

A Consultant's Safety Liabilities

A Guide for Working on Multiemployer Sites

By Vladimir Ivensky

An engineering, scientific or architectural consultant at a multiemployer project site may face a host of safety-related liabilities including directly hired subcontractors, any other party (other employers and/or public), and deficiencies related to project design or professional services provided. For example, hiring a field subcontractor may change a consultant's project role to that of controlling employer (OSHA, 1999), bringing with it the duty of safety care to the employees of another employer.

Therefore, a consulting firm's management and field personnel must recognize the company's project-specific safety roles and responsibilities, and implement a strategy that allows for successful project completion without causing the firm to retain unnecessary liabilities and risks, all while also protecting its own employees' safety and health, and correctly intervening when observing unsafe conditions (not created or controlled by a consultant) or when other project parties take risky actions (without incidentally assuming a controlling employer role).

In addition to design tasks, this work may encompass elements of field oversight (often defined as management in contracts), including oversight of tasks such as drilling, excavating, installing monitoring wells or other tasks classified as construction. These tasks are conducted by either directly hired contractors or by contractors hired by other project parties (e.g., general contractor). Therefore, in some field projects, the activities of an engineering, scientific or architectural consultant may cross from consulting into construction management or prime contracting.

Projects vary in scale and scope, as well as in the level of associated OSH hazards. For example, one project might involve developing one or two boreholes or a couple of test pits, while another may involve hundreds of boreholes or test pits, as well as construction of soil or groundwater remediation systems. These projects may have a complex organizational structure, and may be part of a larger project. As a result, contractual relationships, roles and responsibilities (including safety) among various project parties may not be clear to all project parties and participants.

Consulting engineers and scientists are typically not trained as construction managers or superintendents. For example, they may be wildlife biologists, archaeologists, environmental scientists, water resource engineers, construction materials scientists or technicians hired to accomplish specialized project deliverables. However, other project parties (e.g., client, regulator) may view the consultant (correctly or not) to be not just an engineer or scientist, but a construction manager, general contractor or prime contractor with controlling authority and safety duties to other project employers (Figure 1, p. 40).

Furthermore, a consultant engaged on a multiemployer project, may have a statutory or retained duty of safety care to other project parties, potentially without realizing it. Thus, all multiemployer project parties must recognize their regulatory and contractual roles, responsibilities and liabilities, and establish optimal courses of action to fulfill

IN BRIEF

- **Engineering, scientific and architectural consulting companies involved at multiemployer field projects may have safety liabilities that extend beyond protection of their own employees.**
- **These liabilities originate in a consulting company's regulatory or contractual duty of safety care to subcontractors or other project parties; in consulting company employees' actions in the field that can be interpreted as control over other project parties; and in deficient design or specifications produced by a consulting company.**
- **Recognizing, evaluating and controlling such exposures are important for establishing effective risk mitigative strategies and for the ultimate success of any multiemployer field project.**

Project Roles

Consultants may be hired by any multiemployer project party (e.g., owner, prime contractor, general contractor, lower-tier contractor) to provide

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their obligations and to effectively control the risks and liabilities for themselves and their clients.

Project Safety Liabilities

A consulting company's project-specific safety liabilities may depend on various factors:

- 1) presence of directly hired contractors and existence (or not) of the statutory duty of care to those contractors;
- 2) project role;
- 3) contract with client;
- 4) contract with a subcontractor;
- 5) actual level of control applied toward another employer (including a subcontractor) in the field (not limited by safety control);
- 6) project design deficiencies (including decisions made in the field).

Most of the abilities listed are associated with the presence of contractual or actual control over other project parties (Figure 2, p. 41). While the ways to recognize and evaluate those liabilities are universal, the ways to mitigate them vary and are influenced by state laws and regulations, litigation, OSHA citation history, and clients' requirements and expectations.

Design Professional Safety Liability Immunity

American Society of Civil Engineers (ASCE, 2012) defines the safety responsibilities of design engineers and architects:

- recognizing that safety and constructability are important considerations when preparing construction plans and specifications;
- providing through the specifications that the design or details of critical elements of temporary construction, erection and lifting schemes, complicated form work and scaffolding be prepared by a professional engineer.

