CHAPTER 15

CONSIDERATIONS FOR SUBCONSULTANT AND SUBCONTRACT AGREEMENTS FOR DESIGN PROFESSIONALS AND CONSTRUCTION MANAGERS

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1. Introduction

This Chapter will provide guidance and recommendations for the negotiation and drafting of the subcontract relationships that exist between the lead or so-called Prime Design Professional or Construction Manager ("Prime Contractor") for construction projects in the United States. It will provide both theoretical and practical information with respect to recommended practices and procedures for creating and documenting these subcontracting relationships

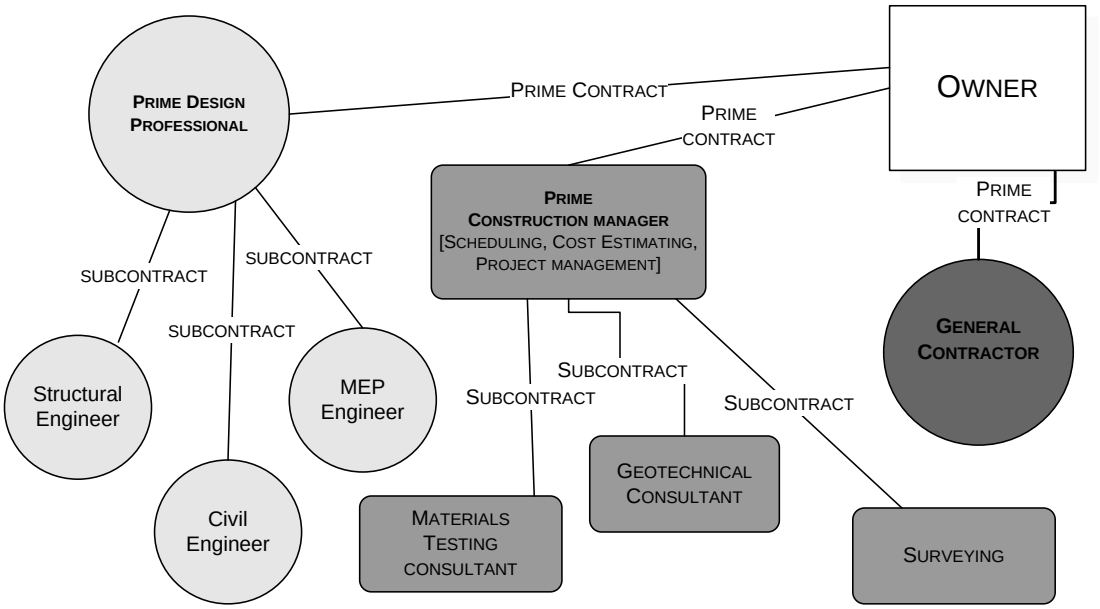
Today's construction projects typically require the services of a team of two or more design and other construction industry professionals, including architects, engineers, cost estimators, schedulers, construction managers and related construction industry personnel to deliver the full range of professional services that are required for the proper and timely completion of the planning, design and contract administration phases of a typical construction project. These teams provide professional services for office buildings, shopping centers, office parks, commercial and retail projects, local and state government facilities, federal projects, high tech plants, transit systems, airports and multi-modal transportation terminals.

The composition of a project design or construction management team may range from a relatively simple two-person group consisting of an individual architect or designer, and one structural engineer, who work together to produce a simple three to five

sheet set of builder's plans for a single family, "stick built" residence—to a twenty or thirty-firm group of architects, engineers, costs estimators, construction managers and specialty consultants, who work together to produce a 250-400 sheet set of very complex drawings and a multi-volume project manual for a large commercial, governmental, industrial or multi-family project. One of the many characteristics that the single-family residence and governmental project teams share is that each team will likely need one or more subconsultants or subcontractors[1] in order to complete its services for the project.

The following Chart graphically reflects typical contractual relationships for a construction project, including some typical Prime Contractor—subcontractor roles, as they will be discussed in this Chapter:

TYPICAL OWNER – PRIME DESIGN PROFESSIONAL OR CM – SUBCONTRACTOR RELATIONSHIPS



Typically, negotiation and drafting of the "prime" contract receives the most attention and care. However, a construction project is made up of a complex web of contracts. Each one a small piece of the whole. Therefore, just as much thought and care should be taken in negotiating and drafting the subcontracts as with the major contracts.

There are some legal considerations, however, that are unique to the Prime Contractor—subcontractor relationship.

2. The Process of Choosing A Subcontractor

As a part of its efforts to obtain the prime contract for a construction project, the Prime Contractor typically solicits and reviews oral or written fee/scope proposals from a pre-selected group of potential subcontractors as it negotiates the prime contract with the Owner. Depending on the size and complexity of the project, the bid solicitation may be done in a formal Request for Proposal or "RFP" process, or simply picking up the telephone to request an estimate from a trusted subcontractor. Most public projects have some sort of minority-owned business and non-discrimination policies to which both the Prime Contractor and its subcontractors must adhere.

Potential subcontractors, who are interested in working on the project with the Prime Contractor, will typically provide the requested information to the Prime Contractor in the form of written subcontractor proposals. As a part of the preparation and submission of the proposals, each proposing potential subcontractor must make sure that it is sufficiently familiar with the project and all of the material aspects of the services on which it is proposing. It is the subcontractor's responsibility to diligently review the requirements of the project and ensure that it is submitting an appropriate and fully responsive proposal. In the event that the proposing potential subcontractor has any questions, it should seek all relevant information from the Prime Contractor. If there is a formal request for proposal or request for qualifications that was issued by the owner, it should be reviewed by each proposing potential subcontractor before it submits its proposal to the Prime Contractor.

Each of the proposals are then transmitted to the Prime Contractor for its review, comment and use in the preparation of the Prime Contractor's proposals to the owner. Many, if not most, subconsultants will also include other desired or intended "standard terms and conditions of service" in their proposal, along with the fee and scope. These subcontractor proposals are often signed and constitute the subcontractor's contractual offer to perform the services, subject to the terms and conditions in the proposal.

> Practice Pointer: The Prime Contractor must read, understand and negotiate the subcontractor's standard terms and conditions. Often, these are simply thrown in the file and not even attached to the contract. However, courts will enforce these terms and conditions like any other contract, and as such, the Prime Contractor may be bound by them, even in the event of a conflict with other terms of the subcontract.

As it focuses on trying to be selected by the Owner to provide the necessary design, construction or project management services for the entire project, the Prime Contractor does not typically pay much attention to anything that it receives from the potential subcontractors other than scope and fee information. It would be very unusual for a Prime Contractor to review and comment on any terms other than scope and fee from a potential subcontractor prior to being awarded the job. The failure to review and become generally familiar with all of the other terms and conditions submitted by the potential subcontractor is a very common mistake. This common mistake frequently leads to significant problems; if the job progresses and no subcontract is negotiated and signed by Prime Contractor and its subcontractors.

