



## **WHEN AN ARCHITECT OR ENGINEER IS ASKED TO RETAIN SUB-CONSULTANTS**

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When being asked to provide design professional services, in many instances the architect or engineer will be retained by the owner/developer at a project to perform a specific task, such as design, special inspections, and/or construction administration. In addition, the architect or engineer is often also asked to retain sub-consultants including, among others, Mechanical, Electrical, and Plumbing Engineers, Structural Engineers, and/or Landscape Architects. Retaining sub-consultants can add significant liability exposure to the design professional who does so on behalf of an owner/developer. So how does one navigate the potential pitfalls associated with retaining sub-consultants?

First and foremost, the design professional must ask themselves during the course of contract negotiations with the owner/developer, whether they are required to retain the sub-consultants, or if the request is simply for the owner/developer's convenience. If the architect has a good working relationship with the owner/developer, they can advise the owner/developer that they would prefer that the sub-consultants be retained and contracted directly with the owner. If the owner/developer agrees to directly retain the other design professionals, the liability exposure on the part of the design professional decreases as they will not be held responsible for the sub-consultant's services unless, as an example, the design professional incorporates the sub-consultant's drawings into their project drawings and specifications.

Should the owner/developer insist that the architect or engineer retain the sub-consultant and the project is worth taking on, the architect or engineer has a number of issues they must consider. First, it is important to perform due diligence and conduct necessary research and make certain that the sub-consultants being retained are qualified and have experience in the type of work they are being asked to perform. The design professional should take the vetting process seriously to limit the possibility that the architect or engineer will wind up bearing the brunt of their sub-consultant's mistakes due to inexperience, or lack of skills. Second, drafting the appropriate sub-consultant

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agreement is of paramount importance. All of the requirements set forth in the underlying architectural or engineering project agreement must be included in the sub-consultant's agreement, such as specific indemnification language and any invoicing or payment requirements specifically required by the owner/developer.

The design professional must pay specific attention to the sub-consultant's professional liability insurance limits. If the project at issue is a large-scale project, \$500,000 or \$1,000,000 limits may not be enough to cover errors by a sub-consultant. Therefore, the design professional retaining the sub-consultant should ask for the sub-consultant to obtain a larger policy before retaining them. If the design professional is not drafting the sub-consultant's agreement, but rather is adding provisions to the sub-consultant's proposal to conform with the underlying agreement, the design professional must carefully scrutinize the sub-consultant's "terms and conditions" as there may be certain conditions which would be detrimental to the design professional. For example, a limitation of liability clause in favor of a sub-consultant engineer that limits their liability to the amount of the sub-consultant's fee could significantly impact the design professional retaining the engineer if the sub-consultant's services turn out to be deficient and the work needs to be remediated.

There are, of course, benefits to retaining sub-consultants directly. The architect or engineer may be better able to coordinate the work if they have contractual relationships with the sub-consultants. Additionally, the design professional may have greater control over the quality of the overall design of the project if they are able to decide who is hired to perform the various design components.

Whether or not the design professional ultimately retains sub-consultants, the design professional should nonetheless consult a qualified attorney to assist them in addressing the issues discussed above and, if they do retain the sub-consultant, negotiating and drafting the appropriate sub-consultant agreement.

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