In the absence of the statutory duty toward subcontractors, the "design professional safety liability immunity" is defined as follows (*Edwards v. Anderson Engineering Inc.*, 166 P. 3d 1047-Kan: Supreme Court 2007):

- 1) the person or entity claiming immunity is a construction design professional or an employee of a construction design professional;
- 2) the construction design professional had been retained to perform professional services on a construction project;
- 3) the worker's injury resulted from his/her employer's failure to comply with safety standards on the construction project;
- 4) compensation for the injury is recoverable under the Workers' Compensation Act;
- 5) the design professional claiming immunity did not, by contract or action, specifically assume responsibility for safety practices;
- 6) the construction design professional's liability does not arise from the negligent preparation of design plans or specifications.

Statutory Duty to a Subcontractor

Consultants hiring other consultants or construction trade subcontractors may have a statutory

duty of safety care to those contractors, depending on their particular project role, project organization, contracts and jurisdiction (Ivensky, 2015).

In the U.S., the statutory duty of safety care to a subcontractor is less clearly defined than it is in the U.K. (HSE, 2007) or in Canadian provincial regulations (WorkSafe Alberta, 2013). In states such as Washington and New York, a general contractor has statutory duties of safety care to a subcontractor, while in states such as Utah, no such duties are mandated. In Washington, the state's Department of Labor and Industries (2001) defines the scope of due diligence actions required from a general contractor toward a subcontractor, fulfillment of which would relieve the general contractor of citations for a subcontractor's poor safety and health performance or an incident.

In New York, state labor law applies strict liability on a general contractor in some instances (NY Labor Law, Section 240). Under this law, a general contractor in New York essentially has no defense in a case involving a subcontractor injury related to a fall from an elevation or related to a scaffold, no matter that the general contractor provided due diligence and that the subcontractor has workers' compensation insurance. This law has sparked significant controversy and efforts to repeal it.

OSHA has no established system for delineating safety roles and responsibilities for defined project parties (e.g., project owner, prime contractor, engineer, construction manager). The agency's expectations in the field are expressed mostly through its multiemployer citation policy (OSHA, 1999). Essentially, OSHA expects that the prime or general contractor would exercise the level of control over the work site. In the agency's view "in almost all cases, some entity has general supervisory authority over the work site. This authority often is given to a general contractor, although it is sometimes given to a construction manager or other type of entity" (Swanson, 2001). When no statutory duty of care exists, safety duty of care may be retained as a result of project control demonstrated by action or by contract, either with the client or with a subcontractor.

U.S. Common Law: Control Equals Duty of Care

According to U.S. common law, the starting point for determining whether a duty exists on a general contractor hiring other contractors is found in §414 of the *Restatement (Second) of Torts* (1965):

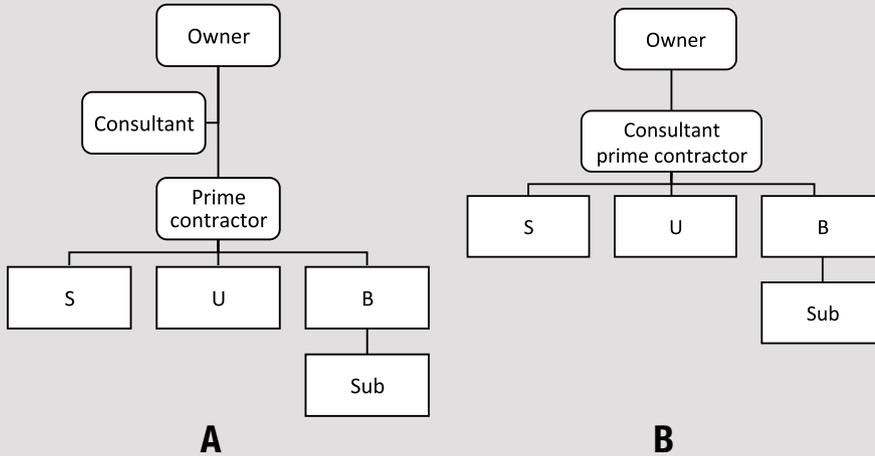
One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The "retained control" element is explained in comment (c) to §414, which states:

[F]or the rule stated in this section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely

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Figure 1
Project Roles of a Consultant



Consulting engineers and scientists are typically not trained as construction managers or superintendents, yet other project parties (e.g., client, regulator) may view the consultant (correctly or not) to be not just an engineer or scientist, but a construction manager, general contractor or prime contractor with controlling authority and safety duties to other project employees.

a general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Under this principle, the hirer of an independent contractor (a principal employer) does not have a default duty of safety care to the independent contractor. The duty arises with the retained control: when the “contractor is not entirely free to do the work in his own way.” This approach is consistent with OSHA’s (1999) multiemployer citation doctrine; that is, both common law and OSHA policy agree that control generates the duty of care.

