

DEPARTMENT of DEFENSE
FORUMS



Contractor Safety Oversight

National Context & Local Impact

John Cooper Masterson
Special Venture Acquisition Counsel
Naval Facilities Engineering Command, Headquarters
Washington Navy Yard
(240) 432-1976

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1

Questions



- Why should DoD safety professionals, contracting officers and counsel attend to contractor safety oversight?
- Why now? What has changed?
- What is the lawyer's value added to contractor safety oversight?
- What is being proposed, and how do we get contractor safety oversight policy into the hands of our field Commands?

Admiralty & Tort Liability



3

This photo is provided by OSHA on their web site as a safe work practice.

One contractor will place gangways, often using discarded pallets on the top and bottom ends. Currently the Department of Justice is defending the Navy in a suit by an employee of another contractor who allegedly twisted his ankle on such a pallet and subsequently has been out of work for over a year (Crumley v. U.S. initiated in 2008).

A Notice of Unsafe and Unhealthful Working Conditions from OSHA which finds the Navy was a “controlling” employer may satisfy much of a plaintiff contractor employee’s burden of proof in a personal injury action in tort (and probably admiralty).



4

Can this hazard wait for a Contracting Officer's Representative to attend to it? Can we provide training without changing the requirement and costs? Consider including the safety office as a contracting officer's representative.

AFI 91-301, O&ES Safety, Fire Protection & Health Program (1996)

9.4. Air Force safety, fire protection, and BE officials do not have the authority to direct contractor activities unless a condition exists which presents imminent danger to Air Force personnel. In all other situations such inspection findings are forwarded to the ACO for resolution with the contractor.

Requirements: Each employee on a walking working surface with unprotected side or edge, shall be protected from falling to a lower level by the use of guardrails, safety nets, personal fall arrest systems, or the equivalent

OPNAVINST 5100.23G	4 ft
29 CFR 1910 General Industry	4 ft
29 CFR 1915 Shipyards	5 ft*

*When rails are omitted, employees working more than 5 feet above solid surfaces shall be protected by safety belts, life lines and employees working over water shall be protected by buoyant vests.

29 CFR 1926 Construction Standards	6 ft
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Does the Contractor know what to do?



5

29 CFR 1915 Subpart P requires Safety Plans and a written Safety Response Policy from each employer, and requires all employers at the work-site to communicate and coordinate regarding fire hazards, plans and policies.

What follows are guidelines for addressing legal liability and safety risk through contractually facilitated communication.

Contractor Safety Oversight



- Why should DoD safety professionals, contracting officers and counsel attend to this issue?
 - DoD already provides oversight without the contractual tools to minimize risk
 - Contracting Officers
 - Safety professionals
 - And, DoD is not providing oversight
 - Because of lack of contractual tools
 - Even when the Navy is legally responsible

Contractor Safety Oversight



Why should DoD safety professionals,
contracting officers and counsel attend to
this issue?

- Fewer mishaps
- Readiness
- Cost
- Schedule
- “World class employer of choice”
- Catalyze a contractor’s independent provision of a progressive safety program for its employees

7

“World class employer of choice” is one of the goals of Naval Sea Systems Command per VADM McCoy, 2008

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Contractor Safety Oversight



- Why now? What has changed?
 - Old context
 - New context
 - Is it “back to basics” or a “major culture change?”

Contractor Safety Oversight



- Why now? What has changed?
 - Old context
 - DoD – allows contractor safety oversight when it is in the best interest of the Department of Defense
 - CNO & AF's liability oriented policy
 - SECNAV's boundary – the Navy is not the regulator of contractor employee safety

Contractor Safety Oversight



- Why now? What has changed?
 - Old context
 - DoD – allows contractor safety oversight when it is in the best interest of the Department of Defense

DoD Oversight Policy



- DoD Inst 6055.1 (1998)
 - DoD components may provide contractor oversight where it is in their best interests
 - DoD oversight has historically contributed to lower accident rates among certain contractor employees, on-time delivery of products and services (increased readiness), and ultimate savings to the Government

12

A rising issue is contract requests for adjustments in price for a changes in OSHA safety standards. Further, in a cost contract, do we know how safety compliance costs are being managed? Probably not unless we have a safety plan from the contractor and we use it to assess the contractor's safety program.