Prior to its contract negotiations with the owner, the Prime Contractor should review the potential subcontractor proposals that it has received. It will normally identify the potential subcontractors that it intends to use for the project. As a part of this process

the Prime Contractor should make sure that it fully understands the terms and conditions submitted in the proposals. It should pay careful attention to identify and investigate any of the terms and conditions that are inconsistent with the requirements of the prime contract. If any of the potential subcontractors' proposals are in conflict with the terms of the prime contract, it must address and resolve those conflicts before it relies upon that proposal for its submission to the owner.

The scope and details of the contract negotiation, drafting and execution process is outside the scope of this Chapter. Once the Prime Contractor has been advised that it has been selected for the project by the owner and before it signs the prime contract with the owner, it should carefully review again all of the proposals from the potential subcontractors that it intends to use on the project. It should reconfirm that the terms and conditions of the proposals are compatible with the terms of the prime contract. It should also reconfirm with each of the potential subcontractors that it intends to use them on the project and will be sending them a proposed form of subcontract agreement. Thereafter, after the prime contract is executed, the Prime Contractor should turn its attention to the negotiation of the precise terms and conditions of its agreements with each of its subconsultants.

> Practice Pointer: Once it has been awarded the project, and during the final negotiation phase with the owner, the Prime Contractor should review both the prime contract and its subcontracts to make sure that the terms and conditions of each do not conflict, and that the Prime Contractor is fully aware of its liabilities and responsibilities to each of the parties. Additionally, the subcontractor should also read the terms and conditions of the prime contract, especially if the subcontract contains a "flow-down" provision discussed later in this chapter.

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Upon the completion of the individual draft subcontracts for each potential subcontractor, the customized draft subcontract and a redacted copy of the prime contract should be sent to the subcontractor, with a request for a meeting to discuss the project, the potential subcontractor's proposal and the draft proposed subcontract agreement. In its transmittal, the Prime Contractor should suggest that the parties and their counsel get together in person to discuss the project and the terms of the subcontract. While it is not necessary that all meetings be in person, it is advisable to hold at least one meeting in person with the subcontractor in order to discuss and review the subcontract agreement.

3. Unique Legal Issues Applicable to the Subconsultant and Subcontractor Relationship

Before turning to the mechanics of negotiating and drafting a subcontractor agreement, it is important to consider legal issues unique to the prime/subcontractor relationship. When a dispute arises between the Prime Contractor and the owner or the Prime Contractor and one or more of its subcontractors, it is important to know each parties rights and obligations to the project and to each other. The legal analysis relating to the liability exposure of each of the parties depends on the relative relationship between and among the design team, the construction team, the owner and/or the CM, the likelihood of a particular jurisdiction to enforce common contractual clauses, and the applicable law relating to the issues of privity, economic loss, indemnity and negligence. Therefore, this section will focus on some of the more most common liability issues that arise in the prime/sub relationship.

In construction projects, the contractual relationships define, govern and dictate each of the parties' obligations. In most cases, the Prime Contractor will be liable for the acts and omissions of its subcontractor. Additionally, the Prime Contractor has certain

obligations to its subcontract, most notably payment, that is dependent on the actions of the owner. As a result, many Prime Contractors utilize various "risk shifting" contract clauses that limit their liability. Whether representing the Prime Contractor or the subcontractor, it is important to recognize and deal with these contract issues that may arise in the prime/sub context.

A. Indemnification and Contribution

Two legal concepts govern the allocation of liability between a Prime Contractor and its subcontractors: indemnification and contribution. Indemnification may arise either contractually in anticipation of future claims or, in some states, by operation of law if, once a claim has arisen, a passive tortfeasor is required to pay damages to a third party. Contribution may arise by operation of law if one party is unjustly required to pay damages to a third party that should rightfully be borne by several tortfeasors.

Liability on a particular project may be shifted between a Prime Contractor and its subcontractors or among the subcontractors themselves through the incorporation of an indemnification clause in their contracts. An indemnification clause shifts all or a portion of the liability from one party to another "in a manner that would not have occurred in a predictable manner under common law in the absence of the contract."[2] The scope of a contractual indemnity provision may range from a somewhat narrow obligation of requiring one party to reimburse the other for actual damages paid to a third party following an assessment of damages, to the much broader obligation of one party to provide legal counsel for the other party based upon allegations which, if proven, would come within the scope of the indemnity provision.

Some states also recognize equitable indemnification as a part of their common law. Under this theory, if "a passively negligent tortfeasor is required solely through operation of law . . . to pay for damages to a third person which have been primarily caused by the active negligence of another . . . the active tortfeasor will be held to be the indemnifier of the passive tortfeasor."[3] With equitable indemnification, therefore, one party may be required to indemnify the other as if there was a contractual indemnification clause in place *if* that tortfeasor actively caused the damages paid for by the passive tortfeasor.[4] Although adopting the phrase "equitable indemnity," several states have adopted a hybrid mix of the concepts of indemnification and contribution.[5]

A second way in which liability may be shifted among multiple subcontractors or as between the prime and the sub is through contribution. "[U]nder [the] principle of 'contribution,' a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tortfeasors whose negligence contributed to the injury and who were also liable to the plaintiff."[6] Many states recognize the right to contribution following damages paid for negligent design or construction either under their common law or by statute.[7] Several states recognize a statutory right to contribution, often stemming from comparative negligence principles, rather than one grounded in the common law.[8]

B. Limitations of Liability Clauses

A subcontractor may limit its liability to the Prime Contractor through the use of a limitation of liability clause. Clauses limiting the liability of a construction professional are frequently found in construction contracts. For example, a structural engineer may limit its liability for performance under the subcontract to the fee earned on the project.

These clauses, if clear and unambiguous, will probably be enforced by a court or arbitration panel. However, the laws of each jurisdiction should be reviewed that such clauses are not void as against public policy. While the courts in some states have never directly addressed the enforceability of limitation of liability clauses contained in the various prime and subcontracts. They most likely have, however, considered the enforceability of exculpatory clauses extensively. Exculpatory clauses are very similar to those limiting liability—while a limitation of liability provides a cap on the damages the other party to the contract may recover, an exculpatory clause relieves one party of liability entirely.

C. Payment Clauses

One of the primary concerns on a construction project for both Prime Contractors and subcontractors is payment. Therefore, construction contracts frequently include payment provisions that attempt to condition payment on receipt of payment from the upstream party.

The Prime Contractor holds the direct contracting relationship with both the client and the subcontractor. Very few but the largest of A/E firms and general contractors will have enough cash flow to pay subcontractors without first receiving payment from the owner. Therefore, issues arise when payment from the client is late, or a dispute arises regarding the services provided by the Prime Contractor that may be unrelated to services provided by all but one of the , thereby causing the owner to withhold payments. In more extreme situations, the owner becomes insolvent, or is otherwise unable to make payment to the Prime Contractor even though both the prime and its subcontractors have fulfilled all the obligations under their contracts. The issue, then, is which party should bear the

risk of non-payment by the owner. Normally, without any risk-shifting provision in each of its subcontract agreements, the Prime Contractor will bear the risk, remaining obligated to make payments to its subcontractors for work performed, notwithstanding payment by the owner. There are, however, two commonly used contract clauses which may shift some portion or all of the risk to the subcontractor. These are known as the "pay-when-paid" and the "pay-if-paid" clauses.

