

# HALL & COMPANY

Serving Architects, Engineers and Environmental Consultants



## A/E Professionals Should Meticulously Choose Sub-consultants

Would you ever consider starting a business venture with just any design professional that happens to come your way and take them on as a business partner? Accordingly, why would you begin a working relationship with a consultant you know nothing about?

As a design professional you scrutinize your clients to manage your risk by the use of an internal client selection process, and you should have an equally thorough selection process for consultants prior to the start of any project.

An excellent place to begin in securing a consultant is to examine the consultant's financial strength. You want to be certain that the consultant will be around to see the project through to its completion. Checking on a consultant does not have to be a difficult task. Begin by obtaining a list of projects the consultant has worked on, and reach out to those clients to ascertain their opinion about the sub-consultant's performance and history.

You may also inquire with the consultant's client base about the approximate ease, or difficulty, of working with the consultant and what communication techniques they use. Are they relatively easy to work with? Do they exhibit an effort to be responsive to requests? Will the consultant's style harmonize well with your firm's?

It is of utmost importance that you obtain a signed contract. Do not permit the agreement with the consultant to be put off to some future date; work with the consultant should not commence until the contract is executed. This is as critical as the signed contract between the prime and the client. It is prudent risk management practice for both you and your consultant to have an executed contract. This will not only safeguard both of you, but it will also set up the guidelines and expectations for each of you, as well as reinforce the scope of services, terms and conditions that are relevant to the project.

*An excellent place to begin in securing a consultant is to examine the consultant's financial strength. . . Begin by obtaining a list of projects the consultant has worked on, and reach out to those clients to ascertain their opinion about the sub-consultant's performance and history.*

Every design professional must keep in mind that as a prime for a particular project, the design professional agrees to carry out several services for a client. As one might presume, the client desires to have a single point of contact, and a single entity to pursue, if things go amiss. So even if parts of these services are provided by a consultant, the prime design professional is accountable for the proper implementation of the whole project. This forms the foundation of vicarious liability, the burden of liability on one company for another company's actions. In other words, this legal rule of law means the prime is accountable for the actions of their consultant.

In many states, the client is unable to pursue a consultant directly but must track the contractual obligations. Therefore the solution is to take positive steps to assure that the consultants are well qualified and will be available to address an issue that arises on a project.

An example of a claim: A client retains an architect to provide design services related to a light industrial building complex. As civil engineering services were needed to complete the project, the architect hired a civil engineering consultant to prepare the site design. The prime agreement with the owner mandated arbitration, but the architect's subconsultant agreement was silent on the matter. Issues directly relating to civil design arose on the project and the architectural firm was left to address the matter alone. The client filed for arbitration with the architect, and when the architect requested that the civil engineering consultant to participate in the arbitration, the subconsultant refused. The architect then resorted to filing a lawsuit against the civil engineer.

On the statutes was a state law requiring that the architect must first experience damages in order to initiate a claim. However, the court dismissed the lawsuit against the architect's consultant. The judge ruled that the architect's damages would not be material until there was evidence that the architect was vicariously liable for the civil engineer's actions. The architect was then left to take on the defense of the arbitration without any help from his consultant. In the end, the architect settled the claim with their client for \$600,000, but only after it cost the architect \$75,000 in legal expenses defending the claim.

To avoid such a mishap, prime design professionals need to be precise with the language in their contracts. Before you begin a project and secure the services of a subconsultant, be certain that if there is a dispute resolution clause in the prime agreement with the client, the same dispute resolution clause should appear in the prime-subconsultant agreement. Also, make sure there is a means to join the consultant in any action with the client if necessary.

Even if you have secured an executed contract with your consultant and can include the consultant in responding to a project-related matter, you still need to make certain that the consultant can actually respond to a claim. Not only is the consultant's financial strength a factor here, but also the consultant's insurance coverage.

Take into account the circumstances where an architect engaged the services of a structural engineer to support the design of a manufacturing project. Five months after substantial completion, the roof of the structure collapsed. Fortunately no one was injured, but the manufacturing equipment was completely destroyed and the owner tendered a claim for \$1 million. An investigation of the collapse revealed that the engineer badly undersized the roof trusses. Due to the enormity of the loss, the structural engineering consultant tendered the limits of their professional liability policy, a total of \$250,000.



*Ashley Hurd and Sandee Watson*

*Even if you have secured an executed contract with your consultant and can include the consultant in responding to a project-related matter, you still need to make certain that the consultant can actually respond to a claim.*

The architectural firm, as the prime on the project, was responsible for the difference, because under the theory of vicarious liability, the architect is ultimately responsible to the owner. And because the consultant did not have adequate limits to cover the damages, the architect paid over \$750,000 from their professional liability policy, including the architect's \$10,000 deductible to satisfy the demands of the claim.

To prevent having to pay for their consultant's errors, design professionals must require in their contracts that their consultants secure and maintain appropriate insurance coverage. To ensure this requirement is met, designers need to obtain certificates of insurance from their subconsultants. Designers also must be concerned that professional liability insurance is issued on a claims-made basis. This means that claims asserted must be reported during the policy period in effect at the time the claim is being made. If a claim is presented to the insurance carrier after the policy expires, even if it pertains to services provided during the policy period, there would be no coverage under the policy. And if the sub-consultant does not obtain a renewed insurance policy after the project is completed, there would be no coverage for a claim that is asserted at a later date. To avoid the possibility that consultants will be uninsured, the prime professional must obtain a new certificate of insurance from their consultants showing that they have adequately renewed their coverage. A provision in the subconsultant agreement should require consultants to continuously maintain their insurance coverage.

The selection of a consultant should not be taken lightly. Design professionals retaining consultants must take the steps as they would when considering a prospective client. Be sure that your consultant contracts are consistent with the obligations of your contract with the client. And finally, require all consultants to maintain and evidence insurance coverage throughout the project and several years after substantial completion.



*Ashley Hurd is Executive Vice President of Hall & Company. He has specialized in A/E professional liability since 1994 and worked in the insurance industry for more than 20 years. He has a bachelor's degree in business administration and has earned designations of Certified Risk Manager and Certified Insurance Counselor. Ashley has served as president, executive officer and board member for the Professional Insurance Agents of Washington/Alaska.*

[www.hallandcompany.com](http://www.hallandcompany.com)

HALL & COMPANY

19660 10th Avenue NE, Poulsbo, WA 98370 [P] 360.598.3700 [F] 360.598.3703 [www.hallandcompany.com](http://www.hallandcompany.com)