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VOLUME 20 NUMBER 5

a/e RISK REVIEW

A PUBLICATION OF THE PROFESSIONAL LIABILITY AGENTS NETWORK

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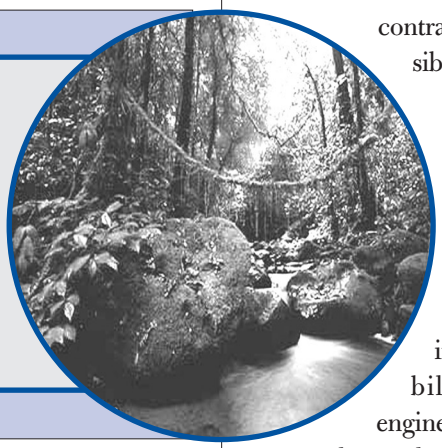

Part 1—Jobsite safety: You win some, you lose some

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances

As innovative and collaborative project delivery methods continue to gain popularity in the design and construction industry, traditional roles continue to blur. With the growth of design-build, building information modeling (BIM) and integrated project delivery (IPD), design and environmental consulting professionals often find themselves involved in aspects of the project traditionally the sole domain of contractors or construction managers. Their input is often sought regarding issues related to means and methods of construction as well as jobsite safety.

As a firm's roles and responsibilities broaden, so do their liabilities. With the traditional design-bid-build contracts, it is clearly established that the general contractor has full responsibility for jobsite safety with direct control over the site and the construction process. But multi-party master contracts often associated with BIM and IPD projects do not always have such clear separation of duties and responsibilities. As a result, it is more likely that a design or environmental consulting firm will be brought into a claim regarding jobsite safety issues. If a construction worker is injured or killed, it may no longer be possible to point to the project's contract documents to establish that the contractor is solely responsible for jobsite safety.

Even with traditional design-bid build projects, construction workers, their estates and their attorneys have repeatedly sought to impose substantial liabilities on architects, engineers and environmental consultants for jobsite injuries or deaths. One major reason for this is that if a construction worker is injured on the job, he or she generally cannot sue his or her employer—the contractor. As an employee, he or she must often accept as sole remedy state-mandated workers compensation benefits. These benefits may not cover all medical costs and lost wages and are certainly lower than the multi-million dollar awards a worker might win through successful litigation against a third party. A workplace injury or death often sets into motion a search for "deep pockets" and an attempt to impose responsibility for a death or injury on a source other than the contractor—typically, the project owner and the consulting firms it has hired.

To date, state and federal court rulings have been inconsistent in regard to a consulting firm's responsibility for jobsite safety. Here in **Part 1** of this two-part report, we'll review some of the more notable court decisions that pro-

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vide valuable lessons for design and environmental consulting firms.

Structural engineer avoids liability

In *Secretary of Labor* v. *Simpson, Gumpertz & Heger, Inc.*, a structural engineer was telephoned by the contractor for an opinion about removing temporary shoring from beneath a recently poured concrete deck. The engineer did not object to removing the shoring. A later collapse of the deck resulted in a worker fatality. A subsequent lawsuit was filed against the engineer claiming he was responsible for "means and methods" on the construction of the deck. Even though the engineer had no one at the construction site at the time of the accident and the contract disclaimed any responsibility for jobsite safety, the Secretary of Labor issued an OSHA citation claiming the engineer was liable.

Fortunately, an appeals court overturned the Secretary of Labor citing that the engineer's contract disclaimed responsibility for jobsite safety or supervision. The court held that there was no contractual liability for jobsite safety and the engineer had not exercised the necessary control at the jobsite to make him responsible for means, methods or safety. The liability, the court said, belonged with the contractor.

Civil engineer liable for trench collapse

In *Carvalho* v. *Toll Brothers Construction*, a New Jersey court held that a civil engineering firm was responsible when a contractor's employee died in the collapse of an unshored trench. The court made this ruling even though the engineer's contract specifically disclaimed responsibility for means, methods and safety and stated that the contractor alone was responsible for safety and adequacy of equipment and methods.

How did the court arrive at its decision? Consider these facts:

- The engineer's representative was on the site daily and was contractually granted stop-work authority.
- Trench boxes were used each of the three days before the collapse, but they were not used on the day of the collapse because they interfered with utility pipes.
- The engineer's representative was assigned to observe progress of the work daily and to approve the contractor's construction schedule. He also approved the contractor's methods for supporting and protecting all utilities that crossed the trench.
- The engineer's site representative knew the trench was unstable.

The court found that the engineer's representative was present and observed the collapse. More important, he had observed a similar collapse a week before and took no action to protect workers in imminent danger. Although the engineer insisted it was not his responsibility to ensure jobsite safety, the court found otherwise, noting that the engineer had the opportunity and capacity to alleviate the risk of harm and and failed to exercise his duty.

This time the engineer wins

Herczeg v. *Hampton Township Municipal Authority and Bankson Engineers, Inc.* (2001) presented a case very similar to the *Carvalho* case. But this time, the Superior Court of Pennsylvania reached a very different conclusion.

In *Herczeg*, as in *Carvalho*, a worker was killed on the construction site due to the collapse of an unshored trench. And, like in *Carvalho*, the engineer's contract specifically stated it was not responsible for construction means and methods, or for jobsite safety. Again, as in *Carvalho*, the engineer had a representative on site during the accident, and it was alleged that this person had knowledge of the unshored and unsafe trench and failed to take action.

