



8 Steps to Successful Subconsultant Relationships

Being a prime design consultant on a project provides control over and leverage with subconsultants, but also comes with significant risk in the form of vicarious liability. *If errors or omissions by your subconsultants cause damage to your client or the project, you as prime will most likely be held responsible, just as if you had committed the negligent acts yourself.*

Given the risks and responsibilities, it's surprising how many times prime consultants retain subconsultants without a thorough vetting process. Many primes fail to have a written contract with their subs—or only use a brief letter agreement or the subconsultant's proposal. *But consider this: if you have no contract with the subconsultant, or if the contract is inadequate or ambiguous, you could end up paying for the client's entire loss.*

Prime consultants are liable not only for their own services...but also for any services performed by any subconsultants they retain.

What's more, primes often neglect to require insurance—or an adequate amount—of their subs. *This can put your own deductible and policy limits at risk.*

We recommend the following 8 steps to a thoughtful, comprehensive approach to subconsultant relationships:

1: Establish a Rigorous Subconsultant Selection Process

The first step is the most important: a thorough and careful selection of your subconsultants. Develop a checklist that covers factors such as:

- technical qualifications
- firm's experience with project type/size
- staff capability and availability
- financial viability
- history of claims and litigation
- internal management structure
- leadership and project management ability
- quality control and coordination procedures
- approach to risk management
- process for preparing alternatives and recommendations
- digital compatibility (especially Building Information Modeling—BIM)

For new subconsultants, ask for and contact references from other firms that have used their services. Ask your staff, too, as they may have worked with a particular subconsultant prior to joining your firm.

Perhaps the most important consideration for firms with whom you have previously worked is whether it was a positive relationship and successful project and process.

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2. Bring Your Subconsultants in Early

Subconsultants should be brought in early in the project in order to become familiar with the owner's project requirements and expectations. Early engagement promotes commitment and encourages a spirit of collaboration. If possible, gain the sub's commitment to staff, services, scope, schedule, and fee before you memorialize your own commitments to the owner.



3. Negotiate Well-drafted, Coordinated Contracts

Your subconsultant contracts are just as important as the prime agreement with your client—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 other agreements used on a project.

If your client chooses to use a non-standard agreement, you and your attorney should make certain your subconsulting agreements “fit” and that the terms are consistent.

If you work with certain subconsultants on a regular basis, consider negotiating continuing services (or master) agreements. Scope, fee, and schedule can be established in a separate task order for each project.

Some approaches that might be incorporated into your subconsulting agreements include:

- **Pass Through.** Subs need to adhere to the same (or greater) rules you establish with your client. In general, you should pass downstream to each of your subconsultants (for its scope of services) the same legal rights and obligations you have with the owner.
- **Scope of Services.** The subconsultant agreement should define the services that the subconsultant will perform for the basic fee and those available as additional services. Be clear as to 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 your agreement with the owner. It should allow reasonable time for you and other consultants 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, with written notice provided if either of you becomes aware of any errors, omissions, or inconsistencies in such services or information.
- **Billing and Payment.** Billing and payment issues are major sources of disputes. 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 method, must also be coordinated with the prime agreement. You need to have confidence that if you're drawn into a claim, the entire design team will work as a unit to defend it with subconsultants being contractually responsible for their design disciplines.

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- **Limitation of Liability (LoL).** Never give an LoL to your subconsultant without one in the prime agreement. If there's a \$5 million claim arising from the negligence of your sub, for example, but the sub is only liable for \$500,000 because of an LoL in its agreement with you, you as the prime consultant will be responsible for the balance.
- **Indemnities.** Indemnities should be mutual and based on comparative fault. You and the subconsultant should agree that each party will reimburse the other party "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. You don't want to give the owner five years to file a claim against you while limiting the subconsultant to three.
- **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 you and the 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 their consultants.

4. Insist on Appropriate and Adequate insurance

Contractually require your 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. (For example, structural and mechanical engineering services can be higher risk.) Pass on the same obligations that you have to your client downstream to the subconsultant. If your client requires you to carry a certain specific coverage (for example, cyber liability), then you'll want to ask the same of your 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, it is the professional liability policy in force when the claim is made that will respond to any future claim, not the policy in force at the time the services were undertaken.

5. Institute a Comprehensive Approach to Project Planning and Design Coordination

A well-developed project plan will orient the entire design team to the known conditions, goals, and requirements of the project. It's another good reason to bring subs in early. Conduct a comprehensive Project Initiation Meeting at project commencement so that all design team members understand the expectations for the project.

Before schematic design starts, establish a design coordination plan and institute regular coordination meetings.

As part of your planning process, Building Information Modeling (BIM) use, process, and protocol should be addressed. Establish a BIM Execution Plan as well as digital data agreements that delineate the roles and responsibilities of each party.



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6. Implement Communication and Documentation Protocols

Communication must be consistent and timely among all parties on the project team (including the owner and contractor).

Develop 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 your subconsultants and/or between your subconsultants and the owner or contractor. While sharing relevant information directly can be efficient, it is critical that you, as the prime consultant, stay fully informed of all client and contractor communications.

In addition, documentation is foundational to effective project and risk management, so it's important to be consistent in contemporaneous documentation.

Encourage subs to document their design processes, particularly for the systems and material selections that impact quality, schedule, compliance, and cost.

7. Watch for Signs of Trouble

Be on the lookout for warning signs with your subconsultants. Watch for communication breakdowns or the failure to follow agreed-upon procedures. Take note if the subconsultant isn't keeping pace with the design team's schedule for progress deliverables. Be wary if the sub reassigns key staff to other projects. During construction, look for excessive RFIs and/or change orders arising from the sub's services.

Don't wait to address any of these issues with your subconsultants. Usually, the faster you respond to a situation, the more easily it can be resolved.

8. Conduct Post-Project Assessments of Your Subconsultants

Assess the performance of your subconsultants. Look at areas such as responsiveness, communication skills, technical expertise, teamwork, timeliness, quality of service, and other project delivery factors. By analyzing performance over a number of projects, you'll be able to determine a subconsultant's best fit for future projects .

Conclusion

Conducting rigorous subconsultant selection and management requires considerable effort. 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 beyond measure.

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For more information, contact:

Andrew D. Mendelson, FAIA
Senior Vice President,
Chief Risk Management Officer
amendelson@berkleydp.com

Diane P. Mika
Vice President,
Director of Risk Management Education
dmika@berkleydp.com



berkleydp.com | 855.534.7285

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