My Two Bits

Here's the way I heard it: The year is 1910. A father and his son walk into a Boston tavern a few minutes past noon. Dad is a mason, working on a new building in the Back Bay. His 18-year-old son has decided to pick up the trade, too, and it's his first day on the job. "What'll it be?" the bartender asks, looking up with a smile. "Beer," says the old man. The bartender turns to the boy and asks the same question just by raising his eyebrows. "Same," the boy says. The bartender reaches down and puts a pail on the bar. In it are two dozen hard-boiled eggs. He sticks a sign in the pail. "FREE LUNCH" it says. "Hey dad," the boy says, enthused. "Free lunch."

"Son," the father responds, with a knowing smile and shaking his head, "the beer here is ten cents more a pint than anywhere else in town. Always remember, there's no such thing as free lunch."

It doesn't matter if the story's a fable; the moral's right on: "There's no such thing as free lunch." And if I wanted to embellish, I could have had the kid say something along the lines of, "You mean, if it's too good to be true, it is?" To which the dad would have sagely responded, "That's right son: You get what you pay for."

"Gosh, dad," the young man could have added, excited, wiping some suds from his upper lip, "You mean the bitterness of low quality remains long after the sweetness of low price is forgot"? At which time the big guy sitting next to the pair would have dumped the bucket of eggs over the both of them. "Why don't you both just shut up," he would have yelled. "If I wanted old saws with my beer I woulda' gone to the saw mill."

Well, the saws *are* old, but with good reason: They relate to something fundamental about our species; our ability to cling to naïve optimism no matter how much evidence exists to the contrary; the belief that people can get what they want without having to

spend the time, money, or effort experience says is necessary; the belief that, in fact, there is such a thing as free lunch.

So, where are we going to dine?

Welcome to the construction industry, the favorite lunch spot of those who should know better. Just about every patron I've met knows the right way of doing whatever it is he or she does: from owning and developing to designing and constructing. So why don't they do things the right way? Some don't because they believe the eggs are free, especially because they work with consultants who whisper in their ear, "I know how to get it for less," presumably by hoodwinking someone perceived to be lower on the totem pole. Others don't do it right because they say they have no choice, but that's all they say; they don't speak up for what they know is right.

The fallacy of the free lunch approach to construction is epitomized by the Construction Law Forum of the American Bar Association. Why? Because it exists! As far as I'm concerned, it could just as well be named the Free Lunch Forum: Just plunk your $10,000 retainer down on the bar and get a hard-boiled egg.

So, how do we fix the situation? We can start by jawboning; by speaking up whenever we encounter that bucket of eggs, hammering on the three fundamental things we can do to turn things around.

There's No Such Thing As Free Lunch Fundamental No. 1: Bidding

We've got to talk about bidding: It doesn't work, and as long as you remain silent about it, it will continue to be used.

The foundation of bidding rests on the notion that whoever submits a bid is qualified to do the work or perform the service. That's just not the case. "Aha," says an owner's

representative, or architect, or civil engineer, or structural engineer, et al., wiping hard-boiled egg crumbs from the corners of his mouth, "it works for us because we limit the bidding only to the best firms." But that's not really the way it is. What's meant is "...the best available firms willing to get involved in our talent auction." And when they participate, what are they going to propose? The best service they're capable of? the kind that achieves the quality needed for long-term cost-effectiveness? Of course not! The cost of service like that would make their offers "noncompetitive."

"Not so," says the egg-muncher. "When it comes to the prime designers, we use a double-envelope system." Ah, yes, the double-envelope system; the one that results in the really good firms being rated even on quality (envelope one), so they have to keep fee to the bone (envelope two), by assigning the least (but still) qualified staff and using the simplest (fastest-to-apply) methods available.

And how do the designers selected on a double-envelope basis select their subs? Often through informal (i.e., sneaky) or formal (no bones about it) bidding. Why do they do that? Ask them; they'll tell you. "Because we're asked to bid." In other words, because they complacently accept a bad approach to selection and procurement, they feel justified in doing unto others what has been done unto them; a.k.a., the inside-of-a-hard-boiled-egg-is-golden rule. And how about those prime design professionals chosen principally on the basis of value, via quality-based selection (QBS)? All too many still turn around and select their subs based on fee. Why? They won't tell you, but there is an answer (besides the fact that they're hypocrites): "Because we'll make a few more dollars by marking up the cost of service provided by a professional into whose eye we stick our thumb, because there *is* such a thing as free lunch."

Not all the fees are marked up, of course. In fact, no mark-up usually is the case when it comes to construction materials engineering and testing (CoMET) firms, because they're retained directly by the owner or developer or directly by a contractor. Nonetheless, for reasons wholly unfathomable to me, architects, structural engineers, civil engineers, and others who should know better commonly recommend to owners that CoMET firms

should be selected based on price, assumedly because so many CoMET firms' laboratories are accredited by A, B, and C, and their personnel are certified by X, Y, and Z. In other words, when it comes to the single-most important quality-related activity in construction; when it comes to the one activity that can help detect problems while they're still larval, and thereby help prevent serious delays, disputes, and claims from arising, for the benefit of *everyone* (except members of the Construction Law Forum), cheapen it! What kind of lunacy is that? Evidently the kind that says, "When you have a brain tumor, find the surgeon who'll operate for the cheapest, because all doctors have to go through the same licensing, and all have the same standard of care to meet," overlooking the indisputable fact that some physicians are far better than others; that the existence of a standard of care has nothing to do with an individual practitioner's ability to meet it…or exceed it.

