

Safety Risk Management of Subcontractors

What is a standard of care?

By Vladimir Ivensky

OCCUPATIONAL SAFETY AND HEALTH risks related to subcontractors are significant business risks encountered by contractors that employ other contractors (as prime contractors or general contractors). Although OSHA stipulates that “with respect to subcontracted work, the prime contractor and any subcontractor shall be deemed to have joint responsibility” [29 CFR 1926.16(a)] and “in no case shall the prime contractor be relieved of overall responsibility for compliance” [29 CFR 1926.16(a)], the regulations have significant areas open to interpretation.

In addition to a prime contractor’s moral obligation to provide reasonable care in recognizing and controlling occupational hazards for all employees—including a subcontractor’s employees—subcontractor-related safety risks to the prime contractor include:

- risk of injury- or fatality-related legal actions against the prime contractor by or on behalf of a subcontractor’s employees;
- risk of regulatory citations (by OSHA) to the prime contractor originating from a subcontractor’s safety violations;
- risk of negative publicity and loss of competitive edge because of a subcontractor’s subpar safety performance.

Mitigating these risks is an important task of a prime contractor’s management team, which should include the insurance, contracts, legal, operations and safety management departments.

“Reasonable care” toward subcontractors is a typically prescribed necessary remedy to control the cited risks (OSHA, 1999). 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 requiring 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 (such as a need for a full-time prime-contractor safety manager, the frequency of a prime contractor’s inspections and safety visits, and the level of documentation) should be the subject of a careful review.

Any remedy should be applied in an optimal dose: too low and it will not be effective, too high and it may become a poison (e.g., potentially exposing a prime contractor to additional liabilities). In the delicate balancing act involving subcontractor safety management, the correct extent of reasonable care is an essential factor (Harrison Steck PC, 2001). To achieve this balance, the prime contractor must establish an optimal level of care over subcontractor safety management programs that includes all contractual, insurance and safety-related elements.

The level of control is a critical element because while it helps achieve the necessary compliance, it may negatively affect the prime contractor’s liabilities (as *more control* can mean *more liability*). Therefore, the strategy is to strive to effectively manage the project safety program without assuming unnecessary liabilities and to find a “golden” optimum somewhere between the total hands-off and total hands-on approaches. Doing so would provide the answers for the prime contractor’s companywide or project-specific safety risk management tactics, including the necessary staffing and funding of subcontractor-related safety management programs.

Based on these risks, the due diligence in a prime contractor’s relations with its subcontractors should be directed toward:

- ensuring that the subcontractor has established and implemented an effective safety and health program which adequately protects its employees, the public and the environment;
- achieving maximum possible transfer of the

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Table 1

Safety-Related Risks for Prime Contractors

	Prime's deficiencies/accidents	Subcontractors' deficiencies/accidents
OSHA citations to the prime contractor	Yes	Potential exists even after OSHRC No. 03-1622 but significant defense is available
Accidents included in the prime's OSHA 300 logs	Yes	No
Accident rates requested during prebid qualification by the prime's clients (as a part of the prime's company safety record)	Yes	Rarely, but increasing trend exists
Workers' compensation costs to the prime	Yes	No, if contract/insurance are correct
Impact on prime's experience modification rate (EMR) and insurance premiums	Yes	No, if contract/insurance are correct
OSHA recommended level of due diligence/reasonable care by the prime	Maximum	Less than that for its own employees

Note. Originating from prime's and subcontractors' activities. Owner-controlled insurance programs are not discussed here.

prime contractor's safety liability for a subcontractor's actions;

- avoiding regulatory citations caused by a subcontractor's safety violations and related actions;
- avoiding negative publicity or competitive damage associated with the poor safety performance of a subcontractor and protecting the prime contractor's public image.

Modification of the fourth listed goal, as established by some companies regarding their subcontractors' safety performance, may include a requirement that subcontractors achieve specific (very low) OSHA-recordable injury rates on a specific project or companywide.

Contractual Transfer of Liability

Contractual transfer of safety liability and its effectiveness is beyond the scope of this article. Typical legal advice regarding contractual transfer of safety liabilities from a prime contractor to a subcontractor includes the following:

- 1) Use a subcontract that does not assume safety responsibilities. "The standard subcontract drafted by a prime contractor should clearly provide that the subcontractor is responsible for the safety of its own employees. It is imperative that a prime contractor does not assume by contract responsibility for the safety of its subcontractor's employees."
- 2) Insist on strong indemnification provisions.
- 3) Make sure the subcontractor's commercial general liability policy names the prime contractor as an additionally insured (Harrison Steck PC, 2001).

