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# PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

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MSP AEE 07/01 "Understanding the Risks of Multiple-Prime Projects"

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## Understanding the Risks of Multiple-Prime Projects

Sometimes it feels as if the traditional method of design/bid/build project delivery has gone the way of the dinosaur. With design/build, construction management, fast track and innumerable combinations and hybrids of these and other alternate techniques, designers may find themselves working simultaneously with various forms of project delivery.

One method of project delivery facing a growing number of design firms is the multiple-prime design project. Multiple-prime design projects are those in which a client contracts with all or most of the consultants directly, rather than using the more traditional hierarchical method of contracting – owner to prime consultant to subconsultants.

Why is this project delivery method gaining favor among some clients? As projects become more complex and specialized engineering and architectural systems become increasingly critical, more is demanded of the consultants who design them. Sophisticated clients who build multiple projects of the same or similar type wish to retain the best specialists in a given field, often ones with which they have worked successfully before. These clients may choose to contract with their consultants of choice directly, bypassing the traditional technique of the prime designer selecting the subconsultants.

### There are benefits

Consulting engineers who have typically operated as a subconsultant hired by the prime designer are often pleased to have an opportunity to report directly to the owner. They feel they have a more prominent role in the design process and better communication with their ultimate client. They often have the opportunity to get involved in the project at its earliest stage and hear the owner's desires and needs firsthand, rather than filtered through the prime.

In addition, because they don't have to transmit their invoices through the prime designer, they see the chance of getting paid more promptly, and may even enhance their profitability by negotiating their fees directly with the owner.

Some prime designers resent the fact that multiple engineers who traditionally

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License No. OA99520

1230 Columbia Street, Suite 850  
San Diego, CA 92101-3547

Phone: 619-234-6848 ♦ Facsimile: 619-234-8601

Website: [www.cavignac.com](http://www.cavignac.com)

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report to them now have the client's ear. However, others who don't put as much emphasis on being the single source of design control find the multiple prime design projects a refreshing change.

With this contracting arrangement, administrative duties can be greatly reduced because the prime is not responsible for selecting, paying and managing a team of subconsultants. Also, the prime's liability is reduced somewhat, and the cost of professional liability insurance may be lower because the subconsultant fees are not included in their revenue.

## **There are drawbacks**

Not all is rosy with multiple prime projects, however. Some owners choose this method of contracting not because of enhanced quality or better communication, but to find the lowest cost consultants and avoid the administrative fees paid to the prime consultant for coordinating the design work. Such attempts to save costs are rarely successful.

Whether there are separate contracts or not, the work of the various consultants must still be coordinated and managed. This coordination requires time and expertise. Often the owner has to retain a full-time employee to adequately fill this role.

What happens if the owner tries to complete a project without a qualified person to fill that role? If it is not provided for in the contract, no one will take the lead in coordinating the overall design. The work scope of each consultant, therefore, must become exceptionally detailed and coordinated with that of every other consultant – a very time-consuming and difficult task without a prime lead.

In such a scenario, the client will find resulting confusion among the various consultants and cooperation typically breaks down. More times than not, this lack of design leadership results in inconsistencies and errors, which in turn leads to a very unhappy client. And who pays for this unhappiness in the end?

If something goes wrong, chances are all of the consultants will be named in a claim, and they will all spend a great deal of time and money extracting themselves from a volatile situation, regardless of who – if anyone – is at fault.

## **Workable options**

- How often has the owner used this method?
- Does the owner have a history of success with these projects?
- How has design coordination been handled with these multiple-prime projects?
- Has there been a history of claims associated with these projects?
- Are the other multiple-prime designers experienced with this project delivery method?
- What is their record of success with such projects?

## **Consultant as project coordinator**

When the owner is a sophisticated client experienced in managing projects under this project delivery method, then it can coordinate the overall project and place the responsibility on each consultant to coordinate his or her designs with the owner representative serving as project coordinator. For less experienced clients, it is better to designate someone – perhaps whoever would traditionally be the prime consultant – as project coordinator. That consultant should make sure that this designation is spelled out in the work scope and included in the fee calculations. This designation should also be spelled out in all of the other client/consultant contracts, with reporting relationships clearly delineated.

## **Contractual Protection**

If your client wants you to take responsibility for coordinating the work of the other consultants, consider adapting this contract language, provided by professional liability insurer DPIC Companies:

### ***Owner's Consultants***

*It is understood and agreed that the Client shall contract directly with other consultants for the following services:*

*It is also agreed that the Consultant shall coordinate the construction documents or reports of the professional consultants listed above, but only for conformance with the design concepts and*

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information as expressed in the construction documents prepared by the Consultant. The client agrees to require all other consultants engaged by the Client to cooperate fully with the Consultant in the resolution of any conflicts or inconsistencies discovered.