In general, "pay-when-paid" clauses deal only with the timing of payment and are construed merely as timing mechanisms, and do not operate to preclude payment indefinitely. In other words, the clauses merely provide a general contractor with some reasonable period within which to make payment. The AIA 401 and the AGC 650 subcontract forms contain pay-when-paid payment terms.

From a subcontractor's perspective, these clauses are preferable to pay-if-paid clauses because it does not completely shift the risk of the owner's non-payment to the subcontractor. With a pay-when-paid clause, so long as the cause for non-payment to the general contractor from the owner is not related to the subcontractor's work, the general contractor will continue to be liable to the subcontractor immediately following the expiration of a "reasonable" time period. The time period is like a grace period for the general contractor, but if the general contractor does not receive payment from the owner, and it is through no fault of the subcontractor, the general contractor is still going to be ultimately liable to the subcontractor. An example of a simple "pay-when-paid" clause is: "Final payment to Subcontractor will occur within 30 days of payment to Contractor by Owner."

On the other hand, "pay-if-paid" clauses will preclude a subcontractor from recovering payment from the Prime Contractor when the Prime Contractor is never paid by the owner. In other words, the risk of non-payment by the owner is shifted from the Prime Contractor to the subcontractor. An example of a "pay-if-paid" clause is as follows:

> The Contractor shall be under no obligation to make any payment to the Subcontractor except to the extent that the Contractor has received funds from the Owner for the work performed by the Subcontractor. The Subcontractor agrees that it will not be entitled to payment by the Contractor for work performed if, for any reason, including the Owner's insolvency or lack of available funds, the Owner fails to pay the Contractor in accordance with the General Contract.

When enforced, these clauses cause the downstream party to forfeit its right to payment under the contract when the party with which it has contracted fails to receive payment from the upstream party. However, courts do not like to enforce these provisions, and, therefore, will require them to be clear and unambiguous to be enforceable. There are some states, including both New York and California, which will not enforce pay-if-paid clauses at all, as these clauses have been held to be void as against public policy.[9] Additionally, North Carolina and Wisconsin have passed statutes voiding such clauses,[10] while other jurisdictions have statutes that do not void pay-if-paid clauses outright, but do place limits on their enforceability.[11]

D. Insurance Issues

In allocating the risk among multiple entities, the proper insurance coverage is essential. Many construction contracts, including some form contracts like those from the Engineers Joint Contract Documents Committee (EJCDC), require that certain parties be listed as "additional insureds" on their Commercial General Liability ("CGL") policy

or professional liability policy. Usually, "additional insureds" are parties who are upstream from the policy holder. For example, owners have often required general contractors to buy liability insurance that names the owners as additional insureds. General contractors, in turn, often require subcontractors to do the same for the general contractor and possibly other upper-tier subcontractors.

Additional-insured endorsements allow "upstream" parties to make a claim directly on the potentially liable party's insurance. For example, if an owner finds construction defect, he or she is most likely to sue the general contractor, even if the defect was caused by one of the general contractor's subcontractors. The endorsement allows the general contractor to make a claim directly on the liable subcontractors' insurance.

In essence, parties who are named as "additional insureds" are entitled to much of the same coverage as the primary insured. Often, these types of arrangements exist even if the additional insured has its own insurance policy. However usually the policy on which a party is named as an additional insured will be "primary" and "non-contributory," meaning that the limits of the policy on which the party is named as an additional insured must be exhausted before their own insurance comes into play. Additionally, the additional insured may be entitled to coverage for instances of its own negligence, which would normally be an exclusion if the additional insured was the policy holder. Allowing coverage in such instances also acts like a "broad-form indemnity" provision in the contract, *i.e.* forcing a party to indemnify the other for the other's own negligence, which circumvents many states' anti-indemnity laws.

Parties who agree to contractual obligations relating to naming additional insureds should be aware of some adverse consequences. This includes exhausting the policy holder's insurance coverage, and being held liable for deductibles and higher premiums, in order to defend another party's negligence.

Alternatives to additional insured provisions include utilization of other available insurance products. For example, "Owner's & Contractors Protective" ("OCP") policies, which are separate and distinct from the insured's CGL policy, may provide a more narrow scope of coverage to third parties, because it covers only the "vicarious" liability of the policy holder or damages arising from the insured's general supervision of the construction work.

On the design side, a project professional liability policy ("Project Policy") is a particularly appealing insurance product for a project involving multiple design professionals. Under such a policy, coverage applies to design services provided for the project itself. Under a practice professional liability policy ("Practice Policy"), by contrast, professional services rendered by an individual design professional on all projects during a policy period are covered. Rather than having overlapping Practice Polices for each design professional where gaps in coverage and conflicts may arise, a Project Policy covers the Prime Design Professional as well as its consultants for their collective work on a project. As such, a Project Policy replaces the design professionals' annual policies with regard to services provided for the project. To ensure that coverage will apply against any potential claims arising out of the project, an extended reporting period should be in place until the time limits set forth in the applicable state's statute of repose have expired.

Practice Pointer: When a contract requires "additional insureds" or the parties agree to a practice policy, in the case of a significant deductible, consider drafting a deductible payment agreement order to fairly allocate the insurance deductible among the various design professionals should a claim arise under the policy. For design professionals, one straightforward way in which to divide the payment is to require each professional to pay the same percentage of the deductible as they will receive of the total design fees.

E. Dispute Resolution

If a dispute arises among the parties of a construction project and all efforts to resolve the conflict by informal negotiation fail, there are other more formal dispute resolution methods available to parties who wish to avoid litigation. These dispute resolution procedures, collectively termed "Alternative Dispute Resolution" or "ADR," are usually less costly and more expeditious than litigation and are widely used in construction disputes. In fact, some ADR techniques, such as arbitration and mediation, are so popular that the term "alternative" is somewhat of a misnomer.

ADR procedures are especially popular in the construction industry in light of the fact that several of the form contracts, including those from the AIA, incorporate mandatory mediation and/or arbitration clauses.[12] Many states have enacted statutes that regulate ADR procedures, including some version of the Uniform Arbitration Act.[13] There are a few issues that Prime Contractors and subcontractors should consider before agreeing to one form of dispute resolution over another.

The first issue is that many construction disputes involve multiple parties, and a range of claims. Parties, however cannot be forced to mediate or arbitrate a dispute, except through an express contractual agreement. Therefore, if ADR is the preferred method of dispute resolution, it is in the best interests of the owner and the Prime

Contractor(s) to ensure that all of the subcontract agreements contain similar ADR provisions. Otherwise, a party may be forced to litigate a dispute in two different forums with differing outcomes.

