

# Managing the Risks of Subconsultant Relationships

By Dan Knise

Engineers have a responsibility not only for their actions or errors but also for the actions/errors of those subconsultants or subcontractors who work under their direction. While there is much focus on managing an engineering firm's own risk, all too often there is not sufficient attention paid to its potential vicarious liability, or so-called *inherited* risk, attendant to utilizing subconsultants. Developing and sticking to a process to manage subconsultant/subcontractor relationships can help minimize this risk and further enhance a firm's success.

What are the components of an effective subconsultant risk management program? Many point to three critical steps for any engineering firm to take:

- 1) Work only with firms that have a proven track record of success, are financially sound, practice good risk management/quality assurance, and are known to deliver their work on time and budget;
- 2) Utilize a well-thought-out subconsultant agreement that clearly spells out the relationship between the parties, delineates the scope of the work expected, and includes appropriate indemnification and other pertinent requirements; and
- 3) Establish and utilize an appropriate requirement for insurances the subconsultant must carry before beginning work on your behalf.

## Effective Subconsultant Selection

Engineering firms must have a well-defined process for evaluating and selecting appropriate subconsultants. This typically involves collecting some necessary information for evaluating the firm's capabilities and qualifications, management approach, quality control/risk management commitment, financial stability, etc. Many firms use a simple questionnaire to collect this data and then maintain an active database to track the information and make it available to project managers and senior executives.

References can play a crucial role in determining appropriate partners, as can

feedback from contractors, local attorneys, and others in the engineering and construction community. This should include input about the experience of staff members who may have worked with the potential partner firm in the past. Furthermore, firms should assess the qualifications and experience of the prospective subconsultant's key team members to be assigned to the project.

## Utilize Good Subcontract Hygiene

The second leg of this three-legged stool involves practicing good contract hygiene when working with subconsultants. This includes:

- Having a written agreement signed by both parties;
- Including a clear scope of services;
- Being sure to *flow down* any unique or additional requirements from the project owner to the subconsultants, including any indemnification and, if appropriate, insurance requirements; and
- Specifying payment terms and any dispute resolution procedures; some like arbitration to avoid the courts, while others feel that requiring a lawsuit may reduce the likelihood of being sued.

Having a written, executed contract with a subconsultant can often make a significant difference in who pays a claim (or defends one). Firms that lack standard contracts for these arrangements might begin by checking the prime-subconsultant forms available from the American Council of Engineering Companies (ACEC) or the Engineers Joint Contract Documents Committee (EJCDC).

One item to flag if the subconsultant offers their standard contract: inadequate limitation of liability clauses that may leave you holding the bag. Some subconsultants argue the smaller scope of their work or lesser compensation justifies a limitation of liability (e.g., to no more than the fees they are paid).

The problem with this approach is that, unless the engineering firm hiring the



subconsultant has the same limitation from their client, this could shift risk to you with no recourse against the subconsultant that created the issues and/or caused the damages.

## Require Minimum Insurances Before Work Begins

Including thoughtful, comprehensive minimum insurance requirements into your subconsultant agreement is another essential approach to help minimize risk when hiring subconsultants. Some key items to consider are:

- **What insurance policies should be required?** There may be variations in required insurances, depending on the type of work the subconsultant will perform, the nature of the project, and any requirements in the prime agreement with the project owner (which must flow down). Nonetheless, several basic building blocks of an effective insurance program should always be required. These include:
  - o Commercial General Liability (CGL);
  - o Automobile Liability (or non-owned and hired auto liability as part of the CGL policy);
  - o Workers' Compensation and Employer's Liability;
  - o Umbrella/Excess Liability (may be optional on very small projects);
  - o Professional Liability (also known as Errors & Omissions coverage); and
  - o Pollution Liability (often combined with professional liability).

Other insurance coverages may also be required, depending on the subconsultant's services, such as drone (unmanned aviation

vehicles), marine, cyber/network security liability, etc.

- **What *Limits* to require?** This is a trickier question (and, in any event, should be noted as *minimum insurance requirements*), but some basic standards for a typical commercial or infrastructure project might be:
  - o Commercial General Liability: \$1 million per occurrence/\$2 million general aggregate and products/completed operations;
  - o Automobile Liability: \$1 million combined single limit or equivalent;
  - o Workers' Compensation/Employer's Liability: Statutory and \$500,000 per illness, injury, or disease for employer's liability; and
  - o Professional and Pollution Liability: Varies, but ideally at least \$1 million per claim and aggregate.

Obviously, on larger or more complex projects or with regard to specific services that are riskier, these minimum limits may increase dramatically (to as much as \$5 million or \$10 million or more).

- **Other Insurance Requirements?** A well-thought-out subconsultant insurance specification must also include several other items. While there are too many to mention here, a few of the more important are:
  - o Additional Insured Status for the Engineer hiring the subconsultant on both the CGL and Automobile Liability policies;
  - o Primary and Non-Contributory Status as part of being an Additional Insured;
  - o Waiver of Subrogation on the CGL, Auto, Workers' Compensation/Employer's Liability; and
  - o Notice of Cancellation or Non-Renewal to be provided to the engineering firm if the insurer cancels any of the policies.

Another critical step is having a compliance procedure to collect and review certificates of insurance from each subconsultant to ensure that they are genuinely complying with the insurance requirements of their contract, as well as to make sure certificates are entirely up to date. Do not allow any subconsultants to

begin work until they provide certificates of insurance that meet all agreed-upon coverage requirements.

## Taking Key Risk Management Steps Pays Off

Effective risk management is integral to an engineering firm's success. Taking these three steps – selecting an appropriate, reputable, and capable subconsultant, utilizing

a solid contract, and requiring appropriate insurance – will help minimize risks from these arrangements and enhance the likelihood of success. ■



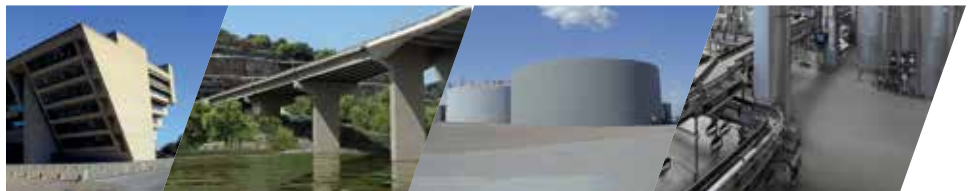
*Dan Knise is Chair and CEO at Ames & Gough, a specialty insurance brokerage serving A/E firms, law firms and professional organizations.*

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