MY TWO BITS

Any number of geotechnical engineers include in their reports a warning that the report was prepared for the owner or one of the owner's design professionals, and so should not be relied on by any other party. The owner's contract documents often include similar warnings, noting that contractors should have their own geotechnical studies performed for bidding purposes.

"Weasel words!" some folks say. "The warnings are there to deflect liability that rightfully belongs to the owner and/or geotechnical engineer." Wrong.

The scope of service on which the geotechnical study is based is or is supposed to be client-specific. To assume that one size fits all is to assume that all clients are the same, all their representatives are the same, all projects are the same, all sites are the same, and so forth. But they're not and, arguably, to act as though they are would comprise a professional lapse.

Given that a geotechnical engineering scope of service will vary from client to client – even when the same site and type of project are involved – it follows that the report will differ, too; i.e., the report I prepare for you will be different from the report I prepare for "the other guy" and, all things considered, my recommendations may differ, too. I need to make you and other users of my report aware of that fact. Stated another way, warnings about unauthorized third-party reliance are wholly appropriate, as our disavowals of liability for problems that arise should the warnings go ignored.

Are the warnings and disavowals risk management devices? Of course they are, just as they should be. Third parties should not rely on geotechnical engineering reports prepared for others, and geotechnical engineers' warning them of that fact could be deemed a professional responsibility. And just as certainly, geotechnical engineering firms should not have their pockets picked, because, in order to save a few dollars, third

parties knowingly put on the wrong-size shoes and then get blisters they have treated by a lawyer rather than a podiatrist. Besides, the nation's long-standing litigious mania is getting worse, not better, especially as a result of court rulings that have dismantled the economic loss doctrine.

The economic loss doctrine holds that, when damages are purely economic, those who suffer the damages cannot sue a professional in tort; e.g., for negligence. As such, in states where the economic loss doctrine still prevails, a contractor who underbids a project because of errors or omissions in plans and specifications would not have a case against the design professional. Accordingly, if it became necessary for the contractor to sue someone to get paid, the owner would be the target. The owner would then have to sue the design professional for breach of contract. It's a process so convoluted any number of people would rather not get involved with it.

In states where the economic loss doctrine has fallen – most recently, Pennsylvania – contractors can sue a design professional directly, for negligent misrepresentation.

Would that apply to geotechnical engineering, too? Maybe, but maybe not, because geotechnical engineering is not like other types of engineering, given the manner in which the instrument of professional service – the geotechnical engineering report – is used; e.g., for preliminary evaluation, for design purposes, or for purposes of bidding. It also differs given that, for any given purpose, hundreds of distinct scopes would be appropriate. As a result, and especially in light of the potential consequences, a geotechnical engineer would have to be foolish to assume that the study conducted and report prepared for a given owner or architect for purposes of design would be suitable for *any* contractor, let alone *all* contractors, for purposes of bidding. In other words, while the report would be available to foundation contractors, they would have to rely on it at their own risk, assuming the owner gives contractors access to the site and adequate time to have their own studies performed.

Are there better ways? Of course, but there's little likelihood they'll be used in conventional D/B/B/L (design/bid/build/litigate) construction. Imagine, if you would, a project where a small group of prequalified foundation contractors' representatives pay to have the geotechnical engineer conduct the additional sampling, testing, and analysis they need for bidding purposes. Even more enlightened, consider a situation where those prequalified contractors invited to describe their subsurface information needs to the geotechnical engineer in a meeting also attended by representatives of the owner and the owner's key design professionals, to result in a scope created to meet the needs of many rather than just a few.

How about a project where just one foundation contractor is selected early in the process, based principally on the company's experience, competence, and integrity rather than a low bid? The company's rate schedule would have to be reasonable, of course, and the overall estimate provided for budgeting purposes could be based on information developed from a scope expanded by subsurface exploration conducted specifically to meet the contractor's needs.

The likelihood of such cooperative approaches being used is slim at best. Instead, owners will continue to rely on a system that rewards risk-taking gamesmanship, where the owner's desire to get more for less runs headlong into the contractor's desire to do less for more. In the meantime, geotechnical engineers will keep doing what they already do, as a matter of professional responsibility… and professional self-preservation.