An Offer You Can't Refuse

(Case 1020)

The Case:

Your firm has been retained by NW Developers, Ltd. (a large regional shopping center developer) to do field explorations and laboratory testing, and make geotechnical design recommendations for an extensive shopping center mall adjacent to a busy interstate freeway in the Pacific Northwest. More specifically, you are responsible for site development recommendations (including extensive cuts, fill placement and compaction) and recommendations for foundation support for the proposed mall buildings. The developer has entered into a separate contract with Noall Engineering, a civil engineering firm with whom you have done business previously. Noall's responsibility is to design the proposed parking lots, roadways, and surface water drainage system. While you interact with Noall's engineers to some extent during your work, there is no direct contract between the two firms. Rather, both firms are under contract directly to the developer. In this way, the developer exerts greater financial and cost control over the project.

Your analyses indicate that the buildings may be supported on spread footing foundations with ground-floor slabs supported on grade, as long as the on-site material is placed and compacted properly.

While you are completing this work, it becomes obvious that the city will not allow the traffic volume the new mall will generate to be carried entirely on the existing adjacent streets. As a result, due to the close proximity of the interstate freeway, the developer asks your firm to do a geotechnical study and make recommendations for support of a proposed off-ramp from the interstate freeway directly onto the shopping mall property - a plan which has been approved by the state Department of Transportation. It is called a "fly-over ramp" since it consists of a bridge structure which will cross over a busy thoroughfare in order to access the mall property from the freeway.

Your firm completes the field work and analyses for the fly-over bridge structure and recommends that concrete-filled steel pipe piles be installed for the heavy bridge column loads. You provide the developer with specifications for the materials and installation of these pipe piles for inclusion in the construction contract documents.

The project is bid in two pieces and awarded to two separate contractors. One is responsible for doing the earthwork and compaction for the general site grading.

The other, Hirise Construction, is a bridge construction contractor for the fly-over bridge ramp. Your firm is hired by NW Developers to provide field observations and testing during the site grading phase of the project, even though Noall made a focused effort with the developer to have their field construction technicians on the site (the construction period took several months and the fee for the construction observation services was substantial).

While the site grading contract was underway, Hirise began construction for the fly-over bridge foundation using Deepdown Pile Driving as their subcontractor for the pile installations. Deepdown purchased the steel pipe for the piles through a Canadian distributor, who supplied pipe fabricated in a far-eastern country. Noall Engineers convinced the owner, NW Developers, that their field technicians had years of experience observing and inspecting pile driving operations, and as a result were hired by NW Developers to inspect the pile installations.

During the initial day or two of pile driving, Deepdown experienced problems in the field which appeared to baffle Noall's field technician. Your field engineer observing the site grading work offered to provide some assistance to Noall's personnel. NW Developers thanked you for the offer, but stated emphatically that the pile inspection was Noall's responsibility, and your firm was not to interact with Noall unless specifically requested by NW Developers. The project continued and you were not requested to assist Noall's personnel.

After completion of the fly-over bridge, Hirise Construction submitted a claim to NW Developers on behalf of their subcontractor, Deepdown Pile, saying that the pile design recommendations prepared by your firm were faulty, and they experienced numerous difficulties during pile driving, including splits in the spiral pipe welding and buckled splices where pipe sections were welded together in the field before driving. As a result, they ran out of pipe and had to purchase more at a far greater unit price than they had agreed in their contract with Hirise. Their extra compensation claim was for $125,000 ($125k) and Hirise tacked on an additional $15k for their costs in handling the claim with the developer, for a total claim of $140k to the developer.

Even though your engineer was not allowed to observe the pile driving operations in the field, you were called in by the developer and Noall to review the situation. You discover that 1) Deepdown Pile had ordered only enough pipe to complete the job on the assumption that no additional or replacement pipe sections would be required during construction; 2) the length of pipe ordered by Deepdown was based on the depth to the top of the underlying denser soil bearing layer, without allowance for penetration of the piles into this layer to achieve the necessary resistance to support the column loads; 3) the last several sets of piles driven were made of up short sections welded together in the field, with as many as seven field butt welds in a 65-foot pile length; 4) photographs of sections of the pipe used clearly showed that the spiral welding was faulty, and instead of a full thickness of pipe wall across the welds, the spiral weld was just

barely holding adjacent sections of the pipe wall together because the spiral was out of round; and 5) Noall's field inspector said nothing to the contractor about these problems during construction and did not reject any of the pipe material.

The Developer states that they know nothing about this type of thing, and that it is something that needs to be handled by Noall and your firm, insinuating that the $140k claim (or whatever is agreed to) should be paid by someone other than themselves.