Retained Duty of Care: Contract With Client

Engineering/scientific or architectural consultants may be involved in the field phases of projects as designers, technical experts, quality controllers or inspectors, playing the role of project party (e.g., owner, general contractor) representative. When a consultant does not hire subcontractors, the statutory duty of safety care to other project parties does not exist. However, it can be retained in a contract with the client via accepting direct project safety responsibilities or accepting controlling obligations over other project parties in a contract (“a right of supervision that the contractor is not entirely free to do the work in his own way”).

Retaining Project Safety Responsibilities

Contract language may require a consultant to accept project-wide or subcontractor-specific safety responsibilities, such as “ensuring the regulatory compliance with all applicable occupational safety and health regulations by all project contractors” as

a secondary item in the scope of work. A client’s contract with a consulting company may include a provision that since compliance with safety is a regulatory requirement, no additional payments for ensuring that compliance will be provided.

Thus, it is important to recognize that in scenarios in which the default statutory safety duty to other project employers does not exist for a consulting company, a contractual requirement to manage safety of other parties, even including the consulting firm’s direct subcontractors, becomes an extra service and extra liability (that poses additional risks and costs, and requires trained, experienced, qualified and competent personnel). If not properly managed, this extra deliverable would become an uncontrolled risk.

In addition, clients may have their own special safety requirements that may exceed regulatory requirements or reasonable care. Compliance with those requirements, even when a hiring company has the statutory duty for subcontractors, may constitute an extra care, involving extra costs. Therefore, it is good practice to be aware of a client’s specific safety expectations and requirements to subcontractors and to discuss them in detail at pre-bid meetings to clarify elements such as each project party’s safety roles, retained risks and liabilities, their controls and reimbursement.

Accepting Project Control Roles

When statutory safety duty to a hired independent contractor does not exist or when a consulting company has no subcontractors, the duty of safety care to other contractors can be retained via project control obligations accepted in the contract. Those are not necessarily expressed as direct safety obligations, but could include any project management obligations that include “retention of a right of supervision that the contractor is not entirely free to do the work in his own way.”

As a result, upon hiring a subcontractor, a consulting company may be considered by OSHA to be a controlling employer and would be citable as such under OSHA’s (1999) multiemployer policy. The company may also be subject to civil tort litigation in cases in which another project party has suffered an occupational injury or illness.

Eckley (2013) provides a relevant “retained control in a contract with the owner” case study:

After suffering an injury on the job site, an injured worker of a subcontractor sued his employer as well as the general contractor for an alleged breach of duty in providing him a safe work environment. The district court granted summary judgment in favor of the general contractor. In doing so, the court held that the general contractor did not have a non-delegable duty to ensure the safety of all workers on the job site. The worker appealed.

Typically, the general contractor employing an independent contractor [in the U.S.] is not liable for injuries to the independent contractor's employees. This applies unless a contract imposes responsibility on the general contractor for the safety of all employees or if the general contractor retains control of the premises and work performed.

In this case, the worker argued that the contract between the general contractor and the owner imposed a non-delegable duty on the general contractor to prevent injury to all employees.

On appeal, the court agreed that the following contractual terms created this duty:

- The design-builder [the defendant] shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to employees on the work and other persons who may be affected thereby;

- The design-builder shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

- The design-builder shall erect and maintain, as required by existing conditions and performance of the contract documents, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owner and owners and users of adjacent sites and utilities.

- The design-builder shall designate in writing to the owner a responsible individual whose duty shall be the prevention of accidents.

