

# Managing design professional risks arising out of the Prime/Subcontractor relationship

J. Kent Holland, J.D.  
Gail S. Kelley, P.E., J.D. ConstructionRisk, LLC



Subcontracts are common on design projects. On all but the smallest projects, the Prime Consultant is likely to have professional Subconsultants. In addition, engineers who provide services such as building or geotechnical investigation often engage trade Subcontractors to provide drilling, sampling and testing services.

Prime Consultants (Prime) who provide turnkey equipment design and installation will have contracts with suppliers. Subconsultants and Subcontractors may in turn subcontract out portions of their scope of work to Sub-Subconsultants or Sub-Subcontractors.

Subcontracts present unique risks to the Prime. While the Subconsultant or Subcontractor may only be performing a very small portion of the services required under the Prime Contract, if the Sub defaults, the default can have a domino effect on the work of the Prime's other Subs, the Prime's work and the work of the Owner's other consultants, as well as the Contractor.

Subcontracts also present unique risks to design professionals working as Subconsultants. Often the Sub will be required to agree to the terms of the Prime Contract, which can include unfavorable indemnification or standard of care provisions, and the Sub may have no input over the schedule that the Prime agrees to. In addition, the Sub typically has no contact with the Owner. Thus the Sub may not know the project is in financial difficulty until it receives a notice that it has been terminated for convenience and the Prime has no liability for several months of unpaid invoices.

## Subcontract relationships

In all contractual relationships, successful risk management includes allocating specific risks to the party that is best able to manage those risks. It goes without saying that the best way to minimize the risk that needs to be allocated in a Subcontract is for both the Prime and the Sub to carefully consider who they enter into a contract with. When the Prime and Sub have not worked together before, it is advisable for both parties to learn as much as they can about the other party before signing the contract. It is also important for both the Prime and Sub to ensure that they understand the terms of the subcontract. Often both parties read quickly over the "boilerplate" provisions without considering what effect these provisions will have on their contractual obligations.

The Prime is responsible for everything in its scope of work, whether the work is self-performed or performed by Subconsultants.

The fact that the Owner has required that the Prime use a specific Subcontractor or Subconsultant generally does not alter the basic relationship between the Prime and the Sub, and does not make the Owner liable for the Sub's work.

## Common Prime Contract terms

It is common for a Prime Contract to include a provision stating: *"The Architect shall be fully responsible for the acts, errors and omissions of its Subconsultants and Subcontractors."* Even when the Prime Contract does not explicitly include this provision, the Prime is responsible for everything in its scope of work, whether the work is self-performed or performed by Subconsultants.

Under the legal doctrine of *respondeat superior* (Latin for "let the master answer"), a party is responsible for the acts of its agents, where "agent" is a general term for someone who is working for someone else. This is referred to as vicarious liability. If a Subconsultant's work does not comply with the standard of care required by the Prime Contract and the Owner suffers damages as a result, the Owner will bring a claim against the Prime; the Prime must then try to recover these damages from the Sub.

It is also common for the Prime Contract to include a provision stating: *"The Engineer shall not subcontract or assign any portion of this work without prior written approval from the Owner."* Even if the Prime Contract does not explicitly contain this provision, a court would likely hold that an assignment of the obligations in the Prime Contract without the Owner's agreement would be a breach of contract, particularly if the contract included representations with respect to the Prime's qualifications. The Owner will generally have hired the Architect or Engineer based on its qualifications. Unless the proposal states that the services will be performed by someone else, the Owner can reasonably expect that the person or firm hired will perform the work. Nevertheless, Owners often include this provision in the Prime Contract to eliminate any potential for dispute over the issue.

The Prime Contract may also include a provision stating: *"...Owner's approval of a Subconsultant shall not in any way make Owner responsible for the Subconsultant's acts."* Again, even without this provision, a court would be unlikely to hold that approval of a Subconsultant makes the Owner liable for the Subconsultant's work. However, including this provision in the Prime Contract can eliminate disputes.