"So why not speak out against bidding for contractors, not just professionals?" I'm sometimes asked, mid-rant. But I do, and so does ASFE/The Best People on Earth. In fact, as I write this, I'm on my way back from a full-day "Contract Fundamentals" seminar, where the last hour was spent discussing the management of subcontracts, like those for drilling and laboratory services. Our message: Don't bid for services if you do not have to and, if you have to, try to educate your client so you can do it a better way. We deliver that message for purposes of loss-prevention. In fact, a firm that's chosen principally because of its quality is likely to perform better than a firm chosen principally because of its price. Just as important, a firm selected based on quality has no reason to propose doing anything less than its best. If for some reason a budget cannot accommodate the best, then prudent reductions can be made. "But that won't get you the lowest price," says Prince Omelet, popping yet another egg into his maw. Which is not true: It won't get you the lowest bid, but the lowest bid is not necessarily the lowest price, given that the price that's bid is seldom the price that's paid. In fact, bidding is a game played with real money. The prospective client issues a set of documents with the intent of getting as much as possible for as little as possible. The bidders review the documents with an eye toward doing as little as possible for as much as possible. By contrast, when QBS is applied, there's every reason to believe that the price that's negotiated will be the

price paid, assuming the negotiated price includes a reasonable allowance for the unanticipated (which can be anticipated on just about every project).

"But how can you tell if the price you negotiate is reasonable or not?" His Dumptiness asks, a question that's really troubling, because it's asked so much. In fact, a party that doesn't know what a reasonable price is has no business making a procurement to begin with, no matter what kind of method is used. But, if you know what a reasonable price is, why use bidding, given its oh-so-many negative attributes?

Just imagine what would happen were an owner or developer to assemble an entire design/construction team based on quality and value, and then apply well-known techniques to achieve communication, coordination, and cooperation among all team members: Meetings of the Construction Law Forum would have to go to a – gasp! – cash bar.

There's No Such Thing As Free Lunch Fundamental No. 2: Risk Management

The next thing to speak up about is the way we deal with risk. Of late, some owners have been criticizing Engineers' Joint Contract Documents Committee (EJCDC) and American Institute of Architects (AIA) model contracts because they don't create enough liability for design professionals and contractors. In their world, these owners see, to believe that "those in the best position to prevent a problem should bear the cost of correcting that problem, should it occur." Okay: So here we have a geotechnical engineer retained to conduct a subsurface exploration for the outdoor parking lot of a new shopping mall (where most of the parking will be indoors), and submit a pavement design. The firm is told it cannot drill as many borings as it would like, nor will it be retained to have a representative on site to help ensure that the subsurface conditions it opines to exist (on which it has based its design recommendations) exist in fact, or to evaluate the extent to which the contractor (retained by low bid) adheres to the design recommendations. So, let's say the geotechnical engineer's fee is $5,000; that the

"benefit" hoped for is $500 (assuming a net 10% profit); and that the potential liability that could be alleged is $3 million. Who in their right mind would accept a $3 million risk in hopes of making $500? Those who are naive, desperate, and/or foolish, or who have somehow made themselves judgment-proof by hiding their money (poverty being the ultimate defense against civil lawsuits).

In fact, the one entity *really* in a position to prevent problems is the owner or developer, whose representatives can *easily* reduce risk by using best practices, starting with effective procurement of the design and construction team, the adoption of fairness in contracting, and involvement of knowledgable representatives from start to finish. How much better such an approach is than relying on various types of unfair risk-shifting mechanisms, like indemnities, those wonderful legal concoctions designed to make everyone except the owner or developer responsible for the owner's or developer's mistakes; the "free lunch" of the risk management "game." (In fact, one locality we're aware of actually tried to include in its standard agreement with design professionals a provision that made the design professionals responsible for any negligence committed by any of the jurisdiction's personnel, including *willful negligence*.)

As it so happens, the risks stemming from onerous indemnities cannot be insured, meaning that, insofar as insurance is concerned, they're almost worthless. ("They are?" says the egg eater, almost choking on his umpteenth ovoid.) Nonetheless, they could be sufficient to put a firm out of business and, for that reason, engineers and architects attempt to offset the risk, often through defensive design (e.g., founding a two-seat outhouse on four piers drilled to bedrock) and by continually monitoring others parties' performance, to help prevent them from doing something stupid that could result in the indemnity having to be enforced. And then there's the risk that whatever firm would be willing to accept such an absurd requirement would probably be desperate or foolish or both, resulting in a project that, in both the short-term and long, would cost far more than it would otherwise have to.

There's No Such Thing As Free Lunch Fundamental No. 3: Litigation

And now item three that needs to be discussed: The need to eliminate litigation as a dispute resolution method, especially so because, when litigation is in the quiver, it's invariably the arrow first withdrawn. Worse: Its power encourages its use. After all, a lawsuit can be used to effect delays, harm credit ratings and bonding ability, smear a good reputation, and so on. People need to become more attuned to the danger of dealing with an owner or developer with an office full of attorneys with time on their hands. For the lawyers, a lawsuit is a free lunch, but only because others pay for it. And others *do* pay for it. In fact, when those involved in a lawsuit sum up the value of the time they lose to litigation, even the "winners" can be losers. Which is why so much time and energy has been expended on the development of other, far more effective dispute resolution methods, such as dispute review boards (especially for major projects), resolution by experts, ASFE Med/Arb 2, mediation, and so on. But the concept of alternative dispute resolution needs to be encouraged. It, too, needs jawboning support.

There's No Such Thing As Free Lunch: The Conclusion

And all that being said, the ball's in your court. If you want, you can keep on keeping on. Alternatively, you can attempt to make things better – sunny-side up – by educating others and encouraging them to try a different approach. Given that free isn't really free, why eat hard-boiled eggs?