By these terms, the court ruled that the general contractor assumed a duty for worker safety. Once

assumed, the duty was non-delegable, which means that even if the contractor delegated a subcontractor to perform the task, the general contractor could not avoid liability for the duties if they were breached (Eckley, 2013). Having no such provisions in a contract with an owner protects the general contractor from the duty of care to the subcontractors (the statutory duty of safety care to subcontractors was absent in the particular jurisdiction).

Promised Control in Proposals

Requests for proposals submitted by companies soliciting professional engineering and specialty consulting services typically include a safety section. This section is in addition to a detailed, prequalification review that may be outsourced to specialized companies.

In addition to typical questions regarding a bidding company's safety culture, management systems and past safety performance (including injury and illness rates, major incidents, regulatory citations and workers' compensation experience modification rates), the questionnaires include questions on subcontractor management. For example:

- How has your firm implemented safety programs for subcontractors?

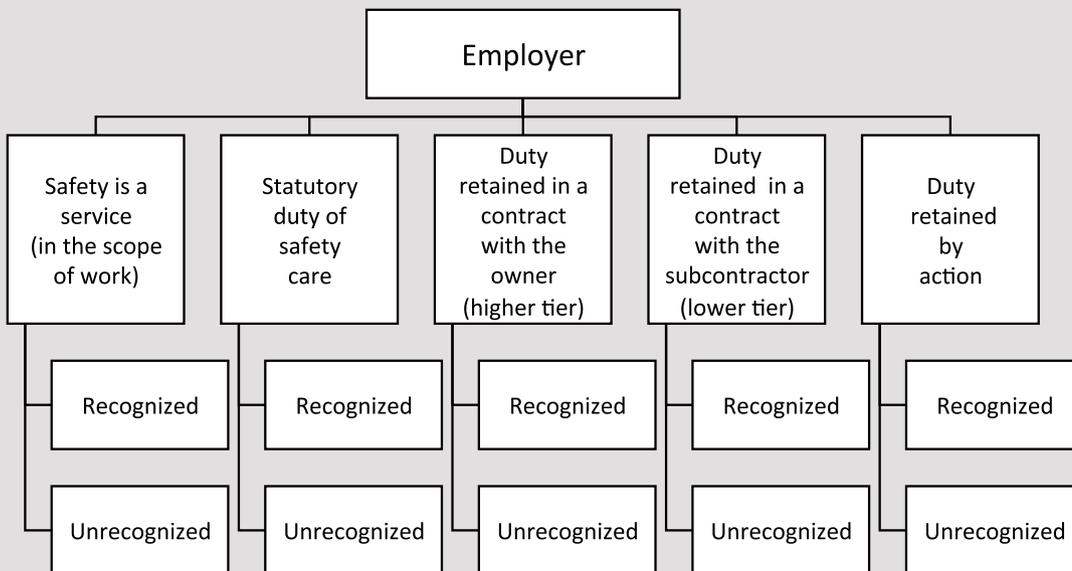
- Do you perform safety audits for your subcontractors?

- Describe how you will onboard new subcontractors given that projects may require many different types of suppliers with varying levels of safety programs?

The questions can be even more direct:

- Describe your company's involvement with subcontractor safety and how it is managed on work sites.

Figure 2
Ways to Retain Duty of Safety Care at a Multiemployer Project



Promising subcontractors safety management in a proposal may indicate that a bidding company has accepted the duty of safety care for their subcontractors, whether the statutory duty exists or not. By accepting that duty, when a statutory duty of care does not exist, a bidding company may accept additional risks and responsibilities. The mitigative actions, therefore, must be clearly envisioned and planned. Proposal promises to manage subcontractor safety can result in losses unless evidence of reasonable care is produced.

Retained Duty of Care: Contract With a Subcontractor

What may constitute retained contractual control over subcontractors? The following list of controls for liability is based on Texas Supreme Court cases (Johnson & Timmons, 2010):

- requirement that subcontractors agree to adhere to a safety manual or safety and health plan under penalty of being removed from the project;
- any language that calls for your company supervision on a job site;
- authority to stop work;
- authority to fine a contractor for safety and health violations;
- permitting system through which a company provides a permit (e.g., hot work, excavation, confined space entry);
- requirement to utilize a particular work means and methods.

