Subcontractor Selection and Oversight

The importance of a subcontractor selection program can be summed up in the following statement: Your company is ultimately responsible for the success of your client’s project. The selection of a subcontractor should not be taken lightly. The subcontractors you select represent your company in the eyes of your client. Clients do not differentiate between those tasks performed directly by the engineer’s staff or by the engineer’s subcontractor. The subcontractor’s job performance, professionalism and errors are directly reflected on your organization. The client equates the engineering firm’s role as expansive, with greater accountability for not only design flaws, but also construction errors.

As a result of this expanded role, clients look toward engineers to ensure that a project’s various tasks are completed in a manner consistent with project specifications and professional standard of care, and do not impact the overall cost or schedule of the project. Culpability falls on the shoulders of the engineers, who may be held liable for any claims that are attributable to the actions of the subcontractor, or for the engineers’ failure to oversee/direct the actions of the subcontractor.

On average, a typical engineering design company utilizes subcontractors to complete between 15% to 35% of a project. Clients are typically unsympathetic if your subcontractor causes a project delay, cost overrun, scheduling conflict, or is unable or unwilling to comply with the project specifications. Even more important, who is going to pay if a specific project or project task must be duplicated due to subcontractor error?

Multiple Roles And Degree Of Control

Engineers have exposures from field and office subcontracted personnel, such as observing construction in the field; relying upon other engineering design firms’ plans and specifications; and working with subconsultants, such as electricians and plumbers, on the overall project delivery. The responsibilities associated with many engineering design services, particularly those that are long-range, multi-phase design projects, include on-site supervisory presence (which may be observation, supervision or direction), a combination of design activities or active participation in the construction process. These multiple roles on the project may result in a high degree of control over the project, and problems related to the final product will be attributed to the engineering design firm even if the problem was the responsibility of the contractor, subcontractor or another entity. The enigma in design projects is that as the degree of control on a project increases, so too does the likelihood of responsibility as the controlling party. However, the greater control the engineer has over the project, the higher the likelihood that they have screened the subcontractor, have authority to stop and control work, have authorized the subcontractor’s performance in the field, and have contractually addressed their concerns with the subcontractor.

The duty of architects and engineers entrusted with the design process is generally limited to the responsibility expressly undertaken in a written contract for services. Thus, unless specifically assumed, the design professionals will not be bound to duties involving supervision and control of the construction, maintenance of safe conditions on the project or safeguarding against defects by a general contractor. Design professionals encounter situations in the field that may not be expressly described in the scope of work, such as activities outside the specifications or health and safety issues. In most cases, design professionals are not responsible to warn construction workers of the existence of hazardous conditions on the project site. The appropriate response is based upon the scope of work and contractual responsibility.

Protecting Against Health & Safety Claims

The engineer should protect himself from the subcontractor’s health and safety claims not only contractually by addressing supervision, control, safety and defects, but also through their actions in the field. Despite the limitations within their contract, design engineers may act outside their scope of work as they begin to direct the means, methods and controls at the project site. Therefore, if the design professional provides construction means and methods directions or provides suggestions on how to correct safety deficiencies, then the courts could assert that the design professional deemed control of the site through site actions. This further places the responsibility of the subcontractors’
actions onto the architect/engineer. However, in the event that a claim arises, the ability for the subcontractor to pay legal and defense costs, as well as any fines, penalties or settlement costs, will minimize the likelihood that the engineering firm will be perceived as the only "deep pocket" associated with the project delivery.

**Subcontractor Selection Procedure**

Confusion and miscommunication regarding project roles and responsibilities may lead to scope exceedence and potential liability, which may be amplified if the engineering firm utilizes unknown subcontractors—those with whom they have no relationship or are located in a different geographical area(s). Assessing the qualifications of a subcontractor and selecting the most appropriate company is one of the first steps in minimizing the likelihood of a claim involving the engineering firm and/or the subcontractor.

To help reduce your risks, an engineering firm should have a written subcontractor selection procedure that, at a minimum, includes:

- Who selects subcontractors
- What to look for in a good subcontractor
- Evaluation of subcontractor’s operations
- Development and implementation of a written subcontract agreement

The written subcontractor selection procedure should first evaluate the individual(s) who has the authority to select a subcontractor. The individual(s) should be provided with appropriate training in evaluating subcontractors, and should track and document due diligence of subcontractors annually. Evaluation of subcontractors should consider the following:

- Cost: Cost should be considered, but not at the sacrifice of quality.
- Subcontractor Reputation: What do your peers say about the subcontractor’s job performance?
- Proper and Comprehensive Response to Your Proposal: Do the subcontractors respond to your technical proposal with understanding and comprehension?
- Good Financial Condition/Insurance Coverage: Does the subcontractor have Contractors Pollution Liability Insurance and bonding abilities? Both illustrate the financial stability of the company.
- Health & Safety Program: Make sure subcontractors have their own program and will not just rely on your organization for health and safety information, direction and correction.
- Certifications/Licenses: Ensure that the subcontractors are properly certified or licensed to provide their services.
- Quality Assurance Programs/Standard Operating Procedures: How does the subcontractor ensure quality services?
- Certificates of Insurance: Obtain documentation regarding the subcontractor’s insurance status, and be named as an additional insured on their policy.

Once the engineering firm has evaluated each of their subcontractors, it is suggested that the firm generate an approved subcontractor list. This will reduce your firm’s chance of working with unknown or unqualified subcontractors.

**Written Agreement**

To best protect your company’s interests, a written agreement between your firm and the subcontractor should be executed prior to commencement of project activities. For subcontractors that you utilize frequently, you may choose to develop a master service agreement (MSA) with mutually agreeable language. This will eliminate executing a complete contract each time you utilize this subcontractor, and a purchase order may be used that specifies a detailed scope of work and references the MSA for each project. At a minimum, a subcontract agreement should include:

- Detailed scope of work
- Terms and conditions
- Indemnification language
- Insurance requirements
- Responsibility for utility identification if subsurface activities are part of the project scope
- Right to retain second tier subcontractors
- Health and safety responsibilities

Once the firm has awarded services to a subcontractor, it is prudent to provide adequate oversight of the subcontractor’s activities. Subcontractor involvement on a project raises questions regarding the design professional’s responsibility for safety at project sites. Due to workers’ compensation laws, site workers cannot sue their employer, but can file suit against third parties, such as design professionals who are present at the job site. There are several ways the courts establish that a design professional had control over the site:

- Subcontract Agreement Language: Does the project contract state that the design professional is responsible for construction means and methods, or safety precautions used by the subcontractor?
- Design Professional Authority: Many design engineers accept the authority to shut the job down. Courts can assert that the design professional assumed control of the site through the project contract.

The purpose of observing subcontractors’ activities is to prevent or reduce the likelihood that safety, schedule or quality is compromised. For those projects that require field activities, it is recommended that your company assign a field representative to observe daily operations. This typically improves production and reduces "down time." The field representative can quickly assess any potential problems and assist the project manager in making decisions to reduce the impact to the project’s quality and budget. The field representative should document the subcontractor’s progress in a bound notebook. The notebook should also contain any significant changes to the proposed scope of work that are attributable to the subcontractor.

Upon project completion, the project team should assess and document the subcontractor’s performance. This will enable your firm to decide whether it will utilize this subcontractor in the future, and if the subcontractor should be retained on your approved subcontractor list.