Site Safety
Danger in the Trenches

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An Overview of the Designer's Risk

Introduction

Safety, engineers have long assumed, is not their job. Along with "means and methods," safety was the contractor's exclusive responsibility. But with increasing use of alternative project delivery systems, is this assumption still true? And does OSHA's increasing focus on design professionals alter traditional construction roles and responsibilities? And if roles and responsibilities have changed, how do indemnification and additional insured status redistribute the resulting liability? This article examines these questions and recommends strategies for managing site safety liability.

OSHA Liability of Design Professionals

OSHA LIABILITY

OSHA seeks to reduce job injuries by imposing stiff penalties on employers who ignore safety regulations. A single violation can draw penalties up to $7,000, and willful or repeated violations can result in fines of as much as $70,000. And where a death occurs, regulators can assess criminal sanctions. The cost of defending an OSHA citation is an additional burden. Without question, OSHA liability is a serious business risk.

Engineers are drawn into OSHA's net by OSHA's peculiar definition of an "employer." From OSHA's perspective, this can include any firm at a multi-employer site, such as a construction site, that has substantial control over site safety. Engineers are often unaware of OSHA's multi-employer perspective and assume they are responsible only for their actual employees. But this is not always true. If an engineer has sufficient involvement with site safety, OSHA will deem the engineer an "employer" *of everyone at the site*, and thus responsible for violations committed by the contractor, subcontractors, or even the injured worker!

How much "involvement" is necessary to trigger OSHA multi-employer responsibilities? Unfortunately, the answer is an evolving and vaguely worded standard. Initially, OSHA imposed liability on designers who were "directly involved in construction."[1] Later, the standard transformed to "substantially supervised construction" and, most recently, OSHA attempted to impose liability if an engineer "possessed broad responsibilities; and was directly and substantially engaged in activities that are integrally connected with safety issues," despite contractual disclaimers of safety responsibility.[2] Although an appellate court criticized this latest formulation, it did not clarify which standard applied.[3] Not only is the standard unclear, it is not clear which standard OSHA can use. But it is clear that engineers undertake significant risks if their duties exceed the traditional design roles of preparing plans and specifications or providing limited construction observation.

Liability to Injured Workers

THIRD-PARTY LIABILITY

OSHA liability is only the beginning. When a worker is injured, he or she will look for persons – other than their employer – that could be liable for their loss. Traditionally, engineers have avoided this liability. If the engineer only provides design services and routine construction administration, courts have generally not held the engineer liable. But if an engineer accepts site safety duties, the courts are more likely to impose liability.

Acceptance clearly occurs if the engineer explicitly accepts responsibility for site safety, such as providing safety inspections, reviewing shoring or erection plans, or otherwise taking responsibility for the means and methods of construction. But acceptance can occur by implication if the engineer has authority over construction, such as the power to stop work or to require compliance with safety requirements. Thus, an engineer that participates in site safety meetings, comments on site safety, or otherwise indicates that it has a role in safety considerations may find itself a target in a construction accident claim. As a general rule, engineers wishing to avoid job site safety responsibility must limit their construction phase engagement to observing work to determine compliance with plans and specifications. The engineer should incorporate these express limitations regarding its responsibility into its agreement, and request that the construction contract include similar language. Indeed, the construction contract should clearly state the engineer is *not* responsible for job site safety, that the contractor *is solely* responsible for safety, and that the engineer has no responsibility for construction means and methods.

Design/Build Delivery Systems

Geotechnical engineers are increasingly using alternative project delivery systems that fuse engineering and construction, such as design/build. Whether such systems affect the engineer's liability for site safety turns on the level of the engineer's involvement in – and control over – construction.

Consulting for a contractor can be similar to traditional engineering roles. The engineer designs, provides interpretation of the design, and may observe implementation of the design in the field.

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[1] *Secretary of Labor v. Bechtel Power Corp.,* 4 OSCH (BNA) 1005 (1976).

[2] *Secretary of Labor v. CH2M Hill Central, Inc.,* 17 OSHC (BNA) 1961 (1997).

[3] *CH2M Hill, Inc., v. Secretary of Labor,* 192 F.3d 711 (7th Cir., 1999).

