

Professional Liability Update



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A/E Risk Review

Multiple Risks with 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.

Today's sophisticated project owners realize they have many options when it comes to project delivery methods. No longer are they restricted to the traditional design-bid-build model. Instead they have their choice of innovative and multi-faceted delivery methods including building information modeling (BIM), design-build, and fast track.

In most cases, even with nontraditional project delivery methods, the client continues to appoint a single lead 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 are allocated accordingly. Similarly, a single general contractor oversees all subcontractors and coordinates the means and methods of construction.

However, some clients and owners are choosing to forego this typical hierarchical approach and instead contract directly with multiple prime designers and contractors. With this approach, the client or its appointed representative serves as the primary project manager and multiple prime designers and contractors are hired directly by the client for different project components.

Benefits of Multiple-Prime Projects

Obviously, clients must feel they have something to gain from using the multiple-prime project delivery method. Many are looking for time and cost savings; some even incorporate fast-track scheduling into the mix. Clients who build multiple projects of the same or similar type strive 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 and contractors of choice directly, rather than having the prime designer and contractor select the project teams.

The multi-prime method can have benefits for design firms as well. Architects and engineers who typically operate as sub-consultants 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 relish 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 also 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 sub-consultants. Also, the designer is not liable for the work of other consultants who would have been their subs, and the cost of professional liability insurance is typically lower because sub-consultant fees are not included in the revenue numbers used to determine premiums.

The Drawbacks

Not all is rosy with multiple-prime projects, however, as they present new risks. Some project owners choose this method of contracting not to enhance design and construction quality, but to hire the lowest cost consultants and contractors and avoid the fees typically paid to a prime consultant and general contractor for coordinating the design and construction work. Such attempts to save costs are rarely successful since the work of the various consultants and contractors must still be coordinated and managed.

And what happens if the owner tries to complete a project without a qualified person on staff to coordinate the design and construction work? If it is not provided for in the contract, no one takes the lead in synchronizing the overall design and construction. In such a coordination vacuum, there can be confusion among the various consultants and cooperation breaks down. A lack of leadership results in delays, disruptions, costs, 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 with the design, chances are all of the consultants will be named in any 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.

Precautions

Fortunately, multiple-prime projects need not be a hornet's nest of hostility and confusion. Sophisticated clients often have the necessary project coordination expertise on staff. But before accepting a consulting engagement on a multiple-prime project, find out:

- How often has the client used the multiple-prime method?
- Does the client 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 and contractors experienced with this project-delivery method?
- What are the other designers' records of success with such projects?
- Are there state statutes that govern multi-prime projects?

Make sure to obtain a copy of the overall project schedule, as well as the schedule of each major project participant who can impact your work. Look for unrealistic timelines or possible bottlenecks in project phases.

Also, carefully evaluate whether your firm has the necessary expertise and culture to handle the project coordination and cooperation necessary to work successfully on a multi-prime project. Determine the types of relationships with the client and fellow designers needed to make the project a success. Who is ultimately responsible for coordinating the work?

The Role of Project Coordinator

When the client is adequately staffed and experienced in managing the multiple-prime methodology, it can successfully coordinate the overall project in house. It can allocate responsibilities on each consultant and contractor to coordinate his or her work with the owner representative serving as project coordinator.

For less experienced clients, it is better to designate someone with expertise as project coordinator. That someone may be an outside professional construction manager (CM), hired by the client to oversee the project on its behalf. Or, perhaps the lead architect could be assigned as either design coordinator or CM. That consultant should make sure that this designation is spelled out in the work scope and included in fee calculations reflecting the additional duties and risks. This designation should also be specified in all of the other client/consultant contracts, with reporting relationships and authorities clearly defined.

If you take on the role of CM for a multi-prime project, make sure the client contract specifically states that you are acting as an agent of the owner and that you are not taking the role of an "at risk" construction manager, nor entering into any contracts with sub-consultants or subcontractors. It should also state that you are not responsible for the means and methods of construction and that the clients retain such liability. (Fortunately, courts have traditionally held that since the client "holds the purse" and enjoys the economic leverage that brings, they have an implied duty to coordinate multi-prime contractors).

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 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.

Indemnities

If you are providing design services on a multiple-prime project but are 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.

Similarly, 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.

Have the client agree, to the fullest extent permitted by law, to indemnify you and hold you harmless from any damages, liabilities or costs arising out of or connected in any way with the services performed by other consultants engaged directly by the client. Also, be careful not to contractually give up your right to file a claim against any consultant or contractor to the project whose delays or other actions can cause you economic loss. Because you do not have a direct contractual relationship with these consultants and subcontractors, you can file a claim against them as a third party.

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.

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.

Ask your client to review with you its contractual agreements with other consultants. It is critical that all contracts reflect the same understandings and responsibilities. It is also important to have all contracts call for alternative dispute resolution, preferably mediation, as the first step in resolving a potential claim.

Finally, keep clear and complete records of your project activities. Document any scheduling problems caused by others and alert the client at the first sign of coordination problems.

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.

***STUCKEY INSURANCE** is the leading provider of Professional Liability to design professionals in Arizona. Please call us if you like to schedule a consultation for your insurance needs.*



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