CE News "Risky Business" No. 22

I've been hearing some moaning about private- and public-sector owners that seem to be demanding perfection from their design and environmental professionals. If you understand "Spearin risk," however, your response most likely would be, "What took them so long?"

Spearin risk derives from the Spearin Doctrine, a precedent set in a 1918 court case (*United States v. Spearin* (248 U.S. 132)). The federal government hired Spearin to build a drydock in the Brooklyn Navy Yard. The government furnished plans and specifications that, among other things, showed exactly how a sewer line had to be relocated. Not quite one year after the government approved Spearin's work, a dam failure in a connecting sewer caused the relocated sewer to flood and burst, ruining the drydock. The failed dam was not shown on the government's plans and specifications. If it had been, Spearin contended, the problems caused by its failure could have been prevented. The government disagreed and sued to recover its damages. The court ruled for Spearin, however, thereby establishing the precedent that an owner creates an implied warranty that, if the contractor complies with the plans and specifications, the finished work will be adequate for its purpose. As such, the owner is expected to provide perfect plans and specifications to the contractor, but – and here's what Spearin risk is all about – the design professional is *not* expected to provide perfect plans and specifications to the owner. Why not? Because the law recognizes that "to err is human," and therefore does not require design professionals to submit perfect contract documents. Design professionals' obligation is to meet the standard of care – i.e., to apply the diligence ordinarily applied at the time – so that errors or omissions are not *per se* negligent acts. In other words, owners – not design professionals – are liable for the costs of imperfection.

"You should be liable to the same extent I am," owners now seem to be saying, which would be a reasonable outlook were design professionals to share more in the rewards. That's not going to happen, of course, meaning that "Spearin risk" is just another cost owners need to consider in pursuit of their goal. But owners are hardly babes in the wood. They can easily manage Spearin risk by applying any number of tried and true approaches, such as:

- selecting their design consultants on the basis of competence and experience;
- developing a scope of service collaboratively with the design team, so it's sensitive to an array of needs and preferences while embracing effective risk management through services such as peer review of plans for errors and omissions, and contractor review of plans for ambiguity and buildability;
- limiting competition to prequalified contractors that are known for quality work and integrity; and
- extensive construction materials engineering and testing (CoMET) services performed by the designers' personnel, to help ensure critically important good communication between the field and the office. (Third-party construction observers almost never speak with the original designers, in part because they often represent competitive firms.)

Understandably, owners don't want to pay for the increased scope required to manage Spearin risk; they just want you to be 100% responsible and liable. But that's patently unfair: If they don't want to pay you to manage their risk, they – *not you* – should pay for the consequences. But are they *really* unwilling to pay? Could it be that you are actually encouraging them to not pay, thereby putting yourself and your firm at risk (given that almost any problem seems to quickly envelop all project participants)? For example, when it comes to the all-important CoMET services, do you counsel the owner to always rely on the geotechnical engineer of record for the subsurface portion of the service? Or do you just go along with (or even create or reinforce) the CoMET provider that bids the lowest will generate the same results as those in a position to know far better?

If you do not take the time or apply the gumption needed to educate owners that foolishly believe all CoMET professionals are more or less the same, contractors will continually be in a position to claim that errors in your plans and specifications, not their own undocumented shortcomings, were at fault, establishing the basis for a costly dispute. And when contractors move to collect extras by applying Spearin, you know full well whom the owner will call over for a chat. Why not have a good chat before then?

Remember: Risks you explain to the owner are the owner's risks. Risks you fail to explain are yours.