Shortly thereafter, you are notified by Noall that the developer has in fact agreed to contribute $50k to settle the claim and Noall is willing to contribute $35k to make the problem go away. They are looking to your firm to come up with the remaining $55k to settle the claim. You indicate that the pile design recommendations were correct, your firm was not allowed to be present during the pile driving to solve problems as they arose in the field, and that the evidence indicated that the pipe used in the piles was inferior. As a result, your firm feels no financial obligation to participate in the claim settlement. You are willing, however, to act in behalf of the developer and Noall in presenting and discussing the technical evidence uncovered.

A couple of weeks later you receive a telephone call from Noall's attorney who tells you that a mediation hearing is scheduled and that you are to appear. The objective of the mediation is to settle the claim without going to court. You have been in a mediation hearing previously, and observed that the facts and merits of the case were only incidental to the effort by the mediator to have everyone contribute something financially to get the matter settled. The bargaining was done by the mediator with each of the parties involved in the claim individually in separate rooms, so that one party was not sure what the position of any other party was. You had ended up contributing money to the settlement, even though you had strong evidence that the problem was no fault of your firm.

After you tell Noall's attorney that you are happy to attend the mediation to present technical facts, but not to participate as a party to the settlement, John Dour, the president of Noall, calls you on the telephone. During the conversation, he states emphatically that you must appear at the mediation proceedings and be a party to the settlement because of your firm's involvement in the project. He also states in no uncertain terms (and rather loudly) that if you do not appear at the mediation, he will personally see to it that the State Board of Registration for Engineers revokes your Professional Engineer's license. Also made clear is that Noall Engineers will never do business with your firm again.

After you put down the telephone and notice the smoke still coming out of the receiver, you face the question: what, if anything, do you do?

Alternate Approaches and Survey Results for "An Invitation You Can't Refuse" (Case 1020)

1. Threaten legal action against Noall, and possibly Deepdown Pile Driving. Their shoddy work deserves punishment!
   Percentage of votes agreeing: 2%

2. Losing your professional engineer's license is a serious matter! Do as Noall's president, Dour, wants you to do. Go to the mediation and bring your firm's checkbook. Nothing is worth not being able to practice your profession!
   Percentage of votes agreeing: 1%

3. Play ball. Your reputation and future prospects will certainly absorb the money your firm will pay as a result of mediation. Consider it a learning experience ("the cost of doing business").
   Percentage of votes agreeing: 2%

4. Agree to participate in the mediation, but then try to convince all of the participants that you are not responsible and should not pay anything toward the settlement.
   Percentage of votes agreeing: 4%

5. Mediation is far less expensive than litigation (going to court), and is not binding. Therefore you should agree to mediation, making it clear that your firm enters the discussions with the strong belief of no responsibility. Your firm can be a good listener and at the end, not agree to participate in any financial settlement. Of course, pressure will be applied to you to have your firm contribute to the settlement, but you should not give in – assuming the facts developed through the mediation process do not change your firm's opinion of responsibilities.
   Percentage of votes agreeing: 31%

6. The Code of Ethics for Engineers published by the National Society of Professional Engineers (NSPE) and the code published by the American Society of Civil Engineers (ASCE), as well as the code produced by the American Consulting Engineers Council (ACEC) all indicate that ethical practice requires an engineer to act in professional matters for each employer or client as faithful agents or trustees. Therefore, since Noall has been a client, do as they want, even though it will cost your firm on the order of $55k.
   Percentage of votes agreeing: 0%

7. The NSPE Code of Ethics (Section III.1.a) says, "Engineers shall admit and accept their own errors when proven wrong and refrain from distorting or altering the facts in an attempt to justify their decisions." Since Noall's personnel were wrong in not rejecting the faulty pipe for the piles, and did

not reject the piles as fabricated in the field prior to driving, it is they who are violating the Code of Ethics. You should refuse to attend or participate financially in the mediation.
Percentage of votes agreeing: 18%

8. Tell Dour that for all the reasons you discovered, your firm has absolutely no responsibility in this issue, and you will not participate in any mediation proceedings in which there is any expectation of your firm contributing money to the settlement. Also tell him that if he persists in threatening you with revocation of your professional license, you in turn will bring the entire matter up to the State Board of Registration for Professional Engineers, and testify regarding his unprofessional extortion tactics.
Percentage of votes agreeing: 27%

9. Welcome the opportunity to "never do business" with Noall Engineers again. They obviously do not respect the consultants they deal with. Also tell Dour that if he contacts the State Board of Registration for Professional Engineers to have your license revoked, you will contact the Board and present the strong evidence showing that his firm was negligent in managing the job, and you will consider taking the case to court claiming professional harassment. (Perhaps he can also see smoke coming from his telephone receiver!)
Percentage of votes agreeing: 15%

Forum Comments from Respondents

1. Accept the offer to participate in mediation because I knew that Noall was inexperienced in inspecting the job in the field and did not bring specific errors of the inspection process to NW Developers. I will gladly pay some of the settlement; however the amount of the payment should be less than Noall's, due to the fact that it was their negligence which allowed Deepdown Pile to perform in an unsatisfactory manner.

