

**TO WHAT EXTENT MAY A PROFESSIONAL ENGINEER SIGNING A  
STANDARD DESIGN CONTRACT WITH AN OWNER RELY UPON  
OWNER'S INFORMATION AND SURVEYS?**

This writer had the privilege of representing one of Wisconsin's architectural firms, Angus-Young Associates, Inc., in a case where the owner retained Angus-Young to study potential sites for a business facility. One site considered was an existing building in Beloit which was built in part over the Rock River. Angus-Young recommended a structural inspection of the building.

The owner retained a professional engineering firm to inspect and evaluate the building and report on its structural soundness. The engineering firm found the building based on its "visual inspection" to be "in good structural condition." As to that portion of the structure in the water, the engineering firm reported that the piers and caissons were in good structural condition except for two piers and caissons which it recommended be repaired. The engineering firm concluded that the piers and caissons were not considered a significant safety concern. The report was silent as to whether an inspection had been undertaken of the building's foundation under water.

Based on that structural report, the owner purchased the building and retained Angus-Young to perform preliminary work, make cost estimates for renovation and develop renovation plans. The owner provided Angus-Young with a copy of the engineering report at some time either before or after a formal contract for architectural services was executed. When work on the building was underway, the first floor was removed and it was discovered that one corner was three and three-quarters inches lower than the rest of the floor. Angus-Young recommended to the owner that an engineering firm be retained to investigate the cause of the floor elevation variance. An engineering firm other than the one that had initially rendered the structural opinion examined the building including the foundation under the waterline and concluded that timber piles upon which the building rested had deteriorated and that costly and time-consuming repairs

were necessary before the building renovation could proceed. The owner brought suit against Angus-Young and the engineering firm that had rendered the initial opinion that the building was structurally sound.

The circuit court granted Angus-Young's motion for summary judgment, concluding that Angus-Young was not liable because it was contractually entitled to rely upon the engineering report which had been independently obtained by the owner and furnished to Angus-Young. On appeal, the Wisconsin Court of Appeals reversed the circuit court and remanded the case for a jury trial where the jury would be called upon to determine whether Angus-Young's reliance upon the engineering report obtained by the owner failed to meet the standard of professional care expected of an architect *Kerry, Inc. v. Angus-Young Associates, Inc. et al.*, 2005 WI App 42, 280 Wis. 2d 418, 694 N.W.2d 407.

The contract between the owner and Angus-Young, a standard AIA B141 contract form, supported Angus-Young's position. The Court of Appeals noted:

Angus-Young points to several provisions in the contract in support of its position. The following are listed as "optional additional services" under the contract, and, hence, are *not* within the services Angus-Young was contractually obligated to perform: "[p]roviding services to verify the accuracy of drawings or other information furnished by the Owner"; and [p]roviding services in connection with the work of ... separate consultants retained by the Owner." The contract also specifically required Kerry, not Angus-Young to furnish "surveys describing physical characteristics," as well as "structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports required by law or the Contract Documents." Finally, as to any "services, information, surveys and reports" furnished by Kerry under these provisions, Angus-Young was "entitled to rely upon the accuracy and completeness thereof."

Nonetheless, the Court of Appeals rejected Angus-Young's position that it had no liability because it had no contractual responsibility to assess the adequacy of the original structural inspection report. The Court concluded that the parties' contract did not preclude a claim by the owner based on a tort claim of professional negligence, i.e., a failure to meet the

requisite standard of professional care in discharging its responsibilities under the contract with the owner. The Court of Appeals held that it was a jury issue as to whether a reasonably prudent architect would determine the adequacy of the owner-procured engineering report which stated that the building was structurally sound ... giving no legal effect to the contractual provisions that arguably relieved the architect of that responsibility.

The Wisconsin Supreme Court refused to review the decision and therefore the decision of the Court of Appeals represents the law in the State of Wisconsin.

Professional engineers are as concerned as architects about their ability to rely upon the contractual provisions contained in standard contract forms defining the professional engineer's and owner's responsibilities. Article 6 of EJCDC E-500 sets forth the Standards of Performance.

- A. The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject professional practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services.  
§ 6.01.A, EJCDC E-500.

However, § 6.01 D. provides:

- D. Subject to the standard of care set forth in paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.

Article 6 contains other provisions purporting to protect the professional engineer against guaranteeing the accuracy of information provided by the owner or by others, or for acts or omissions of any contractor, subcontractor, supplier, or by the owner. Under Article 6.01.B. the owner is protected as follows:

- B. Owner shall not be responsible for discovering deficiencies in the

technical accuracy of Engineer's services. Engineer shall correct any such deficiencies in technical accuracy without additional compensation except to the extent such corrective action is directly attributable to deficiencies in Owner-furnished information.

The question arises in view of the Angus-Young decision as to whether and to what extent a professional engineer may rely upon the adequacies of the information furnished to the engineer by the owner regarding the site, or any other pertinent information regarding the project.

The provisions of Exhibit A to EJCDC E-500, 2002 edition, set forth standard basic services consuming six pages of narration. In addition, Part 2 of Exhibit A sets forth two pages of Additional Services, requiring the owner's written authorization. Clearly, the standard contract terms regarding the engineer's basic and additional services must be carefully examined by the professional engineer to limit the project requirements to the reality of the project. Some have observed that the design professional receives proportionately the smallest remuneration and has the greatest potential legal exposure. It is extremely important to the professional engineer that the preparation of written contracts between owner and professional engineer be clear as to who is to do what on a project. Even then, the professional engineer may find that the owner accuses him or her of failing to meet that standard of professional care, regardless of what the contract language reads regarding the right to rely.

It appears self-evident that the contract should never provide for the performance of professional duties which are not contemplated by the parties and that are not necessary for the performance of the professional work intended by the parties. It is not self-evident in light of the Kerry, Inc. v. Angus-Young decision that the professional engineer can rely on the adequacy or correctness of owner-provided information, including professional reports from third parties, or upon the contract protections found in Article 6 of EJCDC E-500.