

Well founded and recognized in the design and construction industry, the American Institute of Architects' AIA B101, Standard Form of Agreement Between Owner and Architect provides that the Owner shall engage the surveyor and geotechnical consultants for their project.

§ 5.4 The Owner shall furnish surveys to describe physical characteristics, legal limitations, and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions, and other necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 5.5 The Owner shall furnish services of geotechnical engineers, which may include test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

To begin with, a project's site requiring surveying and geotechnical services does not involve design. Rather, investigating the site's soil conditions, establishing boundaries and benchmarks, determining existing utilities, etc. is not within the skill set of an architect or professional engineer. They do not have the education or experience to discover errors or omissions in the surveying and geotechnical documents. A geotechnical analysis involves core drilling with heavy equipment in order to prepare a soils report that is complex and highly technical, interpreted by a skilled professional. Likewise, a surveyor utilizes scientific instruments that an A/E has no familiarity with or related knowledge to prepare their project documentation.

BASED UPON MERRY OLD ENGLAND'S LAWS ADOPTED BY THE U.S.

"Respondeat superior" is a Latin phrase that literally means "let the master answer." It is also a legal doctrine applicable in many civil claims throughout the United States. Under the legal doctrine, an employer can be held accountable for negligence or wrongdoing committed by their employee or agent. Our legal system also knows this doctrine as "vicarious liability." Historically speaking:

The rule originated in England in the late 17th century and was intended to prevent employers from escaping financial responsibility for the actions of their employees. Respondeat superior was first used to justify a criminal indictment in the mid-19th century, first in England and a short time later in the United States. By the end of the 19th century, there was ample precedent to prosecute corporations under respondeat superior. In 1903 the U.S. Congress passed the Elkins Act, which banned rebates by railroads to businesses that shipped large quantities of goods and contained an explicit statutory clause for corporate criminal liability.

Modern legislation based on respondeat superior imposes both civil and criminal liabilities on organizations. Such statutes are meant to force employers to be vigilant regarding the behavior of the people who work for them. Corporate liability under respondeat superior generally requires three elements: (1) the agent of the corporation committed the crime, (2) while acting within the scope of the agent's authority, (3) with an intent to benefit the corporation.

<https://www.britannica.com/topic/respondeat-superior>



That being said, if an error or omission would occur in these reports and project documents, and the A/E retained the surveying or geotechnical firms, and a dispute or claim occurred, they would be involved as the “respondeat superior,” or “vicarious liable.”

Another reason why it is unwise to hire surveying or geotechnical firms as consultants, is that these professionals many times utilize a “limitation of

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liability” (LOL) clause in their agreements, for their own risk management. Their fees are usually modest, relative to the other project costs, and their LOL clauses would protect them, but will not if the A/E engages them as consultants.

CASE STUDY

Project owner, city, issued requests for proposals for A/E firms to design a police station. The scope of services included surveying and geotechnical engineering, in addition to the normal architectural, structural, mechanical, and electrical design. Some of the prospective A/E firms objected to the inclusion of the scope for surveying or geotechnical engineering, but the city stayed firm on their position. In the interest of securing the commission, one A/E firm decided to accept the inclusion of the scope of services, despite the wisdom to ignore the risk management concerns. The successful A/E firm retained consultants for surveying or geotechnical engineering.

Apparently, decades ago the city had allowed citizens in the community to dispose of their unwanted wash machines, dryers and refrigerators on the site that were buried, not visible and not in plain view. The geotechnical consultant performed their services, which included core borings on the vacant site. None of the soil borings discovered the discarded appliances. During excavation for the foundations for the police station, the appliances were discovered and had to be removed. The result was the need for the redesign of the foundations, additional concrete and steel reinforcing, grading, and of course a project schedule delay. The sitework contractor’s change order for the remedy was significant.

The A/E firm requested the city to pay for the change order, which was refused. The city’s position was—“you guys missed the wash machines, dryers and refrigerators during your core borings, and you have to pay for the change order.” Litigation ensued. The A/E firm naturally counterclaimed against the geotechnical consultant. The case ultimately was settled on the “steps of the courthouse” just before a jury was to be selected. However, much time, money and distraction for the design professionals was involved, instead of doing what they normally do—designing projects for their clients.

CONCLUSION

Taking into account that errors or omissions by geotechnical or surveyor firms many times involve large claims and dollars, it is no wonder that professional liability insurance carriers shy away from A/E firms that agree to provide these services. In fact, some insurance carriers, knowing the magnitude that claims that are generated, will not issue a professional policy if they know that their A/E insured would or does engage in this practice. On the other hand, the carriers may provide a quote for coverage, but their rates will result in very high premiums.

About the Author of this Risk Management Building Block Article

As a risk manager for the last 18 years for the design profession, Eric has experience in professional liability insurance and claims, architecture, engineering, land use, law, and a unique background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years at Kent State University's College of Architecture & Environmental Design.

As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals since 2000 on topics of ethics, contracts, and professional practice in various venues across the United States and Canada. He is a former member and chair of his city's Board of Zoning & Building Appeals for 24 years, and is a licensed architect, attorney, and property & casualty insurance professional.

His educational background includes a JD from Southwestern University School of Law, Los Angeles; Master of Science in Architecture from University of Cincinnati; and BA in psychology/architecture from Miami University, Oxford, Ohio.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities and should not be construed to represent a determination of legal issues but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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