



# Legal Brief

by Timothy J. Woolford, Esquire

## The Architect's Duty to Inspect: Exactly What Does It Mean?

*Owners' expectations can lead to legal issues if inspection duties aren't clearly defined*

Owners often enter into contracts with the expectation that the architect (or engineer) will watch over or inspect the work to ensure that the contractor does it properly. And many owners expect the architect to be responsible if the contractor does not perform properly. The exact nature of the architect's inspection duties depends upon the contract terms. Many architect-owner agreements as well as contractor-owner agreements contain the following provision, which is standard in most AIA contract forms:

*Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.3.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents...*

This language is somewhat ambiguous and leaves room for the owner and architect to disagree about the level of the architect's responsibility when something goes wrong. As a result, in resolving claims against architects, courts often analyze whether the architect acted reasonably, and the contract language is an important part of this analysis.

In other words, if the contract requires the architect to periodically visit the work site and inspect the work, the architect must perform that inspection in a reasonable manner. If a defect or dangerous condition would have been discovered through a reasonably diligent inspection, the architect may be deemed responsible and held liable.

For example, in one case involving a defectively installed roof at a school which sprung leaks after construction, the owner

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sued the architect claiming it should have flagged the contractor's errors during inspections. The architect countered by pointing to contract language that it was not responsible for the contractor's failure to follow the plans and specifications and that it was not required to make continuous inspections.

The court ruled that despite this contract language, the architect still had a duty to

carry out its inspection duties in a reasonable, non-negligent manner. Thus, if a reasonable inspection would have turned up the contractor's failure to follow the specifications, the architect would be liable for failing to bring it to the owner's attention. In the words of the court, "the architect could not close its eyes on the construction site and not engage in any inspection procedure and then disclaim liability for construction defects that even the most perfunctory monitoring would have prevented, or fail to advise the owner of a known failure of the contractor to follow the plans and specifications." The rule to be gleaned by architects from that case is that even though there may be contract language that appears to disclaim responsibility for contractor errors, the architect can still be held responsible if the owner can prove negligence.

Another issue that arises in this context is whether the architect can be held liable for safety violations. In other words, does the architect who is engaged to provide ordinary site services have any responsibility for injuries to people or property when the primary cause of the harm is contractor or subcontractor negligence?

One important case involved a suit against the architect by the widow of a construction

**continued on page 10**



# WOOLFORD: Architect's Duty to Inspect

continued from page 9

worker who died when a trench collapsed because it was not shored or braced. The court determined that the architect was not responsible.

First, the court held that "an architect's duty to foresee and prevent harm is generally commensurate with the degree of responsibility that the architect has agreed to undertake [in the contract]." The architect was not required to maintain continuous on-site representation and did not have the authority to stop work for safety violations. The contract also stated that the contractor was responsible for all safety precautions.


Second, there was no evidence that the architect had actual knowledge that the

trench was neither shored nor braced. Had there been evidence that the architect was actually aware of the condition and failed to bring it to the owner or contractor's attention, a different result may have been reached.

Unfortunately, court decisions on design professional liability arising from contractor errors are inconsistent. Outcomes are very fact-specific which makes it difficult to predict results.

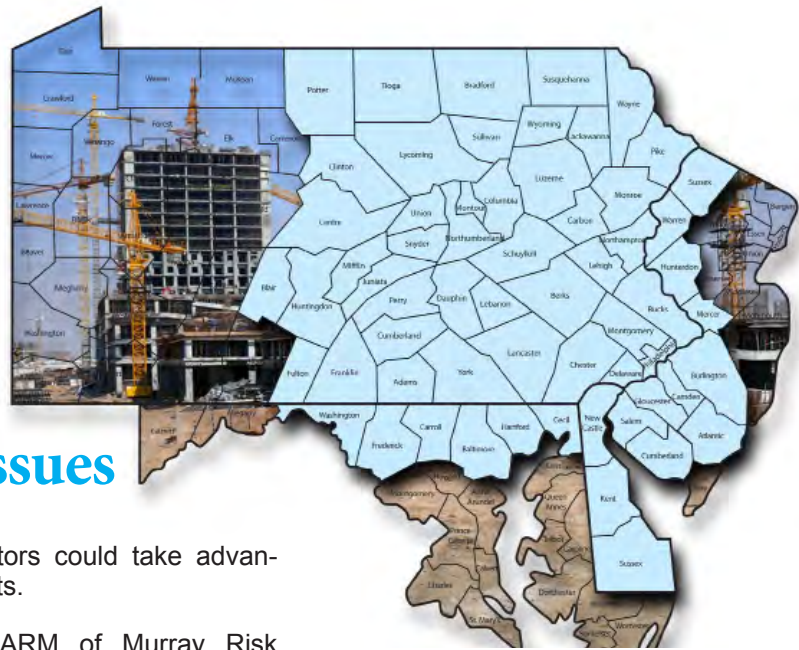
Still, the prudent design professional will pay close attention to the site services and inspection provisions of its contract. If site visits will not be made, all contracts, (including the owner-contractor agreement) should be revised to so state. Where even

limited site services are contemplated, the agreement should precisely describe the limited services and the frequency of the visits, among other things.

As the above discussion demonstrates, the contract terms may not exonerate the design professional in all situations. Still, the legal analysis always begins with an examination of the contract terms and the contract language is usually very important. For that reason, architects and engineers should review contract provisions regarding inspection and observation duties with counsel to make sure the language does not place undue risk on the design professional and effectively disclaims risks that the design professional is unwilling to undertake. 

## Regional News ...

### Spring construction seminar focused on current industry issues



On Thursday May 19, 2011, McKonly and Asbury, LLP along with Murray Risk Management and Insurance and Woolford Law, held their Spring 2011 Construction Seminar at the Eden Resort in Lancaster, Pennsylvania.

The seminar started with a presentation on LEAN for the construction industry by Michael Hoffner, CPA and David Blain, CPA/ABV, CVA of McKonly and Asbury, LLP. Mr. Hoffner and Mr. Blain covered key concepts of LEAN and provided practical guidance for implementation of LEAN for contractors and those in the construction market.

Jamie Malachowski of McKonly and Asbury, LLP provided a brief analysis on energy credits available to contractors and

ways that contractors could take advantage of those credits.

Doug Dvorchak, ARM of Murray Risk Management and Insurance presented on controlling workers compensation costs. Mr. Dvorchak covered the calculation of premium, experience modification factors and discussed effective tools to reduce workers compensation cost.

Mr. Dvorchak's presentation was followed by a discussion on how to obtain and maintain bonding credit in troubled times by Lydia Mantle of Murray Risk Management and Insurance. Mrs. Mantle covered the current state of the surety market, provided a surety outlook, discussed mechanisms to obtain and maintain bonding and covered the seven decisions that can make or

break a surety program.

The seminar ended with an educational presentation from Tim Woolford, ESQ of Woolford Law. Mr. Woolford discussed the Prevailing Wage Act in Pennsylvania. He focused on recent trends in the act, the outlook for future changes to the act and current enforcement trends in the act.

To view a copy of the presentation, please go to the events page of Contractors Center Point ([www.contractorscenterpoint.com/events.html](http://www.contractorscenterpoint.com/events.html)) and view the PDF under the May 19, 2011 Construction Seminar.