
Liability Briefing

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The implications of consultants appointing subconsultants

This *Briefing* looks at the advantages and disadvantages of a consultant being appointed to undertake services, and then engaging subconsultants to undertake some or all of those services. For example, a client might appoint an architect to undertake the design services within a range of disciplines, and the architect will sub-contract services not within its expertise, such as structural and building services design. Alternatively, the architect might choose to sub-contract some of its work due to a lack of resources.

Clients perceive advantages in this approach, but there are disadvantages too. For the consultant there are certainly disadvantages, with few if any advantages. There may be disadvantages for the subconsultants as well.

From the client's point of view

From the client's point of view, it appears an attractive proposition – the consultant is responsible for the design work of all disciplines, and the client need only pursue one party for redress. In the same way that a contractor is responsible for the work of its sub-contractors, the consultant is responsible for the work of its subconsultants. On the other hand, there can be problems:

1. **Terms of the main contract and sub-contracts:** Negotiating the terms of the consultant's and subconsultants' contracts could be far from straightforward. The consultant will want to ensure that its subconsultants (of which there could be several) are engaged on back-to-back terms, otherwise there is a clear risk of the consultant being left exposed. Therefore negotiation of the sub-consultancy agreements needs to keep pace with that of the main agreement. The consultant should not commit itself, until it is sure that the subconsultants are prepared to accept appropriate terms.
2. **Project planning and communication:** Thought needs to be given to how the project will be run. In the absence of a direct contractual link with the subconsultants, the client will have to (and should) conduct all communications with the subconsultants through the consultant. Thus, the consultant will have

to undertake a co-ordination and management role and its fee should adequately reflect this fact.

3. **Insolvency of the consultant:** The obvious disadvantage for the client is the possibility of the consultant going out of business – at a stroke, the client loses the whole design team.
4. **Collateral warranties:** To protect against this, the client might seek to obtain collateral warranties with step-in rights from the subconsultants, although doing this does to some extent dilute the advantages of having one consultant responsible for the work of the team. It also means that the warranties have to be agreed, with all the complications and costs that can involve.
5. **Multi-party litigation and dispute resolution:** If disputes arise there can be complications. One disadvantage is that, although in the event of a design defect (for example) the client can look to the consultant, it may become involved in a multi-party dispute if the consultant brings in its subconsultants. Such a dispute could prove lengthy and expensive to resolve. This could particularly be the case if the contractual arrangements and allocation of design responsibilities between the consultant and subconsultants (something over which the client is unlikely to have control) are not clear. If the parties have chosen arbitration rather than litigation, there is a different problem: the consultant may have to commence fresh proceedings against its subconsultants rather than joining them in the proceedings.
6. **Access to documents:** If some time after the project is complete, the client needs information or documents concerning the work of a particular subconsultant, it might be more difficult to obtain them from a party with whom it was not in direct contract.

From the consultant's point of view

The consultant might be offered a very welcome higher fee if it is prepared to employ the other consultants: but are the risks worth it?

1. **Liability to the client for the subconsultants' work:** If the architect employs the structural engineer and a defect is the responsibility of the engineer, the architect is liable and must seek to recover down the line. In other words, the consultant will remain liable even if a particular subconsultant goes out of business or has no resources.
2. **Back-to-back terms of engagement:** As explained above, ideally the consultant will want to ensure that the terms on which it appoints its subconsultants are back-to-back with the terms on which it is engaged by the client. However, arranging this can be a costly and time-consuming process.

Particular points to be considered include:

- the programme for production of information by subconsultants – can the consultant meet its obligations under the main agreement?
- key personnel – does the subconsultant have the resources to dedicate its named, key personnel to the project?

- copyright licence – if the consultant grants copyright to the client, has it obtained copyright under the sub-contracts?
 - caps on liability – is any cap in the main agreement reflected in caps in the sub-contracts?
 - payment – under the sub-contracts, is there sufficient leeway in the periods for payment to allow the consultant to be paid before it has to pay its subconsultants?
 - deeds – if the main agreement is to be signed as a deed, the sub-contracts should also be signed as deeds (not doing so will leave the consultant exposed to six years' worth of liability without recourse to the subconsultants).
3. **The extent of responsibility:** The extent of responsibility of the consultant will depend upon its terms of appointment and the scope of services undertaken, but the consultant will be responsible for co-ordinating and managing the work of its subconsultants as well as undertaking its own design services. If the consultant is not careful, it may find itself only being able to retain an inadequately small proportion of the fee whilst remaining liable for the output of the team as a whole.
 4. **Consultant's PI insurance:** The consultant should check the terms of its PI insurance policy and if need be advise its broker of the arrangement. For example, if the proposal for insurance states that the consultant undertakes architectural work, and responsibility is taken for structural engineering, there might be no cover for that work. Insurers might require additional premiums in such circumstances. In any event, the fees earned by the consultant but passed on to the subconsultants will need to be included in the consultant's declared income for insurance purposes. The consultant should also consider whether it needs to increase the level of its PI insurance cover. The consultant must be confident that its limit of indemnity is sufficient to cover claims arising from its subconsultants' negligence or breach of contract, as well as its own.
 5. **Subconsultants' PI insurance:** In addition, the consultant should check that its subconsultants maintain adequate insurance, particularly when practices might be shrinking in size. The consultant (or its insurer) carries the risk of the subconsultants having inadequate or no PI insurance to fall back on. There is also the added danger of the subconsultants' PI policies not being maintained after insolvency.
 6. **Payment:** In most cases the consultant will also be responsible for paying its subconsultants, even if it has not itself been paid (though this will not apply to overseas construction projects) – the Construction Act applies equally to sub-contracts as it does to main contracts. The consultant thus carries considerable financial risk when engaging other members of the design team. If the consultant does not pay on time, under the Construction Act the subconsultants will be entitled to suspend performance, whereas the consultant may still have an obligation to continue working.

7. **Completing the project if a subconsultant fails:** The consultant will also be responsible if a subconsultant becomes insolvent or fails to perform during the project. It will have to bear the cost – which could be considerable – of getting someone else to re-do or complete the work. The new subconsultant may not be prepared to take on responsibility for the earlier work, leaving the consultant vulnerable. To add to the complications, there may be consequential costs for the rest of the design team as a result of delays, none of which would be recoverable from the client.

From the subconsultants' point of view

The observations made above have implications for the subconsultants too. In general terms, being one step removed from the client may cause a number of problems. It may be more difficult to negotiate acceptable terms of appointment and collateral warranties because the consultant will be protecting its own interests as well as attempting to impose the terms of the main contract on to the subconsultants by means of back-to-back arrangements. The subconsultants may also have to wait for what they regard as an excessively long time to be paid, as the consultant seeks to protect its cash flow. Finally, subconsultants may become embroiled in multi-party litigation should a complicated dispute arise.

From all points of view therefore, it would be as well to assess the pros and cons carefully before subconsultants are appointed.

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