## When the Owner requires the Prime to use a specific Subconsultant

The fact that the Owner has required that the Prime use a specific Subcontractor or Subconsultant generally does not alter the basic relationship between the Prime and the Sub, and does not make the Owner liable for the Sub's work. This is true even if the Owner will be paying the Sub directly. If the Prime has an objection to the Sub designated by the Owner, or would prefer a different Sub, the Prime can negotiate the requirement with the Owner. However, once the Prime signs a contract with the Owner agreeing to use a certain Sub, the Prime would be in breach of contract if it did not use that Sub.

## The Owner's other consultants

On many projects, the Owner will contract with other design Consultants, in addition to the Prime. In such cases, the Owner may want a single point of responsibility for the design. While this is understandable, it can create problems with liability. The Prime is liable for the work of its own Subs, even those specified by the Owner, but it should not accept liability for the Owner's other consultants.

Prime Contracts will sometime contain wording such as: *"The Architect shall coordinate its services, the services of its Subconsultants, and the services of Owner's other consultants."* Wording like this can make the Architect or Engineer liable for errors or delays caused by the Owner's other Consultants. Preferred wording for this provision is: *The Architect shall coordinate its service and the service of its Subconsultants with the services of Owner's other Consultants.*

Another example of a provision that could force the Prime to assume unreasonable risk is the following:

*Consultant shall be responsible for ensuring that the work product of the Owner's separate consultants is fully integrated into the Architect's drawings and specifications and ensuring a fully coordinated set of construction documents."*

The Prime is liable for the work of its own Subs, even those specified by the Owner, but it should not accept liability for the Owner's other consultants.

If the Owner insists that the Consultant assume responsibility for producing fully coordinated drawings, preferred wording would be:

*Consultant shall be responsible for verifying that the work product of the Owner's separate consultants is fully integrated into the Architect's drawings and specifications and producing a fully coordinated set of construction documents. Architect shall not be liable for delays caused by Owner's separate consultants and shall have no liability for any errors or omissions in Owner's separate consultant's drawings and specifications.*

### Flow-down clauses

A "flow-down" clause (also referred to as a "flow-through" or "pass-through" clause) is a general term for a provision that requires the obligations of the Prime Contract to flow down to the Subcontractor. The most common type of flow-down clause is a broadly worded clause in the subcontract. The intent of the clause is to ensure that the obligations of the Prime Contract for the portion of the work that the Sub will be doing are passed down to the Sub.

Article 1.3 of AIA C401, Standard Form of Agreement between Architect and Consultant, is an example of a broadly-written flow-down clause.

*§ 1.3 To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the Architect shall assume toward the Consultant all obligations and responsibilities that the Owner assumes toward the Architect, and the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner. Insofar as applicable to this Agreement, the Architect shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the Architect, and the Consultant shall have the benefit of all rights, remedies and redress against the Architect that the Architect, under the Prime Agreement, has against the Owner. Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, this Agreement shall govern.*

This is a reasonable provision. While it requires the Sub to assume the Prime's obligations for the Sub's portion of the work, it provides the Sub with the same rights against the Prime that the Prime has with the Owner. It further states that if a provision in the subcontract conflicts with the Prime Contract, the subcontract will govern. The Sub can thus protect itself by ensuring any unreasonable obligations in the Prime Contract are overridden by a corresponding provision in the subcontract. For example, the Sub can protect itself against an unreasonable indemnification clause in the Prime Contract by making sure that its indemnification obligation for a professional liability claim is limited to the extent the claim is caused by its negligence.

However, in some cases, particularly when the Prime has not read the Prime Contract closely or does not completely understand the wording, the Prime may not be comfortable with the statement that "*the Consultant shall have the benefit of all rights, remedies and redress against the Architect that the Architect, under the Prime Agreement, has against the Owner.*" Likewise, the Prime may want to ensure that the Sub's obligations are identical to the Prime's obligations with respect to the portion of the work that the Sub will be doing. The flow-down clause in many subcontracts is therefore written in terms more favorable to the Prime, using language such as the following:

*To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner. The Architect shall have the benefit of all the rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the Architect. Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, the Prime Contract shall govern.*

In other words, the Prime is requiring that its obligations flow down, and is giving itself the same rights against the Sub that the Owner has against it, but is not allowing the Sub the rights that it has against the Owner. In addition, if there is a conflict between the Prime Contract and the subcontract, the Prime Contract will govern.

