

Sabo & Zahn
233 S. Wacker Dr.
Suite 8620
Chicago, IL 60606
312-655-8620
312-655-8622 fax
[Http://www.sabozahn.com](http://www.sabozahn.com)

Sabo & Zahn

Attorneys at Law

Is the Architect Supervising the Project? — Litigation Update

In the last article, we examined the architect's role in supervising (or rather, not supervising) the typical construction project. On September 23, 1999, the Seventh Circuit Court of Appeals issued an opinion¹ that addresses this issue. Although that case did not involve an AIA contract, the language involved is surprisingly similar and the case is instructive.

In 1977, the Milwaukee Metropolitan Sewerage District ("MMSD") undertook a \$2.2 billion pollution abatement program that included construction of some eighty miles of sewer tunnels. CH2M Hill was the lead engineering consultant firm and Healy was the contractor for one of the tunnels, CT-7. In November, 1988, the tunnel boring machine's methane monitor detected a high concentration of methane. The tunnel was evacuated, but the electrical power was not turned off. Contrary to Healy's evacuation plan, three supervisors reentered the tunnel only seventeen minutes after the methane was detected. Apparently, one of the three attempted to operate the grout pump, which was not explosion-proof. The gas exploded, killing all three.

The engineer was cited for willful violation of OSHA standards. At the initial trial before an Administrative Law Judge, the engineer was found not guilty because it was not engaged in construction work, but was engaged in "typical engineering services." This finding was reversed by a review panel. Ultimately, the case was brought before the Seventh Circuit, which reinstated the original finding that the engineer was not liable under the OSHA regulations. The court did not hold that an engineer could never be liable under OSHA, but rather, that each case must be examined to determine the scope of the engineer's duty on each particular construction project. The court found that OSHA was intended to apply to those employers who were best suited to alleviate hazards at the construction site.

With this intent in mind, the Seventh Circuit examined the contractual duties of the engineer, as well as how the project was actually run, to determine if this engineer was in a position to "alleviate hazards at the construction site." The starting point was the contract. The court stated 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

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burdens and benefits is contrary to our notion of contract law.”

The engineer’s contract forbade it from supervising and directing Healy or any other contractor. The engineer was to “administer the contracts in accordance with the requirements of the Contract Documents and act as the DISTRICT’s representative during construction.” The contract also stated that “the construction contractors shall remain responsible for construction means, methods, techniques, procedures and safety precautions on the construction portions of the PROGRAM.”

Here is the language found in AIA Document B141-1997:

2.6.2.2 The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor. However, the Architect shall not be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect’s negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.

Additional language in the engineer’s contract referred to site visits and observations by the engineer during construction, which included this language: the visits “shall not relieve a construction contractor of its obligation to conduct comprehensive inspections of the work sufficient to ensure conformance with the intent of the construction contract documents, and shall not relieve a construction contractor of its responsibility for means, methods, techniques, sequences and procedures necessary for coordinating and completing all portions of the work under the construction contract and far all safety precautions incidental thereto.”

Here is the corresponding AIA language found in A201-1997, the General Conditions:

4.2.2 The Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor’s operations (1) to become generally familiar with and keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor’s rights and responsibilities under the Contract Documents, except as provided in Subparagraph 3.3.1.

The court also examined whether or not the engineer actually exercised sub-

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stantial control or supervision so as to place it in charge of safety and concluded that there was no evidence of such control or supervision. While the engineers did enter the tunnel, and were further involved in issuing contract modifications with regard to discovery of methane gas in another tunnel, the owner retained the right to approve any modification dealing with safety.

The engineer could not act on its own. The court then went on to state:

“In addition, the fact that Healy turned to CH2M Hill for advice does not indicate that CH2M Hill was acting as the de facto director of safety. Before it issued the clarification, CH2M Hill had to check with MMSD. From the record it is clear that CH2M Hill functioned as an intermediary between Healy and MMSD. MMSD directed the modifications; it ordered CH2M Hill to conduct an inquiry, reviewed CH2M Hill's suggestions and granted the final approval to the draft language, as well as the clarification of it requested by Healy. With this fuller picture, it would be disingenuous to say that the record supports the Commission or the Secretary's conclusion that CH2M Hill played a 'central role' as the 'nerve center' for developing and implementing safety practices for tunnel CT-7.”

This case illustrates the points covered in our prior article. Design professionals are usually not hired to perform construction work. That is the job of the contractor. It is the contractor who is in the best position to “alleviate hazards at the construction site.” AIA documents, as well as custom contracts that are modeled on standard AIA language, place the duty for safety squarely on the shoulders of the contractor, where that duty belongs. The Seventh Circuit found that the contract involved the CH2M Hill case did the same thing, namely, make the contractor responsible for safety and the means, methods, techniques, sequences and procedures of construction. Here, also, the engineer could not direct the contractor's work nor stop the work. The AIA contracts contain similar language. Similarly, the AIA documents allow only the owner, and not the design professional to make contract modifications.

The CH2M case dealt with OSHA regulations. These regulations generally concern safety at the jobsite. It is clear from reading this case that architects and engineers are subject to OSHA regulations if they undertake safety duties at a construction project. On the other hand, OSHA does not apply to design professionals if they do not have a duty to oversee safety. OSHA had levied a \$200,000 fine against CH2M Hill. The fine was overturned, but only after a lengthy appeals process.

The bottom line: use a contract that clearly spells out your duties as well as non-duties. Follow the contract, and do not undertake additional duties after the project starts. Finally, make sure your employees understand what they are and are not supposed to do on any project.

Werner Sabo, FAIA, CSI
James K. Zahn, FAIA, CSI

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1. *CH2M Hill, Inc., v. Alexis Herman, Secretary of Labor and Occupational Safety and Health Review Commission*, No. 98-3282, 7th Cir. Sept. 23, 1999.