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Risk Management Tools for the Design Professional

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Retaining Consultants: Considerations When You Are the Prime Design Professional

By Colleen M. Palmer, Specialty Risks, Beazley

Your client has asked you to be the prime design professional and retain consultants to perform certain services on the project. How do you respond? Design professionals retain consultants as a matter of course in the A/E/C world (and industry standard documents such as the AIA and EJCDC contemplate this), but you should consider the potential risks before assuming the prime role.

Before we explore the risks of retaining consultants, one significant advantage of acting as the prime is that you have control over and unlimited opportunity to communicate with your consultants. Clients may prohibit your access to their consultants, making it difficult to clarify issues on a project within the consultant's scope of services.

Now for the risks. First, and critical from a risk management perspective, your firm is vicariously liable for the actions of your consultants and any damages resulting from their performance of services. If your consultant does not have sufficient professional liability insurance to respond to a claim, your firm will be responsible for those damages.

Second, to the extent any consultant asserts a fee claim alleging you did not appropriately pay for services rendered, you will have to defend the claim, which is typically not covered by professional liability insurance. In addition to the financial impact of defending a fee claim, time spent dealing with that claim takes valuable time away from providing services on a project.

Third, retaining certain consultants (i.e., geotechnical engineers) is inherently riskier than retaining more typical consultants (i.e., mechanical or electrical engineers), and there could be underwriting implications if you retain atypical consultants. We recommend the client retain such atypical consultants; however, if you agree to retain them, negotiate an agreed remedy provision limiting your liability and indemnity language running in your favor in your contract with the client.

What About the Consultant Agreement?

If you retain consultants, you should have an executed consultant agreement in place that defines the parties' rights and responsibilities. Consider the following points when negotiating the consultant agreement:

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Scope of Services

The consultant agreement should include a sufficiently detailed and defined scope of services so both parties fully understand what each party will, and will not, do during the course of the project. You should ensure there are no gaps in the scope of services so both parties understand who is responsible for each task.

The scope should not include ambiguous language and should be crystal clear, especially if the consultant is less experienced or if you have not worked with the consultant on prior projects.

Incorporation of Prime Agreement

We recommend (and the prime agreement often mandates) that the consultant agreement incorporate the prime agreement by reference so that your obligations are passed through to the consultant for its part of the project.

You may want to share your agreement with the consultant prior to executing it to avoid surprises when the parties negotiate the consultant agreement. This proactive approach gives the consultant an opportunity to identify problematic provisions, lets you negotiate those provisions with your client, and can avoid a protracted negotiation of the consultant agreement after your agreement has been executed and cannot easily be changed.

If you do not involve the consultant early in the negotiation of your agreement, be prepared to provide your agreement (and any other documents incorporated by reference in the consultant agreement), since a savvy consultant will refuse to execute its agreement without carefully reviewing all documents incorporated by reference.

Insurance

We recommend both your firm and your consultant carry adequate insurance, including professional liability insurance ("PLI"), relative to each party's scope of services and risk assumed on the project.

Admittedly, the definition of "adequate" can be difficult to quantify, particularly if the consultant does not carry the limits you, or the flow-through provisions in your agreement, deem necessary. If the requested limits exceed the limits the consultant normally maintains, you may consider reimbursing the consultant for the additional costs and seeking reimbursement from your client (especially if your agreement sets out mandatory types and limits of insurance for consultants).

Indemnity

Any language in the consultant agreement requiring the consultant to indemnify you should be fair and balanced. The consultant agreement sometimes includes a problematic and uninsurable indemnity obligation, despite the fact that you would, rightly, object to such a broad provision in your agreement.

You (and clients who insist on flowing down inappropriate indemnity language from your agreement) need to remember that an indemnity provision is only as good as the assets available to back the obligation and that indemnity is typically funded by professional liability insurance. If a consultant's contractual indemnity obligation is not appropriately negligence-based, the consultant may be exposed to liability beyond that for which it is insured.

If the consultant does not have sufficient resources to support an uninsurable indemnity obligation, you would arguably be in a worse position with the broad provision than if you negotiated a narrow, but insurable, provision.

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Dispute Resolution

The venue for dispute resolution and law governing the consultant agreement should be consistent with your agreement so that all disputes are governed by the same substantive law in the same jurisdiction. Prime agreements and consultant agreements often provide that the venue and governing law is that of the location of the project, so this is not usually an issue of contention.

Importantly, the consultant should be required to participate in and become a party in any dispute resolution procedure called for in the prime agreement if those disputes involve the consultant's scope of services. The consultant's participation in such disputes may result in a quicker, and therefore less expensive, dispute resolution process, which ultimately benefits all parties.

Conclusion

The decision to retain consultants should be carefully considered since there are potential risks of doing so. If you retain any consultants, ensure the consultant agreement is reasonable since both parties are best served when the agreement is fair and well-balanced.

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