The Prime will often use a standard subcontract with a standard flow-down clause. The Sub may be asked to sign the subcontract without being provided a copy of the Prime Contract — in some cases, before the Prime is even executed. When a subcontract includes a flow-down clause, the Sub should never sign the subcontract without having been provided a copy of the Prime Contract. If the Prime Contract is long and the Sub's scope of work is relatively small, the Sub can ask that the sections of the Prime Contract which will flow down to its subcontract be specifically identified.

Under the legal principle of *contra proferendum* (Latin for "against the drafter"), if there is ambiguity in a contract, the ambiguity will be interpreted against the party that drafted it. However, if there is no ambiguity, the contract will be interpreted according to its plain meaning. If a Sub signs a contract saying that it has reviewed the Prime Contract and agrees to be bound by its terms, there is no ambiguity; the Sub will be held to the terms of the Prime Contract.

### Incorporation by reference provisions

Instead of a general flow-down clause, the subcontract may incorporate the Prime Contract by reference using language such as "*the terms of the Prime Contract are incorporated into and made part of this subcontract.*" The same cautions apply whether there is a flow-down clause or the Prime Contract is incorporated by reference.

### Flow-down provisions on design-build contracts

Flow-down provisions in subcontracts where the Design Professional is providing services to a Design-Builder can be particularly problematic. The wording is often similar to the wording of the flow-down provision in AIA C410. For example, the following is the flow-down clause in ConsensusDocs 420, Standard Agreement between Design-Builder and Design Professional:

#### **3.1 OBLIGATIONS DERIVATIVE**

*To the extent that the terms of the agreement between the Owner and Design-Builder apply to the performance of the Design Professional's Services, then the Design-Builder assumes toward the Design Professional all the obligations, rights, duties, and remedies that the Owner assumes toward the Design-Builder. In an identical way, the Design Professional assumes toward the Design-Builder all the same obligations, rights, duties, and remedies that the Design-Builder assumes toward the Owner. In the event of an inconsistency among the documents, the specific terms of the ConsensusDocs 420 Standard Agreement as modified by the Parties shall govern.*

However, as with the flow-down clause in AIA C401, Design-Builders often change this provision such that the Prime Contract governs. This can create problems because design-build contracts between the Owner and Prime Contractor typically include warranties of the services. They generally also require defense of claims and indemnification obligations that are much broader than what will be covered by professional liability insurance.

When a subcontract includes a flow-down clause, the Sub should never sign the subcontract without having been provided a copy of the Prime Contract.

When a subcontract includes a flow-down clause, the Sub should never sign the subcontract without having been provided a copy of the Prime Contract.

Flow-down provisions in subcontracts where the Design Professional is providing services to a Design Builder can be particularly problematic.

## Limiting the impact of the flow-down obligation

The Sub has various options when the flow-down clause would impose unreasonable obligations. The Sub can take exception (in writing, as part of the subcontract negotiation) to specific clauses in the Prime Contract and state that the terms of the subcontract take precedence. Alternatively, the Sub can add a clause to the subcontract that explicitly defines the Sub's Standard of Care and limits the Sub's indemnification obligations to what will be covered by professional liability insurance. For example, wording such as the following can be used:

*Notwithstanding any clause in the Prime Contract or this Agreement to the contrary, Subconsultant expressly disclaims all express or implied warranties with respect to the performance of its professional services, and it is agreed that the quality of such services shall be judged solely as to whether Subconsultant performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances. It is further agreed that Subconsultant shall not provide indemnification of any indemnitee other than to the extent damages are caused by Subconsultant's willful misconduct or negligence, and shall not be required to defend any indemnitee against professional negligence.*

One benefit of a clause such as the example above is that it not only eliminates express warranties that might otherwise flow down from the Prime Contract, but it also avoids potential warranties that might be implied by the language of either the Prime Contract or the subcontract through the use of words such as "assure" and "ensure" or requirements for absolute compliance with all laws, codes, standards and regulations. Professional liability insurance will generally not cover any warranties of professional services, including implied warranties.

