



Tales from the Trenches: Managing Scope of Work Risk from Proposal to Project Completion

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**SVTC & VTA Mentor / Protégé
Workshop**

Introduction



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Goals

- Understand “Negligence” and the “Standard of Care.”
- Discuss strategies to reduce riskier scope of services.
- Learn to identify high risks items in contracts.
- Use case examples to inform good practice

CACI 600 – Standard of Care

- ▶ An engineer is **negligent** if she fails to use the skill and care that a reasonably careful engineer would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the **standard of care.**”
- ▶ You **must** determine the level of skill and care that a reasonably careful engineer would use in similar circumstances based **only** on the testimony of expert witnesses, including the engineer defendants who have testified in this case.

Standard of Care: AIA B101 2017

§ 2.2 The Engineer shall perform its services consistent with the professional skill and care ordinarily provided by engineers practicing in the same discipline, and same or similar locality under the same or similar circumstances. The Engineer shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Case Example 1: The Incredible Sinking Homes



Background

- ▶ Geotechnical engineer provides report and testing and inspection services for single-family home residential development
- ▶ Homes subside and suffer damage to interior and exterior
- ▶ Issues: Who was responsible for inspecting the grading and foundation work during construction?

That's Not Supposed to Happen



Lessons

- ▶ Clear language setting the boundaries of your scope of services
- ▶ Expressly stating who is responsible for decision making
- ▶ Standing firm on principles for benefit of business and risk reduction

Case Example 2: Hit the Moving Target, or ‘Sorry, It’s In Your Contract’



Background

- ▶ Civil engineer retained by developer on new construction and renovation of existing buildings for retail center project, including C3 requirements
- ▶ During permitting phase, AHJ personnel changes resulting in change in determination of amount of work classified as new construction triggering additional C3 storm water treatment requirements
- ▶ Issues: Did the civil engineer have to redesign as part of basic services, and who is responsible for lack of functioning of pavement system?

Seems Innocuous at First

“Consultant shall perform its Services such that they will conform to all laws, regulations, ordinances, directives, requirements, or instructions applicable for the Project or required by the authority having jurisdiction over the Project.”

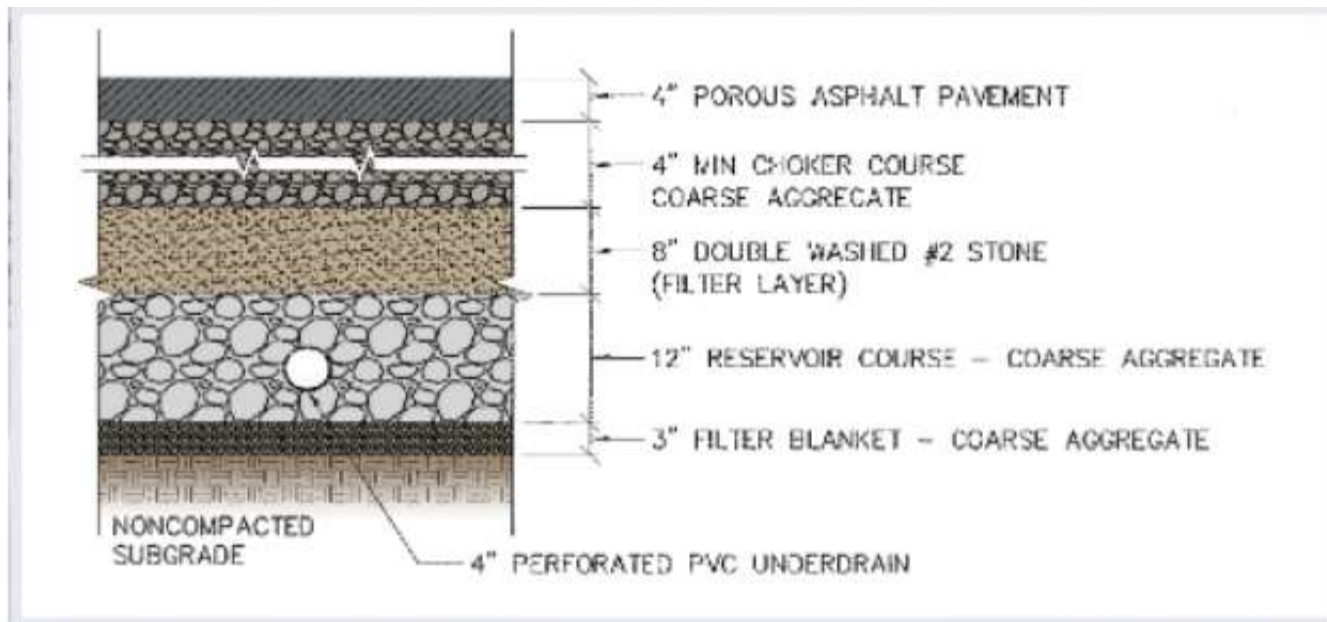
What Is Required?



C.3 Regulated Projects Guide

For use by developers, builders and project applicants to design
and build low impact development projects

So Much Water, So Little Space



Concept Versus Practice



Lessons

“Consistent with the applicable Standard of Care, Consultant shall perform its Services such that they will conform to all laws, regulations, ordinances, directives, requirements, or instructions applicable for the Project or required by the authority having jurisdiction over the Project, which, to the best of Consultant’s knowledge are in place at the time this Agreement becomes effective. Any change in the laws, regulations, ordinances, directives, requirements, or instructions applicable to the Project that occur after the Agreement’s effective date and that require re-design or modification in the Instruments of Service shall be an Additional Service and invoiced as such per the terms of this Agreement.”

