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"Heads I win. Tails you lose." That seems to be the attitude of all too many owner clients when, in order to lower civil engineering fees, they forgo important services, and then insist on contract provisions that require their civil engineers to accept the risk created by weakened scopes of service. Part of the blame for such attitudes belongs to those attorneys who advise owner clients that sneaky contract language can provide just as much protection as effective engineering services. That's a foolish notion in any event – even good contract language can be contested – and it's particularly stupid when the language offered as armor is as flimsy as the emperor's new clothes. Thus it is that certain owner-prescribed contract provisions serve as beacons to warn you, "Caution. The owner's attorney is especially ignorant about the issues associated with this contract." One such provision is this gem:

"The engineer shall abide by the highest professional standards."

Why is the requirement idiotic? Because, by law, civil engineers are required to abide by the standard of care; i.e., how a given service was ordinarily (say, 80 or 90 percent of the time) performed by peers in the same community (typically a state or portion of a state) at the same time the service in question was performed. When an engineer fails to meet the standard of care and consequently injures or damages the client or a third-party, the engineer is negligent, and negligence is a tort (a civil wrong for which the law will grant a remedy). Compounding the issue, the standard of care can only be determined in retrospect (usually by a jury). As such, engineers cannot know for a fact what the standard of care is at the time they are required to abide by it.

"The engineer shall abide by the highest professional standards" ignores what the standard of care really is by presupposing at least three standards exist (regular, high, and highest), and that the engineer is somehow is in a position to make a selection beforehand. Stated simply, "highest standards" is gibberish.

Assuming for the sake of discussion that "highest standards" does make sense, how would one identify them? Knowing that the standard of care can be legitimately ascertained *only* through research, how does one go about identifying the regular standard, the high standard, and the highest? It can't be done.

We can also ask, "What does using the 'highest standards' do for the owner's risks?" Surprise! *It increases the owner's risks*, which is why most lawyers who recommend the language demonstrate their ignorance about the issues they're advising on.

Consider this: Professional liability insurance (PLI) provides a source of recovery to those injured or damaged because the insured professional failed to abide by the standard of care. Contract language that calls for engineers to abide by the *highest* standards makes them more liable than the professional would otherwise be, because "highest standards" wording could be referred to in order to obtain relief in those cases where the

professional *did* abide by the standard of care, but damage or injury allegedly occurred nonetheless. "So we could have a claim we otherwise wouldn't have," the absolutely delighted owner would say to the attorney who provided the "highest standards" guidance. "We sure would," the lawyer responds. But were that actually the case; if the client really did have a claim not because the engineer was negligent, but rather because the engineer failed to meet "the highest standards," the engineer's professional liability insurer would say, "Hold on. Our insured wasn't negligent. Our insured merely failed to meet the higher standard the owner client established by contract. As such, the owner client wants us to cover the insured *not* for a negligence liability, but rather for a contractual liability. PLI policies expressly exclude coverage for contractual liabilities. We're paying nothing."

And here's the real clincher: Some PLI companies would use the "highest standards" language to *deny coverage even for legitimate claims*, on the ground that those claims emanated not from negligence, but rather from a contractual guarantee of performance not covered by PLI. As such, for owners to collect from the insurance obtained to protect them, they'd have to successfully sue the insurance company first. Why would an insurer make things so difficult? Because it wants to make money. And their lawyers understand insurance enough to help them achieve that goal.

In some cases, of course, engineering firms are so large insurance is not really an issue. But engineering firms don't get to be that size by being stupid. When they see "highest standards" wording, they say, "Okay, we'll do it." Then they explain how expensive doing it would be, because the project would have to be designed as though it were a clean room or nuclear power plant. Most owners would rather not pay that much, and thus are willing to accept the standard of care. And if they're not, they'll have to settle for a smaller, less astute engineering firm protected more by its insurance than its assets. Good luck.

Next time: Even more ways to tell that the owner's lawyer doesn't understand the issues.