## Flow-down requirements in the prime contract

Sometimes the Prime Contract will require that all subcontracts contain a flow-down clause to incorporate the Prime Contract requirements. For example, the Prime Contract may include a provision such as the following:

*The Architect shall require its Consultants to be bound by the terms of this Agreement, and to assume toward the Owner all the contractual obligations and responsibilities that the Architect has assumed toward the Owner. This Agreement shall control in the event of conflicts or discrepancies between such agreements with Consultants and this Agreement.*

Even if there is not a broad flow-down requirement in the Prime Contract, the Prime Contract may require that specific provisions flow down. These often include insurance requirements and confidentiality agreements, as well as more general requirements such as employment verification. If the required provisions are not included in the subcontract, the Prime would be in breach of its contract with the Owner. However, whether or not the provisions are in the subcontract, the Prime will still be liable for the Sub's actions. If the Owner suffers damages because the Sub has failed to comply with a requirement that flowed down from the Prime Contract, the Owner will look to the Prime for reimbursement.

When the Prime is negotiating the terms of its contract with the Owner, it needs to be aware of the terms that it will either be required to pass down to its Sub or that it will want to pass down. A Prime who agrees to unreasonable terms in the Prime Contract may have trouble negotiating contracts with its Subs. For example, professional liability policies do not cover defense of indemnified parties. A Prime who agrees to an indemnification clause including defense may find that a Sub will not agree to the defense requirement. This could leave the Prime responsible for the defense of a claim arising from a Sub's alleged negligence.

## What actually flows down under a broadly worded flow-down clause

What actually flows down under a broadly worded flow-down clause or an incorporation by reference provision is a matter of state law, as courts in different states have ruled differently on virtually identical contract provisions. In some states, courts view a general flow-down clause narrowly such that only those terms of the Prime Contract that are deemed “substantive” will be flowed down. Courts in other states may take a broader view of what can be flowed down via a general flow-down clause. The parties to the contract should obtain legal advice from construction attorneys who are knowledgeable with respect to the law of the state that will govern the contract.

Dispute resolution provisions, particularly a requirement in the Prime Contract to arbitrate, may not flow down unless specifically stated to do so. Waiver of the right to file a mechanic's lien may not flow down, as mechanic's lien laws were specifically enacted to protect those who provide materials or services that improve a property. Owners often do not want to take their chances with a court's enforcement of flow-down provisions which waive a right that the Sub would otherwise be entitled to; in such cases the Prime Contract may require that the provision be specifically included in the subcontract. Likewise, if the Owner wants to ensure that it will be able to assume the subcontract if the Prime defaults, the Prime Contract may require that the subcontract explicitly include a consent to the assignment.

What actually flows down under a broadly worded flow-down clause or an incorporation by reference provision is a matter of state law, as courts in different states have ruled differently on virtually identical contract provisions.

Whether to engage a Subconsultant that does not have insurance is a business decision for the Prime, one that may impact the Prime's own insurance program and premiums, if not immediately, then at some point in the future.

## Subconsultant/Subcontractor insurance requirements

Many Prime Contracts expressly require that all Subs carry the same insurance as the Prime. Whether or not the Prime Contract requires Subs to carry insurance, if there is a claim because of a Sub's work, the Prime will be vicariously liable. If the Sub does not have insurance, the Prime's insurance will be the only insurance that the Prime can use to cover damages from a claim arising out of the Sub's services.

Sometimes, however, the Sub may be a small firm that provides a unique service at a rate that does justify it procuring insurance. In other cases, a Sub without insurance may be the only one that is able to provide the required service locally. Whether to engage a Subconsultant that does not have insurance is a business decision for the Prime, one that may impact the Prime's own insurance program and premiums, if not immediately, then at some point in the future. The Prime needs to evaluate the amount and type of risk that will be generated from the Sub's services. The Prime also needs to evaluate whether the advantages of using that particular Sub justify the risk that the Prime's insurance will have to cover any claims arising from the Sub's services.

In some cases, the Sub may have insurance, but does not have the coverage required by the Prime Contract flow-down provision. For example, a Sub whose contracts are typically less than \$10,000 will probably not have a \$5,000,000 limit on its Commercial General Liability policy. Likewise, Subcontractors such as drilling companies that do not provide professional services typically will not have professional liability insurance, or if they carry such insurance it may not be to the limits required in the Prime Contract.