As an example, assume that an owner sues the A/E for a design error that was caused by the A/E's structural engineer. However, the A/E prime contract contains an arbitration provision with mandatory mediation, but the A/E's subcontract does not. Instead of being allowed to join the structural engineer as a third party to the arbitration, "passing-through" the owner's claim to the structural engineer, the A/E must first defend the arbitration on behalf of its engineer, and then sue the engineer in state court. Liability on behalf of the engineer may be found in the arbitration, but not in the litigation, leaving the A/E holding the bag.

> Practice Pointer: The Prime Contractor should review all dispute resolution procedures in both the prime contract and each of its subcontracts to ensure that all parties are required to adhere to the same dispute resolution process. Additionally, if all parties agree to resolve the dispute through arbitration, there should be some language in the contract that allows joinder of both parties and claims.

F. Flow-Down Clauses

Flow-down clauses, sometimes referred to as "incorporation-by-reference clauses," are contract provisions by which the parties incorporate the terms of the construction or design contract between the owner and the Prime Contractor into the lower tier subcontractor. In other words, the subcontractor agrees to be bound by the obligations and responsibilities that the Prime Contractor has assumed toward the owner. Additionally, a well-crafted flow-down clause may allow the Prime Contractor to reduce its total exposure to its subcontractors by limiting its damages to only those that are

recovered by the Prime Contractor from the owner and "provides a means to pass through to the responsible subcontractors the contractor's damage exposure to the owner."[14]

In addition to increasing the subcontractor's liability to the Prime Contractor, flow-down clauses may severely reduce the subcontractor's ability to recover damages on its contract, if the prime contract contains limitations of liability, limitations regarding rights to payment, or other enforceable exculpatory provisions such as no damages for delay or waiver of consequential damages. [15]

Often, it is difficult for subcontractors to remove these clauses from their contracts due to lack of bargaining power with the Prime Contractor. One commentator has suggested that one way to make such clauses more balanced is to insist on a flow-down clause that imposes reciprocal obligations: "For example, if the subcontractor assumes the contractor's obligations to the owner, then the contractor should be asked to assume the owner's obligations to the contractor, including the obligation of payment."[16]

Not all flow-down clauses, however, are necessarily detrimental to the rights of the subcontractor. There are instances where the prime contract actually affords the subcontractor more rights than the subcontract. These "added benefits" include access to "alternative dispute resolution,[17] payment terms, notice requirements, completion dates, delay and delay damages, indemnity obligations, and conditions of default."[18] In order to successfully evaluate whether a flow-down provision means added risks or benefits to the subcontractor, the subcontractor must take the time to review and examine the prime contract.

G. Applicability of Economic Loss Rule

While the "contract is king" on construction projects, there are tort principles that

regularly come into play. Most notably is the standard of care required of all design professionals, including consultants. While the standard of care is an obligation under the contract or subcontract, its genesis is in negligence principles. In other words, if an A/E has breached the standard of care, i.e. acted in a way contrary to what a prudent A/E would do in that location under similar circumstances, the A/E has both been negligent, and breached its contract. The economic loss rule, as discussed elsewhere in this book, is a judicially created doctrine that prevents a party from suing in tort to recover purely economic damages.[19] Under today's modern pleading rules, it is not uncommon for a plaintiff to allege a cause of action against the contractor or design professional for both breach of contract and negligence. However, in the absence of contractual language holding a particular party to a higher standard of care than that imposed by law, the standard of proof for breach of contract will, in most cases, be essentially the same as for negligent violation of a duty.[20] As a result, in states where the courts adhere to the economic loss doctrine will bar such actions in tort.[21]

With respect to subcontractors, the application of the economic loss doctrine arises where there is no privity of contract. For example, owner may claim that it was damaged by the negligence of one of the Prime Contractor's subcontractor and attempts to sue the subcontractor directly in tort. This situation may also arise where the general contractor or one of its subcontractors attempts to sue one of the A/E's subconsultants for negligence or vice versa. Here the question is whether the economic loss doctrine can act as a bar to a direct cause of action for damages from negligent conduct provided by a party not in privity with the plaintiff.[22]

As this issue is fully discussed in Chapter ___, there is no need to reiterate this interesting debate here. However, the emerging trend by courts who are faced with this issue appears to be in favor of limiting the applicability of the economic loss doctrine in cases where no privity of contract exists between the parties. The courts that have applied the economic loss doctrine to find that a party may not maintain an action in tort against a subcontractor with which the party has no privity of contractor, seem to be persuaded by distinct provisions contained in either the prime contract or the subcontract itself. As a practical consideration, therefore, in order for an A/E to possibly avoid a tort action, the A/E should insist on a clause that specifically identifies the A/E's duty of care.[23]

4. Drafting Subcontract Agreements

The purpose of this section is to provide practical drafting tips in addition to a checklist of issues which should be considered for every subcontract. Due to the fact that the Prime Contractor generally takes the lead in drafting the subcontracts, the checklist is from the Prime Contractor's perspective. However, listing all of the issues will help subcontractors identify and negotiate important terms that will affect their liability, obligations and responsibilities under their subcontracts.

A. <u>Rule No. 1</u>: Get It In Writing, and Get It Signed!

We have all heard the stories of the days when everyone in the construction industry "knew everyone else" and no one had to write anything down. These were the days of complete honesty and perfect memories. These were also the days when no one changed jobs and everyone lived forever. Without questioning exactly when those bygone days ended, it is safe to say that such times have long since passed.

The terms and conditions of every agreement between a Prime Contractor and each of its subcontractors should be reduced to writing and signed by duly authorized representatives of the Prime Contractor. In every jurisdiction, it is possible to have enforceable oral subcontracts. However, unless the terms of the agreement are reduced to writing, disagreements over material and important issues are certain to occur. In general, it is not possible to predict how such disagreements will be reduced resolved. Additionally, in many prime contracts, there is an obligation imposed upon the Prime Contractor to "pass down" or impose certain provisions of the prime contract on the Prime Contractor's subcontractors and this obligation can only effectively be completed in a written subcontract.

It is baffling the number of times that a Prime Contractor and its subcontractor will spend weeks even months negotiating a contract, and then never bother executing it. While courts will usually enforce unsigned contracts if it conforms with the "conduct of the parties," it saves both time and money to simply sign the final contract.

B. Rule No. 2: Develop a "Form" Contract For All Subcontracts on the Project

The prime contract with the owner will normally impose a duty and responsibility upon the Prime Contractor to identify and select all subcontractors required for the project. The right of the Prime Contractor to select and employ the subcontractors for its services will often be subject to the approval of the owner.

> Practice Pointer: Before executing the prime contract, the Prime Contractor should deliver to the owner a list of the potential subcontractors for the project. If the owner is given the list and then requests a change in a subcontractor after the prime contract is executed, any additional costs related to the change in the subcontractor will be at the expense of the owner.

i. Form or Custom Subcontract Agreements

There are many subcontract forms or templates available in the marketplace today. Among them are subcontract forms from the American Institute of Architects ("AIA"), the Associated General Contractors ("AGC"), the Engineers Joint Contract Documents Committee ("EJCDC"), the Design Build Institute of America ("DBIA") and Construction Owners Association of America ("COAA"), to name of a few of the most widely-known forms.