Case Examples 3 & 4: Baby Come Back & A long Walk Off a Short Pier

“Eleven months from the issuance of the Certificate of Substantial Completion, Consultant, upon request of Owner, shall return to the site to inspect the works of improvement to confirm that they are performing as intended and to prepare a report for Owner of any deficiencies or damage to the Work requiring repair or correction.”



Background

- ▶ Design team returns to perform warranty work inspection, includes review of retaining wall abutting parking lot
 - ▶ Three and a half years later retaining wall fails, causing property damage
 - ▶ Issues: Were the design professionals required to “catch the bad guy”?
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- ▶ State blames the bad concrete on the civil engineer who drafted the pier plans and helped the general contractor by gratuitously reviewing State's concrete mix design. In the words of Clare Boothe Luce, “No good deed goes unpunished.”
 - ▶ Issues: Was the civil engineer responsible for the damages caused by the bad mix design?

Exception Taken With Your Approval



- APPROVED
- APPROVED AS CORRECTED
- REVISE AND RESUBMIT
- FOR YOUR INFORMATION AND USE
- INCOMPLETE SUBMITTAL
- NOT APPROVED

Checking is only for conformance with the design concept of the Project and compliance with the information given in the Contract Documents. Contractor is responsible for dimensions to be confirmed and correlated at the job site; for information that pertains solely to the fabrication processes or to techniques of construction; and for coordination of the work of all trades.

Your Company Name Here

Date _____ By _____

Oops

Review and approval

No exceptions taken

Clear definition of limits of service for submittal review

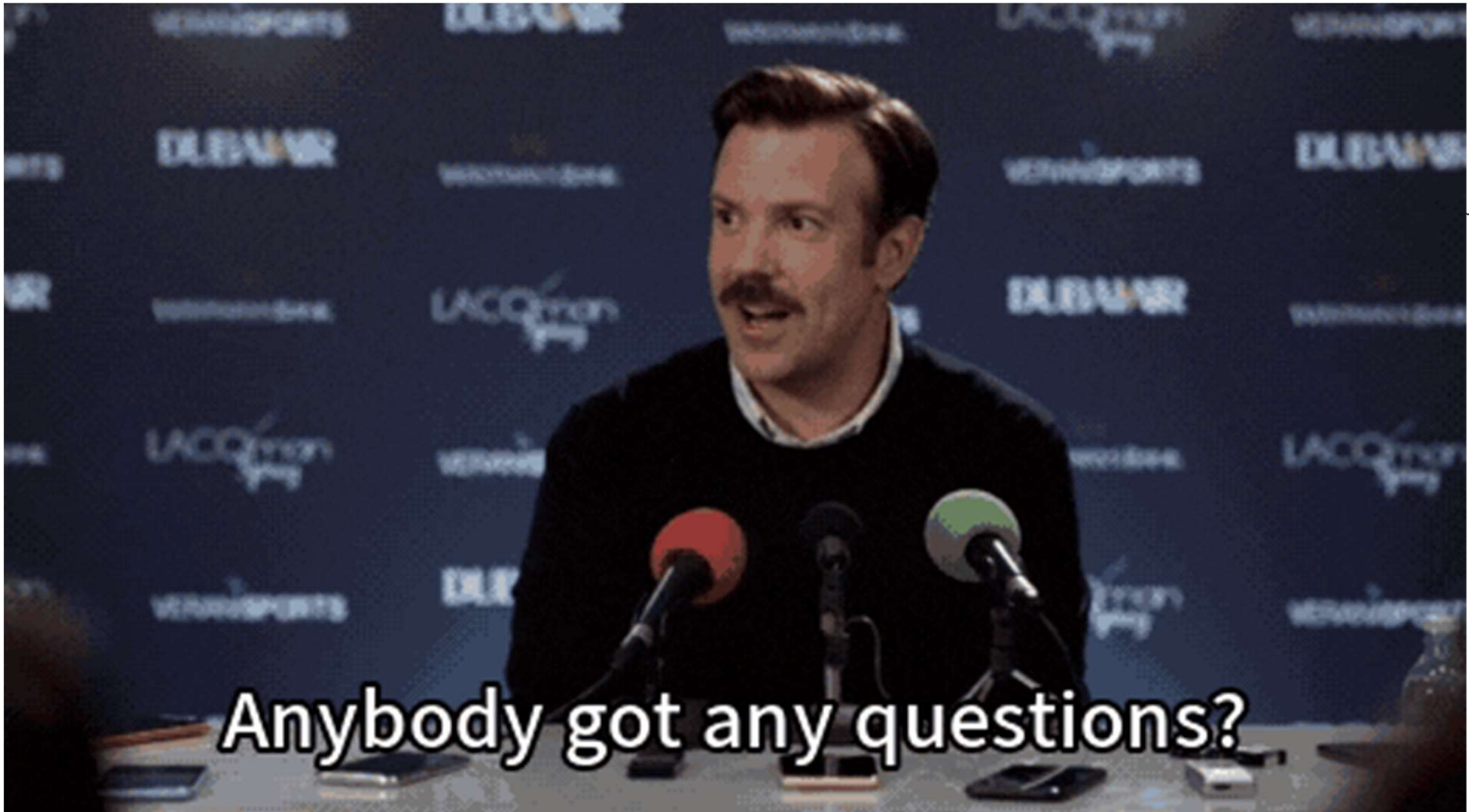


Lessons

- ▶ Define the limitations of submittal review
- ▶ Use language in contracts that best describes what service is being performed, e.g., observations vs. inspections
- ▶ If there is more risk in the service, then there should be additional compensation

Additional Ideas

- ▶ Proposal as a contract exhibit
- ▶ Discrete numbers are better than nice words
 - Plan check cycles
 - Meetings
 - Site visits
 - Submittal reviews
- ▶ Exclusions or qualifications





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