Alternatively, the engineer may be involved in developing systems to construct the project, including erection systems, temporary shoring and excavation. Working with the contractor to implement these systems may involve the engineer sufficiently to create site safety liability.

Engineers are also leading design build projects as the prime contractor. In such instances, they clearly enter the zone of liability for job site injuries.

Risk Transfer: Insurance and Indemnity

Job site safety creates a significant liability risk. As described above, much of the risk can be allocated to other parties by explicit limitations on the engineer's role or assignment of safety responsibility to the contractor. The risks can also be transferred to other parties through insurance and indemnification. But coverage gaps can arise unless the engineer carefully crafts and manages the risk transfer programs.

AN INSURANCE SHADOWLAND

Job injury claims can fall between the traditional insurance coverages maintained by most engineers. An effective risk management program should strive to eliminate this gap.

Professional and General Liability Coverage

Professional liability policies provide coverage for negligent acts, errors or omissions in professional activities. Although broad, this definition does not cover all activities of an engineer. For example, if an engineer leaves a monitoring well uncovered, the "error" is one of simple negligence, not professional malpractice. The professional's general liability policy should cover this type of claim. But the engineer's general liability policy commonly excludes coverage if the engineer inspects or supervises work. The carrier may argue that the engineer failed to properly supervise the drilling contractor or inspect the work after completion. Thus, the professional liability carrier and the general liability carrier may each contend it has no coverage.

Filling this gap requires amending exclusions in the general liability policy, or obtaining a difference in conditions endorsements. Your broker or insurer can provide information regarding these alternatives.

Additional Insured Endorsements

Additional insured endorsements bridge the gap between the engineer's professional and general liability coverages. An additional insured endorsement is an agreement by an insurer (usually the general liability carrier) to extend a party's insurance coverage to another person or entity. In many instances, the general contractor names the owner and engineer as additional insureds under its policy. If the general contractor or its subcontractors cause an accident, the engineer tenders the claim to the general contractor's insurer. But the additional insurance may not apply if a claim raises a serious question of professional malpractice (such as poorly designed shoring). In such cases the carrier may reserve its rights, or exclude coverage altogether, because of the professional liability exclusion in the contractor's policy.

Other Insurance Tools

The insurance industry has developed a broad range of innovative tools for transferring project risk. These include project policies, owner controlled insurance programs, wrap-ups and other programs. Although a description of these products is outside the scope of this article, they are a significant tool for larger projects. Where such tools apply, they are often the primary mechanism for distributing job site risk.

One note of caution: you must carefully integrate these new tools with your existing practice policy. In some instances, the existence of other professional liability coverages may void the new coverages or your existing coverage. Your broker should insure that no coverage is diminished by the existence of potentially duplicative coverages.

INDEMNITY

Participants in a project can transfer job site injury liability among themselves by using indemnity agreements. Contractors commonly indemnify the owner – and often the engineer – against job site injury risks. This is a standard method to shift responsibility for a contractor's employee's injuries back to the contractor, despite the restrictions of workers' compensation systems. Without an indemnification agreement, the owner (or the engineer) may find itself liable for the worker's injuries, while workers' compensation system shields the worker's employer.

Because of the potential to abuse and overuse indemnity agreements, specific rules govern their interpretation and application. Small changes in language can drastically alter meaning and effect. Unless you have skill and experience in drafting indemnification agreements, you should obtain assistance from a construction attorney who understands the law of the jurisdiction under which the indemnification agreement will be construed.

Relationship to Insurance

Contract negotiations usually discuss indemnification and insurance together because both serve as vehicles to transfer liability. But they are distinct concepts and different legal principles govern their application.

Insurance is a contract between an insured and an insurance company. Special legal principles favorable to the insured apply to the insurance agreement. If the insured is sued, it tenders to the insurance company, which, with limited exceptions, must defend the claim and pay the loss. Under an indemnification agreement, however, the indemnifying entity may have tenable defenses to the tender and may, therefore, refuse to defend until the validity of its defenses has been determined. In addition, an indemnification agreement is no stronger than the financial resources of the indemnitor. Although indemnification can be a valuable tool, in general, you are more assured of defense and indemnity from an insurance company than from an indemnitor.

