

A Case Study In Claims Caused by Subconsultants

RLI[®]
DIFFERENT WORKS

RLI Design Professionals
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DIFFERENT WORKS

Course Description

Teamwork Makes The Dream Work

When you're working with the right team

In many cases, design firms work with a variety of different sub consultants on a continuing basis for multiple projects. A certain level of risk is inherent in this relationship and it is important to remember that the client will often look to the prime design firm and not the sub consultant for ultimate responsibility.

This presentation will analyze a hypothetical claim stemming from the services of a sub consultant, discuss steps that the prime design firm could have taken to reduce their liability, and review best practices of contracting with sub consultants and navigating through dispute resolution.

Learning Objectives

Participants in this session will:

- 1 Examine details of a hypothetical claim stemming from the services of a subconsultant;
- 2 Determine the cause of the problem, and what steps could have been taken to reduce the risk of it occurring;
- 3 Review best practices when establishing a subconsultant relationship; and
- 4 Analyze dispute resolution options geared towards reducing risk and gaining cooperation between prime consultants and subconsultants.

Retaining a Sub Consultant

Benefits of Retaining a Sub Consultant:



Additional/different projects

Specialized knowledge

No long term commitment

Fewer legal obligations

Vicarious Liability

Attachment of responsibility to a person for harm or damages caused by another person (“imputed liability”).

Case Law

Prime held vicariously liable for **\$1.3 million in damages caused by the subcontractor's work**, 7 years after completion of the project.

*This award was later amended to just over \$976k.



Case Law

Mark and Sandra Smith
Client



Marrick Properties, Inc.
Contractor



Creative Trim, Inc.
Subcontractor



Adam Rutkowski and Sara Mastropole
Buyer

The Smiths retain Marrick properties to build a single family home. Marrick subcontracts the construction and installation of safety guardrail to Creative Trim.

Seven years after the project is completed the Smiths sell their home to Adam Rutkowski and Sara Mastropole. Two months later, the guardrail fails.

Negligence

- 1** Duty Duty of care
- 2** Breach Violation of duty of care
- 3** Causation Actual and proximate cause
- 4** Damages Harm suffered

General Rule in Maryland

Employer of an independent contractor is not liable for the physical harm caused to another by an act or omission of the contractor or his employees UNLESS:

- 1** Negligence of the employer in selecting, instructing, or supervising the contractor;
- 2** Nondelegable duties of the employer, arising out of some relation toward the public or the particular plaintiff; and
- 3** Work which is specially, peculiarly, or inherently dangerous.

Restatement (Second) of Torts, § 424

“

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

”

Breach

Failure to satisfy code requirements

Construction of guardrail failed to meet building code standards under the facts presented:

Requirements/Applicable building code

Actual construction of the guardrail

Role of the Contractor and the Sub Contractor

Standard of care required for general contractors

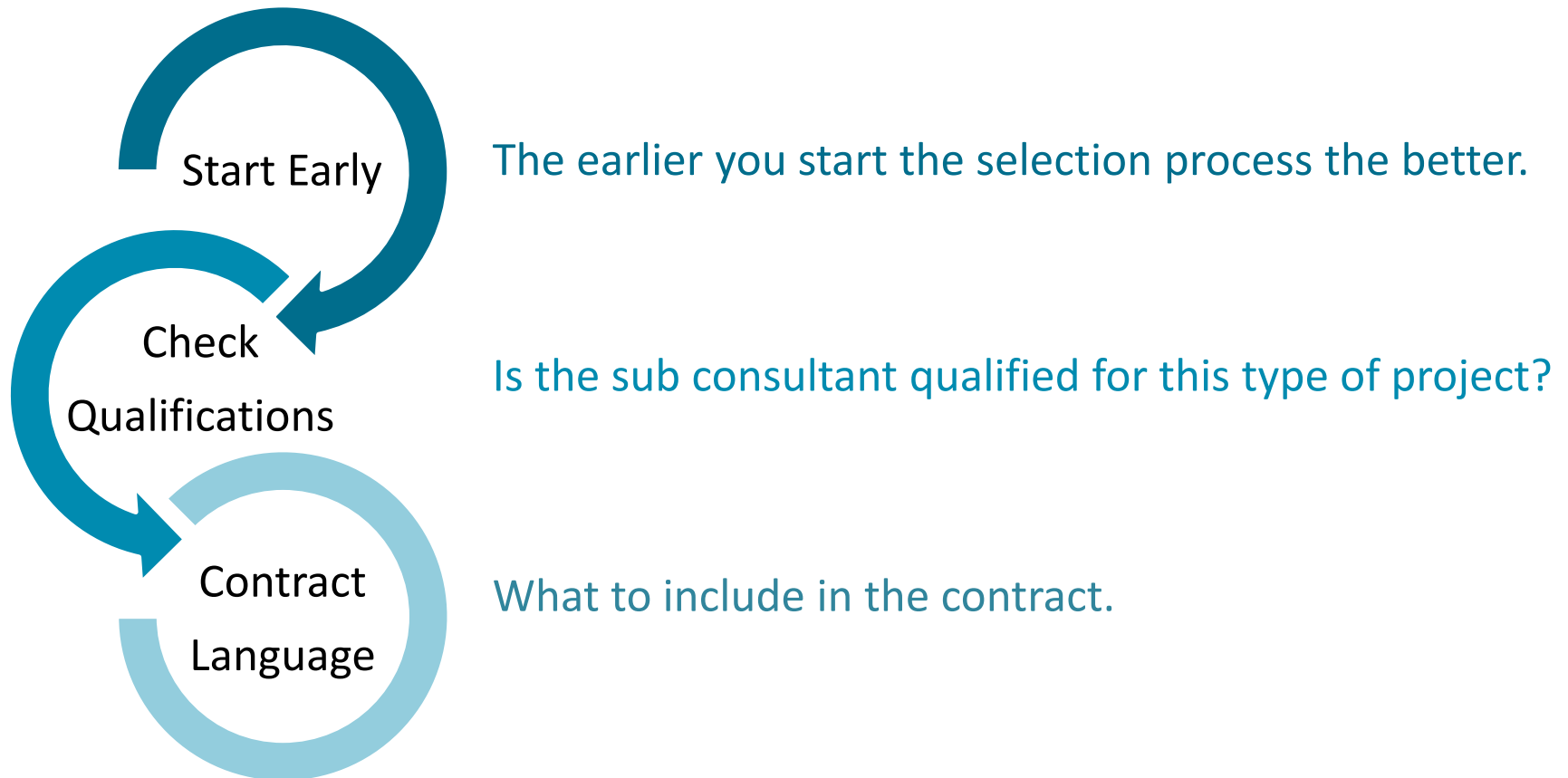
Failure to comply caused harm

Expert witness testified to the following:

- 1** Use of finishing nails rather than screws to affix the guardrail to the building was why the guardrail failed.
- 2** Safety guardrail, as constructed, would not have been able to withstand 200 pounds of force, as required by the building code.
- 3** The place where the finishing nails were used was identified as the point of failure for the guardrail. [causation]

Choosing the Right Partners

3 Steps to Creating the Dream Team



Step #1: Start Early

Benefits of Starting Early:



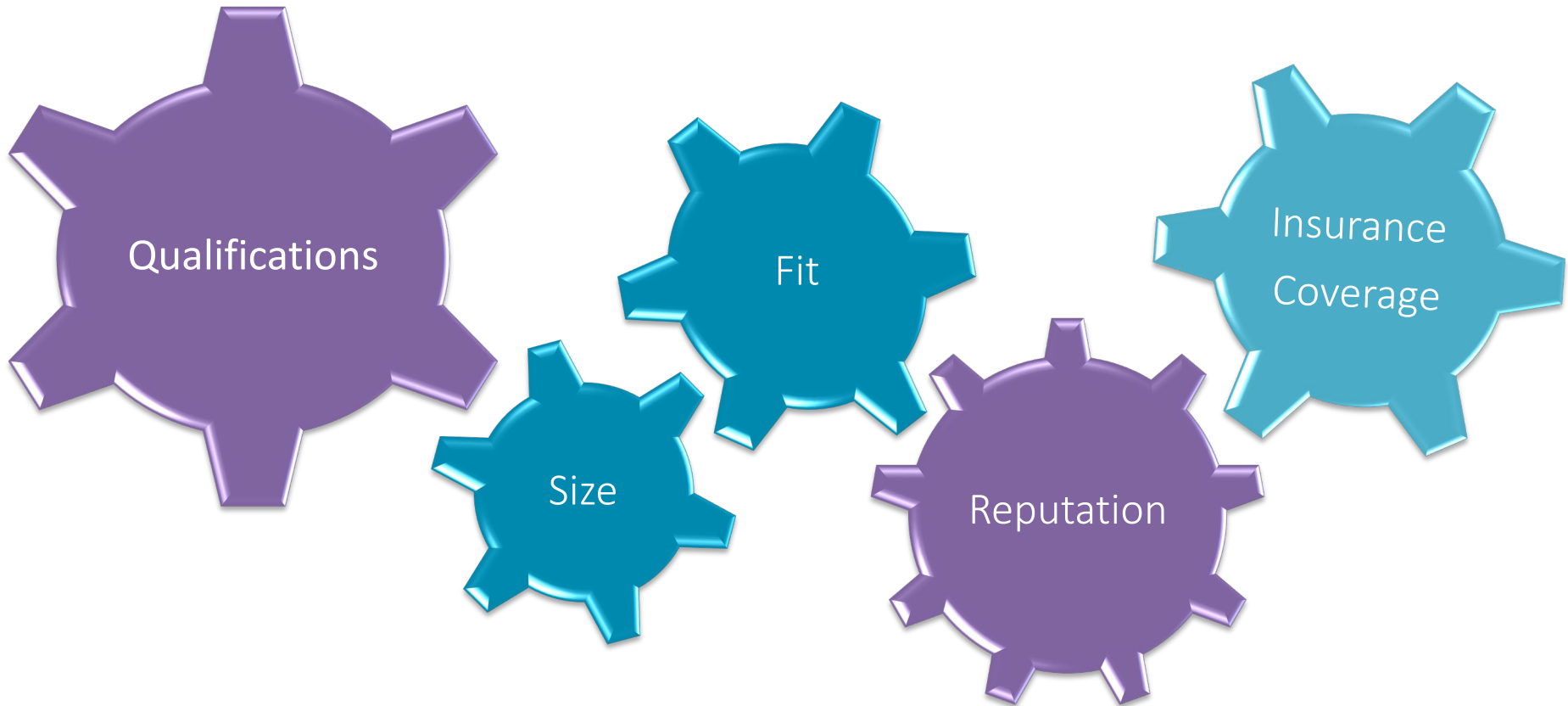
Timely selection

Clear understanding

Mitigates likelihood of delays

Step #2: Check Qualifications

Is the Sub Right For This Project?



Qualifications

Check your sub consultant's qualifications:

HELPFUL HINT:

Make sure you select both
a reputable firm AND
a reputable employee
within that firm.

Formal qualifications

Evidence of proper education in the required discipline.

Degree of expertise

Evidence of appropriate experience in the relevant field.

Check your sub consultant's fit:



Resources

Financing

Special requirements

Reputation

Check your sub consultant's reputation:

Seek feedback from past client and from trusted colleagues or mentors.

Were contract terms honored?

Were services completed on time and within budget?

What was the quality and usefulness of furnished services?

How well does this sub work with others?

Double Check the Insurance!

Check your sub consultant's insurance for:



Coverage

Make sure your sub consultant has adequate insurance before a project starts.

Duration

Make sure your sub consultant's insurance lasts for the time of the statute of limitation in that jurisdiction or requirements of the Prime Agreement, whichever is longer.

Helpful hint: Require notification of cancellation, renewal, nonrenewal or any changes in the policy.

Finding a Sub Consultant

Strategies to finding a sub consultant

- ✓ Previous working relationship
- ✓ Referrals
- ✓ Request for proposals (RFP)
- ✓ Professional organization database

State Board of Registration



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Architect //3877 Washington

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Step #3: Contract Language



Flow Down Clause

Aka “pass through clause”.
Incorporates the terms of
the Prime Agreement into
lower tier agreements.