Exercised Project Control

Exercising any these controls or similar controls, even without retaining them in a contract, may create a duty of care with the imposed obligation to provide reasonable care as if they were contractual obligations (Johnson & Timmons, 2010). When a statutory duty of care does not exist and contracts with a client and subcontractors do not impose controlling obligations, the consulting firm's employees should strive to avoid any controlling actions to protect the firm and not create the duty of care. The obligation to intervene in unsafe acts and conditions remains.

Negligent Preparation of Design Plans/Specifications

The following case study illustrates the fact that the courts can interpret negligent preparation of plans or specifications more widely than the traditional meaning (plans and specifications produced in the office and properly reviewed, approved and sealed).

In this case, a consultant from a construction materials testing company was hired by a construction company to collect a damaged concrete pipe sample for further lab analysis. He specified the location of the desired cut lines by marking them on a damaged concrete pipe with a marker. A worker cutting the pipe suffered fatal injuries. The consulting firm was found at fault for negligent preparation of plans or specifications. The pipe markings were considered a negligent design (*Edwards v. Anderson Engineering, 2007*):

Originally, the City of Pittsburg hired Wilson & Co. Inc. to design a storm sewer and drainage improvement project. Crossland Heavy Contractors (Crossland) [Figure 3] won the construction bid and used large, elliptical-shaped concrete pipe manufactured by Moores Manufacturing Inc. (Moores) to build the system. Crossland completed the project in September 2001.

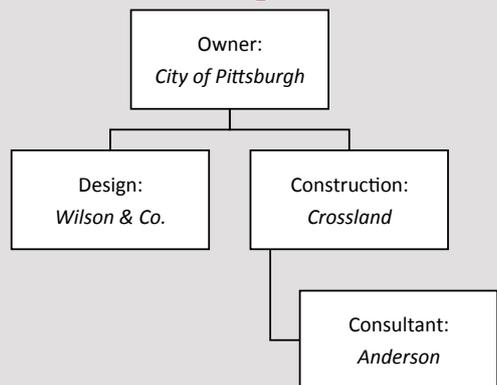
In January 2002, Wilson notified Crossland that it would need to replace some of the concrete pipes that had failed. Crossland replaced the pipe and put the extracted failed pipe on a vacant lot that had been prepared as a materials storage and staging area for the original construction project. The replacement project was completed on March 29, 2002.

Crossland retained Anderson to test the failed pipe to determine whether it complied with the project specifications for wire reinforcement and strength. The parties did not memorialize their agreement in writing.

Anderson needed the large pipes cut into sections to conduct its testing, and Crossland committed to cut the pipe. Upon being notified the pipe cutting would occur on April 1, 2002, an Anderson engineer went to the storage site and conversed with Crossland's project superintendent. Crossland proposed to crush the pipe with heavy equipment, but the Anderson engineer wanted the pipe cut in order to have clean edges for testing. The engineer specified the location of the desired cut lines by marking on the pipe with a yellow marker, which included a line that extended lengthwise on the top of the pipe.

Crossland commenced cutting the pipe, but when the Anderson engineer determined the process would take some time, he left the site. Edwards, a Crossland employee, stood on top of the concrete pipe to effect a lengthwise cut. At some point, shortly after the Anderson engineer had left, the pipe split lengthwise and rolled outward, causing Edwards to fall and be crushed when the pipe rolled back.

Figure 3
Case Study



Note. *Edwards v. Anderson Engineering, 2007.*

The Edwards family initially filed suit against Anderson and Moores, the pipe manufacturer. As an employee of Crossland, Edwards was covered by Crossland's workers' compensation policy, and benefits were paid to his survivors. The district court granted a motion by Crossland and Zurich North America to intervene in the wrongful death action. The district court granted a motion to amend the petition to join Wilson, the original project engineer, as a party defendant. Subsequently, the district court granted summary judgment in favor of Wilson and Moores, and both of those defendants were dismissed with prejudice.

However, on Anderson's summary judgment motion, the district court found that "material issues of fact exists [sic] as to whether K.S.A. 44-501(f) is applicable and therefore summary judgment is improper."

The court went on to specify that: A jury must determine if 1) defendant Anderson is a construction design professional; 2) the testing of the failed concrete pipe was on a construction project; and 3) that defendant Anderson's activity in testing and drawing on the pipe constitutes negligent preparation of design plans or specifications.

