



# Staying Out of Harm's Way

by Quenda Behler Story

When it comes to safety, the law in most states holds the general contractor responsible for everything that goes wrong on a project, because the general contractor is assumed to have the most control over the work. But control can be illusory. Even though the general contractor has the power to hire and fire, does he or she really have the knowledge and expertise to know what safety measures are most appropriate? If not, does it make sense for the general contractor to accept all of the risk?

While it may not be possible to shift the overall responsibility for providing a safe workplace, in many cases the risk can be shared. A builder or remodeler can often use contractual arrangements to shift responsibility for part or all of the risks involved with specific tasks to other parties who are in a better position to prevent or control those risks.

Think about the subcontractors you hire who have much more expertise in their specialty than you do. Excavators, for example, probably know much more about what is necessary to support the walls of a trench than you do. Even a small excavation is dangerous — the weight of the exposed soil creates tremendous pressure on the sides of the excavation, and your crew will be in serious danger if the excavation is not done properly. As the general contractor, you could also be sued if the excavation collapses on other people whom you are responsible for protecting — delivery people, the owners, even trespassers (such as curious children).

In this kind of situation, it may be quite appropriate for the excavation subcontractor to shoulder all or part of the risk associated with his or her portion of the job. By placing responsibility for a risk on the person best suited to handle it, you as general contractor

can pay more attention to controlling those risks that are properly your responsibility.

**Hold harmless clause.** But sharing or shifting risks does not happen automatically. If your contract does not provide otherwise, you will probably find yourself solely responsible when something goes wrong.

The first step in evaluating any specific risk is to ask yourself if this is a risk for which you should accept sole responsibility. If you believe that a subcontractor is in a better position to control the risk, then include in your contract a hold harmless clause that stipulates the subcontractor will indemnify you should someone be injured and sue you. If you are found liable because of a subcontractor's failures, a hold harmless clause allows you to turn around and sue your subcontractor for what you had to pay. You may not get full reimbursement from the sub, but you may get what the law calls a "contribution" — partial reimbursement for your losses.

**Proof of insurance.** A hold harmless clause in your contract is meaningless, however, against someone who has no ability to pay. Your contract should also include language that requires the subcontractor to carry the proper insurance, and to submit to you

proof of coverage — usually in the form of a certificate of insurance — before work begins.

**Safety training.** Other contract provisions should clearly define responsibility for maintaining safety standards and training. If you subcontract all of your wiring, for instance, your contract should require your electrician and his or her employees to adhere both to your safety practices and to the safety standards of the electrical subtrade.

Well-written contracts outlining the specific responsibilities of each subcontractor — and requiring verification of their current insurance status — will go a long way toward clarifying and enforcing each person's role in maintaining a safe work site. Both the hold harmless clause and the insurance warranty are important, however. Neither alone will protect you. ■

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## Sample Hold Harmless Clauses

- Subcontractor is responsible for any damages caused by Subcontractor's work force, materials, and equipment, and by Subcontractor's suppliers.
- Subcontractor hereby warrants to the Contractor that Subcontractor is fully insured for both liability and workers compensation. Subcontractor is hereby required to provide proof of current insurance to the Contractor and hereby promises to maintain such insurance in good standing.

*Used together, these two clauses in your contract can help you to share liability with others who might be in a better position to control risks. As always when modifying your contracts, have your attorney review the language to make sure it complies with applicable laws.*