*The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from any damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising in any way from the services performed by any other consultants engaged by the Client.*

If you are the consulting firm who would typically be the prime, but you are **not** named responsible for project coordination, obtain an indemnity from the client against claims arising from lack of coordination by others. Consider adapting the following contract clause, also provided by DPIC Companies:

### **Owner's Consultants**

*It is understood and agreed that the Client shall contract directly with other consultants for the following services:*

*The Client agrees that the Consultant shall have no responsibility for any portion of the project designed by the Client's other consultants. The Consultant shall not be required to check or verify other consultants' construction documents and shall be entitled to rely on the accuracy and completeness thereof, as well as the compliance of such documents with applicable laws, codes, statutes, ordinances and regulations.*

*The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from any damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising in any way from the services performed by any other consultant engaged by the Client.*

If your client requires the other consultants to coordinate their designs with yours, you may want to add the following:

*The Client further agrees to require all other consultants engaged by the Client to coordinate their construction documents or reports with those of the Consultant, to promptly report any conflicts or inconsistencies to the Consultant, and*

*to cooperate fully in the resolution of those conflicts or inconsistencies.*

## **Delays by others**

Make sure your contract also has provisions that protect you from delays by others and faulty information provided to you. Your agreement should address the issue of delays in two ways: (1) by stating that you are not responsible for delays caused by others, and (2) by requiring equitable adjustment in your compensation and schedule. Such a clause might read:

### **Delays**

*The Client agrees that the Consultant is not responsible for damages arising directly or indirectly from any delays for causes beyond the Consultant's control. For purposes of this agreement, such causes include, but are not limited to, strikes or other labor disputes; severe weather disruptions or other natural disasters; fires, riots, war or other emergencies or Acts of God; failure of performance by the Client or the Client's contractors or consultants, or discovery of any hazardous substances or differing site conditions.*

*In addition, if the delays resulting from any such causes increase the cost or time required by the Consultant to perform its services in an orderly and efficient manner, the Consultant shall be entitled to an equitable adjustment in schedule and/or compensation.*

## **Faulty Information**

Finally, have an agreement with the client that you are entitled to use and rely on information supplied or produced by others, including the client and its consultants and contractors, and that the client bears the resulting risk of faulty information. A contract clause that accomplishes this could read:

### **Information Provided By Others**

*The Client and the Client's contractors and consultants shall furnish, at the Client's expense, all information, requirements, reports, data, surveys and instructions required by this Agreement. The Consultant may use such information, requirements, reports, data, surveys and instructions in performing its services and is entitled to rely upon the accuracy and completeness thereof.*

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Ask your client to review with you the other agreements with his or her consultants. It is critical that all these contracts reflect the same understandings and responsibilities. \*

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**Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.

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## Owners Protective E&O Insurance Coverage

Oftentimes an owner will request professional liability limits higher than what a design professional carries. There are several ways to satisfy this insurance requirement. These include:

1. Increasing the design professional's practice policy limit
2. Endorsing the practice policy with specific job excess coverage to provide additional limits over and above the practice policy limit to reach the required limit
3. Purchase of a separate stand-alone project policy with adequate limits

There is a fourth option as well that is fairly new. It is called "Owners Protective Errors and Omissions" insurance. Basically, the policy provides excess insurance over the underlying professional liability policies of the design professionals.

Unlike a project policy in which the various design professionals are named insureds, the project owner is the only named insured under the protective errors and omissions policy.

Owners protective errors and omissions coverage basically serves two functions. First, it provides a source of recovery for project owners when they make claims against design professionals (assuming the prime design professional's limits have been exhausted or are inadequate). Second, protective errors and omissions policies cover the insured owner's vicarious liability to third parties that arises out of services provided by the design professionals.

It is important to note that owner litigation costs against design professionals are not covered by the policy.

The owners protective errors and omissions policy does require that the design professionals working for the owner carry certain minimum limits of coverage. In a sense, these primary errors and omissions policies are treated as a deductible. If these primary limits are not available for any reason other than erosion by payment of claims, the insured owner may have to absorb an amount equal to the difference between the required un-

derlying limit and the amount of coverage actually available.

Advantages of owners protective errors and omissions policies for the owner include coverage flexibility, broader selection of design professionals, increased potential recovery in the event of a loss, ease of underwriting, lower costs, and administrative simplicity.

Advantages for the design professional include no interference with the design professional's practice policy program, and protection from subrogation.

Although it is not anticipated that owners protective errors and omissions coverage will be widely used, it is another option that you might want to call to owners' attention when they require limits higher than those you carry. \*

### COAA a Cause of Concern

*From the DPIC Newsletter:  
DPIC e-Alert: Concerns About COAA*

For architects and engineers accustomed to using recommended contract language from DPIC's **Contract Guide** or the American Institute of Architects' (AIA) contracts, the recently released Construction Owners of America (COAA) forms, called Contracts for Professional Services, should cause concern on at least three levels: ability to perform, adequacy of insurance coverage, and profitability.

The stark facts, according to James C. Moore, a partner in the Rochester, New York law firm of Harter, Secrest & Emery, are that design professionals who sign the COAA agreements will assume unexpected liabilities. They will take on responsibilities with which they are not likely to be familiar, for which they may not be insured, and for which they will almost certainly be under-compensated.

Read Moore's opinions why the "COAA Contract Poses Problems for Design Professionals" in DPIC's Loss Prevention Library at [www.DPIC.com](http://www.DPIC.com). \*