Limits on Indemnification

The type of claim and applicable "anti-indemnity" statutes constrain the scope of indemnification. Contractor's associations have long sought to prohibit wholesale transfer of risk to the general contractor, and to that end have sponsored anti-indemnity statutes in most states. These statutes often prohibit transferring liability arising from sole negligence or defective design from the owner (and the owner's consultants) to the contractor. In addition, most states do not permit indemnification for intentional or willful misconduct, or gross negligence.

Recommendations

NO HALF-WAY MEASURES: AVOID THE DUTY OR EMBRACE IT!

There is no middle ground with site safety. Involvement with site safety risks liability to injured third parties and OSHA citation.

There are two strategies for minimizing risk. First, carefully curtailing any site safety responsibility or involvement can help you avoid site safety liability. This does not lessen the risk of injury, but reduces your liability for any claims. Alternatively, if you have involvement with site safety, you can actively manage the workplace to reduce the incidence of injury. For construction management, construction supervision, or engineer-led design/build, this second approach may offer the only workable strategy.

Whichever strategy you pursue, you must integrate it with a solid indemnification and insurance program to assure the transfer of civil liabilities to the appropriate entities.

Avoiding the Risk

A well drafted contract is the first step to avoidance. The contract should state that the engineer is not responsible for site safety and place this responsibility with the contractor. The engineer should not have responsibility for means and methods of construction, and should not have authority to

stop work. The contract should also explicitly state the purpose of the engineer's site observations: the engineer reviews work solely to determine whether it will meet the intent of the design documents when fully completed. This general standard also applies to reviewing submittals.

The engineer should use only documents that are consistent with these limitations. Proposals, marketing materials, reports, daily field logs, and submittal stamps should either echo the appropriate limitation, or at least not increase the engineer's responsibility.

And the engineer's staff must act within these limitations. The engineer should train all field and project personnel concerning what they should, and should not, do regarding construction operations and site safety.

The engineer should also require the owner to agree that it will require that the contractor take steps necessary to protect the engineer. Specifically, the contractor must have the engineer named as an additional insured under the contractor's general liability policy and as a person benefited by the contractor's indemnification agreement. It follows that the engineer should not indemnify the owner – or anyone else – against job site safety risks, with the exception of injuries to the engineer's own employees.

Embracing the Risk

Under the "embrace" strategy, the engineer should still request additional insured status and indemnification by the contractor. Other than these two steps, however, the strategies diverge.

If the engineer endeavors to reduce the nature and severity of injuries, it must have control over operations. This implies an ability to order the contractor to take steps to minimize site injury risks. To accomplish this, the engineer needs authority delegated from the owner, which the engineer often enforces through approval (or disapproval) of pay applications. But to obtain sufficient control to affect the incidence of injuries, the contract documents must clearly obligate the contractor to maintain a safe site, and must also provide the engineer with tools for enforcing that obligation.

If an engineer decides to become involved in site safety, it must actively engage in safety training for its employees and inspectors. The engineer should facilitate safety meetings with the contractor and emphasize the importance of safety. Under this approach, safety considerations become an integral part of the engineer's operations. Remember, for this strategy to succeed, the engineer's involvement must lead to fewer claims. Otherwise, the engineer will have undertaken significant legal responsibility without any offsetting reduction in claims severity or frequency.

TRANSFER THE RISK

Whether the engineer chooses to avoid or embrace site safety responsibility, it should make sure that the contractor and its subcontractors indemnify it and name it as an additional insured under their insurance policies. Usually, these requirements appear in the general conditions for the construction contract. If at all possible, the engineer should draft or review the general conditions to assure appropriate requirements for indemnification and additional insured status. Since these provisions vary between states, you must consult with a knowledgeable construction lawyer to obtain appropriate contract language.

Conclusion

Site safety is a complicated, multi-layered problem. The most appropriate approach depends on whether the engineer's activity will subject it to job site safety liability, or if the engineer can avoid liability by narrowly constraining its role. Whichever approach the engineer takes, the firm's key employees must understand the strategy and have proper training to execute it consistently.