The Superior Court of Pennsylvania ruled that the engineer was not liable. The court identified differing circumstances from the *Carvalho* case that led to its decision:

- Unlike *Carvalho*, Bankson Engineers did not agree to provide daily observation of the jobsite.
- Unlike *Carvalho*, Bankson Engineers did not have stop-work authority.
- And, unlike *Carvalho*, Bankson Engineers did not have knowledge of a previous trench collapse.

An Illinois loss

A case in Illinois points out the importance of contract language regarding the design firm's duties to ensure jobsite safety. In *Miller* v. *DeWitt*, an architect's contract with its client regarding a gymnasium remodel gave the architect the right to interfere and stop work if it felt that construction shoring was done in an unsafe or hazardous manner. Following an accident in which a

worker was injured in a roof collapse, the Illinois Supreme Court found that "if the architects knew or in the exercise of reasonable care should have known that the shoring was unsafe, they had the contractual right and corresponding duty to stop work until the unsafe condition was remedied."

CH2M Hill wins reversal

A federal appeals court decision struck down an OSHA penalty imposed on engineering firm CH2M Hill, ending a decade-long legal battle. In 1987, during a construction project on a Milwaukee sewer system, methane gas was discovered. The sewer district directed the lead engineering firm, CH2M Hill, to investigate. CH2M Hill indeed found methane and drafted a contract modification that addressed, among other things, the kinds of electrical equipment that could be used in the tunnel. The district reviewed and approved the modification.

In late 1988, methane was again detected in a tunnel and the contractor evacuated its employees, but did not turn off the electrical power. Contrary to its evacuation plan, three contractor supervisors re-entered the tunnel after only 17 minutes. An explosion, presumably caused when one of them attempted to operate a grout pump, killed them.

OSHA issued citations to the contractor and CH2M Hill for willful violation of its construction standards. Thus, the case turned on the legal question of whether OSHA's construction standards apply to professional firms with construction management responsibilities similar to those exercised by CH2M Hill.

The Occupational Safety and Health Review Commission concluded the standards did indeed apply. In fact, the commission announced a new test to determine whether a firm like CH2M Hill was substantially engaged in construction—and thus responsible for safety. The test stated that an architectural or engineering firm was engaged in construction work if it:

1. Possessed broad responsibilities in relation to construction activities, including both contractual and de facto authority over the work of the trade contractors; and,

2. Was directly and substantially engaged in activities that were integrally connected with safety issues, notwithstanding contract language expressly disclaiming safety responsibility.

CH2M Hill appealed. In September 1999, the U.S. Court of Appeals for the Seventh Circuit struck down the decision, saying that, because CH2M Hill's responsibilities "did not rise to a level that constituted being engaged in construction work, the (OSHA) regulations do not apply to it." The court further said, "even if this 'new' test were appropriate, OSHA still fails to establish that CH2M Hill contractually or on a *de facto* basis exercised direct authority and control over or substantially engaged in activities integrally connected with the safety measures." In its opinion, the court said that "Contracts represent an agreed upon bargain in which the parties allocate responsibilities based on a variety of factors.... To ignore the manner in which the parties distributed the burdens and benefits is contrary to our notion of contract law."

The court also pointed out that the commission had previously concluded that a "professional" employer is engaged in construction work only if the employer, either contractually or in actuality, had substantial control over

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Dealey, Renton & Associates
www.dealeyrenton.com
- *530 Water Street, Seventh Floor*
  Oakland, California 94607
  510.465.3090
  Fax 510.452.2193
  info@insdra.com
  MAILING ADDRESS:
  P.O. Box 12675
  Oakland, CA 94604-2675
- *199 S. Los Robles Ave., Suite 540*
  Pasadena, California 91101
  626.844.3070
  Fax 626.844.3074
- *3 MacArthur Place, Suite 440*
  Santa Ana, California 92707
  714.427.6810
  Fax 714.427.6818
  MAILING ADDRESS:
  P.O. Box 10550
  Santa Ana, CA 92711-0550

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the safety program, had the authority to stop work, or had substantial supervision over actual construction. CH2M Hill did not have any of these powers.

And a win in Mississippi

Finally, in *Hobson* v. *Waggoner Engineering, Inc.* (2003), a worker of a subcontractor died on the jobsite when he drowned in a lagoon being constructed at a wastewater treatment plant. The engineer who designed the lagoon was sued by the worker's estate, which alleged that the engineer violated its duty to warn the worker about the steep sides and slick surface of the liner of the lagoon. The estate also alleged defective design of the lagoon, saying it was too steep.

A Mississippi court held for the engineer. It claimed that Wagoner had no duty to warn the construction worker since it had no jobsite safety responsibility, either contractually or through its actions. The court also ruled that the estate presented no expert testimony to show that the design was defective or that the engineer did not comply with the prevailing standard of care.

Steps you can take

Considering that claims may become harder than ever to defend due to changes in project delivery methods, design and environmental consulting firms must play close attention to their actions and their words—particularly their contract terms—in order to minimize liabilities related to jobsite safety.

In **Part 2** of this two-part report, we will discuss important steps you can take to help ensure you avoid—contractually and otherwise—taking responsibility for jobsite safety.

Can we be of assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

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DRA
Dealey, Renton & Associates
Insurance Brokers

P.O. Box 12675
Oakland, CA 94604-2675