

My Two Bits

As a contractor, you know that construction litigation is like a game of *Twister*: A sues B; B countersues A and then, just in case, adds C and D to the complaint. Whoa! C and D get upset and sue one another, and then each sues A and B. A countersues C and D and adds E, F, and G to the mix, because, if C and D have culpability, E, F, and G must have culpability, too...or, better yet, deep pockets. E, F, and G are furious about this development and countersue, of course, and also file claims against B, C, and D, just for good measure, and then each other. Frankly, in a lot of these cases, it's near miraculous that some of the players don't wind up suing themselves.

Given that one project claim frequently leads to many, it stands to reason that every participant in a construction project has a vested interest in seeing to it that "we all just get along"; that none of the participants gets embroiled with any other; that the bones of contention provide calcium rather than bile.

Do you review a project's litigation risk before you get involved, or do you simply submit a bid and hope for the best? Wouldn't it be nice to have lunch with someone who could not only fill in some technical blanks, but who could also discuss other project risks, before you make your offer for drilling services? Someone who could identify what the go/no-go factors should consist of? Someone who could talk about the techniques available for dealing with known or likely project risks? But where would you find such a person?

Let me respond as an unabashed ASFE-chauvinist.

Fact: Firms join ASFE for one reason only...to learn how to manage their risks wisely and thereby prosper through professionalism. Also a fact: Although working with anyone associated with any ASFE member firm will not make you and your firm bulletproof, the odds are that ASFE member firms and the people associated with them are far more

aware of risk management issues than others, and thus can help all project participants lower their risk exposure. While technical expertise is important, what really counts is people skills, because the risks you confront stem not so much from technical inadequacies as they do from human inadequacies. That’s why, even when a “situation” stems from what is supposedly a “pure technical problem,” you are likely to discover a deadly sin behind it; e.g., someone decided to use a technique not because it would achieve better results, but rather because it would save time and/or money and maybe – just maybe – it would also achieve the specified result or, if it didn’t, maybe no one would notice.

So, if you call a representative of the ASFE member firm involved with a project, will the individual go to lunch with you? I hope so: Almost four decades of ASFE research suggest that most of the construction problems that lead to litigation stem from poor communication and win/lose behavior. ASFE has performed this research – based mostly on case histories – as a matter of survival. The firms that founded ASFE in 1969 faced a claims-against record so severe, they were unable to obtain professional liability insurance from any conventional insurer. The founders wanted ASFE to discover why they were being sued so often, and to develop programs, services, and materials to help them lower their liability exposures.

ASFE was so successful at what it did, it had a major impact on members’ bottom lines. That’s why they were encouraged to expand their service mix, to include environmental consulting, construction materials engineering and testing, and civil engineering, not to mention biology, ecology, archaeology, and geology. All these and related services involve above-average risk because they involve natural conditions hidden by earth, rock, and time, the same conditions you have to deal with. To do so and thrive, firms must apply effective risk management.

ASFE's founders didn’t realize that at the outset. Their lament was, “We’re good at what we do. In fact, we’re the best geotechnical engineers there are. Why are we being sued so much?” They didn’t like the answer: “You’re not good at what you do.” But then we

explained: “You think you’re geotechnical engineers, but you’re not. You’re geotechnical engineers *and* you’re business managers. You may be good at geotechnical engineering, but that’s not the source of your problems. Your management deficits are the cause.”

Thanks to ASFE's case history analysis, ASFE members learn early on that everything a firm does affects liability risks. *Everything*. Billing methods. HR. PR and marketing. Project review and acceptance. Contract formation. No matter what the business process, if a firm doesn't do it well, the deficiency will sooner or later manifest itself as a claim. And because you're involved with the same project, you're in the same boat. And that being the case, how do you want to proceed? Will you trust your future to the wind and the tide? Or will you grab an oar?

Here's an oar you ought to know about: ASFE members are taught to inquire about the other firms involved with a project. Do you? What do you know about fellow project participants? Do you ask? And if you do not already have relationships with others involved in a project, do you take the time to develop them, knowing that doing so can build lines of communication that make it far easier to encourage communication, coordination and cooperation when it's needed? Developing collegial relationships is an excellent risk management technique, and it can be highly enjoyable, especially when implemented over lunch or dinner. It can be profitable, too, when you learn something new and create the possibility of mutual referrals and other activities together.

Do firms other than those that belong to ASFE understand risk management? Of course they do. Do all folks with all ASFE member firms understand risk management? Regrettably, no. And really, that's the point: We're all in this together. But who is we?