

ENGINEER'S LIABILITY EXPOSURE FOR THE CONTRACTOR'S DEFECTIVE CONSTRUCTION

Occasionally contractors who have been sued for defective construction bring actions against the engineers or architects who perform the design work, asserting that the contractor was supplied with defective plans and specifications or alleging that the engineer or architect negligently supervised the work of the contractor. While such cases frequently fail because the plans and specifications were not defective or because the engineer or architect had no supervisory responsibilities over the contractor, it is beneficial to reflect upon the liability exposure involved.

A contractor guilty of defective construction stands exposed to a damage suit brought by the owner to recover the costs of correcting the defective performance. However, the courts in Wisconsin and in other states have held that this measure of damages is practical and attains a desired result only when the correction does not involve unreasonable destruction of work done. The courts have held that when the correction of the defective construction involves unreasonable economic waste so that the cost of correction far exceeds the reasonable value of the property, then the aggrieved owner, whose project was defectively constructed, is entitled only to recover the diminished value of the property, as constructed. The courts have concluded that while the law may attempt to give the parties to a contract exactly what they contracted for, if that is not possible or feasible where correction cannot be made without incurring unreasonable economic waste, the loss in value to the owner is the proper measure of damages.

Whether a contractor has been pursued for the costs of correcting defective construction or for the diminished value of the property as a result of the defective construction, the contractor may choose to blame the engineer or architect that provided the plans and specifications and performed construction observation during site visits while the work was in progress. When such actions are brought, there will be a judicial focus upon the quality of the plans and specifications and upon the duty owed by the engineer or architect to the contractor.

While this article is not intended to be an exhaustive discussion of potential areas of liability in the preparation of plans and specifications, some general principles can be stated:

1. Whether the contractor has an actionable claim against the engineer or architect based on negligent preparation of plans and specifications will necessarily involve questions of whether the engineer or architect was negligent in the preparation of those plans and specifications, but
2. Since the complaining contractor has a substantial involvement in producing the condition which may be defective construction, a fact intensive inquiry will be made as to whether the contractor was negligent and whether such negligence was the cause of the defective construction or whether the plans and specifications were inadequate, or both.

The duty owed by the engineer or architect to the contractor will not be the same as the duty owed by the engineer or architect to the owner. The engineer or architect's duty toward the owner arises out of the scope of work to be performed by the design professional for the owner. The contractor is expected to follow the plans and specifications unless he knows they are inadequate. If the contractor follows the plans and specifications, and the result is unacceptable, the problem would not appear to be one of defective construction.

A contractor who asserts a claim against an engineer or architect based upon a theory that the professional designer had a duty to supervise the work of the contractor is destined to fail except where the engineer or architect has in fact contracted to perform such supervision service. Normally under the pre-published Standard Form of Agreement Between Owner and Engineer or Owner and Architect, the professional designer's legal obligations in connection with observing the contractor's work is explicitly defined as non-supervision in nature. The purpose of the engineer's visits to the project sites, for example, under EJCDC No. 1910-1 (1996 edition), is to enable the engineer to better carry out the duties and responsibilities assigned to the engineer by the contract between the owner and the engineer, and not to supervise the work of the contractor. Such site visits are to permit the engineer to assess the progress and quality of the work, but not to supervise the contractor's work in progress or to involve detailed

inspections of the contractor's work in progress. Nor does the engineer as a result of such visits have the authority to supervise, direct or control the contractor's work, and the engineer is expressly given no authority over the contractor's means, methods, techniques, sequences or procedures of construction selected by the contractor, or for safety precautions and programs incident to the contractor's work.

In one Wisconsin case in the past, *Vonasek v. Hirsch & Stevens, Inc.*, decided by the Wisconsin Supreme Court in 1974, the court was called upon to review whether the architect was liable to the general contractor for the collapse of joists during construction. The contractor in that case alleged that the architect had failed to comply with applicable code provisions calling for the use of cross bridging rather than horizontal bridging. However, the court relied upon expert testimony in concluding that either cross bridging or horizontal bridging was acceptable under applicable code provisions. DILHR had approved the construction plans and the administrator of DILHR's Industrial Safety and Building Division testified that the statute requiring cross bridging was not applicable to steel joists which were as long as the ones specified in this building construction. Other expert witnesses supported that testimony. The Supreme Court held that the trial court had not erred in finding that the architect had not violated the applicable codes.

The plaintiff in *Vonasek* then argued that the common law standard of care should be applied even though the applicable building code was met, and introduced expert testimony that in the building industry cross bridging would have been required. The Supreme Court held that the trial court was correct in finding that the defendant had not breached any common law duty as to proper design, based on the testimony of consulting engineers who were of the opinion that the special precautions necessary when erecting long span joists with horizontal bridging are generally known in the steel erection industry, and that if correct erection procedures were followed, horizontal bridging was as safe as cross bridging. The court also held that the architect had no duty to warn the contractor of any hazards associated with the performance of the contractor's work.

While it may seem obvious that a contractor must stand accountable for defective performance, because contractors accused of defective performance will naturally look for explanations which may extricate themselves from liability, attempts to pass the responsibility on to the professional designer can be expected.

*Published in the *Wisconsin Professional Engineer*, May-June, 2002. Written by Attorney Robert J. Kay.