Many lawyers, Prime Contractor's and subcontractors prefer to use their own, customized subcontract agreements. It is beyond the scope of this Chapter to evaluate and recommend one form or approach over the other. Attached to the Appendices of this Chapter as Appendix A, is typical customized subcontract agreement.

In general, the individual terms and conditions of a particular project, coupled with the unique requirements of each construction project and subcontract terms and conditions will require a great deal of unique language and terms or customization, without regard to whether the initial contract template is a nationally recognized form or individually drafted subcontract agreement. In any event, it is essential to ensure that certain terms and conditions are the same for all subcontractors on the project that all key subjects are addressed in the final, executed subcontract agreement and a properly signed subcontract is in place at the very beginning of the project.

ii. Developing a Standard or Template Base Subcontract Agreement

As a starting point to the negotiations with all of the subcontractors, the Prime Contractor should prepare a form of subcontract agreement that it will use as a starting point for all subcontracts on the project. Sometimes this is done well in advance, and

may be attached to the RFP or when a request for bid is made. It does not matter whether the initial template is a form from AIA, AGC, DBIA, EJCDC or other similar organization, or a customized from that the lawyer or Prime Contractor has used on other projects, or was specifically drafted for the project at hand. Whatever the starting point, it is important develop a template or form that contains all of the terms and conditions that should apply to all of the subcontractors on the Prime Contractor's project team.

The template should include all of the terms and conditions that the Prime Contractor and its counsel believe should apply to any of the subcontractors' performance of the services required by the agreement. Remember that the prime contract may require that certain provisions or clauses be included in each subcontract agreement. The next step is to prepare a draft of a customized subcontract for each of the subcontractors on the project using the template. Each individualized draft subcontract should include all relevant information, terms and conditions, including information from the specific proposals previously submitted by the subcontractor. Once completed the customized draft subcontract and a redacted copy of the prime contract should be sent to the subcontractor for its review and comment. The copy of the prime agreement should be redacted to remove the numbers that represent the fee and reimbursable expenses information. Any other confidential or proprietary information should also be redacted from the copy of the prime agreement.

Some of the Prime Contractor's consultants will have significant professional responsibilities and others will have relatively narrow scopes of work, with short durations. For example, the scope of work of the structural engineer for a project is typically more extensive and involves a greater fee than a subcontractor that is providing

drafting or duplication services to the Prime Contractor for the project. In order to efficiently manage the development of a subcontract for these two types of subcontractors, it is recommended that the Prime Contractor develop two versions of its subcontract template for the project, in order to support efficient and properly focuses contract negotiations with its subcontractors.

As a result, the Prime Contractor should develop a template that is comprehensive and detailed or "long form" of subcontract template for the major consultants or subcontractors.[24] "Major Consultants" are those consultants whose expertise is typically required to produce the structure, facility, building, development or project of the type at issue. The professionals who would be considered "principal or major consultants" vary depending upon the type of project, the expertise possessed on the Prime Contractor's staff and the deal made with the owner.

A shorter, more abbreviated "short form" of subcontract agreement should be used for specialty subcontractors[25] with small fees and scopes of work and for limited or shared risk subcontractors.[26] "Specialty Consultants" are subcontractors to the Prime Contractor and are retained to provide specialized technical expertise for some particular system or portion of the project. The variety, level of specialization and expertise of Specialty Consultants range from the very common to the very specific. On the design side, examples of Specialty Consultants include elevator or vertical transportation, interiors, kitchen, acoustical, scheduling, cost estimating, parking, surface transportation, graphic or signage, fire protection, communication, audio visual, security, curtain wall, shoring, steel connections, and lighting.

Ideally, a representative of the Prime Contractor and each subcontractor should meet in person to discuss the draft subcontract and to discuss their mutual expectations of each other for their working relationship on the project. This provides an opportunity for each party to discuss the particular or unique characteristics and issues associated with the project. It also allows the parties to meet first hand to address any particularly troublesome or difficult contract issues. After this first meeting, the remaining or unresolved subcontract issues can typically be addressed by the exchanges of electronic redlines and clean drafts of the subcontract.

One short note regarding so-called "Master Agreements." These are agreements which are often executed between a Prime Contractor and a subcontractor who work on multiple projects together. These projects may be related or unrelated. The Master Agreement contains the terms and conditions which control all of the projects between the Prime Contractor and the Subcontractor. The problem with Master Agreements, however, is that no two projects are alike, and therefore, no two contracts should be exactly alike. Each project and the parties need to be evaluated before entering into a contract. Master Agreement invite the parties to become lazy, not seeing the need to review the contract until a dispute arises. Furthermore, while the Master Agreement sits in the drawer for sometimes years, laws may change in the intervening period, or emerging legal issues at the time of the contract may be developed and resolved in such a way that makes various clauses of the contract either unenforceable or causing unintended results.

C. Rule No. 3: Identify Key Subcontract Terms and Conditions

There are certain issues that need to be addressed in every Prime Contractor subcontract in order for it to be legally enforceable and in compliance with the terms of the prime agreement. There are other issues, subjects, terms and conditions that, based upon the common experience of many people in the construction, should always be considered for inclusion in Prime Contractor subcontracts. Good examples of these types of issues are discussed in Section 3, above. Finally, there are other issues, subjects, terms and conditions that may be necessary for a particular subcontract based upon the negotiation of the parties and/or the needs of the project.

The following chart is list of the terms and conditions that should be evaluated for inclusion in every Prime Contractor subcontracts. This Checklist is based upon the customized Design Services Subcontract Agreement that is attached hereto as Appendix A.

Table 1:

PROVISION CHECKLIST DESIGN PROFESSIONAL/CONSTRUCTION MANAGER SUBCONTRACT			
TYPE/SUBJECT MATTER OF PROVISION	**REASON FOR, OR OBJECTIVE OF, PROVISION(S)**	**[27] E = ESSENTIAL[28]; HD = HIGHLY DESIRABLE; U = USEFUL O = OPTIONAL**	**COMMENTS**
Names/Identity of the Parties			
	The full and correct legal name of the parties must be properly reflected at the beginning of the document.	E	Drafting and reviewing counsel should check the Secretary of State for the jurisdiction in which the Parties are domiciled to make sure that they are in good standing. Use the full, legal name, including, if applicable any fictitious name or "dba". In most jurisdictions, this task can be performed using the Internet.
Name or Title of Document			
	The name or title of the agreement should be reflected at the top of the first page.	HD	
Project Description			
	Description of Project, including	E	The project description in the

