

A/E RISK REVIEW

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Jobsite Safety, Part 2: Three Keys to Avoiding Liabilities

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

In the traditional design-bid-build method of project delivery, the general contractor is held primarily responsible for jobsite safety. That makes perfect sense since the contractor typically controls the means and methods of construction. Still, construction workers, their estates and their attorneys have repeatedly sought to impose substantial liabilities on architects and engineers for jobsite injuries or deaths. One major reason for this is that if a construction worker is injured on the job, he or she generally cannot sue his or her employer – the contractor. As an employee, he or she must often accept as sole remedy state-mandated workers compensation benefits. While prudent design firms with solid client contracts often avoid this liability, they still endure costly and lengthy litigation and settlements.

Now, with the growth of collaborative project delivery methods such as design-build, building information modeling (BIM) and integrated project delivery (IPD), the contractor's primary role for jobsite safety is blurred. The design firm's risks, rights and responsibilities have been muddled. Therefore, if a design firm is brought into a claim for a workers injury or death, it may no longer be possible to point to the contract document to establish the contractor's sole or primary responsibility for jobsite safety.

Because jobsite safety is a serious liability concern, every architect and engineer should become knowledgeable of the risks and remedies. Part 1 of this two-part report, examined some of the notable court decisions regarding jobsite safety. We demonstrated a range of outcomes and examined the primary issues considered by the courts. Now, in Part 2, we will examine three keys to avoiding liability for jobsite safety:

1. Your contract with the client
2. The client's contract with its contractor
3. Your actions on the jobsite.

The Designer-Client Contract

Consult with your attorney for help in developing jobsite safety language in your client contract. Under no circumstances should you accept a contract clause that makes you responsible for jobsite safety or any losses or injuries that occur as a result of a jobsite accident. In fact, the contract should explicitly state that you are not responsible for jobsite safety. Also, avoid any contract language that calls for your "supervision" or "inspection" on a jobsite, as well as any language that calls for you to "assure strict compliance" with plans, specifications or any health or safety plans or programs. Your responsibilities for construction observation at the jobsite should be limited specifically to determining general conformance with your design.

Work with your attorney to adopt the following points in your client contract language:

- State that neither your professional activities nor your presence on the jobsite relieves the contractor of full responsibility for construction means, methods, sequence and techniques.

- Note that you have no authority to exercise any control over any construction contractor or its employees in connection with their work or any health or safety programs or procedures.
- Have your client agree that the contractor is solely responsible for jobsite safety.

In particular pay attention to the following clauses in your client contracts:

Scope of services. When developing your scope of services in your contract, carefully define your construction-phase services to avoid assuming responsibility for jobsite safety. This is especially important if you are offering full-time, resident or expanded field services or if you are entering into an Integrated Project Delivery (IPD) master contract.

It is worth repeating: In your scope, make it explicitly clear that you are not responsible in any way for the means, methods, sequence, procedures, techniques or scheduling of construction activities – or for jobsite safety. These duties rightfully belong with the general contractor, who has the largest degree of control of the jobsite. Also avoid words such as “inspect,” “guarantee” or “warrant” when it comes to describing your field services.

Stop-work authority. Make certain that your agreement with the client does not give you the authority to stop work for any reason. Having that authority can be construed as having the duty to stop work if you see a safety problem. This could be a significant factor for the courts when determining whether you might be subject to civil, criminal or OSHA penalties if a site worker is injured.

It is the client – and only the client – who should make the decision to stop work. You can, however, with proper contractual protection, reject or recommend rejection of portions of the work that, based on your observations and judgment, do not conform to your design documents or work plans. If you have such rejection-of-work authority in your client contract, ensure that you include a provision stating that this authority shall not subject you to claims for any liability or cause of action to anyone performing work on the jobsite.