When the Prime Contract requires the Subconsultants to carry the same insurance as the Prime, the Prime should request a modification to explicitly allow for exceptions. Wording such as the following in bold lettering can be used:

*“The Engineer shall require that its Subconsultants carry the insurance required by this Agreement, **unless otherwise approved by the Owner, where such approval shall not be unreasonably denied.**”*

If a Sub does not have the limits required by the Prime Contract, it can look at increasing its limits, which might allow it to bid on larger jobs. However, carrying the increased limits for the typically required three-year tail period may add additional costs.

## Limitation of liability clauses

Should a Prime agree to a limitation of liability clause in a subcontract when there is no limitation of liability in the Prime Contract or the limitation of liability in the Prime Contract is much higher than the limitation that the Sub is requesting? The short answer to this question is, "It depends."

The Prime's obligations are set by its contract with the Owner. If there is no limit of liability in the Prime Contract, and there are damages caused by the Sub's negligence, the Prime will be liable for the damages in excess of the Sub's limit of liability. However, a Sub who has a contract for \$10,000 may be unwilling to agree to unlimited liability for its services, particularly when there are a number of other Subconsultants on the project and the Sub has no control over the costs that could accumulate. Just as the Prime must make a business decision as to whether to contract with a Sub that does not carry insurance, whether to allow the Sub a limit of liability that conflicts with the Prime Contract requirements is essentially a "business decision" for the Prime.

As a practical matter, regardless of the limitation of liability in the subcontract, the most that the Prime will be likely to recover from the Sub will be the available proceeds of the Sub's insurance policy, as Subs generally do not have other assets that can be attached. Some limitation of liability clauses specify a dollar amount limit, but then add a provision stating that the limit will not apply to claims and damages to the extent that there is insurance coverage. This limits the amount of uninsured risk the Sub must assume but allows the Prime to obtain coverage from the Sub's insurance, to the extent such coverage is available.

A design professional's subcontract with a Design-Builder can be particularly problematic with respect to the limitation of liability, as the Prime Contract will often carry very substantial liquidated damages for delay. If the Prime is not willing to agree to a complete limitation of liability, the parties may be able to negotiate a limitation of liability with respect to delay damages.

## When things go wrong - termination provisions

If a Sub becomes overextended or loses a key individual, it may be unable to comply with the schedule it has agreed to. This in turn may cause the Prime to be unable to meet its contractual obligations to the Owner. The subcontract should address this issue and give the Prime the right to bring in another firm if the Sub is not performing in accordance with the required schedule (or is not performing at all.)

The subcontract should also address the use of the Sub's work product if the Sub is terminated, particularly if the Sub's work product includes proprietary specifications or design features. If the subcontract doesn't give the Prime termination rights, the Prime could face a claim for breach of contract if it terminates the Sub.

Generally, if one party to a contract intends to terminate the other party for default, the defaulting party must be given notice and a reasonable amount of time to cure the default. If this is not required by the contract, a provision for notice and a cure period will usually be "read into" the contract by the court. As a matter of public policy, courts typically do not allow a party to be terminated for a default that it might not even be aware of.

To avoid having a dispute over its right to terminate, the Prime should include both the notice provision and the cure period in the subcontract. If the Sub needs to be terminated because it is not performing in accordance with its contractual requirements, the termination procedures must be strictly followed. Failure to do so could result in the termination for default being found defective by a court, in which case the Prime can be held liable for breach of contract.

## A Sub's right to suspend services for non-payment

Under a "pay-if-paid" clause, receipt of payment from the Owner is a condition precedent to the Prime's obligation to pay the Sub.

Subcontracts are often written with "pay-if-paid" clauses that make the Prime's obligation to pay the Sub contingent on the Prime's receipt of payment from the Owner. State law varies with respect to how these clauses are interpreted. Courts in some states have held that it is unfair to pass the risk of non-payment to the Sub and therefore will treat a "pay-if-paid" clause as a "pay-when-paid" clause.

The distinction between these two clauses is that under a "pay-if-paid" clause, receipt of payment from the Owner is a condition precedent to the Prime's obligation to pay the Sub. If the Prime never gets paid, it has no contractual obligation to pay the Sub. In contrast, under a "pay-when-paid" clause, if the Prime is never paid, it must still pay the Sub within a "reasonable amount of time".

