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Reducing Liabilities of Multiple-Prime Projects

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.

The recent growth in building information modeling (BIM), green design, design-build, construction management, fast track and other nontraditional project delivery methods has added layers of complexity for architects and engineers. As this complexity grows, many clients and building owners demand more and more specialization and unique skill sets to complete their projects. This often leads to large project teams, with each architect and engineering firm brought aboard for its unique talents.

In some cases, the client or owner of a complex project appoints a single designer, typically an architect, to serve in the role of prime designer. All members of the design team report through the prime in a traditional manner and responsibilities (and liabilities) are allocated accordingly.

However, some clients and owners are choosing to forego this typical hierarchical approach to project delivery. Instead, an owner representative serves as the primary project manager and multiple prime designers are hired directly by the client for different project components. The client contracts with multiple consultants, rather than using the owner-to-prime-consultant-to-subconsultants model.

Benefits of Multiple-Prime Projects

Clients often feel they have much to gain from using the multiple-prime project delivery method. For example, clients who build several 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 choose to contract with their consultants of choice directly, rather than having the prime designer select subconsultants.

The multi-prime method can have benefits for design firms as well. Architects and engineers who typically operate as subconsultants often welcome the 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 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 project owner.

Some prime designers may resent the fact that multiple architect and engineering firms 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 multiple-prime projects a refreshing change. With this contractual 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 the revenue numbers that are used to determine premiums.

But There Are 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 management and 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 requires time and expertise. Often the project 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 manage the design 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 often confusion among the various consultants and cooperation breaks down. More times than not, this lack of design leadership results in added errors and omissions which, in turn, lead 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 must 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, investigate the client's level of expertise with this project-delivery method. Find out:

- 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 are the designers' records of success with such projects?

Consultant as Project Coordinator

When the client is experienced in managing the multiple-prime methodology, then it can successfully 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 providing design services on a multiple-prime project but not responsible for design coordination, try to obtain an indemnity from your client against claims arising from lack of coordination by others. Have your contract acknowledge that the client is contracting directly with multiple consulting firms. It is also recommended that you list those firms and the professional services they are providing.

In your contract, have the client agree that you have no responsibility for any portion of the project designed or managed by other consultants hired directly by the client. The contract should state that you are not required to check or verify any other consultants' designs, construction documents or reports. Further state that you are entitled to rely on the accuracy and completeness of those documents and reports as well as the compliance of all such documents and reports with all applicable laws, codes, statutes, ordinances and regulations.

Finally, have the client agree, to the fullest extent permitted by law, to indemnify you and hold you harmless from any damages, liabilities or costs, including defense costs, arising out of or connected in any way with the services performed by other consultants engaged directly by the client.

If your client asks you to serve in any type of project coordinator role, you'll want to add additional protective language. Have the client agree to require all other consultants engaged by the client to coordinate their construction documents or reports with yours, to promptly report any conflicts or inconsistencies to you, and to cooperate fully with you in the resolution of those conflicts or inconsistencies.

If your client wants you to take the role of project coordinator, make sure your contract spells out all of those responsibilities. In the contract, agree to coordinate the construction documents and reports for an adequate fee that takes into account your increased risk. List all of the professional consultants involved. Specify that your coordination activities are limited to ensuring conformance with the project design as expressed in the construction documents. Have the client agree to require all other consultants to cooperate fully with you in the resolution of any design conflicts or inconsistencies.

With multiple-prime projects, you are often in the position of having to rely on the performance of other consultants yet lack any authority to ensure they are performing their duties as required. Therefore, you want to make sure your contract also has provisions that protect you from delays by others and faulty information provided to you by other consultants.

Delays by Others

Your contract with the client should address the issue of project 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 if the project is delayed due to the actions (or inactions) of others. Such a clause should state that you are not responsible for damages arising directly or indirectly from any delays for causes beyond your control. Specify that such causes for delay include, but are not limited to:

- Failure of performance by the client or the client's contractors and consultants
- Failure of any third party, such as a government agency, to act in a timely manner
- Discovery of any hazardous substances or differing site conditions
- Strikes or other labor disputes
- Severe weather disruptions or other natural disasters
- Fires, riots, war or other emergencies or acts of God.

In addition, the contract should state that if the delays resulting from any such causes increase the cost or time required by you to perform your services in an orderly and efficient manner, you are entitled to an equitable adjustment in schedule and/or compensation.

Faulty Information

Have an agreement with your 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 any faulty information. Your contract should state that your client and its contractors and consultants will furnish, at their expense, all information, requirements, reports, data, surveys and instructions required by you to complete your responsibilities under the contract. State that you have the right to use such information, requirements, reports, data, surveys and instructions in performing your services and that you are entitled to rely upon the accuracy and completeness of such information.

Finally, ask your client to review with you the contractual agreements with his or her other consultants. It is critical that all 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 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.