Flow Down Provision



To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the [Design Professional] shall assume toward the Consultant all obligations and responsibilities that the [Design Professional] assumes toward the Owner. Insofar as applicable to this Agreement, the [Design Professional] shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the [Design Professional], and the Consultant shall have the benefit of all rights, remedies and redress against the [Design Professional] that the [Design Professional], under the Prime Agreement, has against the Owner...



AIA C401-2017 §1.3

Sub Consultant's Rights & Remedies

“

To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the [Design Professional] shall assume toward the Consultant all obligations and responsibilities that the Owner assumes toward the [Design Professional]. Insofar as applicable to this Agreement, the [Design Professional] shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the [Design Professional], and the Consultant shall have the benefit of all rights, remedies and redress against the [Design Professional] that the [Design Professional], under the Prime Agreement, has against the Owner...

”

AIA C401-2017 §1.3

Prime Consultant's Rights & Remedies

“

To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the [Design Professional] shall assume toward the Consultant all obligations and responsibilities that the [Design Professional] assumes toward the Owner. Insofar as applicable to this Agreement, **the [Design Professional] shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the [Design Professional],** and the Consultant shall have the benefit of all rights, remedies and redress against the [Design Professional] that the [Design Professional], under the Prime Agreement, has against the Owner...

”

AIA C401-2017 §1.3

Case Law

Prime on the hook for **\$7 million in damages caused by the subcontractor's work**, when the flow-down clause was found to be ambiguous.

*Prime settled with Client for \$3 million.



Holding

“

While the subcontracts incorporate the prime contract by reference, a general incorporation provision is insufficient to expressly waive a limitations period...

”

Contract Language

Flow Down Contract Requirements

Examples of contract provisions to flow down:

Standard of care

Payment terms

Insurance

Indemnity

Dispute resolution

Sample Standard Agreements



AIA



1

Updated regularly



2

Coordinated documents



3

Easy to modify

Dispute Resolution Provision

“

Any claim, dispute, or other matter in question arising out of or related to this Agreement shall be subject to the same dispute resolution provisions as set forth in the Prime Agreement...

AIA C401-2017 §8.1.1

”

Dispute Resolution Provision



Disputes between the [Design Professional] and Consultant arising out of the Owner's acts, omissions or responsibilities under the Prime Agreement shall be resolved in accordance with the binding dispute resolution method in the Prime Agreement. In the event of such a dispute, the Consultant shall be entitled to relief only to the same extent and according to the same provisions as the [Design Professional] is entitled to recover from the Owner after deduction for the [Design Professional's] costs incurred in presenting and litigating or arbitrating the claim, including legal fees, normal overhead costs and apportionment to other affected consultants.



AIA C401-2017 §8.1.4

Dispute Resolution

Ways to resolve disputes:

Mediation

Arbitration

Litigation

Other Settlement Options



Mediation Provision

“

Should any dispute arise regarding, the terms, conditions, interpretations, rights, duties, obligations, or performance of this Agreement, the Parties agree first to attempt resolution through good faith negotiation.

”

Mediation Provision

“

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution

AIA B101-2017 §8.2.1

”

Mediation

RLI Policy Language:

If any Claim made against the Insured and reported to the Insurer during the Policy Period is resolved, with the Insurer's consent and agreement, through the use of Mediation, the Insured's Deductible as respects the Claim shall be reduced by fifty percent (50%) subject to a maximum of \$12,500.

Defense, Settlement and Cooperation

RLI Policy Language:

The Insureds agree not to settle or offer to settle any Claim, incur any Claim Expenses or otherwise assume any obligation or admit any liability with respect to any Claim without the Insurers' prior written consent, which shall not be unreasonably withheld. The insurer shall not be liable for any settlement, Claim Expenses, assumed obligation or admission to which it has not provided prior written consent.

Inspirational Quote

“

I can do things you cannot,
You can do things I cannot.
Together we can do great things.

- Often attributed to Mother Teresa

”

Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
Continuing Education Systems Program**

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