

# EC RISK REVIEW

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## Jobsite Safety Presents Double Duty for Environmental Consultants

*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. We'd like to thank professional liability insurer DPIC Companies for their contributions to this article.*

Jobsite safety truly presents double duty for environmental consultants. First, like architects and engineers, environmental consultants must avoid assuming professional liability associated with jobsite accidents and resulting injuries. These liabilities typically fall to the general contractor. Second, environmental engineers must ensure the safety of their employees while carrying out normal duties. Because environmental consultants are often brought to a jobsite to address real or potential environmental hazards, employee safety is a major concern even in the absence of workplace injuries.

### **Duty #1: Avoid Professional Liability**

It is common knowledge and practice that the general contractor is primarily responsible for jobsite safety. Contractors are rightly given this responsibility because they have direct control over the jobsite and the construction process. They also have the training and experience needed to implement effective safety programs.

Environmental and design consultants need to take preventive steps to ensure they do not contractually or otherwise assume liability for jobsite safety. Areas that need to be addressed in this regard include:

- Contractual language
- Scope of services
- The client-contractor agreement
- General liability provisions
- Stop work authority
- 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. Any responsibilities for construction observation at the jobsite should be limited specifically to determining general conformance with your plans and designs. 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 offering your clients sample language for use in their Client-General Contractor agreement. XL Design Professional suggests the following clause:

***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. Further, work to ensure that the policy names the client as well as you and your 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 design 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 suppliers or persons performing work on this project.*

## **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.

## **Duty #2: Ensure Employee Safety**

Because you are often brought onto a client's site due to a real or potential hazard to human health, you must safeguard the safety of your employees on the jobsite.

This scenario distinguishes your profession from that of architects or engineers, whose jobsite safety issues are usually limited to Duty 1 above.

To reduce the chances of employee health and safety problems related to your environmental consulting activities:

**Establish a corporate safety policy.** Make it clear that health and safety issues are considered critically important at the very top of the organization. Establish a corporate policy that provides general guidelines for safe conduct on the jobsite. Address all potential site hazard issues that come into play with the type of work your employees perform.

**Develop safety plans and programs.** Along with the general safety policy, develop site-specific plans and procedures to direct project-level work. These plans should take into account all applicable OSHA and EPA worker health and safety regulations.

**Train your employees.** OSHA and other mandated safety programs require that a potentially affected employee must be trained before performing hazardous tasks. Further, some regulations require routine refresher training. Make sure your employees receive all required training and monitor performance to ensure they are applying what they learn on the job.

**Provide medical monitoring.** Several OSHA-related worker safety programs call for medical monitoring of employees. Many environmental firms provide entrance, annual and exit physicals to document any exposures incurred and to identify any potentially limiting health-related constraints.

Development and implementation of site-specific safety plans in compliance with applicable OSHA standards should lessen your liability associated with unsafe jobsite conditions or acts. While the mere existence of a site-specific plan won't prevent accidents from happening, the severity of an accident may be lessened if the plan's protocols are immediately and diligently employed. And, just as with your standard project management procedures and solid QA/QC documentation, your development of and adherence to a well-prepared site safety plan – backed by complete and compliant company plans and programs – will provide a solid defense against a claim.

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**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.*