Contractor Safety Oversight



- Why now? What has changed?
 - Old context
 - CNO & AF's liability oriented policy

13

Except in cases of imminent danger, the old context is that safety professionals do not provide safety oversight to contractor employees & the DoD safety program is for the protection of Government employees, personnel and property.



- CNO Message (1996)
 - Due to liability and tort claims issues, the Navy generally does not provide safety and health oversight for contractor employees. Based on the long-standing DoD policy, our role in terms of contractor oversight is the protection of Navy personnel and property, and contract compliance.

14

SECNAVINST 5000.2, Implementation and Operation of the Defense Acquisition System (Nov 2004)

7.3. CNO & CMC shall support ASN(RDA) in developing acquisition ESOH requirements, recommending mandatory acquisition ESOH policy, assisting in ESOH policy implementation, reviewing ESOH related documentation, and providing ESOH advice and assistance to acquisition personnel.



- AF Instruction 91-301 (1996)
 - Contractors are solely responsible for compliance with OSHA standards and the protection of their employees. Air Force interest is to protect Air Force personnel working in or around contractor operations and with Air Force equipment and property.

15

AIR FORCE INSTRUCTION 91-301

1 JUNE 1996

Safety

**AIR FORCE OCCUPATIONAL
AND ENVIRONMENTAL SAFETY, FIRE
PROTECTION, AND HEALTH
(AFOSH) PROGRAM**

9. Contractor Operations. This instruction does not apply to employees, or working conditions of employees, of private contractors performing work under government contracts. Contractors are solely responsible for compliance with OSHA standards and the protection of their employees. Air Force interest is to protect Air Force personnel working in or around contractor operations and with Air Force equipment and property. This instruction covers working in or around government contractors.

9.1. In such cases, the Air Force ensures a safe and healthful work environment for its personnel.

9.2. This is accomplished by contractor abatement of hazardous conditions, application of administrative controls, PPE, or withdrawal of affected employees.

9.3. Air Force safety, fire protection, and BE officials may enter a contractor's workplace to verify working conditions of Air Force personnel, provided the administrative contracting officer (ACO) authorizes such action. Accompaniment by the ACO or the ACO's designated representative is preferred.

9.4. Air Force safety, fire protection, and BE officials do not have the authority to direct contractor activities unless a condition exists which presents imminent danger to Air Force personnel. In all other situations such inspection findings are forwarded to the ACO for resolution with the contractor.

9.5. This instruction does apply to government-furnished facilities or equipment provided to a contractor when known hazards and interim control measures are contained within the contract requirements.



- CNO Message (1996)
 - Contract compliance is the responsibility of the contracting officer's authorized representative. If we happen to observe safety deficiencies with a contractor, they should be identified to the contracting officer's authorized representative for resolution with the contractor.



- AF Instruction 91-301 (1996)
 - Air Force safety, fire protection, and BE officials may enter a contractor's workplace to verify working conditions of Air Force personnel, provided the administrative contracting officer (ACO) authorizes such action. Accompaniment by the ACO or the ACO's designated representative is preferred.



- CNO Guide to S&OH Responsibilities in Contract Management (2001)
 - The local OSH office shall not assume a regulatory role
 - Recognizes OSHA's multi-employer policy and states that we need to avoid being a controlling employer except in infrequent circumstances where we knowingly accept this role.



- OPNAVINST 5100.23G (2005)
 - **Navy activities must have a clear understanding of who has responsibility, by contract, agreement or practice for the safety and health of all contractor employees.** This determination should only be made in consultation with the Contracting Officer and appropriate legal counsel.

19

OPNAVINST 5100.23G, Chapter 5, section 0503(3)

In instances where multiple employers are sharing a workspace, OSHA multi-employer worksite policy may apply. **With the continued increase of functions performed by contractors at Navy shore facilities and onboard vessels, the potential implications are significant.** Navy activities must have a clear understanding of who has responsibility, **by contract**, agreement or practice for the safety and health of all **contractor** employees. This determination should only be made in consultation with the Contracting Officer and appropriate legal counsel.

