My Two Bits

Owners retain construction materials engineering and testing (CoMET) firms to perform quality assurance (QA) services; i.e., to evaluate contractors' work for compliance with specifications. Although CoMET QA services are *not* provided for the benefit of contractors, many contractors rely on CoMET QA reports nonetheless. Too often, they file claims against owners' CoMET firms, alleging that deficiencies in the firms' services have damaged them, either because a CoMET firm "passed" something that was later shown to be out-of-spec, or "flunked" work that allegedly was fine.

Those who regard such claims as meritless point out that contractors – and only contractors – are responsible for the sufficiency of their work. They also note that contactors have no right to rely on CoMET firms' QA services and reports, because CoMET firms provide them *solely* for the benefit of the owner, based on the owner's – *not the contractor's* – needs and preferences.

Practically speaking, a contractor is not going to retain its own CoMET provider when the owner has one "on board." And while the contractor may not be permitted to rely on CoMET QA reports, it is permitted to review them, to learn what the CoMET firm is reporting to the owner. If the contractor learns that the CoMET firm is reporting an out-of-spec situation, for example, it may want to disagree and conduct its own tests then and there, or make a change. If the contractor decides to make the change, it needs to recognize that doing so is at its own risk; that it has no recourse if the CoMET report was flawed. Otherwise, the contractor would be saying to the CoMET firm, "Even though you prepared the report for another party, and we were not involved in formation of the scope, schedule, or budget, we assume what you did for the owner is exactly what you would have done for us, even though you are contractually and ethically bound to the owner." Good luck.

The economic loss doctrine (ELD) feasibly may come into play in some of these instances. The ELD states, in essence, that a professional services provider cannot be sued in tort (typically, for negligence) when the damages involved are purely economic; e.g., losses stemming from delays or unnecessary remedial activity. The only means for recovery in such cases would be a breach of contract suit. Because a third party, by definition, does not have a contract with the professional services provider, it could not sue it. It could seek to recover from the owner, however, and, if it did, the owner could seek to recover from the professional services provider.

In those states where the ELD has fallen – most recently, in Pennsylvania – a contractor that has suffered purely economic losses can sue a professional services provider for negligent misrepresentation, when the provider knew or should have known that the contractor would be relying on the professional's reports, when those reports were negligently flawed, and when the flaws resulted in the contractor being damaged. Could a contractor claim negligent misrepresentation to successfully sue a CoMET firm? Probably not, provided that the CoMET firm advised the contractor that CoMET QA reports and services are provided solely for the benefit of the owner, and that any other party that relies on the QA reports does so at its own risk; and provided that the contractor was given ample time and opportunity to retain a CoMET firm of its own. (Also telling, in the Pennsylvania case, the contractor had no choice but to rely on the plans involved, given they were the architectural drawings. That's not the case with CoMET reports.)

So what's a contractor to do? Retain its own CoMET firm? Not likely, but it would be far better than another commonly used approach, where a contractor retains a CoMET firm to perform QA services for the owner, creating an "instant" conflict of interest. In those cases, the contractor is the client, but the CoMET firm is expected to act as though the owner is. Add to that the scheduling preferences of the contractor, not the owner, and a pustule of problems can erupt. (Some contractors schedule CoMET services specifically so certain activities or areas go underobserved and/or undertested.)

Why would an owner authorize a known conflict of interest? Because, when the contractor pays for CoMET services, the owner eventually pays for them through permanent financing. The conflict can be dealt with head-on, however, by using contract language that – for all intents and purposes – states the owner is the CoMET firm's client, and the only thing the contractor does is pay. But that doesn't solve the reliance problem.

To get to a reasonable outcome, project participants need to recognize that, when problems erupt, almost all of them – the owner, design professionals, general contractor, subs –get dragged in, each bringing attorneys to muddy the waters with adversarial attitudes and advocacy. True: No matter how effective CoMET services may be, contractors should not rely on reports prepared for others, and that can be an important point to make after disputes arise and the litigation process has started. The goal should be to prevent those disputes. How? Given that contractors will continue to rely on CoMET services performed for owners, knowingly or unknowingly at their own risk, it may be best to let them, providing they are informed of the risk and providing that the owner makes "misreads" and disputes far less likely by retaining a high-quality CoMET services provider with which the owner negotiates a scope of service and fee. If that's going to happen, contractors and key design professionals need to strongly encourage owners to make it happen. In fact, owners (and not just a few "key" design professionals) need to realize that, even though standard tests supposedly are used, and even though certain facilities and personnel supposedly meet certain criteria, results most definitely will *not* be the same no matter who performs CoMET services. Some firms – just as some personnel – are far superior to others. Owners also need to realize that requiring CoMET firms to bid can have a seriously negative impact on quality, given that a low-bidder's specialty may be knowing how to bid low, as opposed to knowing how to provide high quality. Besides, just about all firms willing to bid are discouraged from offering their best services and/or personnel, because doing so would make their bids "nonresponsive." (Some of the best firms may not even bother to get involved with what they see as a "talent auction.") By contrast, when the CoMET firm really knows what it's doing, and

when it has the scope and budget required to deliver truly first-rate quality, a contractor lowers the risk it incurs by relying on things it shouldn't rely on. And when that risk is lessened for the contractor, everyone else's risks are lowered, too.