	address or location and “name”		subcontract should be identical to the “project description” in the Prime Contract between the Owner and the Prime Contractor. Any differences can create significant problems if there are any claims, disputes or litigation regarding the Project.
Effective Date of Agreement			
	Establishes the date on which the contractual relationship terms of the Agreement start to apply to their relationship	E	Frequently, the Prime Agreement establishes a date in the past as the date on which the design professionals, construction manager and their consultants “started” to provide services. As a general rule, the “Effective Date of the Agreement” must should be identical to the “Effective Date” in the Prime Contract between the Owner and the Prime Contractor. On a related topic, the parties may want to consider adding a date on which they agree that the statute of limitations begins to run for the purposes of disputes regarding the project.
Incorporation of applicable terms of Prime Contract			The prime agreement will normally impose upon the Prime Contractor an obligation to require that its subcontractors accept and agree to certain terms and conditions of the prime agreement.
	Requires that applicable provisions of the Prime Agreement that are required to be imposed upon the subcontractors to be incorporated into their subcontracts.	E	
Notice/Contact/Designated Representative Info	Identifies the person or persons who are responsible for receiving any official notice or information that are required by the terms of the subcontract agreement.	HD	This provision sets forth the form or forms of notification that may be used for communicating information required or allowed by the subcontract. It also provides the specific contact information, i.e., name, title, address, email, telephone, fax and other pertinent details for communication between the parties.
Scope of Services			
	The scope or description of the services that are to be provided. This description should be very detailed and thorough.	E	
Standard of Performance			
Subconsultants			The Prime Contractor’s duties and responsibilities under the provisions of the prime contract with the owner will typically include the identification, selection and management of the services and deliverables required of the Prime Contractor’s subcontractors. In many prime design contracts, the Prime Contractor must obtain the owner’s approval of its subcontractors.

Schedule, applicable to provision of Services or Deliverables, if any.			
Description of Deliverables			
Budget or Financial Parameters applicable to consultant's services			
Coordination – description of relative allocation of duties and responsibilities			
Compensation			
	Amount		
Terms of Payment			
	Payment application processes		
	Pay when paid clause		
Additional Services			
	Sets for the terms and conditions upon which any out of scope or "additional services" may be authorized and the method of determining amount of compensation to be paid.		
Insurance			
	Sets forth the specific insurance types, coverages and other parameters required of the subcontractor		
Indemnification			
	Professional and contractual liability		
	Intellectual property		
	Mechanic's lien or claimant liability		
Dispute Resolution			Review dispute resolution procedures in both the prime contract and the subcontract to make sure they conform. Additionally review and consider joinder issues.
Ownership and Use of Documents			
	Who "owns" the documents and what does this mean		
	Non-exclusive licenses		
	Indemnification for reuse		
	Termination implications		
Document Formatting			
Status of Subcontractor			
	Independent contractor, agency		
Maintenance of Records			
Assignment/Successor			
Authority			
Integration Clause			
Counterpart Execution			
Third party Beneficiary			
Choice of Laws			

Language, formatting and calculation methodology			
Shop Drawing, Submittals and Detailing Issues			
Forum Selection			
Signatures			

5. Subcontract Negotiations

The subcontract negotiations between the Prime Contractor and each of its subcontractors should be intended and should be conducted with the goal of developing a set of terms and conditions that fairly and accurately reflect the allocation of rights, responsibilities, obligations and risks between the Prime Contractor and its subcontractors that are inherent in the project. The negotiations should not be intended to impose unreasonable burdens or liabilities upon either party.

During the process of the negotiations between the Prime Contractor and the owner, the Prime Contractor must be sensitive to the roles of its subcontractors and not agree to unusual or unduly burdensome responsibilities. In order to avoid this situation, the Prime Contractor should periodically advise its subconsultants of the status of the negotiations.

6. Subcontract Issues Unique to Offshore Subcontracting Relationships

Over the last twenty years, many architects, engineers, steel fabricators and general contractors have used teams of technicians from other countries as subcontractors on their projects. Detailing and shop drawing for steel fabrications are some of the disciplines were personnel from Mexico, the Philippines, India and other foreign locations, have provided and continue to provide construction services for projects in the United States.

The principal reason for the creation of these off-shore relationships has more often been the available of less expenses services in foreign locations. In order to provide the less expensive services, local technicians, craftsmen and personnel are used to produce the work product. The personnel typically do not hold any United States licenses or certifications. The entity providing the services is typically a lower-tier subcontractor and may not possess the background, experience and training of comparable domestic personnel.

On large projects, the use of such off-shore subcontractors must be considered and a determination made with respect to whether any off-shore subcontracting will be allowed. If it is to be allowed, the subcontract should clearly articulate the conditions under which such services may be provided. In addition the factors listed in Table 1, in all subcontracts where first or lower-tier off-shore subcontracting may be used, the following issues should be discussed and properly addressed:

Table 2:

SUPPLEMENTAL CHECKLIST FOR OFF-SHORE DESIGN PROFESSIONAL/CONSTRUCTION MANAGER SUBCONTRACTS			
TYPE/SUBJECT MATTER OF PROVISION	**REASON FOR, OR OBJECTIVE OF, PROVISION(S)**	**[29] E = ESSENTIAL[30]; HD = HIGHLY DESIRABLE; U = USEFUL O = OPTIONAL**	**COMMENTS**
Form of Agreement			
Communications			
	How will communications be handled and in what language		How will questions and issues associated with understanding the scope of work be addressed?
Delivery Methods			
Payment			
	Currency/Payment Issues		
Insurance			
Disputes			
	Jurisdiction		
	Dispute resolution with subconsultants		
	Problems related to multiparty dispute resolution under Owner-DP contract.		

Deliverables			
QA/QC Issues			

7. Conclusion

Every subcontract between a Prime Contractor must be negotiated based upon the terms and conditions of the prime contract with the owner and include all of the terms and conditions of the service of the subcontractor. The pertinent parts of the prime contract should be incorporated by reference into the subcontract, with a redacted copy of the prime contract attached to it. The subcontract and any amendments thereto must always be reduced to writing. Finally, it must be signed by the parties to it and copies distributed accordingly.

PRACTICE AIDS

Sample Subcontract Agreement at Appendix A.

Standard Construction Manager and Subcontractor Contract Forms Available:

The Most widely used standard forms are as follows:

American Institute of Architects (AIA) Contract Documents

Association of General Contractors (AGC) Contract Documents

Engineers Joint Contract Document Committee (EJCDC) Contract Documents

Design-Build Institute of America (DBIA) Contract Documents

American Institute of Architects:

AIA construction management Forms are:

A101/CMa Standard Form of Agreement Between Owner and Contractor Where the Basis of Payment is a Stipulated Sum

A121/CMc (AGC Document 565) Owner-Construction Manager Agreement Where the Construction Manager Is Also the Constructor

A131/CMc (AGC Document 566) Agreement Between Owner and Construction Manager Where the Construction Manager is Also the Constructor and Where the Basis for Payment is the Cost of the Work Plus a Fee and There is No Guaranteed Cost

A201/CMa General Conditions of the Contract for Construction - Construction Manager Edition
A511/CMa Guide for Supplementary Conditions - Construction Management - Adviser Edition

B141CMa Standard Form of Agreement Between Owner and Architect - Construction Manager Edition

B144/Arch-CM Standard Form of Amendment for the Agreement Between the Owner and Architect - Construction Management Services Adviser

B801/CMA Standard Form of Agreement Between Owner and Construction Manager – Adviser

