally be the prime consultant – as project coordinator. That consultant should make sure that this designation is spelled out in the work scope and included in the fee calculations. This designation should also be spelled out in all of the other client/consultant contracts, with reporting relationships and authorities clearly defined.

Contractual Protection

If you are the consulting firm who would typically be the prime, but you are not responsible for coordination, you should obtain an indemnity from your client against claims arising from lack of coordination by others. Consider adapting this contract language, provided by professional liability insurer XL Insurance:

OWNER'S CONSULTANTS

It is understood and agreed that the Client shall contract directly with other consultants for the following services:

Consulting Firm

Professional Services

The Client agrees that the Consultant shall have no responsibility for any portion of the Project designed by other consultants engaged by the Client. The Consultant shall not be required to check or verify other consultant's construction documents or reports, and shall be entitled to rely on the accuracy and completeness thereof, as well as the compliance of such documents or reports with applicable laws, codes, statutes, ordinances and regulations.

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from any damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising out of or connected in any way with the services performed by other consultants engaged by the Client.

If your client requires the other consultants to coordinate their designs with yours, you may want to add the following to the language above:

The Client further agrees to require all other consultants engaged by the Client to coordinate their construction documents or reports with those of the Consultant, to promptly report any conflicts or inconsistencies to the Consultant, and to cooperate fully with the Consultant in the resolution of those conflicts or inconsistencies.

On the other hand, if your client wants you to take responsibility for coordinating the work of the other consultants, consider this addition:

It is further agreed that the Consultant shall coordinate the construction documents or reports of the professional consultants listed above but only for

conformance with the design concepts and information as expressed in the construction documents prepared by the Consultant. The Client agrees to require all other consultants engaged by the Client to cooperate fully with the Consultant in the resolution of any conflicts or inconsistencies discovered.

Make sure your contract also has provisions that protect you from delays by others and faulty information provided to you.

Delays by Others

Your agreement should address the issue of delays in two ways: by stating you are not responsible for delays caused by others and by requiring equitable adjustment in your compensation and schedule. Such a clause might read:

DELAYS

The Client agrees that the Consultant is not responsible for damages arising directly or indirectly from any delays for causes beyond the Consultant's control. For purposes of this agreement, such causes include, but are not limited to, strikes or other labor disputes; severe weather disruptions or other natural disasters; fires, riots, war or other emergencies or acts of God; failure of any government agency to act in a timely manner; failure of performance by the Client or the Client's contractors or consultants; or discovery of any hazardous substances or differing site conditions.

In addition, if the delays resulting from any such causes increase the cost or time required by the Consultant to perform its services in an orderly and efficient manner, the Consultant shall be entitled to an equitable adjustment in schedule and/or compensation.

Faulty Information

Finally, have an agreement with the client that you are entitled to use and rely on information supplied or produced by others, including the client and its consultants and contractors, and that the client bears the resulting risk of faulty information. A contract clause that accomplishes this could read:

INFORMATION PROVIDED BY OTHERS

The Client and the Client's contractors and consultants shall furnish, at the Client's expense, all information, requirements, reports, data, surveys and instructions required by this Agreement. The Consultant may use such information, requirements, reports, data, surveys and instructions in performing its services and is entitled to rely upon the accuracy and completeness thereof.

Ask your client to review with you the other agreements with his or her consultants. It is critical that all these contracts reflect the same understandings and responsibilities.

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 preventatives, 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.