

Checklist for Use of Subconsultants

The use of subconsultants and subcontractors (“Subconsultants”) is common on many design projects. Typically, an owner/client contracts (“Prime Agreement”) with a Prime Designer and the Prime Designer contracts with Subconsultants (“Subconsultant Agreement”) of varying skills and disciplines.

While Prime Designers largely focus on managing the risks of their own work, they often do not consider the potential inherited liability risks from the work performed by their Subconsultants. The Prime Designer may have vicarious liability (imputed liability) for any errors or omissions caused by the subconsultants and subcontractors. Thus, Prime Designers should take care to protect themselves contractually to the extent they can in their Subconsultant Agreements.

- Utilize a process to select Subconsultants that are reputable, licensed (if necessary), qualified and capable (i.e., previous working relationship, references, info from professional organizations), and insured. Also, review the individual Subconsultant team members assigned to the project.
- Resist the use of unknown or unfamiliar Subconsultants selected by a client or owner.
- To the extent possible, utilize Sample Standard Agreements from industry groups that coordinate, review and regularly update sample design professional contracts, such as AIA, ACEC, ASCE, CASE, ConsensusDOCS, DBIA and EJCDC, etc.
- Utilize a Subconsultant Agreement that clearly spells out the relationship between the Prime Designer and the Subconsultant(s), delineates the scope of the work expected, insurance, payment terms, dispute resolution and includes all allowable risk shifting and liability protections to reduce the overall risk to the Prime Designer.
- Require that Subconsultant Agreement includes an unambiguous and specific “Flow Down Clause” or “Pass Through Clause” that incorporates the terms of the Prime Agreement to mirror the obligations and responsibilities Prime Designer has with Owner with the Subconsultant(s) including Standard of Care, Payment Terms, Insurance, Indemnity and Dispute Resolution.
- Require that the Subconsultant Agreement matches the customary Standard of Care outlined in the Prime Agreement. Ideally, the Standard of Care should be measured as imposing liability only where there is a failure to exercise the ordinary reasonable care, technical skill and ability and diligence ordinarily exercised by the

design professional in the same industry, geographical area with the same resources, same time period and type of project. Beware of contractually altered “elevated or heightened” Standard of Care in Prime and Subcontractor Agreements.

- Require that the payment terms in the Subconsultant Agreement are outlined specifically to mirror the terms of payment in the Prime Agreement. Consider, if allowed in the jurisdiction, adding that the Prime Designer is only obligated to pay the Subconsultants if the Prime Designer is timely paid pursuant to the terms of the Prime Agreement.
- Confirm that all Subconsultants have adequate insurance policies with policy limits that either exceed or are equal to the Prime Designer insurance policy limits and require that all Subconsultants provide copies of all current certificates of insurance prior to any work being conducted. Consider being added as an additional insured on the Subconsultant’s insurance policy.
- Require that all Subconsultants agree to formally notify Prime Designer of any cancellation, renewal, nonrenewal or any changes in their insurance policies on project and update their certificates of insurance as appropriate.
- Require that the Subconsultant Agreement mirror and mutually match any limitation of liability and risk transfer clauses from the Prime Agreement to the extent allowed by law in the jurisdiction. Any limitation of liability granted to a Subconsultant could expose the Prime Designer to additional liability under the Prime Agreement in excess of the Subconsultant’s limitations.
- Require that any disputes between Prime Designer and Subconsultants shall be resolved in accordance with the same dispute resolution method outlined in the Prime Agreement, e.g., mandatory arbitration, mediation and/or litigation, etc.
- Consult with a licensed attorney before executing any Prime or Subconsultant Agreement to confirm all details and ensure that all clauses in the contracts conform to any specific requirements and rules for the jurisdiction

Contact information

For questions about the content of this article, please contact
Gawain Charlton-Perrin, Director of Risk Management.
Phone: 630-379-6068
Email: GCharltonPe@Hanover.com



The Hanover Insurance Company
440 Lincoln Street, Worcester, MA 01653

hanover.com

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