2. By participating in the mediation meeting, only presenting technical evidence, and not agreeing to a financial settlement, the possibility of any wrongdoing on your part may be explored further. Also, it may become evident that Noall Engineers is liable and have no grounds to seek a settlement or complain to the state Board of Registration. However, choosing to remain silent may help Dour's case against you in court, and the legal fees and detrimental effects on your career may exceed any potential mediation settlement.

3. The cost of going to court and dealing with attorneys will be more in the end that the cost of just paying the $55,000. This geotech company should have gotten the contract in writing specifically listing their responsibilities. Since it is clear that they haven't, they better eat the cost and not deal with the attorneys, and be extremely cautious around Noall Engineering in the future.

[ed. note: there is no indication that there was not a written contract – there was. Based on normal profit margins, it would take new contracts for other clients in excess of $550,000 just to break even, so giving away $55,000 is not a minor issue.]

[ed. note for comments 1-3: mediation is not litigation (court proceedings); Dour is not suing you, he is trying to convince you to bring a bag of money to a settlement hearing.]

4. You should be willing to contribute a small amount to the settlement (maybe $20 – $25k) but stand firm on the stance that your firm is not responsible and should not carry the brunt of the payment. [ed. note: if your firm is not responsible, why contribute any money to the settlement? It will take new contracts for other clients in excess of $250,000 just to break even without a profit gain.]

5. This one I would FIGHT! Changes made in the field, like improperly welding short sections together under another company's inspector, are not your company's responsibility. You were told "not to interact with Noall unless specifically requested by NW Developers." You should take all your documentation to the state Board of Registration for Engineers. Tell them you have been threatened by another engineering firm, convene the facts in the case and let the chips fall where they may. I am on the State Board of Registration in my state and Noall would be in hot water with me for threatening another engineering firm, when it appears that Noall was a big part of the problem. Stand up and fight!

Epilogue

As it turns out, you reiterated you position that you had no responsibility for the screw-ups in the field, and decided not to appear at the mediation meeting, but told Noall's attorney that you would be available by telephone if technical questions arose needing your input. They didn't call. Your engineering staff was quite disturbed, fearing that your action would alienate Noall and there would be no more work from them in the future (not that there had been any appreciable work with them in the past).

Some time later you learned that in lieu of a monetary contribution from your firm, NW Developers assigned your written contract for the design (but not the inspection) of the piles to the contractor as part of the settlement. The contractor felt they could in turn sue you directly (since they now had been legally assigned your contract and you were no longer a third party in your legal relation to them). When they got back to their office after signing the settlement agreement with NW Developers and Noall Engineers, the contractor discovered that you had included a clause in the pile design contract with NW Developers limiting your liability (the total amount the client could sue you for) to $50,000 or your fee, whichever was less (a standard practice for quality engineering firms). You had

completed your scope of services under the contract and the fee paid to your firm by NW Developers for completion of the pile design, including the field explorations and laboratory testing, was on the order of $20,000. In order to try to recover that amount from you, the contractor would have to spend considerably more in legal fees and court costs, and run the very real risk of having their complaint thrown out entirely. They did not pursue the issue any further.

Despite the trepidations of your staff, you understood that in many/most cases, meditation is intended to bring opposing parties together to effect a settlement of some sort, which may or may not be totally satisfactory to the individual parties involved, but is considered to be far better than expending the funds necessary to take the issue to court, and run the risk of losing even more money. Participation of the individual parties is voluntary, and the mediation does not proceed unless a sufficient number of key parties participate. Such mediations usually are limited to one day (or perhaps two) with an outside mediator hearing each party tell their side of the story, even if it is not totally factual or substantiated. The issue of who is right and who is wrong is of little consequence.

After the initial presentations by the participants, they are split up into separate rooms away from each other, and the mediator uses what s/he has heard to convince each of them individually that it is in their best interest to put a sum of money (recommended by the mediator) into the pot to make the problem go away. The mediator goes from one party to another in marathon fashion, bargaining for amounts required to satisfy the total claim, using whatever legal, quasi-legal, psychological or emotional tactics they deem appropriate to convince the participants and bring the proceedings to a speedy resolution. Once that is achieved, the participants sign the agreement and go away, if not totally satisfied at least feeling that they avoided spending unnecessary large amounts on lawyers, which could never be recovered.

Needless to say your firm did no work for Noall Engineers for several years while Mr. Dour was still president. But then, you had done little, if any, work for them previously, ad were not working under a contract with them on this project. It was obvious they were making every attempt they could to take work (the pile installation inspection) away from you in order to increase their own fees, and reaped an appropriate reward for their efforts.