Some subconsultants clarify that they are not agreeing to give up their rights to payment by adding language such as the following to the payment provisions of the subcontract:

*"In no event, however, shall the Subcontractor be paid the undisputed amounts of any invoice later than 90 days from the date of invoice."*

Alternatively, they can use wording adapted from the provisions in ConsensusDocs 750, Standard Agreement Between Constructor and Subcontractor:

*If Prime Consultant does not receive payment for Subconsultant's Work from the Owner, through no fault of the Subconsultant, the Prime Consultant will make payment to the Subconsultant for the Work satisfactorily performed within a reasonable time.*

Regardless of whether its payment is contingent on the Prime being paid, the Sub should require the right to suspend its services if it has not been paid. A right to suspend is more valuable than a right to terminate since the Sub would usually prefer to resume working on the project once it has been paid. The following is typical wording for a suspension clause:

*If Architect fails to make payment within sixty (60) days of receipt of Subconsultant's invoice, such failure shall be considered cause for suspension. Subconsultant shall provide Architect with a written notice to cure and if Architect fails to make payment of the sums properly due to Subconsultant within ten (10) days, Subconsultant may suspend performance under this Agreement until payment is tendered. Subconsultant shall not be responsible for any damages or delays due to such suspension.*





## Jobsite safety responsibilities

Who is legally responsible for project site safety? Contractors, design professionals and Project Owners have different roles and responsibilities when it comes to site safety. Responsibility and liability can arise under both statutory law and common law. Contract terms and conditions may also be the basis by which parties become responsible for site safety. And actions by parties in the field may establish responsibility, even if such responsibility would not exist by law or under the terms of the contract.

Construction contractors typically have overall responsibility for project safety. Project Owners generally limit their own responsibility for safety by contractually making the contractor and design professionals “independent contractors” such that the Owner is not responsible for their actions.

Professional consultants typically seek to include language in their own contracts with Project Owners stating that the consultant is not responsible for the contractor’s means, methods, and procedures—including matters of safety, and stating that it is understood that the contractor is solely responsible for site safety. Despite such contractual language, however, injured construction workers often seek to recover damages from entities other than their employer so that they can obtain more than would be available under workers’ compensation.

Numerous court decisions have addressed the question of whether a firm such as an architect, engineer or construction manager has liability for someone else’s employee. Reviewing some of these decisions can help design professionals and professional consultants take precautions against accepting responsibility for Subconsultant employees. While most of the reported decisions involve the relationship between a Prime Contractor and its Subcontractor or Sub-Subcontractor, the same legal principals would apply to a case involving a Prime Consultant and its Sub.

When there is a dispute over whether a consultant is responsible for an injury to a contractor’s employee, the first question addressed by the court will be whether in its contract with the Project Owner, the consultant assumed safety responsibilities that could extend to the safety of others.

Even if the contract language clearly states that the consultant has no responsibility for site safety, or states that the contractor is solely responsible (e.g., AIA B 101-2007, § 3.6.1.2 and AIA A 201-2007, § 11.1.4), the court might not stop there with its analysis. Instead, the court will often look at the facts of the case to determine whether the consultant did anything in the field during construction which could reasonably make it responsible for the injury.

In addition to being liable for acts that cause injuries, the Prime may, in some instances, have liability for the injuries of its Sub’s employees, even when the Prime does not directly cause the injuries. If an employee of a Subconsultant or Subcontractor is injured and makes a claim against the Prime Consultant, courts may look at whether the Prime retained control over the Sub’s work. Courts may find a Prime liable for injuries to a Sub’s employees if the Prime has retained control over the Sub’s means, methods and procedures, especially if the Prime performs safety-related supervisory duties such as providing a safety supervisor, or monitoring compliance with safety rules and regulations.

Some courts find Prime liability by focusing their legal analysis on the language of the contract between the Project Owner and Prime that imposes specific and detailed safety responsibilities on the Prime. Other courts hold that merely having the authority to direct, control or supervise the work that created the injury is not a sufficient basis to find the Prime liable for the injuries of a Subcontractor’s employee if the Prime did not exercise actual control over its Subcontractor’s work. Thus, in the absence of proof of any negligence or actual supervision of a Subcontractor, the mere authority the Prime has to supervise the work and implement safety procedures is not a sufficient basis to impose liability on the Prime or to find that it owes any common law indemnification to the Project Owner for damages.

