

ARE PROFESSIONAL DESIGNERS RESPONSIBLE FOR OSHA STANDARD COMPLIANCE?

A methane explosion in November of 1988 in the Milwaukee Metropolitan Sewerage District tunnel CT-7, spawned federal court litigation over the question of whether the engineering consultant for the project was liable under OSHA for failing to furnish a place of employment free from recognized hazards that might cause death or serious physical injury. The explosion killed three employees of S.A. Healy Company, the general contractor. The Secretary of Labor prosecuted CH2M Hill, the engineering consultant employed by MMSD on the theory that the construction standards of safety had been violated by CH2M Hill permitting the contractor to use unapproved electrical equipment in the tunnel after the detection of methane gas. The citation filed against CH2M Hill was heard by an administrative law judge who concluded that the safety regulation found in the code of federal regulations did not apply to CH2M Hill because it was not engaged in construction work, but rather as an engineering consulting firm providing typical engineering services. The OSHA Review Commission reversed that decision and remanded it back to the administrative law judge who found that CH2M Hill entered the tunnel regularly and knew of the OSHA standards requiring the use of only approved electrical equipment but had authorized Healy to use unapproved equipment. The ALJ found 40 violations and assessed fines of \$5,000 for each violation against CH2M Hill. Hill appealed to the United States Court of Appeals for the 7th Circuit in Chicago.

The federal appeals court observed that the case presented the question of whether OSHA construction safety standards apply to professional firms with engineering responsibilities similar to those exercised by CH2M Hill regarding tunnel CT-7.

The federal court initially observed that all professionals operating in the field of construction are not exempt from complying with construction safety standards. However, the court held that under the facts of this case, CH2M Hill's responsibilities did not rise to a level that constituted being engaged in construction work and therefore the OSHA regulations did not apply to it.

In explaining its view of the application of OSHA regulations to professional consultants, the court observed that the OSHA safety standards consisted of both general industry standards as well as various industry-specific standards such as the construction standards found in the Code of Federal Regulations. The regulatory scheme requires that the general industry standards apply unless a specific industry standard trumps them. CH2M Hill and the OSHA Review Commission were in disagreement as to whether the industry-specific standards for construction applied to CH2M Hill.

After reviewing the applicable standards relating to electrical equipment found in the OSHA regulations, requiring electrical equipment approved for hazardous locations, the court noted that OSHA claimed that those standards apply to CH2M Hill because it functioned as an employer engaged in construction work as evidenced by its contractual responsibilities and its role in approving safety standards in the performance of its agreed tasks. OSHA had argued that CH2M Hill violated the requirements for electrical equipment installed in tunnels by permitting the use of unapproved electrical equipment. CH2M Hill contended that it was not engaged in construction work, and therefore should not be held liable for any regulatory violations.

CH2M Hill urged the federal court to reject the Secretary's interpretation of the construction standards that permits application to professionals such as engineers and architects, arguing that the plain meaning of the term "construction" creates a per se exclusion of a professional working on a construction project. CH2M Hill argued that "construction" should be strictly construed according to its dictionary meaning of building, erecting or putting together.

The Federal Appeals Court disagreed with the proposition that the Secretary of Labor or Congress envisioned a broad exclusion of engineering professionals from the construction standards. The court concluded that under OSHA, the Secretary had adopted construction standards that apply to every employer, not just those with construction contracts. The court also noted that the OSHA Review Commission had repeatedly rejected arguments similar to those presented by CH2M Hill and concluded that construction standards may apply to professionals under certain circumstances, citing other cases

where a consulting firm operated as a construction manager exercising substantial supervisory authority over the construction work at the job site. The court held:

"Thus, Congress did not intend the Act, or the regulations flowing from it, to apply only to some employers and not to others, but rather to those employers who were best suited to alleviate hazards at the construction site. A per se exception excluding professionals, regardless of their duties, from liability under the Act, and its regulations would diminish the aims of Congress in enacting this legislation. Therefore, the Secretary's goal of adopting a balance as to whom the regulations apply is a reasonable approach. We do not find the Commission's decisions regarding the general applicability to professionals in some cases arbitrary or capricious."

As to the applicability of the construction standards to CH2M Hill, the court reviewed the Commission's test of applying OSHA standards to engineering or architectural firms who possess broad responsibilities in relation to construction activities including both contractual and de facto authority involving the work of trade contractors and who are directly and substantially engaged in activities that are connected with safety issues. The court noted that several professional engineering and architectural associations and societies urged the court to accept CH2M Hill's arguments and reject the Commission's expanded interpretation of those engaged in construction work. However, the court refused to reject the Commission's test in its general sense, but held that OSHA had failed to establish that CH2M Hill contractually or in effect exercised direct authority and control over the construction safety measures involving tunnel CT-7. The court did reject the OSHA Review Commission's decision to ignore contract language found in the contracts between owners and engineers, stating,

"While perfunctory language that does not represent the true responsibilities of a particular employer should not absolve it from complying with the regulations, language exempting an employer from particular responsibilities that the facts confirm the employer does not actually retain cannot be casually thrown aside."

The court concluded that the question of what responsibilities an engineering firm has should turn on a factual inquiry including the language of the contract.

It therefore is evident that engineering firms are well advised to carefully draft contracts so as to relieve them of any responsibility under the OSHA construction safety standards. The Federal Appeals Court made it clear that while such contract language may not be determinative of an actual outcome if the engineering firm's actual work is broader than the contractual responsibilities, where both the contract exclusions and the engineering firm's work established that the engineering firm had no responsibility for construction safety standards, OSHA could not lawfully apply the safety regulations to an engineering firm.

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