

# To Sub or Not to Sub

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To sub or not to sub, that is the question.

Should a firm retain a subconsultant that flows through them on a project, or should a firm let the owner directly retain the other design professional?

It's probably not the first time that an architect or engineer has seen this question posed, nor will it be the last.

I raise this question not because it is an exciting topic, but because it is a very relevant claim scenario that I have seen time and time again.

Here are some things to think about:

- Has your client considered what it would do if its subconsultant stopped responding to phone calls or emails?
- What would happen if the subconsultant simply shut its doors without notice to your client in the middle of a project?

I know that a firm would not think this scenario would happen to them, especially if the subconsultant is a firm that your client has worked with in the past and has a good relationship with. But it happens.

## **“What if” scenarios to consider**

What happens if the firm's subconsultant has a significant error on a project and the subconsultant does not have insurance because they let their insurance lapse without notifying the firm? Or, what if the subconsultant's insurance policy has been eroded by other claims, not leaving sufficient funds available for your claim?

What happens if your client's subconsultant has a significant error on a project, but will not agree to address the error? Does the firm need to step in to address the subconsultant's error?

What if the subconsultant disagrees that they have an error? There is a delicate balance between the firm and the owner on the one hand and the firm and the subconsultant on the other hand.

The firm may want to keep the owner happy so that they may be awarded other projects. The firm may feel the need to keep the owner happy so that they can use the project in their portfolio. If the firm sides with the owner, agreeing that there is an error with their subconsultant's design, are they, in essence, agreeing to a breach in their own contract with the owner?

**Here are some pros and cons for a firm to think about before they consider retaining a subconsultant on a project:**

**Pros:**

- A firm may retain another firm whom they have a good working relationship with, a collaborator that they have vetted, that they trust and may help the project run more smoothly.
- A firm may be able to obtain a project, client or contract that they may not have otherwise received because they did not have that expertise.
- A firm may be appeasing an owner that wants contracts to flow through the firm.

**Cons:**

- If a firm's subconsultant has a design error, the owner will turn to the firm first to make a claim due to privity of contract. Hopefully, the firm will be able to turn to their subconsultant to request that they report the claim to their insurer and address it.
- If a firm's subconsultant does not address its design error, the owner will look to the firm to step in and resolve the issue.
- Suppose a lawsuit is filed due to the subconsultant's design error. In that case, the firm may be included in the lawsuit for various issues which could include breach of contract and professional negligence.

Other things to consider that could mean more work and additional steps for the firm:

- If a firm retains a subconsultant, this may place more responsibility on the firm to not only manage their own work but also to manage another firm's services.
- If a firm retains a subconsultant, they need to make sure that not only does their contract with the owner protect them, but they need to ensure that their subconsultant's contract(s) protect them.

Speaking of protection, the firm should ensure that its subconsultant has professional liability insurance with specific limits, has and maintains certificates of insurance and if the subconsultant should cancel or non-renew its insurance, that the firm is notified.

We understand that most firms go into a project with a sense of optimism, with rose-colored glasses. Why would a firm go into a project thinking about how it might go sideways? By providing you with some hypothetical situations and some pros and cons to consider, we hope that the firm thinks twice about whether to sub or not to sub.



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