Therefore, the courts can construe that any sketches a consultant produces in the field as a design, including placement of boreholes, test pit excavations, construction materials sampling locations and even markings on the ground or on a pipe.

Risk Mitigation Strategies

Selecting a risk mitigation strategy depends on the presence of directly hired subcontractors and the existence of a statutory duty of safety care to those subcontractors. Each project party must recognize and evaluate its OSH liabilities while negotiating its contractual project roles and responsibilities.

In situations where no statutory duty of care exists, the optimal risk mitigation option may be to avoid creating this duty of care whenever possible in contracts or in field actions that could be interpreted as control (hands-off strategy).

When a statutory duty exists or when duty of care is embedded in the contracts, safety management becomes an integrated part of project delivery (hands-on strategy). Thus, any risk mitigation strategy selected for projects involving directly hired subcontractors calls for several key practices:

- Hire only qualified (prequalified) contractors.
- Insist that contractors provide OSHA-competent personnel and supervisors for their part of the project, and produce adequate safety planning and activities hazard analysis.
- Require strong indemnification provisions.
- Focus special attention on any consulting activities (e.g., borehole locations mapping) that may be interpreted as a faulty design in a case of an incident.
- Require current and uninterrupted workers' compensation insurance coverage.
- Insist that a subcontractor's commercial general liability policy names the consulting company as an additionally insured.

Other contractual mechanisms include request-

ing certain limits of coverage on the subcontractor's commercial general liability and workers' compensation policies, and identifying and avoiding potential coverage gaps due to policy expiration. In addition, including waivers of subrogation can further solidify risk transfer to subcontractors (Ivensky, 2008).

Hands-Off Strategy

Following are recommendations for safety-related contract clauses for design professional services from XL Group Insurance (2013).

Intervening in Response to Unsafe Act or Condition: Hands-Off Strategy

A professional consultant has a duty to intervene when s/he witnesses an unsafe condition or unsafe act that has a potential to harm (*Edwards v. Anderson Engineering, 2007*):

- if [the architect] had actual knowledge of unsafe practices [the architect] should have taken some action;
- [a]s a professional, an architect cannot stand idly by with actual knowledge of unsafe practices on the jobsite and take no steps to advise or warn the owner or contractor.

Many companies give their employees the right to intervene if they observe a third-party employee performing an unsafe action, including the right to stop project work when they think it is unsafe. In some instances, this is an obligation ("you must intervene"). A proper safety intervention can prevent an injury or even save a life.

However, improper safety intervention in low-potential-risk situations that involve other project employers, may be harmful both to project safety and to intervening company liability. At a multiemployer project site, employees must understand their project safety roles and responsibilities, and be trained in a proper process to intervene in safety situations that involve employees from other companies.

For example, employees must be trained that regardless of the safety strategy selected (i.e., hands-on, hands-off) or the company's contractual role, they must intervene directly in situations that they deem immediately dangerous to life and health. As XL Group (2013) states, "You cannot ignore your duty as a licensed professional to step forward in the face of imminent threats to life or safety about which you are aware." In those situations, the employee must attempt to stop the work activity and report the situation immediately to his/her supervisor, the contractor's safety officer and the client. The employee should offer no solution and provide no recommendations.

The consulting firm must carefully plan how its employees will respond to and report any low-potential-severity safety deficiencies and violations by subcontractors and other project parties, and the firm must effectively communicate this process to its field employees. Field employees' activities should not be misinterpreted as project safety management or project control, which "make the

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Job Site Safety

What

Your contract should include a job site safety provision that makes clear that responsibility for site safety and construction means and methods remains with the contractor, not your company.

Why

Assuming any responsibility for safety programs and safety procedures, either by contract or by your actions, can have serious economic consequences.

Do Not Accept

Any language that calls for your supervision on a job site, or any extreme contract language that calls for you to ensure strict compliance with plans and specifications, with safety of subcontractors, or to provide services beyond the traditional scope. Delete any client-provided contract clause that gives you control or charge of the contractor, including the authority to stop work.