Shop drawing reviews. Establish and follow appropriate procedures with respect to shop drawing

review. Your principal concern is to avoid reviewing and commenting on any aspect of shop drawings that relates to jobsite safety. To handle shop drawing reviews effectively:

- Clearly describe in your client contract your duties in reviewing submittals. State that you will not review shop drawings for anything related to the means, methods, techniques, sequences and procedures of construction, or to safety procedures and programs. Spell out, too, the individual items that are the contractor's duty, such as dimensions, gauges, quantities and weights.
- Define exactly what types of shop drawings you will review and inform the contractor of your decision via contract documents. Also, advise contractors that you will not review shop drawings not specifically requested or approved.
- Require that the contractor provide and adhere to a schedule of submittals. Allow adequate time for thorough shop drawing review and obtain an appropriate fee.
- Be careful how you indicate shop drawing "approval." Use a shop drawing stamp to indicate you have reviewed submittals for "general conformance with the design concept," or similar language.
- Do not allow contractors to use a shop drawing to obtain approval for a variation. Require contractors to review and approve in writing all shop drawings before submitting them to you.

The Client-Contractor Agreement

In addition to carefully drafting your agreement with your client, work with your client to ensure that the client-contractor agreement also provides you both with protection against liabilities for jobsite safety. For instance:

- Ensure a provision in the general conditions to the construction contract requires the contractor to indemnify you, your client and your subconsultants for all claims arising from the performance of the contractor and his or her subcontractors.

- Have the contractor provide evidence of satisfactory general liability insurance.
- Have the contractor name the client, your design firm and your subconsultants as additional insureds under its general liability insurance policy. This allows you to tender back to the contractor any claim from an injured worker in the event you are named in a jobsite injury suit.
- Have the contractor require all subcontractors to conform to these provisions.

Your Actions on the Jobsite

Contractual protection is a great preventative for jobsite safety claims. However, equally important to what you say are your responsibilities in your contract are your actions on the jobsite. If a member of your firm visits the jobsite and takes inappropriate actions, your contractual protection disappears. Courts generally agree that your actions speak louder than your words.

With the assistance of legal counsel, develop a field manual that establishes standard procedures to be followed by all of your project representatives. The Professional Liability Agents Network (PLAN), of which we are a member, has published the *Project Representative's Manual: A Guide to Preparing a Construction Administration Manual for Design Professionals*. This detailed manual covers pre-construction activities, field observation duties and project closeout techniques and provides recommendations on how your project representatives should conduct themselves on the jobsite in order to avoid liabilities. Included are instructions on what to do if an unsafe condition is observed on a project site. Here are some general project representative guidelines to consider:

- Project representatives should assume the role of observer, not director or supervisor, of jobsite conditions. Your representatives should not inspect for hazardous conditions of any kind, nor review the contractor's safety program. It is also advisable not to attend the contractor's safety meetings.
- If a workplace condition poses a potential safety risk but not an immediate hazard or danger, your field rep should report the condition to the contractor or the contractor's site superintendent

as soon as possible. The rep should report what was observed, but not instruct the contractor what to do. For example, your representative should not instruct the superintendent to inspect the site or stop work.

- Your project representative should make a record of any jobsite notification to the contractor in a journal or daily field report. He or she should also alert the lead designer on the project and, together, they should make a determination of whether written notice of the observation should be provided to the contractor.
- If a reported situation is not remedied or becomes more serious, notify your client (and perhaps even appropriate public officials). It is advisable to record in writing the observation and notification of appropriate parties.
- If the threat of serious injury or death is imminent, your professional duty of care to protect the health and safety of the public requires that your field representative take immediate action. This is a critical judgment call. Your firm should work with your attorney to develop general guidelines on how to handle such situations.

Reinforce these procedures by requiring that your field personnel receive periodic training. Instruct your project representatives on how to adequately document their visits to the jobsite. Likewise, develop procedures and train your firm's employees to safeguard their own safety and health, wherever they perform their services. You have an inescapable duty to protect your employees, both in your office and on the project site.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.