CE News **"Risky Business" No. 7**

Limitation of Liability: It's Just Plain Common Sense

Limitation of liability – a.k.a. LoL – is a contract provision that limits an architect's, engineer's, or environmental professional's (A/E/E's) liability to its client (usually an owner client) to a fixed amount, commonly $50,000 or the fee, whichever is higher.

By the time ASFE introduced LoL to A/E/Es in 1970, the concept was almost four centuries old; formally recognized by the English Parliament in 1601, when it limited the liability of merchant ship owners to the value of a vessel's hull. Before then, ship owners were liable for the value of the cargo lost to storms and pirates, a burden so severe it jeopardized the nation's pivotal maritime industry.

As well accepted as LoL is in many industries, it's hardly a universal among A/E/Es. In fact, some are strongly opposed to it, proceeding under the notion that "we *should* be responsible for our errors and omissions." I agree, but only in situations where A/E/Es are permitted to use well-accepted techniques to help minimize their potential for errors, omissions, and claims. How often do those situations arise? Almost never, requiring A/E/Es to defend themselves against liability with one hand tied behind their back.

Because projects start from the ground up, consider, first, what geotechnical engineers face. All too often they are told to submit a bid to implement a scope of service they did not develop, and that was not designed for the specific client and project involved. And even when they are selected based on qualifications and develop a scope with the owner and the owner's other design professionals, they frequently are told to forgo one quality assurance service or another in order to lower costs. And, when that happens, the geotechnical engineer is forced to accept increased risk so the client can obtain the benefit of short-term cost savings.

The diluted quality of the geotechnical engineer's report and recommendations also increases the risk of all the A/E/Es who rely on them. That risk is exacerbated by the fact that A/E/Es seldom take the time to read the full report, because time is money and, frequently, they have accepted a fee that puts a premium on haste. The desire to move quickly can also make it undesirable to have geotechnical engineers explain the implications of their findings and recommendations, and/or to review other A/E/Es' plans to help ensure geotechnical findings have been correctly applied (assuming that the client is even willing to pay for such services). The result of this additional dilution of quality? More short-term savings for the owner, and more risk for the A/E/Es, especially given that contractors are generally selected by low bid, and often look to change orders and claims to enhance otherwise negligible profits. Which is where LoL comes in.

If the owner is willing to select A/E/Es based on their qualifications and create a solid, quality-focused scope of service with each; if that scope were to include peer review of deliverables, appropriate levels of construction observation by the professionals of record, and prequalification of contractors, then those professionals should be fully

responsible for errors and omissions. (Note that "fully responsible" is always limited, however, in that no design or environmental professional's pockets are infinitely deep.) However, when the owner derives benefits from circumstances that make A/E/E errors and omissions (or allegations of errors and omissions) more likely, A/E/Es have every reason and right to ask owners to lower the A/E/Es' liability for problems the A/E/Es could have prevented, except for the owner's demand for short-term savings.

A/E/Es and owners also need to recognize that lower-quality A/E/E services create long-term A/E/E risks that LoL is powerless to affect. Why? Because many private-sector owners and contractors can easily isolate themselves from liability by dissolving their corporate status. Public-sector owners can isolate themselves as well, through sovereign immunity. As such, when a problem arises several years after project completion (which is when most problems arise), A/E/Es may be the only project participants available for third-parties (like motorists, pedestrians, homeowners, etc.) to sue, because – even if their firms shut down – they are personally liable for their services.

Bottom line: In typical practice, the entire design team is asked to improve the owner's lot in life by foregoing QA/QC activities that make errors and omissions more likely, thus increasing team members' risks. While limiting A/E/Es' liability helps remove some of the sting, A/E/Es still will be stuck (personally, and possibly for life) with third-party exposures that otherwise would not exist. Given that reality, how can otherwise rational engineers, architects, and environmental professionals say requesting LoL is somehow wrong? "Professionals who are ignorant of their own risks can hardly be expected to understand their clients' risks." Show owners you care about risk. Ask for LoL.