Other contractual mechanisms should include requesting certain limits of coverage on the subcontractor's commercial general liability and workers' compensation policies, and identifying and avoiding potential coverage gaps due to the expiration of insurance policies. In addition, including waivers of subrogation can help further solidify risk transfer to subcontractors.

The proper contract is critical to the overall success of any potential future legal defense by the prime contractor. Further discussions on safety due diligence and reasonable care assume that all necessary contractual and insurance requirements have been met universally.

Current Status: Controlling Employer Citation Doctrine in the U.S.

In the U.S., under OSHA's CPL 2-0.124 multiemployer citation policy, more than one employer may be subject to a

citation for a safety violation on the worksite. Those at risk of such citations may include the owner, prime contractor, lower-tier subcontractors, construction managers and others, depending on their role. The multiemployer directive gives OSHA inspectors guidance on when citations should/should not be issued and provides examples of roles and citation vulnerabilities to four categories of employers—exposing, creating, correcting and controlling employers.

Historically, prime or general contractors were vulnerable for their controlling role on project sites. Reasonable care extended by the prime contractor toward a subcontractor's safety compliance was used as a defense (through the existing appealing process) against OSHA citations. Another defense that has proven successful in some cases (OSHRC, 2000, 2002) was disputing a prime contractor's controlling employer role as supported by a completely hands-off approach on the project site (i.e., no control = no liability).

In April 2007, the Occupational Safety and Health Review Commission (OSHRC) issued a dramatic revision of OSHA's controlling employer doctrine, essentially invalidating it. In *Secretary of Labor v. Summit Contractors Inc.* (OSHRC, 2007), Summit contested OSHA citations it received for allegedly failing to properly protect its subcontractor employees working on a scaffold from fall hazards while having knowledge of these hazards. In the case started in June 2003, Summit argued that the multiemployer citation policy was not valid because it was contrary to the language of 29 CFR 1910.12(a):

Each employer shall protect the employment and places of employment of each of *his* employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph (emphasis added).

The OSHRC agreed and concluded that 29 CFR 1910.12(a) prevents OSHA from citing under the controlling employer citation doctrine, “relieving general contractors of the need to patrol work sites and supervise the behavior of contractors with respect to conditions to which general contractors’ own employees have no reasonably predictable exposure” (Sapper, 2007). Dissenting OSHRC Commissioner Thomasina Rogers stated that “by their decision . . . my colleagues have reversed over 30 years of commission precedent . . . in voting . . . to eliminate the Secretary’s ability to cite a general contractor under multiemployer enforcement policy.”

OSHA has appealed the decision to the Eighth Circuit U.S. Court of Appeals. It is unclear whether the agency will change its enforcement policy and will stop issuing controlling employer citations. The agency often regards only decisions of a court of appeals, rather than OSHRC, as establishing binding precedent (Yohay & Walsh, 2007). In addition, the OSHRC decision is not obligatory in state-plan states. At this time, the author believes that “business as usual” should be recommended to prime/general contractors with regard to safety-related due diligence toward subcontractors.

Safety-Related Risks for Prime Contractors

The real dynamics of subcontractor-related safety risks and negative outcomes (such as accident rates, number of citations and level of litigation originated from subcontractors) depending on the level of the prime contractor’s safety involvement, are difficult to predict. However, some general assumptions can be made.

1) With the increasing level of safety diligence, the risk of a subcontractor’s accidents will not be reduced until a specific, significant level of influence is achieved, first through the pre-qualification process, then with the effective safety oversight.

2) The risk of litigation against the prime contractor will decline when the basic due diligence, proper contractual and qualification processes are in place. Some sources suggest increased risks of litigation on the high end of a hands-on approach (Davies, 2001).

3) The risk of citations related to the controlling employer has significantly decreased

after the Summit decision and significant defense is now available.

The optimal value of reasonable care for subcontractors’ workers depends on the prime contractor’s priorities. The standard of care should be established considering the interests of such parties as property owner, client and prime contractor. Table 1 highlights risks to the prime contractor originating from a subcontractor’s safety performance, while Table 2 summarizes the overall importance of the risks.

