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Jobsite Safety Part 2: Steps for Reducing Liabilities

The Value of Business Planning

By Leslie Kusek, Marketing Consultant

It's that time of year. Many of us are looking at what we've done in '08 and figuring out what we want to accomplish in '09. For many of us, this involves market research to identify

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AIA Michigan Kicking Off New Benefit

By Debra Gervase, PCIA Executive VP
Group Benefits 810.224.5278 or
dgervase@pciaonline.com

Effective December 1, 2008, AIA Michigan members will have access to an exclusive health insurance program with medical, prescription drug coverage, dental and life insurance in one

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PCIA "Gets Personal"

By Tony Preston, PCIA VP Personal Lines
810.224.5267 or tpreston@pciaonline.com

Did you know that PCIA is a specialist in auto and home coverage for your principals and employees? We also strive to keep you informed about risk exposures you may not be aware of.

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In the traditional design-bid-build method of project delivery, the general contractor has been held primarily responsible for jobsite safety. Still, construction workers, their estates and their attorneys have repeatedly sought to impose substantial (and often un-insurable) 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 accept as sole remedy state-mandated workers compensation benefits.

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 being blurred. The design firm's risks, rights and responsibilities become 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.

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PROFESSIONAL CONCEPTS
INSURANCE AGENCY

Steps for Reducing Liabilities

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Part 1 of this two-part report, examined some of the more notable court decisions regarding jobsite safety. Now, in Part 2, we will recommend steps design firms can take to avoid finding themselves liable for jobsite safety.

Because jobsite safety is such a serious liability concern, every architect and engineer should become knowledgeable of the risks and remedies.

The Designer-Client Contract

Consult with your attorney for help in developing jobsite safety language in your client agreement. 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 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 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.

Also pay attention to the following 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. In your scope, make it 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. 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. 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.

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Steps for Reducing Liabilities

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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.



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New AIA MI Benefit

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convenient plan that fits varying budgets. This program offers several benefits:

- Flexible plan choices, including traditional PPO and consumer-directed plans.
- Cost-saving, consumer-directed options, such as health savings accounts (HSAs) help achieve lower premiums and empower employee choice.
- Pharmacy benefits through Wellpoint include over 61,000 network pharmacies nationwide, copay options, mail order and specialty drug services.
- The buying power of a larger group with other AIAMI member employers statewide, which may help lower overall costs.

The AIAMI Health Plan is underwritten by Trustmark Life Insurance Company. Trustmark has nearly 100 years of experience in the insurance industry, and more than 50 years as a leader serving associations. For more info, go to www.trustmarkaffinitymarkets.com.

PCIA is ready to assist you with evaluating your options and taking advantage of this exclusive plan. Please contact *Debra Gervase*, at 810.224.5278 or dgervase@pciaonline.com.

Steps for Reducing Liabilities

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- 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 there is 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.
- 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.

A Project Representatives' Manual

Contractual protection is a great first step for preventing jobsite safety claims. However, equally important to what you say your responsibilities are 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.



With the assistance of legal counsel, develop a field manual that establishes standard procedures to be followed by 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 provides recommendations on how your project representatives should conduct themselves on the jobsite in order

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to avoid liabilities. Included are instructions on what to do if an unsafe condition is observed on a project site. Here are some general guidelines to consider:

- Field representatives should assume the role of observer, not director, of jobsite conditions. They should not inspect for hazardous conditions of any kind, nor review the contractor's safety program or attend the contractor's safety meetings.
- 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 site superintendent as soon as possible.
- Your project representative should make a record of the notification 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 the reported situation is not remedied or becomes more serious, you should notify your client (and perhaps even appropriate public officials). It is advisable to record the observation and notification of appropriate parties in writing.

If danger to serious injury or 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. This is a critical judgment call. Your firm should develop general guidelines on how to handle such situations before an imminent jobsite danger occurs. As always, consult your attorney.

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.

The above 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.

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Business Planning...

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where we can reasonably expect projects to occur—Where will they be? What markets? What clients? For others, it involves conversations with existing clients and key prospects to determine what business they are expecting in the coming year.

In general, business planning involves the following steps:

1. Revisiting history: where have revenues and profits come from over the last 2 or 3 years?
2. What can you reasonable expect from these sources in the next year?
3. Where do you want to grow? What new clients do you want to add in the next year or two?
4. What actions (and investments) do you need to make your plans happen? These should be scheduled and budgeted, with an assigned champion.

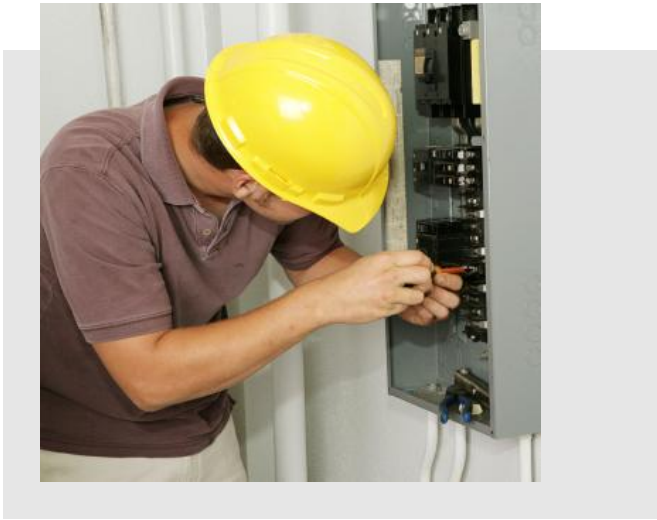
Relying on “seat of the pants best guesses”, however, is not a strategy that is working in today's tight markets. As architects and engineers, run your business with the same due diligence that you use on your projects.

Leslie Kusek can be reached at Leslie@LMKconsulting.com



**PROFESSIONAL CONCEPTS
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Tips you can use: Defuse those electrical fires



Defective electrical wiring systems cause approximately 40,000 residential fires annually, according to a United States Consumer Product Safety Commission (CPSC) study. In addition, electric cords and plugs are involved in about 7,000 fires annually. The National Electrical Safety Foundation offers numerous tips to safeguard the home against electrical fire and related losses, including the following:

- Verify that outlets and extension cords are not overloaded.
- Examine electrical cords to ensure they are not frayed, damaged, or placed under rugs or carpets.
- Verify that the proper wattage bulbs are being used in light fixtures and lamps.
- Consider installing ground fault circuit interrupters (GFCI) in bathrooms, utility rooms, and kitchens. This device protects people against electrocution by shutting down the electrical system if it detects any imbalance in the electricity.
- Take steps to safeguard electrical appliances from power surges. A power surge is a sudden rise of current that can ruin electrical appliances and equipment, such as computers. You can purchase surge protection devices to safeguard against the problem.
- Consider updating the entire electrical system if the home is over 40 years old. Older homes are more susceptible to electrical fire.
- Install child tamper-resistant electrical outlets to prevent a child from inserting something into the outlet holes.
- Install arc fault circuit interrupters (AFCI) to avoid fires caused by arc faults. An arc fault is a discharge of electric current across a gap. This can be caused by improper electrical connections, pinched wire insulation, and overheated wires.

Note that many insurers offer discounts for some of these electrical safety improvements. Please call for details.

*Tony Preston, PCIA VP Personal Lines
810.224.5267 or tpreston@pciaonline.com*