CNO Guide to S&OH Responsibilities in Contract Management (2001)

The local OSH office shall not assume a regulatory role

Recognizes OSHA's multi-employer policy and states that we need to avoid being a controlling employer except in infrequent circumstances where we knowingly accept this role

Mantra Heard on many Navy Facilities

We are not OSHA

We do not instruct contractors how to do work

We do not approve contractor submittals

Contractor Safety Oversight



- Why now? What has changed?
 - Old context
 - SECNAV's boundary – the Navy is not the regulator of contractor employee safety



- SECNAVINST 5100.10J (2005)
 - Navy OSH Programs only extend to contractor employees for those matters over which the Navy exercises statutory authority
 - In all other matters, the contractor is directly responsible to OSHA

Contractor Safety Oversight



- Why now? What has changed?
 - New context



- Navy movement towards a safety program that is inclusive of contractors
 - “Total workforce safety” objective
 - Navy IG requirement for COR safety training
 - Revision of safety program manual
 - Fleet custom to allow contractor employee entry to confined spaces on Navy certificates

SECNAV “total workforce safety” objective:

DoN Objectives for FY 2008 and Beyond

Objective 4

Safeguard the people and resources of the Navy-Marine Corps Team. Integrate Safety and Risk Management into all on and off-duty evolutions to maximize mission readiness and to establish DON as an organization with world class safety where no mishap is accepted as the cost of doing business.

June 2008 SECNAV tasked ASN(M&RA) to “track down fatalities at the BIG six non-Government shipyards”



- Enforcement by our OSHA regulator
 - Voluntary Protection Program
 - Multi-Employer Workplace Citation Policy
 - Draft safety “system” guidance



July 24, 2000 Fed. Reg., **Revisions to the Voluntary Protection Programs To Provide Safe and Healthful Working Conditions:**

- **Contract Worker Coverage. All contractors and subcontractors, whether in general industry, construction, maritime, or federal agency sites, must follow worksite safety and health rules and procedures applicable to their activities while at the site.**



July 24, 2000 Fed. Reg., **Revisions to the Voluntary Protection Programs To Provide Safe and Healthful Working Conditions:**

- **(a) In addition to ensuring that contractors follow site safety and health rules, VPP participants are expected to encourage their contractors to develop and operate effective safety and health program management systems.**



July 24, 2000 Fed. Reg., **Revisions to the Voluntary Protection Programs To Provide Safe and Healthful Working Conditions:**

- **(b) To this end, participants must have in place a documented oversight and management system for applicable contractors [worked 1,000 or more hours in at least one calendar year at the worksite] . . .**



July 24, 2000 Fed. Reg., **Revisions to the Voluntary Protection Programs To Provide Safe and Healthful Working Conditions:**

- . . . that ensures the contractors' site employees are provided effective protection and that drives improvement in contractor safety and health. Such a system should ensure that safety and health considerations are addressed during the contractor selection process and when contractors are onsite.



- Multi-Employer Citation Policy in two steps

Step One

Determine the employer's status

- “creating employer”
- “controlling employer”
- “correcting employer”
- “exposing employer”

29

A “creating employer” caused the hazardous condition. You are citable if you created a hazardous condition even if none of the employees exposed to the hazard do work for you.

A “controlling employer” is “An employer who has general supervisory control over the worksite, including the power to correct safety violations itself or require others to correct them. Control can be established by contract, or in the absence of . . . contractual provisions, by the exercise of control in practice.” CPL (OSHA Compliance Directive) 2-0.124 (1999). The controlling employer is responsible, by contract or through actual practice, for safety and health conditions on the worksite; this may be the employer who has the authority for ensuring that the hazardous condition is corrected. OSHA Field Inspection Reference Manual (FIRM) para. 6.

A “correcting employer” has the responsibility for actually correcting the hazard. This employer may be engaged in a common undertaking, on the same worksite, with the exposing employer.

An “exposing employer” is an employer whose employee has been exposed to a hazard. This employer is citable if it knew of the hazard, or made no reasonable steps to discover the hazard to its employee. You may not have the authority to correct a hazard, but you are citable if you did not ask the creating or controlling employer to correct or if you did not inform your employees of the hazard.

