

A/E RISK REVIEW

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Jobsite Safety, Part 2 Steps for 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.

Because jobsite safety is such a serious liability concern, every architect and engineer should become knowledgeable of the risks and remedies. Design firms must avoid any contract language that could make them liable for safety and instruct their staff to conduct themselves cautiously while on the jobsite.

Part I of this two-part report, examined some of the more 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 steps every design firm should take to avoid finding themselves potentially liable for jobsite safety. Major areas we'll examine include:

- Contractual language
- Scope of services
- The client-contractor agreement
- General liability provisions
- Stop work authority
- Shop drawing review
- A field manual

Contractual Language

Consult with your attorney and your professional liability insurance specialist for help in developing the jobsite safety language in your agreement. Work to ensure that the client has a provision in the General Conditions to the construction contract requiring the contractor to indemnify your client, you and your subconsultants for all claims arising from the performance of the contractor and his or her subcontractors.

Under no circumstances should you accept a contract clause that makes you responsible for any losses or injuries that occur at the jobsite. Also, avoid any language in a client-drafted agreement that calls for your "supervision" 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 the design. Consider working with your attorney to adopt the following sample contract language provided by XL Design Professional:

Jobsite Safety

Neither the professional activities of the Consultant, nor the presence of the Consultant or its employees and subconsultants at a construction/project site, shall relieve the General Contractor of its obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. The Consultant and its personnel 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. The Client agrees that the General Contractor shall be solely responsible for jobsite safety, and warrants that this intent shall be carried out in the Client's contract with the General Contractor. The Client also agrees that the Client, the Consultant and the Consultant's subconsultants shall be indemnified by the General Contractor and shall be made additional insureds under the General Contractor's policies of general liability insurance.

Scope of Services

When developing your scope of services, 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.

Make it clear to the client and the contractor 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.

The Client-Contractor Agreement

Also consider giving your clients sample language for their use in the Client-General Contractor agreement. The following example supports the intent of your Client-Consultant agreement:

The General Contractor agrees to waive any claim against the Client and the Client's agents, architects, engineers, environmental consultants and their employees acting within the scope of their duties, and to defend, indemnify and hold them harmless from any claim or liability for injury or loss that allegedly arises from the General Contractor's performance or the work described herein, but not including the sole negligence of the Client or the Client's agents, architects, engineers, environmental consultants or employees. The General Contractor will require all Subcontractors to conform with this provision before they start any work. The General Contractor shall ensure this provision is in conformity with the insurance provisions of this contract.

General Liability Provisions

Help your client ensure that the general conditions require that the contractor provide evidence of satisfactory general liability insurance coverage and that the policy names the client as well as the design professional and its subconsultants as Additional Insureds. 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.

An insurance provision in the client-general contractor agreement might read:

The General Contractor shall require the General Contractor's insurance carrier to add the Client and the Client's professional consultants and their agents as additional insureds under the General Contractor's general liability insurance policy with respect to services performed by the General Contractor for the Client. The General Contractor's insurance carrier shall acknowledge that the protection so extended shall be primary protection for the Client and the Client's professional consultants and their agents.

Stop-Work Authority

Make certain that your agreement with the client does not give you the authority to stop work. 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 owner -- and only the owner -- 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 construction documents. Here is a sample Rejection of Work clause to discuss with your attorney:

Rejection of Work

The Consultant shall have the authority to reject any Work that is not, in the judgment of the Consultant, in conformance with the Construction Documents or work plans. Neither this authority nor the Consultant's good-faith judgment to reject or not reject any Work shall subject the Consultant to any liability or cause of action to the Contractor, subcontractors or any other supplies or persons performing work on this project.

Shop Drawing Reviews

One added level of protection is to 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.

A Field Manual

With the assistance of legal counsel, develop a field manual that establishes standard procedures to be followed should your project representatives observe an unsafe condition on a project site. Here are some general guidelines to consider:

- Field representatives should assume the role of observer, not director, of jobsite conditions.
- If a workplace condition poses a potential safety risk but no immediate hazard or danger, then your field rep should report the risk to the contractor or the contractor's representative as soon as possible. The rep should report what was observed, but not instruct the contractor what to do.
- If the reported situation is not remedied or becomes more serious, the field representative should notify the owner (and perhaps even appropriate public officials). It is also advisable to record the observation and notification of appropriate parties.
- If danger to human life is imminent, your professional duty of care to protect the health and safety of the public requires that your field representative take immediate action.

Reinforce these procedures by requiring that your field personnel receive periodic training. Insist on adequate documentation of your project representative's visits to the construction site. 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 preventatives, 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.