The following court decisions may be useful to help understand how courts apply contract language and common law to determine who is responsible for injuries of a Sub’s employees while they are working on the job site.

## Prime Contractor found not liable for injuries sustained by Subcontractor employee

An employee of an independent contractor cannot generally recover damages from the one who hired the contractor for work-related injuries. There are exceptions to this rule, however. One such exception is where the hirer actually retained control of the work or otherwise caused or contributed to the injuries. In *Khosh v. Staples Construction Company*, 4 Cal. App. 5th 712 (2016), an appellate court affirmed a trial court's dismissal of a Subcontractor employee's case because the employee failed to present evidence that the Prime Contractor (the "hirer") retained control over the work and affirmatively contributed to his injuries.

Although the contract between the Prime Contractor (Staples Construction) and the Project Owner required the Prime Contractor to "exercise precaution at all times for the protection of persons and their property," and to "retain a competent, full-time, on-site superintendent to...direct the project at all times," and otherwise made the Prime Contractor "exclusively responsible" for the health and safety of its Subcontractors, and required it to submit "comprehensive written work plans for all activities affecting University operations," this was not sufficient to render the Prime Contractor in "control" over the work actually performed by a Subcontractor's employee.

The worker was injured while performing electrical work for a Sub-Subcontractor at the University project. On the day of the accident, the worker's direct employer informed the Prime Contractor that it needed three days to accomplish its last task on the project, and the electrical system needed to be shut down for it to perform this work. The worker arrived at the site two-and-a-half hours before the shutdown was scheduled to begin and rather than wait, went ahead and performed work in a substation where the switchgear was still energized. An electrical arc flash occurred half an hour before the shutdown was scheduled to begin and severely injured this worker. At the time of the injury, the Prime Contractor had no personnel at the site.

Despite being injured because he worked on the switchgear with full knowledge that the electricity was still on but would be turned off shortly, the worker sued the Prime Contractor for negligence. Under workers' compensation law, a worker cannot bring an action against its direct employer, so unless the injured worker could succeed in a negligence action against the Prime Contractor, he would be limited to what he could recover as workers' compensation benefits.

In finding against the Subcontractor's employee, the court explained that, "in order for a worker to recover on a retained control theory, the hirer must engage in some active participation." The court further explained that, "An affirmative contribution may take the form of directing the contractor about the manner of performance of the work, directing that the work be done by a particular made, or actively participating in how the job is done."

In this case, there was no evidence that the Prime Contractor performed any of these actions. Moreover, the court concluded that, "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." As a result, the injured worker was not entitled to proceed to trial against the Prime Contractor, and was instead limited to the benefits available under workers' compensation.

A similar result was obtained by the Prime Contractor in the case of *McCarthy v. Turner Construction*, 953 N.E. 2d 794 (NY 2011). There, the court held that the Prime had no common law duty to indemnify the Owner for the injuries sustained by a Sub-Subcontractor's employee since the Prime neither controlled nor supervised the Sub-Subcontractor's work. The Prime was performing a build-out for a tenant (not the property owner) and retained the services of a Subcontractor for certain work. An employee of a Sub-Subcontractor was injured when he fell from a ladder and he subsequently sued the Owner to recover his damages. The Owner then sued the Prime for both common law indemnification and contractual indemnification because it was found vicariously liable under New York's so-called scaffold law, which imposes a non-delegable duty upon Owners and contractors to provide the safety devices necessary to protect workers from the risks inherent in elevated work.

An employee of an independent contractor cannot generally recover damages from the one who hired the contractor for work-related injuries. There are exceptions to this rule, however.

## About the authors:

**Kent Holland** is a construction lawyer located in Tysons Corner, Virginia, with a national practice representing design professionals, contractors and project owners. He is principal of ConstructionRisk, LLC, providing insurance risk management services and construction risk management services, including but not limited to advice to insurance underwriters; guidance to those procuring insurance; change order and claim preparation, analysis and defense; contract preparation; contract review and contract negotiation. Mr. Holland is publisher of ConstructionRisk.com Report.