Summit Contractors, Inc., OSHRC Docket No. 03-1622 (2007)

Solis v. Summit Contractors, Inc., No. 07-2191, 8th Cir. Feb. 26, 2009

Marshall v. Knutson Constr. Co., 566 F.2d 596 (8th Cir. 1977) (OSH Act § 5(a)(2) is statutory authority for the policy)

Anthony Crane Rental, Inc. v. Reich, 70 F.3d 1298 (D.C. Cir. 1995); *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998) (D.C. Circuit in dicta has twice questioned the viability of the policy in light of § 1910.12(a) where the controlling employer did not create the hazard and its employees were not exposed to the hazard). *Comm’n’r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 26-28, 609 S.E.2d 407 (N.C. Ct. App. 2005) (state counterpart to the words in 1910.12(a) permit citation of a controlling employer under these circumstances).

Portrait of one Controlling Employer



Secretary of Labor v. Summit Contractors, Inc. (Occupational Safety & Health Review Commission 2007)

- Summit “could reasonably be expected to prevent or detect and abate the violative condition by reason of its supervisory capacity and control over the worksite.”
- Includes consideration of contract terms

30

Secretary of Labor v. Summit Contractors, Inc., OSHRC Docket No. 03-1622, 2007

The Review Commission considers supervisory authority and control sufficient where the general contractor has specific authority to demand a subcontractor’s compliance with safety requirements, stop a contractor’s work for failure to observe safety precautions, and remove a contractor from the worksite.

Summit’s project superintendent and three assistants (1) coordinated vendors, (2) scheduled work of subcontractors, and (3) ensured that subcontractor’s work was performed in accordance with their agreement

Summit’s project manager visited twice a month

Summit could control the quality of work through inspections

Summit conducted injury investigations for injured subcontractor employees

Summit was aware that All Phase employees were not utilizing personal fall protection and that the scaffold lacked guardrails.

The lack of fall protection was open and obvious and in plain view from the street and Summit’s jobsite trailer.

Summit’s superintendent inspected the jobsite once or twice each day, and his three assistants were on site overseeing the subcontractor’s work.

Summit’s superintendent had observed the same violations several times earlier by All Phase and had asked All Phase to correct the violations.

There was no doubt that the superintendent knew the scaffolding fall protection requirements because he had previously received OSHA training.

Control w/o explicit contractual authority: “Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site.” CPL 2-0.124 para. X.D.5.d.

Summit’s safety manual provided that Summit “has no control over subcontractor’s hiring, training or disciplinary practices.

Control established by a combination of other contract rights: Particularly significant are the authority to resolve disputes between subcontractors, set schedules, termination, and determine construction sequencing because of their likelihood to affect safety. CPL 2-0.124 para. X.D.5.b.

In contract with Collegiate Development, Summit took responsibility for safety at the worksite, but in contract w/ Summit, All Phase (1) had sole responsibility for compliance, (2) warranted and guaranteed its work would comply, and (3) indemnified, held harmless, and agreed to pay fines



- Current Multi-Employer Citation Policy in two steps

Step Two

*Determine if the employer exercised
“reasonable care”*



- Reasonable care may include:
 - Inspected for safety requirements
 - Conducted worksite safety meetings or training
 - Enforced compliance “with a graduated system of enforcement”

32

According to some industry web sites, reasonable care is informed by:

- a. Knowledge of the hazard
- b. Having an effective safety program
- c. Having a hazard identification and abatement system in place
- d. Documentation of meetings and training.

The inspector also will take into account any history of incidents and violations.

Note that “the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.” CPL 2-0.124 para. X.2.

At the preconstruction meeting, Summit conducted a safety presentation which included fall protection and invited subcontractors to attend.

Navy: At Naval Maritime Facilities, the Navy generally conducts worksite safety meetings to brief on local hazards as opposed to training, is working to keep track of POC’s & reps in contract, and is reviewing the adequacy of its contractor check-in process

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Contractor Safety Oversight



- What is the lawyer's value added to contractor safety oversight?

It is by answering:

- When do we create an unauthorized or unwanted employer-employee relationship?
 - Federal procurement and personnel law
- When do we create a duty to exercise reasonable care?
 - OSHA Multi-Employer Worksite Citation Policy
 - Admiralty and tort liability

34

This is easier to answer if we divide the world into three groups:

Embedded contractors

Contractors with whom Gvt employees & personnel work side-by-side

Contractors who work in their own space.

