

Well folks, the barbarians are no longer at the gate: Now they run the castle. Which is somewhat upsetting, because it's your castle! The barbarians I'm talking about comprise the Engineers' Joint Contract Documents Committee (EJCDC), a once-venerable bastion of fairness known for producing even-handed model contract documents. But what was no longer is and, sad to say, this column focuses on the risks newly inherent in relying on EJCDC models; i.e., model contracts developed by a partnership of (believe it or not) the American Council of Engineering Companies (ACEC), National Society of Professional Engineers (NSPE), American Society of Civil Engineers (ASCE), and Associated General Contractors (AGC).

For years, EJCDC bragged about the fairness of its model contracts, and with good reason: Fair contracts help establish good relationships among project principals, encouraging the cooperation, coordination, and communication essential to project risk management and successful project outcomes.

Kiss fairness goodbye.

One of the newest EJCDC model contracts – a prime engineer/geotechnical engineer model that is a precursor of others (sorry, structurals and MEPs!) – includes a "pay-if-paid" provision, a contract element stating that, if the owner doesn't pay the prime (almost invariably a civil engineer), the prime doesn't have to pay any of its subs. Such provisions are so unfair that some states have outlawed them by statute. In others, the courts have made them illegal. But fairness aside, consider the risks that use of such EJCDC models create for primes; i.e., *you*.

First, how would you react to a prime that starts the project with the notion that "might makes right"; that some professionals are more important than others? Would you go the extra mile for the prime? Or would you utter what, apparently, the prime would utter were you to encounter hardship as a consequence of the prime's inadequate client

evaluation measures: Tough? Good-bye cooperation, coordination, and communication.
Hello additional risk!

Second, the best firms, geotechnical and otherwise, are loss-prevention-savvy; they know how to identify risks and how to manage them. By using an EJCDC engineer-subconsultant model, you would be inviting the best firms to turn down the engagement, which is always an effective risk management option. Given that "a firm that is incapable of recognizing its own risks can hardly be expected to recognize its client's risks," use of the EJCDC model would almost force you to rely on subconsultants that either do not know how to manage risk, or know something you don't (and won't, until it's too late) and thus see you as "fair game." That's not too reassuring, now, is it?

Third, if the conflict between pay-if-paid provisions and public policy has not already been decided in a state, it's almost guaranteed that any attempt to exercise a pay-if-paid provision would result in a lawsuit. And even in states that allow pay-if-paid provisions, trying to exercise the provision would more than likely cause geotechnical engineers to argue that they signed an unenforceable contract of adhesion, because the civil engineer exercised "disparate bargaining power."

Fourth, primes commonly mark up the fees they pay to their subconsultants, a practice justified in part because primes assume a certain degree of risk by dealing directly with interprofessionals on clients' behalf. Part of the risk is the civil engineer's potential for still owing a fee to a subconsultant after being stiffed by a client that declares bankruptcy. Frankly, I'd advise owners, as part of their contract formation process, to review the prime's contracts with its subconsultants. Obviously, if they include pay-if-paid provisions that seem to eliminate certain risks, the owner should insist on lower mark-ups.

Fifth, its dubious risk reduction value notwithstanding, a pay-if-paid provision increases risks overall. In those states where it is flat-out illegal or ruled to be against public policy,

the provision would be nullified. As a consequence, the reasonable protection available from a "pay-*when*-paid" provision would not be available; i.e., instead of being able to work out some type of reasonable payment formula (which generally is required when a client tanks and a "pay-when-pay" provision is in place), the civil engineer would be required to pay up immediately.

Bottom line: Construction engineering is risky enough without being aggravated by model contracts that will ultimately do far more harm than good. Frankly, I never thought I'd see the day when I would say, "If you can use anything other than an EJCDC contract, do it."