Ask Vic!

Q: I currently have more work than I can handle. I have a client that wants to give me work beyond the typical surveying services I provide. I'm worried about adding more staff without knowing how long I will be able to keep them busy. Is it better to retain separate consults, professionals, and other surveyors, or should I tell my client to retain them himself? Is a joint venture a viable option?

A: When a surveyor agrees to provide services for a client, that surveyor assumes the same level of responsibility whether the services are performed directly by the surveyor or by a separate consultant. Often, surveyors have to rely on the services of other professionals to fulfill their obligations. Firms need to understand their legal responsibilities when they retain other professionals. Surveyors can have legal responsibility for the actions of others in much the same way that they have responsibility for the actions of their own employees. This is called vicarious liability. The legal concept of vicarious liability is the imposition of liability on one party—in this case the prime surveyor—for the conduct of another professional, based solely on the relationship between the two.

What are the Relationships and the Risks?

Teaming relationships can be divided into three categories: (1) joint ventures, (2) separate independent consultants, and (3) prime-consultant arrangements. If a surveyor and another professional or multiple surveyors provide professional services to a client together they are, in essence, a joint venture. Regardless of what term the firms use to describe their teaming relationship; if they both sign a contract or indicate to a client that they both have responsibility, they are usually jointly and severally liable for the services provided by either party.

In other instances, separate and independent surveyors or other professionals may provide services for the same project. Often, they are hired directly by the client. In other cases they provide services to the design team or contractor but are clearly separate from the design team and contractor. In general, when a party hires a surveyor, that surveyor has control over his own activities. The client, contractor, or the lead design professional can instruct the independent surveyor on what to do, but not how to do it.

A client may want a specific professional consultant as part of the professional service team for any number of reasons. A prudent surveyor will either negotiate the use of consultants for whom the surveyor is willing to take responsibility or require an arrangement for the consultants to contract directly with the client so that the surveyor is not vicariously liable for their actions.

The latter arrangement may necessitate greater coordination among the services of the client-selected consultants. The surveyor's coordination requires careful attention, and this arrangement should be appropriately compensated. Since the prime surveyor does not have authority over the services provided by a separate consultant, the surveyor should not be held responsible for the accuracy of those services. In an arrangement where the client is contracting directly with additional surveyors or consultants, each part should be able to rely on the technical sufficiency and timely delivery of documents and services furnished by the others.

Managing the Risk of Others

When a client retains a surveyor, only the surveyor is contractually liable to the client. This privity of contract establishes broad rights for the client against the survey but usually more limited rights against consultants retained by the surveyor. Often, these rights extend no further than the rights of any other member of the public. When a client's needs go beyond surveying services, the surveyor must subcontract that portion of the project to a licensed or otherwise qualified consultant. While the surveyor cannot instruct the consultant on how to provide those services, the surveyor may still be held responsible for a loss relating solely to the negligence of the consultant.

If separate contracts exist for different disciplines, the client must have a carefully developed multiple prime agreement. In such cases, the surveyors or service providers should be required to coordinate their instruments of service through a designated prime consultant and the scope of review by the coordinating entity should be carefully described. Moreover, it would be appropriate for the client to agree to indemnify the surveyor for any costs resulting from the independent consultants' negligence.

Generally, courts presume vicarious liability for a surveyor arising out of the negligence of an independent consultant due to an overriding responsibility of the surveyor

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to the public. This presumption is based primarily on traditional contract principles and public policy arguments. Contracts for professional services create a non-delegable duty on the part of the prime surveyor to provide services that conform to applicable standard of care. Therefore, even if the surveyor has no authority under state registration laws to control the activities of a consultant, the surveyor still has vicarious liability for the consultant's professional services. A consultant, however, may escape liability if the client requires the prime to use a specific consultant. Even if there is no separate direct relationship between the client and consultant, the consultant may be determined to be an independent contractor and, therefore, solely responsible for its own actions.

Coverage for Vicarious Liability

Most insurance policies, including Schinnerer and CNA's professional liability insurance policy, defend policyholders against allegations of their negligence and pays on their behalf if the firm or its employees are found to have performed professional services in a negligent manner. Intrinsic in this policy is coverage for the negligence of those providing services through a surveyor. There is coverage for the vicarious liability of the insured surveying firm for the negligence of its consultants.

While a surveyor's policy will protect it from the negligence of consultants, the policy does not defend or pay on behalf of the consultants. Therefore, if consultants want protection for their professional services, they must have their own professional liability insurance. Separate coverage not only protects the consultant, it protects the surveyor since the surveyor should be able to look to its consultants to financially stand behind the services they provide.

Managing Exposures

With rare exceptions, a prime surveyor is responsible for the negligence of those providing services on behalf of the prime. Therefore, care should be taken to select inter-professional consultants who are qualified and capable of providing their services. Even if the consultant is selected by the client or could be considered a truly independent contractor, insurance protection should exist.