Contractor Safety Oversight



- *When do we create an unauthorized or unwanted employer-employee relationship?*
- *When do we create a duty to exercise reasonable care?*

This is easier to answer if we divide the world into three groups:

- Embedded contractors
- Contractors with whom Government employees & personnel work side-by-side
- Contractors who work in a space separate from Government employees & personnel

35

This is easier to answer if we divide the world into three groups:

Embedded contractors

Contractors with whom Gvt employees & personnel work side-by-side

Contractors who work in their own space.

Admiralty Law Reasonable Care



- *Scindia Steam Navigation Co. v. Santos*
U.S. Supreme Court 1981.

Shipowner duties:

- Must warn of hidden danger which was known or should have been known
- No general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions which develop within confines of operations assigned to the contractor

36

The Supreme Court applied “tort” (also know as “personal injury”) law comparative negligence standards to evaluate liability for the injury to a contractor working in the hold of a ship allegedly injured as a result of operation of a defective winch. Therefore, the precedent set by the Supreme Court in this case is applicable beyond shipboard mishaps and extend to any personal injury in a state that accepts the defense of comparative negligence.

Comparative negligence is a legal defense that reduces the amount of damages that a plaintiff can recover in a negligence-based claim based upon the degree to which the plaintiff's own negligence contributed to cause the injury. It is a modification of the doctrine of contributory negligence which disallows any recovery by a plaintiff whose negligence contributed, even minimally, to causing the damages. Contributory negligence in tort is still the law in Alabama, the District of Columbia, Maryland, North Carolina and Virginia.

Admiralty Law Reasonable Care



- *Scindia Steam Navigation Co. v. Santos*
U.S. Supreme Court 1981.

Shipowner duties:

- But must act if it knows of an equipment defect and contractor continues to use the equipment with an unreasonable risk of harm to its employee
- May have continuing duty to inspect equipment based on statute, regulation, contract or custom

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NAVFAC Evaluation of offerors

- Past performance
 - Facility Accident Investigation Report database
 - Experience Modification Rating
 - OSHA rating
- Hazard analysis, and plans
- During contract administration
 - Safety plan is used to encourage a progressive safety culture at the contractor's facility

39

The past performance factors listed are used by NAVFAC in its fixed price construction contracts (FAR 36.513, 52.236-13). This evaluation of offers is set forth in NAVFAC instruction 5100.11J, NAVFACENGCOM Safety and Health Program (18 Jan 2000)

Safety is an integral part of the acquisition planning process (FAR 7.105(b)(19) & 7.103(f)).

Having a safety program applicable to the materials to be produced of services to be performed by the prospective contractor and subcontractors is a general standard for contractor qualifications (FAR 9.104-1(e)).

The past performance factors listed are used by NAVFAC in its fixed price construction contracts.

Safety clauses I have seen incorporated in ship construction contracts include:

DFARS 252.246-7003, Notification of Potential Safety Issues (Jan 2007)

FAR 52.223-3, Hazardous Material Identification and Material Safety Data (Jan 1997)

FAR 52.223-11, Ozone Depleting Substances (May 2001)

52.223-12, Refrigeration Equipment and Air Conditioners (May 1995)

FAR 52.223-14, Toxic Chemical Release Reporting (Aug 2003)



- **Army Regulation 385–10 (2007)**
 - Contract clauses
 - Contractor responsibilities
 - Contractor safety brief
 - Army vs. contractor safety responsibilities
 - Past performance
 - System design, development and production

EXXON-Mobil “Safety Process”



- Evaluation of Offerors
 - Pre-qualification Questionnaire
 - Culture Assessment
 - Progressive, Emerging, Traditional
- Discussions
 - Opportunities for Improvement Worksheet
 - Resolution Plan
- Source Selection
 - Evaluation incorporating all of the above

41

Element, Short Questionnaire used for Scoring Safety Management Systems

Company utilizes a documented safety management system. System and components are periodically reviewed with company senior management. Company has a formal documented safety training program. Company has a documented set of safety rules and policies (e.g., safety manual). Site safety meetings are held on a regular basis. Hazard identification and control processes (e.g., JHAs, JSAs, etc.) are utilized to identify task specific hazards. Periodic site assessments (e.g., walkthroughs and inspections) are performed and stewarded with management. Safety performance is considered in selection of subcontractors. Company utilizes hazard and near miss reporting processes.

