THE MAGAZINE FOR THE PEOPLE
WHO BUILD NORTH AMERICA

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CONSTRUCTION TODAY QUARTERLY

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GOOD CITIZEN:
Sorensen Gross builds relationships in the community.

BIG APPLE UPGRADE:
Picone and Skanska help NYC improve a wastewater plant.

30 Years of Success

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CONSTRUCTION TODAY

"WE'RE HAVING TO REALIGN OUR COMPANY BASED ON THE ECONOMIC CLIMATE, BUT THAT DOESN'T MEAN PEOPLE ARE GETTING LAID OFF."

On the Cover

R.D. Olson Construction
California's R.D. Olson Construction says it has followed the same general philosophy for the past 30 years. The company says it concentrates on providing customers with high-quality construction services with an emphasis on delivering projects on time. These principles have elevated the company to annual sales of more than $100 million, and more than 80 percent of its high-profile clients come back to R.D. Olson Construction for multiple projects. Many of the company's projects have received major recognition from the industry. →p.6

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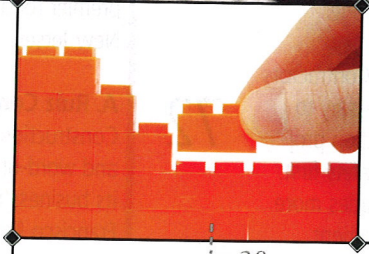

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WHO'S AT FAULT?

Negotiating tort liability is an essential skill for builders. BY JULIE NEGOVAN

You get a call at your desk one morning: Scaffolding has collapsed at the work site, injuring more than a dozen people. Obviously, your first thoughts are on getting people to safety and preventing additional injuries. Once that is done, your next thought may be: Who is legally responsible for those injuries? Identifying such liability involves contractual relationships, the legal and professional duties of those in control, and the activities of all involved. Usually, more than one party contributed to the cause of an accident, so allocation of liability is the key. Here, we discuss minimizing your allocation of liability and protective measures to put in place before any disaster strikes.

Acting Reasonably

Owners, contractors, subcontractors, designers and even vendors delivering supplies all have a duty to act reasonably. Unreasonable behavior that can be linked to the cause of an accident exposes one to "tort" liability for injuries to others. Depending upon the role of each of those on the site, their activities will be measured against different standards of "reasonableness." For example, architects and engineers have the legal duty to exercise the degree of skill, care and diligence common to other professional members under similar circumstances. Because architects and engineers possess knowledge, skill and training superior to that of the ordinary person, the law demands their conduct be consistent with this professional standing. A breach of this duty may lead to liability for negligence where it is deemed to be a "proximate cause" of injury.

Similarly, foremen, supervisors, and laborers of contractors and subcontractors have duties to act reasonably in their work. Certain guidelines have been established by regulation and law, such as OSHA regulations, which if violated and cause an injury, can subject the contractor to liability as "negligence per se," or as a matter of law.

Further, where injuries occur to workers employed by potentially responsible parties, a void in allocation of the liability may occur because Workers' Compensation Acts may bar claims against employers of harmed individuals. As a result, allocation for liability is pushed to someone else.

How Tort Liability Works

Once it is established that someone breached a duty by failing to comply with the applicable standard of care, injured parties must establish that the breach contributed to the harm. Courts employ various tests to determine "proximate cause," which is at the heart of allocating liability among multiple parties. The most commonly used "foreseeability" test says it is not negligence unless a reasonably prudent person in the same position would have predicted the probability of harm resulting from the acts. Courts also rely on the "substantial factor" test, measuring whether the breach played a substantial role in the injury.

Where more than one actor (e.g. structural engineer, general contractor, and possibly other subcontractors) is negligent for an injury, courts apportion liability between negligent parties. At trial, it is the jury's duty to weigh the egregiousness of the breach and assign percentages of liability to each party it determines has breached the standard of care and caused the injury.

In most states, parties allocated a percentage of liability are only responsible to pay that percentage of the total award. For instance, if a jury finds a general contractor and engineer each 50 percent liable for an award of $100,000, they will individually be responsible to pay $50,000. However, in some states, if any one party's percentage of fault is above a minimum threshold (often 60 percent, but sometimes as low as 1 percent), the injured person can collect 100 percent of the amount awarded from that party.

The party paying greater than its allocated percentage has the right to seek contribution from the other liable party, but that is easier said than done.

Minimizing Tort Liability

Of course, the best way to avoid liability is by always meeting the applicable standard of care. One may, however, inadvertently increase the standard by which he is measured, and therefore, the risk he faces, by using such language as contracting for services "in accordance with the highest standards of the profession," or by promoting himself as a "spe-

cialist." Therefore, contract documents should clearly identify everyone's scope of services and functions to be performed. There should be reasonable and clear protocols in place to ensure timely and adequate performance of the agreed-upon work.

Contract provisions that require inspection of the work done by contractors or designers increase those parties' exposure to tort liability. Inspection duties open the door, beyond design and workmanship issues, for allocation of liability for construction defects onto those who did not actually participate in the construction work that caused an accident. Allocation of liability can occur when a reasonable inspection should have uncovered the defect. To the extent feasible, restriction of contractual services/obligations in connection with site inspection is preferred. A separate "inspection" or "testing" company may be retained for specialty or high-risk work (such as structural steel, structural concrete, etc). There are also specialty firms that focus specifically on safety inspections for compliance with OSHA regulations, as well. Typically, general contractors, construction managers and engineers limit their inspection obligations to simply observing general work progress. Unless qualified, and paid to do so, stay clear of performing exhaustive and continuous inspections during construction.

Another potential pitfall is shop drawing processing and review, often left to your least experienced personnel and leading to an increased potential for errors causing injuries. That said, sufficient time and resources should always be dedicated to shop drawing processing and review at critical connections. They can limit exposure here by utilizing provisions from the American Institute of Architects form contracts, which define division of labor among the architect, engineer, and general contractor.

Even when the contract defines the division of labor, it is important to have the additional protection afforded by insurance. Not only should your companies' insurance broker review your coverage against the value and risk of your on-going work, you should obtain additional named insured coverage from every party working down the line. Owners and general contractors are in the best position to obtain this, but construction managers and designers can also request it. Importantly, obtaining an accord certificate with your company's name in the right box is not the final step in ensuring additional insured status. Many times, riders in the policies themselves have limitations in the additional insured coverage. Your contract should specify either a specific insurance rider form for all subcontractor policies, in addition to obtaining the certificate of insurance as additional named insured, or your contract may specifically outline the exact coverage you expect as additional named insured. Many other pitfalls exist in contracting for additional insured coverage, and you should always check with your broker to ensure compliance with the contract terms and to obtain the right coverage.

In addition, unless you are participating in one of the new integrated project delivery methods, you should have indemnification and contribution provisions in your contracts with all parties as well as flow-through provisions for any subcontractors and sub-subcontractors. This seems basic, but we see it so many times. Make sure that all contracts, purchase orders, napkin agreements or whatever are signed before work begins by any party.

Good faith, the best of intentions and even the highest standards of care are sometimes not enough to protect from liability associated with workplace injuries. Preparation, meticulous documentation and the proper insurance are key to minimizing your allocation of tort liability. ◆

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