

MARCH 2008

# tunnels



# & tunneling

NORTH AMERICA



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**Front cover**

An Akkerman EPBM completes the Hollyhills Drain project for the Los Angeles Department of Public Works. General contractor Mladen Buntich Construction and tunneling contractor Pacific Boring used the EPBM to jack 84" i.d. reinforced concrete pipe in excess of 1,000ft in one drive.

In 1973, Akkerman Inc, of Brownsdale, MN, began providing TBMs to meet the needs of the trenchless market. Today the company sells and leases new and used microtunneling, pipejacking, tunneling and guided boring equipment. Akkerman has also built a reputation for reliability and responsive service through its team of experienced engineers, field technicians and a large parts department. Visit Akkerman at NAT, booth #511.

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# The need for fair contracts

Bill Edgerton, PE, Jacobs Associates

**W**hy don't all public owners prepare contracts that offer equitable terms - contracts that are fair? Many owners respond to this question by stating that they have developed their contracts over many years to "prevent contractors from taking advantage of us."

It is easy to see from such statements that unfair contract language is reactive; it's not based on a conscious decision to create unfair (i.e. one-sided) contracts. However, despite the lack of intention, that is the result. Unfair contracts may include inequitable terms and conditions, unreasonable notice provisions, unclear guidelines for pricing changes and resolving disputes, or all of the above.

The terms of most public contracts are not negotiable, and bidders are asked to "price it the way you see it." Given this landscape, there are three really good reasons for owners to make their standard contract language fair to all parties:

First, fair contracts result in more accurate and more competitive bids. Right now, the tunnel construction industry is a seller's market, and an owner attracting even two bidders will benefit from even this low level of

competition. Some contracts in recent years have been awarded to a single bidder. The owners I talk to understand that unfair provisions increase the bid cost, but many are willing to pay such a premium to obtain the certainty of a firm price. The problem with this approach, as described below, is that prices based on unfair contract provisions are rarely firm.

Second, fair contracts reduce the likelihood of certain bidder behaviors that are likely to lead to disputes. When bidding is competitive, some bidders will not include all the costs of complying with unfair contract provisions in their bid—instead they will make optimistic and unrealistic assumptions about whether such provisions will be enforced, or

recommendations by ignoring what they consider unfair provisions. Owners often complain in such circumstances that "the DRB is not reading the contract." And although I'd be the first to agree that DRBs should make recommendations based on what the contract says rather than what they think it should say, the truth is that the DRB is reacting, albeit inappropriately, to the one-sided contract provisions.

So given these three good reasons, why don't more public owners re-evaluate their legacy contracts? Sometimes, changing standard terms and conditions can be viewed as caving to high-profile contractors. In other situations, an owner's procurement and legal staff are

trying to create contract language that makes their job easier. Unfortunately, this usually works against the objectives of the project delivery staff, who are trying to get competitive bid prices and

minimize disputes and claims.

Ultimately, we all must choose to set aside selfish motivations and do the sometimes difficult work of establishing fairness in our projects.

Successful underground construction occurs when individuals work productively toward a common goal. A fair set of terms and conditions establishes a framework for partnership between the owner and the contractor and helps generate shared respect for the other party's objectives.

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assume that there will be distractions or differing site conditions that will allow them to "make up" the impact of the unfair provisions. All of these behaviors will result in disputes and claims. So the owner is hit with the double whammy of more disputes and claims along with higher bid prices.

Third, fair contracts will be supported by dispute adjudicators. When dealing with the inevitable disputes that arise from one-sided contracts, many dispute review boards make their

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