Statistical Performance (Total for 3 years) Total number of fatalities (0 scores 2; >0 scores 0) Lost Time Injury Index* (LTII) (LTII < 1, scores 2; 1 < LTII < 2, scores 1) Total Recordable Injury Index*(TRII) (TRII < 3, scores 1; TRII > 3, scores 0)

Contractor must require similar plan of its subcontractors.

Cultures: Traditional (not caring, no goals), Emerging (caring, industry standards, programs approach), Progressive (safety valued and is way of life, proactive, integrated systems approach)

Walking the Inspection & Duty Tightrope



Inspection requires a legal call about duty

- Inspect for Government interests, “safety walk-through”
- Address the contractor’s Safety Plan rather than hazards to individual contractor employees
- Stop Work for imminent harm
- Know who is on the facility, provide hazard briefs & coordinate with the COR and KO

42

From the Summit case,

Reasonable care may include:

Inspected for safety requirements

Conducted worksite safety meetings or training

Enforced compliance “with a graduated system of enforcement”

Walking the Inspection & Duty Tightrope



- Enforce compliance “with a graduated system of enforcement”
 - Corrective Action Reports

43

Corrective Action Reports – Quality Assurance

- A Verbal
- B Written by Navy safety to Contractor
- C ESH Director to Contractor on-site or company owner
- D Commanding Officer to company owner

safety
manager

Applies to shipbuilding, ship maintenance and ship breaking
New direction is to route all CARs through KO

SE Regional Maintenance Center & CAR Method B:

Addresses safety culture even more easily

SDR Safety Deficiency Reports

EDR Environmental

QDR Quality

MDR Management – e.g., an issue for repeated or many safety deficiencies, therefore an indicator of safety culture

Used in CPARS – contract performance report, gives leverage with some contractors

Inspect, and leave the contractor with the responsibility



- Provide incentives for progressive safety culture
 - Incentive fee processes
 - Assessment of performance
 - Investigations

Regarding investigations, if they are conducted for the preservation of Navy assets, both people and property, they fit within the CNO guidance. Query whether always conducting an investigation for a contractor mishap would give the contractor a disincentive to perform an investigation itself.

Overall, the issue is how to encourage and support a progressive safety culture at the private shipbuilder's facility.

In the DDG 1000 contracts there is a clause in C similar to:

**DEPARTMENT OF LABOR SAFETY AND HEALTH STANDARDS FOR SHIPBUILDING
(AT) (NAVSEA) (JAN 1990)**

Attention of the Contractor is directed to Public Law 91-596, approved December 29, 1970 (84 Stat. 1590, 29 USC 655) known as the "OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970" and to the "OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT" promulgated there under by the Secretary of Labor (29 CFR. 1910 and 1915). These regulations apply to all shipbuilding and related work, as defined in the regulations. Nothing contained in this contract shall be construed as relieving the Contractor from any obligations that it may have for compliance with the aforesaid regulations.

A typical new ship construction clause:

The Government, through any authorized representative, may inspect the plant or plants of the Contractor or of any of his subcontractors engaged in the performance of this contract. If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties.

Contractor Safety Oversight



- These legal recommendations will be very fact specific, so local discretion is paramount
 - Who has authority to make the call about contractor safety risk?
 - How can we provide the Commanding Officer, the Contracting Officer and the safety professionals the tools they need?
 - Policy consistent among the stakeholders
 - Best practices and success stories on the web
 - Achieve more “quick wins” to establish an even more healthy vector for this “freight train”



John Cooper Masterson
Special Venture Acquisition Counsel
& Associate Counsel (Acquisition)

Naval Facilities Engineering Command,
Headquarters
1322 Patterson Street, S.E.
Washington Navy Yard
Washington, D.C. 20374-5065

(mobile) (240) 432-1976
john.masterson@navy.mil