AIA Subcontract/Subconsultant Form Documents

A401 Standard form of agreement between Contractor and Subcontractor with instructions (1997)

C105 Standard form of agreement between Architect and Consulting Architect (2005)

C141 Standard form of agreement between Architect and Consultant with instructions (1997)

C142 Abbreviated standard form of agreement between Architect and Consultant with instructions (1997)

C727 Standard form of agreement between Architect and Consultant for special services with instructions (1992)

Associated General Contractors of America:

AGC Form Documents Regarding Subcontractors

AGC 601 2004 Subcontract for Use on Federal Construction

AGC 602 2004 Standard Form Purchase Order

AGC 603 2000 Standard Short Form Agreement Between Contractor and Subcontractor (Where Contractor Assumes Risk of Owner Payment)

AGC 604 2000 Standard Short Form of Agreement Between Contractor and Subcontractor (Where Contractor and Subcontractor Share Risk of Owner Payment)

AGC 605 2004 Invitation to Bid/Subbid Proposal

AGC 606 2004 Subcontract Performance Bond

AGC 607 2004 Subcontract Payment Bond

AGC 610 1988 Subcontractor's Application for Payment

AGC 621 2004 Subcontractor Statement of Qualifications for a Specific Project

AGC 650 1998 Standard Form of Agreement Between Contractor and Subcontractor (Where the Contractor Assumes the Risk of Owner Payment)

AGC 650.1/655.1 2003 Standard Form Rider Between Contractor and Subcontractor for Storage of Materials at Subcontractor's Yard

AGC 655 1998 Standard Form of Agreement Between Contractor and Subcontractor (Where the Contractor and Subcontractor Share the Risk of Owner Payment)

The Engineers Joint Contract Documents Committee

Standard Form of Agreement Between Engineer and Architect for Professional Services (1910-10)

Standard Form of Joint Venture Agreement Between Engineers for Professional Services (E-580)

Standard Form of Agreement Between Engineer and Consultant for Professional Services (1910-14)

Standard Form of Agreement Between Engineer and Geotechnical Engineer for Professional Services (1910-27-B)

Amendment to Engineer-Consultant Agreement (E-571)

Design Build Institute of America:

DBIA Document No. 501 - Contract for Design-Build Consultant Services

DBIA Document No. 510 - Design-Build Contracting Guide

DBIA Document No. 520 - Standard Form of Preliminary Agreement Owner and Design Builder

DBIA Document No. 525 - Standard Form of Agreement Between Owner and Design-Builder - Lump Sum

DBIA Document No. 530 - Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price

DBIA Document No. 535 - Standard Form of General Conditions of Contract Between Owner and Design-Builder

DBIA Document No. 540 - Standard Form Of Agreement Between Design-Builder and Designer

DBIA Document No. 550 - Standard Form Of Agreement Between Design-Builder and General Contractor - Cost Plus Fee with an Option for a Guaranteed Maximum Price

DBIA Document No. 555 - Standard Form Of Agreement Between Design-Builder and General Contractor - Lump Sum

DBIA Document No. 560 - Standard Form Of Agreement Between Design-Builder and Design-Build Subcontractor - Guaranteed Maximum Price

DBIA Document No. 565 - Standard Form Of Agreement Between Design-Builder and Design-Build Subcontractor - Lump Sum

[1] Design professionals typically refer to their subcontractors as "subconsultants". Construction or Project Managers may use the term "subconsultant" or "subcontractor". In this Chapter, the terms subcontractor and subconsultant will be used interchangeably to refer to the lower-tier subcontractors of the Prime Contractor.

[2] Robert L. Meyers & Debra A. Perlam, *Risk Allocation Through Indemnity Obligations in Construction Contracts*, 40 S.C. L. REV. 898, 990 (1989); *see, e.g., Marino Constr. Co. v. Renner Architects*, 214 Wis. 2d 589, 571 N.W.2d 923 (Wis. Ct. App. 1997); *Kehoe v. Commonwealth Edison Co.*, 296 Ill. App. 3d 584, 694 N.E.2d 1119 (1998).

[3] *Green Constr. Co. v. United States*, 506 F. Supp. 173, 178 (D. Mich. 1980).

[4] *See, e.g., Woolard v. JLG Indus., Inc.*, 210 F.3d 1158 (10th Cir. 2000); *Medallion Dev., Inc. v. Converse Consultants*, 113 Nev. 27, 930 P.2d 115 (1997); *District of Columbia v. Murtaugh*, 728 A.2d 1237 (D.C. Cir. 1999); *Beitzel v. City of Coeur d'Alene*, 121 Idaho 709, 827 P.2d 1160 (1992); *Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1992); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, No. 38966-1-I, 1997 Wash. App. LEXIS 1801 (Wash. Ct. App. Oct. 27, 1997).

[5] *See, e.g., Benner v. Wichman*, 874 P.2d 949 (Alaska 1994) (recognizing right of "equitable apportionment" following state abolition of right to contribution); *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 760 P.2d 399 (Cal. 1988) (concept of comparative equitable indemnity covers whole range of apportionment of liability).

[6] *Converse Consultants*, 113 Nev. at ___ (quoting Black's Law Dictionary [**page number and edition needed**]).

[7] *See, e.g., Hartford Accident & Indem. Co. v Scarlett Harbor Assoc.*, 109 Md. App. 217, 674 A.2d 106 (Md. Ct. Spec. App. 1996); *Standhardt v. Flintkote Co.*, 84 N.M. 796, 508 P.2d 1283 (1973).

[8] *See, e.g., Brochner v. Western Ins. Co.*, 724 P.2d 1293 (Colo. 1986); *Rothberg v. Reichelt*, 270 A.D.2d 760, 705 N.Y.S.2d 115 (2000); *Clearwater v. L.M. Duncan & Sons, Inc.*, 466 So. 2d 1116 (Fla. Ct. App. 1985); *Good v. Lemcon Dev., Inc.*, No. 12837, 1992 Ohio App. LEXIS 847 (Ohio Ct. App. Feb. 24, 1992). (*Understanding Negotiating and Documenting Relationships*)

[9] *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372 (1997); *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 638 N.Y.S.2d 394, 661 N.E.2d 967 (1995).

[10] *See* NC Gen Stat § 22C-2 and Wis Stat Ann § 779.135.

[11] *See, e.g.,* 770 Ill Comp Stat Ann 60/21, Ann Code of Md Real Prop § 9-113(b), (c), Mo Stat § 431.183; still other jurisdictions declined to adopt such legislation, *see* Conn HB 5669, and RI 89-H5695 Substitute A.

[12] *See, e.g.,* AIA Doc. A201 General Conditions of the Contract for Construction (1997 ed.). § 4.5 contains both mandatory mediation and arbitration clauses. In fact, the mediation is made a condition precedent to arbitration.