Do Not Forget

- What you say and do during the project could change the contract terms.
- You cannot ignore your duty as a licensed professional to step forward in the face of imminent threats to life or safety about which you are aware, contractual language of exoneration notwithstanding.

contractor not entirely free to do the work in his own way.” This concern does not exist when a hands-on safety management strategy is applied, as solutions to mitigate any safety deficiency can be prescribed by a controlling employer.

Hands-On Strategy: Achieving the Standard of Care

When a duty of safety care exists to subcontractors or other project parties and a problem arises (e.g., subcontractor-involved incident, negative finding during a regulatory inspection), the controlling contractor must demonstrate that reasonable care has been achieved. In principle, if reasonable care is achieved, no regulatory citations or legal damages would be expected (except in strict liability jurisdictions, such as NY Code Section 240).

However, some might argue that the incident itself indicates that a standard of care was not achieved; the definition of standard of care in subcontractor safety management is open to interpretation, with various parties having various expectations of what constitutes the reasonable care. OSHA’s (1999) multiemployer citation policy specifies that:

[T]he extent of the actions required of employers varies based on which category applies. Note that according to OSHA’s citation policy the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to detect and prevent safety violations is less than what is required of an employer with respect to protecting its own employees.

Ivensky (2008) states that reasonable care involves proper contractual and insurance bases; prequalification of subcontractors; requesting and obtaining qualified and safety-trained subcontractor personnel; obtaining safety planning documentation (such as safety and health programs, site-specific safety and health plans, and job safety analyses); and obtaining competent safety officers with the subcontractor’s trade employees. It also involves establishing rules of the game, such as re-

quiring the subcontractor to hold regular safety meetings; providing regular and random safety inspections and audits; and holding regular joint prime/subcontractor safety meetings. The optimal dose of a prime contractor’s involvement in subcontractor safety management or oversight (e.g., need for a full-time prime-contractor safety manager, frequency of a prime contractor’s inspections and safety visits, level of documentation) should be the subject of careful review.

A regional directive issued in Washington State (2001) provides a good approach in defining standard of care. This directive was issued after the state’s supreme court held that a general contractor could be held liable for an injury to a subcontractor’s employee that occurred as a result of a WISHA violation. The directive explains:

[W]hen a WISHA violation is being issued to a subcontractor working under the control of a general or upper-tier contractor, the general or upper-tier contractor can argue that it has met its responsibilities to promote safety and health on the workplace and, therefore, is not responsible for the violation.

However, before the agency accepts this affirmative defense, the general contractor must fulfill its responsibilities as outlined in Section IV of the directive. Section IV lists safety program elements that a general contractor must demonstrate to prove that it is meeting its standard of care responsibilities, including:

- contractual control requirements;
- establishing and enforcing work site safety rules, including developing and implementing an incident prevention program and site-specific project safety plan;
- requiring its subcontractors to have incident prevention programs and site-specific plans consistent with the act;
- developing a management plan that not only confirms existence of subcontractor-required programs/plans, but also ensures review for regulatory compliance and project conformance;
- making safety programs and plans available and accessible.

The directive is comprehensive and provides detailed requirements on the elements of the OSH program that would be satisfactory proof of reasonable care. The degree of a general contractor’s oversight depends on the level of the subcontractor’s activity, experience with the subcontractor (current and previous), and awareness of the subcontractor’s commitment to safety and health.

The degree of oversight necessary also depends on the level of specialized expertise required to identify OSH problems. A general contractor relying on a specialized subcontractor who has been given no reason to doubt the subcontractor’s safety efforts may rely on the subcontractor’s representations with regard to hazard control when violations

could not be expected to be readily apparent to the general contractor. However, the following statement is interesting:

[A] general contractor is not required to inspect a subcontractor's equipment for health and safety violations (unless there is reason to doubt the subcontractor's safety efforts). Under normal circumstances, it is sufficient for the general contractor to establish clear expectations for such inspections and to rely on the subcontractor's representations that they have in fact been conducted.

Acting Beyond the Standard of Care

A client's request that a consulting firm assume the duty of safety care at a project where no statutory duty of care exists or to extend the standard of safety care beyond levels considered reasonable care creates additional safety liabilities for that consulting firm, and it constitutes an additional risk and additional deliverable. Examples of such requests include implementing specific client-mandated and non-regulatory-driven safety programs such as a subcontractor's injury case management or project-wide behavior-based safety programs. If accepted, the consultant must properly plan and budget for these additional deliverables, effectively implement them and be appropriately compensated.

