Construction Law in North Carolina

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Wine without Cheese? (Why a construction contract needs an order of precedence clause)(Law Note)

By Melissa Brumback on July 28, 2011

Reader Mailbag:

For today's law note, I'm addressing a comment that came to me last week from Dave O'Hern of Miller O'Hern Construction. Dave writes:

I am a general contractor doing a fuel tank replacement project for our county. In the specifications there is a spec for a UL 142 tank, on the plans the spec references UL 2085 – a much more expensive tank. My subcontractor bid the UL 142 tank. **The specifications state that the specs and plans are on the same level of precedence.**

The county wants me to furnish the more expensive tank without compensation citing the clause that states the plans and specs are complementary and what is called for by one is binding as if called by all and the most stringent requirement will apply.

My position is the word "stringent" according to Websters means "rigidly controlled, enforced, strict, severe." The two specifications are written by Underwriter's Laboratory and precisely decribe each type of tank clearly and without ambiguity for the purpose of rigidly controlling the qualities of the product. Consequently the two specifications are equally stringent. Stringent does not mean more expensive or what the pre-bid intent of the owner.

Is this sound reasoning, does it fall under Spearin and is there another defense I should take?

What Dave is experiencing is a **poorly-constructed contract**. Obviously, the goal in a set of construction documents is to not have any conflicts. However, between specifications, drawings, shop

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drawings, contract language, addendum, and change orders, the goal of absolute consistency in contract documents is ~~impossible~~ extremely hard to meet.

The usual way around this very likely problem is to **state the order of precedence of the various contract and construction documents**, so that in the event of a conflict between two provisions, everyone knows which one prevails. In the absence of any contract language stating the order of precedence, the parties are forced to argue contract law principles such as mutual mistake, which party is considered the contract drafter (and hence, disfavored), and other technical legal issues ~~that numb the mind~~ are only exciting to those of us crazy enough to go into the legal profession.

Sure, you can have wine without cheese, but why would you? The two should go together, in the same way that ***an order of precedence clause*** should go with any construction contract.

Dan has also raised the issue of "more stringent" requirements. In general, when a contract contains instructions that are susceptible to two or more reasonable interpretations, these are considered "ambiguities". There is generally a duty on the contractor to **point out conflicts** between the documents. However, where a conflict between the documents is not noticed by any party prior to the bidding, the plans arguably are defective under the Spearin doctrine.

So, back to Dan's question. Dan– your situation is a mess! I agree that your reasoning on the stringent requirements is sound; **whether or not a Court will agree with your position remains to be determined**. Time to hire a good construction lawyer in your jurisdiction to negotiate a resolution to your situation! (I see that you are in Arizona. If you don't have a lawyer, let me know and I'll try to get you a recommendation or two).

Have you ever encountered a contract like Dan's? Did it cause any problems with conflicting documents later on? How did you handle the situation?

Photo: 054/365: Wine, cheese and crackers via Addison Berry/Creative Commons license.