Value of Achieving Low Injury Rates

Poor safety performance by a subcontractor is a clear indicator of overall problems and elevated risks to the prime contractor. Influencing overall subcontractor safety performance can be perceived as: 1) a way to reduce the overall probability of a significant injury or fatality at a prime contractor’s site; 2) one project deliverable to a client; or 3) one of the prime contractor’s companywide deliverables to shareholders and the public (i.e., via the yearly sustainability reports).

Construction industry clients, such as property owners, developers, or industrial or utility companies, have vested interests in excellent projectwide safety performance as they

Achieving an effective level of care over subcontractor safety management programs requires finding a “golden” optimum somewhere between the total hands-off and total hands-on approaches.

Table 2	
Negative Values of the Prime Contractor’s Safety-Related Risks	
Criteria	Negative value
Prime’s accident rates	•Significant. Direct damage to the prime’s competitive edge if the rates and EMR are above the acceptable thresholds.
Subcontractor’s accident rate	•Important as an indicator of potential problems or achievements related to a particular subcontractor. May be important as an internal reporting value for specific companies managing large construction projects. •Important as one of project’s deliverables with some clients on specific projects. •Each particular subcontractor’s accident can become a significant problem if required due diligence/reasonable care is not in place.
Regulatory citations	•Significant. This parameter is reportable to the potential clients during the prebid phase. Direct damage to the competitive edge. Potential exists even after OSHRC No. 03-1622 but significant defense is available.
Legal actions	•Significant.

may have few venues in which to protect themselves against the potential claims brought by a subcontractor's employees or against the regulatory citations than does a prime contractor.

Therefore, the value of targeting and achieving exceptionally low injury rates among a company's subcontractors (i.e., below the 50th percentile of the baseline) should be studied carefully by the prime contractor and the owner's management. Attorney assistance can help clarify the targets in each case.

Achieving Best Safety Performance from Subcontractors

While a prime contractor's own accident rates and subcontractor-related citations and claims are universally important to the contractor and pose a significant negative value, the importance of a subcontractor's exceptionally low accident rates varies depending on the client and the project.

Not all reasonable care systems (reasonably sufficient to protect against a citation) would influence a subcontractor's injury rates. When the actual level of a prime contractor's influence on a subcontractor's injury rates is objectively acknowledged, the data on a subcontractor's injuries can provide valuable information that can be used to identify and correct potential patterns.

However, prime contractors should be careful in accepting credit or blame for a subcontractor's injury rates in cases when their actual influence is relatively low. It should also be acknowledged that although a high-quality safety management program can significantly reduce the probability of serious accidents, the risk of such accidents can never be eliminated completely.

Some prime contractors can demonstrate significant achievements in improving a subcontractor's OSHA recordable rates. One way to improve performance is to hire only subcontractors with low experience modification rates (EMR) or with total recordable injury rates below the average published for the specific standard industry classification, and to provide exceptional quality safety oversight.

It should also be assumed that the subcontractor's staff is more knowledgeable in the specific work tasks and assignments particular to their business, and that actual or perceived direct management of their safety program, means and methods, if it results in an accident, can be the subject of potential litigation.

In addition, such close and direct management by the prime contractor's competent safety personnel is most feasible on larger projects where the prime can provide dedicated, high-quality safety leadership. One feasible step to reduce a subcontractor's accident rates without micromanaging its program is to rely more on the subcontractor selection process and to formalize and implement clear mandatory safety requirements for subcontractors.

Conclusion

The reasonable care provided by a prime contractor for a subcontractor's safety has its optimal value

and optimal effect for a project or for a prime's safety management system. Finding that optimum helps provide the answers on specific safety risk management tactics, including necessary staffing and funding. The standard of care established should consider the interests of the property owner, client and prime contractor.

With the increasing level of safety diligence, the risk of a subcontractor's accidents will not be affected until the prime contractor achieves a specific and significant level of influence via prequalification and effective safety oversight. Furthermore, when the actual level of a prime contractor's influence on a subcontractor's injury rates is objectively acknowledged, the data on a subcontractor's injuries can provide valuable information that can be used to identify and correct potential patterns.

The risk of litigation against the prime contractor will decline when basic due diligence including proper contractual, insurance and qualification processes is in place.

Company management should study the value of targeting and achieving exceptionally low injury rates among subcontractors in order to make proper safety management staffing and budgeting decisions. For smaller projects, low injury rates can be best achieved by carefully selecting contractors, establishing mandatory safety requirements for subcontractors and providing basic safety oversight training of the prime contractor's managing personnel. For larger projects, dedicated high-quality professional safety oversight by the prime contractor would make an additional difference. ■

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