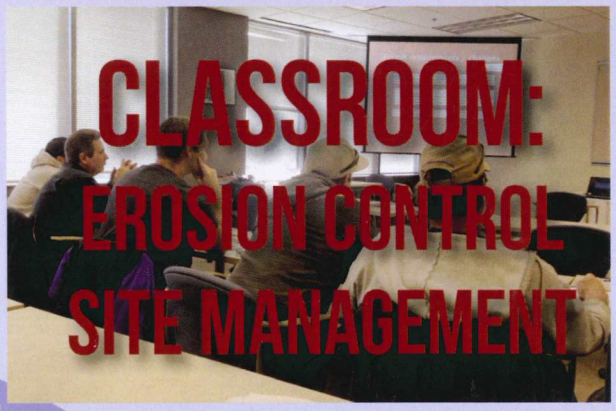
THE MINNESOTA UTILITY CONTRACTORS ASSOCIATION

Fall 2015

UNDERGROUND PRESS

1000 Westgate Drive, Ste 252 | St. Paul, MN 55114 | www.muca.org

HANDS-ON: HD SUPPLY'S FUSION TRAINING



CLASSROOM: EROSION CONTROL SITE MANAGEMENT

THE BENEFITS OF BLENDED LEARNING

story on page 20

Also inside:

ONLINE: PIPELAYERS CERTIFICATION

WHEN THE STREET SETTLES:

OWNERS TRYING TO CONTRACT AWAY LIABILITY FOR DEFECTIVE DESIGN

By Thomas R. Olson, Olson Constuction Law
651-298-9884 | trolson@olsonconstructionlaw.com

As someone who assists contractors on change issues, one issue that is growing in scope is street "settlement." The road settles, be it before project completion or during the warranty period, and the engineer asks that the contractor fix it. In an article that I wrote in last fall's *Underground Press*, entitled "When the Road Settles, Who Should Pay for the Cost to Repair?", I advised that contractors should not be so quick to assume responsibility for this problem. Based on my experience, more often than not the problem is the result of defective design, not defective construction. Typically, if you met the applicable requirements for lift size, optimum moisture and density, it should not be the contractor's cost to fix the settlement problem.

It is normally the case, and the law in Minnesota, that if the design documents sufficiently dictate how the work is to be performed, there is an "implied warranty" that it can be built as designed. If it can't, or it is more costly to complete because of a design deficiency, the owner should be responsible to pay for all the related extra costs. This is not only the rule in Minnesota, but throughout most of the country. There is, however, a movement in Minnesota and many other states whereby owners and engineers are seeking to avoid this liability. They are trying to do that by two means.

First, notwithstanding all of the contract language which describes how the project is to be constructed, engineers are claiming that the contractor still retains enough discretion on what to do, so there should not be an implied warranty. So, for example, engineers will point to the standard contract limitation that the "Owner shall not supervise, direct, or have control or authority over, nor be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction." If there is a problem with the street settling or some other problem, the engineer is relying upon this or other language to claim the owner did not impliedly warrant the design.

Second, engineers are including language which they claim disclaims liability for the implied warranty. So, for example, language is included which states that "[a]ny settlement of road surfaces . . . shall be considered failure of the mechanical compaction. The Contractor shall be required to repair such settlement."

How do you protect yourself from having to repair a street that settles or other design problems? Other than not bidding projects with questionable contract language (which is likely not a realistic option), you must first determine whether the contract language is properly interpreted to sufficiently direct "how" the work is performed such that there is an implied warranty. Make sure that you do this analysis rather than relying upon the engineer to do it for you: we know where that will go! And, while you are examining the contract, look at whether there is language included that suggests the contractor is responsible for problems such as settlement.[1] On this issue, be careful to neither refer to nor acknowledge street movement as "settlement." If you have met applicable lift size, moisture and density requirements, the movement should be the result of either "subsidence" (downward movement due to the withdrawal of moisture) or "heave" (upward movement due to the addition of moisture), not "settlement" (downward movement due to loading in excess of the soil's bearing capacity).

[1] It is still an open question in Minnesota, like many other states, on whether an owner even has the legal right to disclaim an implied warranty. Some state courts have held that an owner can disclaim this warranty, while other states have ruled that an owner can. It is also unclear on if an owner could disclaim this warranty, exactly what language would be required to do this. Minnesota has not ruled on either issue.