



Infrastructure Inspection Engagements: Opportunities and Perils

The sad state of the nation's infrastructure is probably no surprise to anyone reading this article. While all types of public infrastructure represent significant capital investments, many—bridges, tunnels, dams, and levies—also represent significant safety hazards. The failure of these infrastructures potentially brings far-reaching ramifications, including major loss of life, and/or astronomical economic losses. In the wake of levy failures in New Orleans and California, floods in the Midwest, a fatality in a newly constructed Massachusetts tunnel, and a catastrophic bridge collapse in Minneapolis, the public has demanded safety assurances—and the politicians have responded. Politicians have turned to the cash-strapped owners and operators of these previously-taken-for-granted facilities, and commanded their implementation of inspections, repairs, and safety upgrades.

The majority of these structures and facilities are publicly owned and maintained. The agency, authority, or other public entity responsible for these facilities generally implements some type of inspection regime. Many of these public entities, however, are finding their internal resources overtaxed both in the number and skill level of inspectors available to comply with the newly mandated inspection regime. As a result, the public entities are outsourcing these services. This practice of retaining independent consultants to perform inspections is not new. The Federal Highway Administration's ("FHWA") bridge inspection program, for example, which has been in place since the mid-seventies, has been performed by a combination of private consultants overseen by state Departments of Transportation ("DOT") across the country. In January of this year, Congress approved a similar national program for the inspection of tunnels. It is likely that DOTs will begin outsourcing these tunnel inspections as well. The inspection of dams and levies are, of course, receiving similar attention, although the ownership and responsibility for maintenance and inspection of these facilities is often less clear.

This heightened demand for inspection services presents civil, structural, and geotechnical engineering firms with increased opportunities to participate in these inspection programs. These opportunities, however, are coupled with exposure to huge risks associated with a catastrophic failure of the inspected facility. Putting the issue of loss of life aside for a moment, the economic damages associated with such a failure would exceed the available insurance coverage of all but the very largest firms in this country. Indeed, these insurance proceeds would be quickly attacked by plaintiffs, as they represent a new source of recovery that was not available to that hypothetical plaintiff when the public entity performed the inspection. This is because the public entity benefits from sovereign immunity to losses incurred by others as a result of the negligent performance by the public entity. No such immunity is available to the private engineering firm.

There are, of course, steps that firms can take to minimize their exposure. Perhaps the most significant consideration is to negotiate a clearly defined scope of work that identifies the limits of the inspection and associated budget to perform that inspection. For bridges, the FHWA bridge inspection manual is a good place to start. For tunnels, the 2005 joint FHWA/FTA Tunnel Inspection Manual presents a generic inspection program. The commercial terms and conditions present a wholly independent concern—one in which a public agency will likely have considerably less autonomy to negotiate.

Risk Management Prevention Tip

If your firm would like to engage in these infrastructure inspections, it is imperative that you take into consideration the unique risks of those engagements as outlined in this article, plus any others that are applicable to the type of project you accept. With the disproportionate potential liabilities such an assignment carries, it is vital that your role, and more importantly the limitations of your role be clearly understood by your team and your client. Similarly, a clear understanding of what client provided data can be relied on and what data requires validation will serve to insulate the design professional from the work of others. Finally, all opinions or recommendations provided must be reasonably and logically derived from the observations and data collected. (Donovan Hatem LLP will feature design professional roundtables exploring the various concerns and considerations for firms engaging in these inspection programs in January of 2009—visit www.donovanhatem.com for more information.) It is also advisable that you review the actual terms, coverages, amounts, conditions, and exclusions of the relevant insurance policy before undertaking any project to verify it would provide protection.

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