**Gail S. Kelley** is a risk management consultant with ConstructionRisk, LLC. She handles construction and design professional contract reviews and negotiations. Her background includes providing consulting on a wide variety of disputes and claims involving complex engineering and construction issues. Prior to becoming a lawyer, Gail worked as an engineer, primarily in the design and evaluation of pre-stressed and post-tensioned concrete structures. Gail also performed constructability reviews, due diligence inspections and condition assessments and provided litigation support for construction defect and delay claims in both state and federal courts. Gail is a graduate of Cornell University, Massachusetts Institute of Technology and The American University School of Law. She is the author of "Construction Law: An Introduction for Engineers, Architects and Contractors," published by RSMears – John Wiley & Sons (2013).

Although the Prime was not found to be either directly or vicariously liable for the worker's injuries, the property owner argued that it was entitled to common law indemnification from the Prime. The Owner asserted that by virtue of its contract with the tenant, the Prime contractually assumed sole responsibility and control of the entire project, and had the contractual authority to (1) direct, supervise and control the means and methods of plaintiff's work; and (2) institute safety precautions to protect the workers.

The Owner asked the court to adopt a general rule that a party may be liable for common law indemnification upon a showing that the party was either actually negligent or had the authority to direct, control or supervise the work that resulted in the injury, even if it did not exercise this authority. What the Owner asked the court to do was equate a party who merely has authority to direct, control or supervise the work with a party who is actively at fault in bringing about the injury suffered by the plaintiff.

The appellate court held that in the absence of proof of any negligence or actual supervision of a Subcontractor, the mere authority that the General Contractor has to supervise the work and implement safety procedures is not a sufficient basis to require common law indemnification of the Project Owner.

In rejecting the Owner's argument, the court explained:

"If a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone.

"Although the agreement, *inter alia*, required (Prime) to supervise and direct the work at the premises owned by the property owners, this fact alone was insufficient to establish that (Prime) actually supervised or directed the injured plaintiff's work, especially in light of the fact that (Prime) contracted the work [out to a Subcontractor,] that resulted in plaintiff's injury, and Supreme Court's findings that (Prime) (1) had no supervisory authority over [Plaintiff's employer's] work, (2) would not have directed plaintiff as to how to perform his work; and (3) did not provide any tools or ladders to the Subcontractors who worked at the site."

Although the Prime interacted with both the Subcontractor and the Sub-Subcontractor whose employee was injured, the court found that the Prime had no supervisory authority over the Sub-Subcontractor's work, and it provided no tools or equipment to Subcontractors that worked at the site. The court, held that because the Prime "did not actually supervise and/or direct the injured plaintiff's work, [Prime] is not required to indemnify the property owners under the common law.

## Conclusion

As is true in most contract negotiations, the party with the greater leverage generally has the ultimate decision on the terms of a subcontract. Typically, this is the "upstream" party -- the party that is paying for the services. However, Subconsultants who are in high demand or have a very good reputation may have significant leverage when negotiating their subcontracts.

Regardless of who is dictating the terms, unless a subcontract is reasonable and fair to both parties, what starts as a minor problem can escalate into a significant claim. In the end, a Prime may find that a Subconsultant who accepts uninsurable defense requirements, unreasonable indemnification requirements and unrealistically high limits of liabilities is more of a risk than a Subconsultant who insists on negotiating reasonable terms.

## Zurich

1299 Zurich Way, Schaumburg, Illinois 60196-1056  
800 382 2150 [www.zurichna.com](http://www.zurichna.com)

---

The information contained in this publication is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

ConstructionRisk, LLC is not a subsidiary or affiliate of Zurich. Zurich expressly disclaims any and all damages and other costs that may arise related to the use of or reliance upon the products, services, representations or warranties made by or on behalf of ConstructionRisk, LLC.

Zurich neither endorses nor rejects the recommendations of the discussion presented in the briefing. Further, the comments contained in the briefing are for general distribution and cannot apply to any single set of specific circumstances. If you have a legal issue to which you believe this article relates, we urge you to consult your own legal counsel.

©2017 Zurich American Insurance Company. All rights reserved.

A1-112009440-A (05/17) 112009440