A consulting company should recognize that fulfilling a client's request to achieve specific lagging key safety performance indicators (e.g., a zero incident rate) and achieving leading key safety performance indicators (e.g., implement traceable elements of a safety management system) will require engaging top-quality subcontractors; training consulting project managers to become defacto construction project superintendents (or hiring construction superintendents); and allocating necessary resources to safety management to achieve the selected standard of care.

Conclusion

For a consulting firm involved in a multiemployer project, non-employee safety liability risk mitigation strategies can be summarized as follows:

If the firm does not hire subcontractors:

- Avoid accepting safety responsibilities or retaining any contractual or expressed control (by action in the field) over other project parties and their employees.

- All project employees have a duty to intervene when they witness an unsafe condition or unsafe act that has a potential to harm. They are to follow the recommendations on effective safety interventions, without retaining the duty of care.

- If a company has accepted project safety responsibilities by a contract, achieve the level of safety care specified in the regulations and in the contract. Make sure safety risks and liabilities are well understood by company management and other project parties, and ensure that safety services provided by the firm are reimbursed by the client.

If the firm hires subcontractors:

- Establish whether a statutory duty of safety care to subcontractors exists in the jurisdiction in which

the site is located. If it does, provide the reasonable care to satisfy that duty. If it does not, when possible, maintain a position where the duty of safety care is not retained or exercised.

- If a company has retained safety responsibilities by a contract or has a statutory duty of care to subcontractors, achieve the level of safety care specified in the contract and regulations (and achieve the reasonable care).

- Provide high-quality design that will not become a direct or indirect cause of a serious incident.

A consulting company must recognize and understand its safety roles and responsibilities at a multiemployer project site and select the optimal courses of action that will allow its employees to effectively managing safety liabilities while not retaining any unnecessary liabilities. **PS**

References

- American Law Institute (ALI). (1965). *Restatement of the Law Second, Torts (Volume 2)*. Philadelphia, PA: Author.
- ASCE. (2012, April 12). Construction site safety (Policy statement 350). Retrieved from www.asce.org/issues-and-advocacy/public-policy/policy-statement-350---construction-site-safety
- Eckley, E. (2013, May 17). Contractor had nondelegable duty to protect subcontractor's employee. Retrieved from www.calt.iastate.edu/article/contractor-had-non-delegable-duty-protect-subcontractor%E2%80%99s-employee
- Edwards v. Anderson Engineering*, No. 96,203 (Supreme Court of Kansas, Sept. 7, 2007).
- HSE. (2015). Construction (design and management) regulations. Bootle, Merseyside, U.K.: Author.
- Ivensky, V. (2008, Jan.). Safety risk management of subcontractors: What is a standard of care? *Professional Safety*, 53(1), 43-46.
- Ivensky, V. (2015, July). Statutory duty of care to a subcontractor: U.S., Canadian and U.K. perspectives. *Professional Safety*, 60(7), 38-45.
- Johnson, W.G. & Timmons, B.D. (2010). Determining "right of control" in construction accident litigation. Retrieved from www.cooperscully.com/uploads/seminars/Johnson-RightControl.pdf
- OSHA. (1999). Multiemployer citation policy (Directive No. CPL 2-0.124). Retrieved from www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024
- Scaffolding and other devices for use of employees, 10 NY Labor Law § 240. Retrieved from <http://codes.lp.findlaw.com/nycode/LAB/10/240>
- Swanson, R.B. (2001, Dec. 13). OSHA interpretation letter re: CPL 2-0.124: Multiemployer citation policy. Retrieved from www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24359
- Washington State Department of Labor and Industries. (2001, Aug. 1). Contractor responsibility for safety and health under *Stute v. PBMC*. Retrieved from www.lni.wa.gov/Safety/Rules/Policies/PDFs/WRD2700.pdf
- WorkSafe Alberta. (2013, Feb.). The prime contractor (LI-018 legislation). *Occupational Health and Safety Bulletin*. Edmonton, Alberta, Canada: Author.
- XL Group Insurance. (2013). 10 must-have contract clauses. Retrieved from <http://bit.ly/1R8wjcf>