[13] *See, e.g.* Alaska Stat. § 9.43.010 *et seq.*; Ark. Code § 16-108-201 *et seq.*; Colo. Rev. Stat. § 13-22-201 *et seq.*; Del. Code § 10-5701 *et seq.*; Fla. Stat. § 682.01 *et seq.*; Haw. Rev. Stat. § 658A-1 *et seq.*; Idaho Code § 7-901 *et seq.*; 710 Ill. Comp. Stat. § 5/1 *et seq.*; Ind. Code § 34-57-2-1 *et seq.*; Ky. Rev. Stat. § 417.045 *et seq.*; Me. Rev. Stat. tit. 14, § 5927 *et seq.*; Md. Cts. & Jud. Proc. Code § 3-201 *et seq.*; Mass. Gen. L. ch. 251, § 1 *et seq;* Minn. Stat. § 572.08 *et seq.*; Mo. Rev. Stat. § 435.350 *et seq.*; Mont. Code § 27-5-101 *et seq.*; Neb. Rev. Stat. § 25-2601 *et seq.*; N.M. Stat. Ann. § 44-7A-1 *et seq.*; N.C. Gen. Stat. § 1-567.1 *et seq.*; Tenn. Code § 29-5-301 *et seq.*; Utah Code § 78-31a-1 *et seq.*; Vt. Stat. tit. 12, § 5651 *et seq.*

[14] Andrew Howard, *Flow-Down Clauses*, THE CONSTRUCTION CONTRACTS BOOK: HOW TO FIND COMMON GROUND IN NEGOTIATING DESIGN AND CONSTRUCTION CONTRACT CLAUSES 9-10 (Daniel S. Brennan et al. eds., 2004).

[15] *L&B Constr. Co. v. Ragan Enters., Inc.*, 482 S.E.2d 279, 281-83 (Ga. 1997) (flow down provision incorporating 'no damages for delay' clause from prime contract "remove[d] any conceivable doubt" that subcontractor's recovery was limited to time extension and was prevented from seeking monetary damages resulting from contractor's two-year delay on project).

[16] Howard at 9.

[17] *Turner Constr. Co. v. Midwest Curtainwalls, Inc.*, 543 N.E.2d 249, 252-53 (Ill. App. Ct. 1998) (subcontractor entitled to arbitrate its claims where prime contract contained an arbitration clause but subcontract did not).

[18] Howard at 10.

[19] . Economic loss is defined in the construction context as "the cost to repair or replace defective materials, damage to a structure, diminution in value of a damaged structure not repaired, loss of use or delay in utilizing property for its intended purposes and related lost profits, lost revenue, and costs." 6 Bruner & O'Connor Construction Law § 19:10 (2005) (citations omitted).

[20] *See Lee County v. Southern Water Contractors, Inc.*, 298 So.2d 518 (Fla. App. 1974).

[21] See, e.g. *National Steel Erection, Inc. v. J.A. Jones Const. Co*., 899 F. Supp. 268 (N.D. W. Va. 1995); *World Trade Co. v. Westinghouse Elec. Corp*., 256 A.D.2d 263, 682 N.Y.S.2d 385, 39 U.C.C. Rep. Serv. 2d 1053 (1st Dep't 1998); *Anderson Elec. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 104 Ill. Dec. 689, 503 N.E.2d 246 (1986); *Du Page County v. Graham, Anderson, Probst & White, Inc*., 109 Ill. 2d 143, 92 Ill. Dec. 833, 485 N.E.2d 1076 (1985); Doran-Maine, Inc. v. American Engineering & Testing, Inc., 608 F. Supp. 609 (D. Me. 1985); *Berschauer/Phillips Const. Co. v. Seattle School Dist.* No. 1, 124 Wash. 2d 816, 881 P.2d 986, 94 Ed. Law Rep. 610 (1994); *American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc*., 930 P.2d 1182 (Utah 1996); *Williams & Sons Erectors v. South Carolina Steel*, 983 F.2d 1176 (2d Cir. 1993).

[22] Philip L. Bruner et al., 2004 Construction Review, Construction Briefings No. 2005-1 (2005).

[23] *BRW, Inc. v. Dufficy & Sons, Inc*., 99 P.3d 66, 73-74 (Colo. 2004) (stating "[i]n the case before us, the court of appeals first determined whether an independent tort duty existed. It held that licensed engineers and inspectors owe subcontractors an independent duty of care to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of that profession. In reaching this conclusion, the court of appeals did not examine whether the contracts created and contained the duties that BRW and PSI allegedly breached. Instead, the court applied a four-part analysis we have used to determine whether, in a negligence action, the defendant owed the plaintiff a duty of care. In contrast, the holdings in Town of Alma and Grynberg require courts to focus first on the contractual context among and between the parties to see whether there was a contractual relationship that established the duty of care alleged to have been breached.")

[24] On the design side, the Prime Design Consultant is an architect or engineer, and the major consultants will typically be the structural, civil, electrical, mechanical, and plumbing design professionals. The Major Subconsultants typically consist of licensed or certified professionals who have significant responsibility from the beginning of the design process through the production of final drawings and specifications, which must be stamped, sealed, signed or certified for submission to the code review authority for approval before a "building permit", may be authorized for issuance. The Principal or Major Subconsultants typically receive a significant portion of the total fee. Their services constitute significant portions of the total scope services that are to be provided by the Prime Contractor and/or may include significant potential risk or exposure for the Prime Contractor, if they are untimely or deficient.

[25] The evolution of the "standard of care" that is a minimum performance standard for design professionals has caused some areas of consultancy that thirty years ago were limited to only high-budget or unique projects but have now become as common and necessary as structural or civil engineering. Some examples include:

- Lighting consultants on commercial, office, governmental or other public facilities
- Security consultants
- Acoustical consultants
- Communications consultants on governmental or headquarters office facilities
- Elevator or vertical transportation consultants on office complexes, shopping centers or multi-modal transportation hubs.

[26] In the modern world of design professional contract negotiation, drafting, evaluation and review, a third area of subconsultant is frequently encountered. These subconsultants are technically subcontracted to the Prime Design Consultant/CM but with some significant modification in the normally expected line of authority, reporting relationships, allocation of risk or responsibility for performance. Unique contractual provisions that modify the normal level of liability of the Prime Contractor typify the agreements between these subconsultants and the Prime Design Consultant/CMs, which have corresponding provisions in the prime design contract. Some examples of these subconsultant disciplines include soils engineering, surveying, environmental and hazardous materials or explosives removal. A significant characteristic of this grouping is that the discipline or specialty is not insured or insurable under the professional liability insurance of the Prime Contractor. For many years, the use of the project professional liability insurance

policy reduced the need for a construction lawyer to have special agreements or provisions for this grouping. However, over the last several years and particularly since "9/11", we have observed project professional liability insurance become less available for certain types of projects, such as condominiums. Furthermore, the significant increase in premium costs since September has made project policies less attractive even when they are available. Accordingly, contractual risk limitation, sharing or avoidance will make this grouping more common and special subcontracts more necessary.

[27] E = Essential; HD = Highly Desirable; U = Useful; O = Optional Based upon the Business Deal and the bargaining power of the parties.

[28] In most jurisdictions, this information is necessary to create an enforceable contract or agreement.

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