Construction Law in North Carolina

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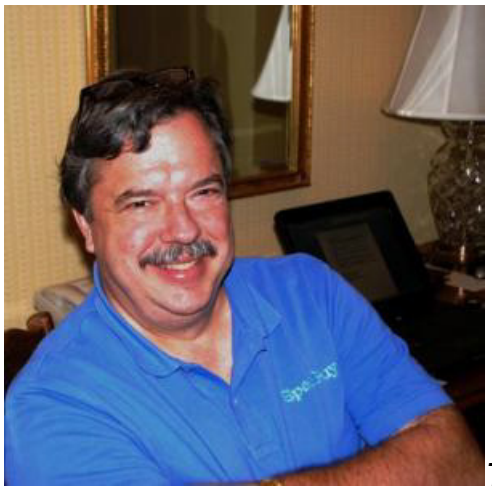
The Expert Weighs in on construction contract "orders of precedence" (Guest Post)

August 3, 2011 by Melissa Brumback



This past week, my post on the concept of contract "orders of precedence" generated a lot of comments and feedback from blog readers. One reader, an expert in MasterSpec documents, weighed in with a weighty response that deserved a post of its own. What follows is a Guest Post by ***Phil Kabza****,* ***FCSI, CCS, AIA.*** *Phil is a partner with SpecGuy, providing specifications and technical consulting and training to architects, engineers, and facility owners.*

Phil is a graduate of the University of Michigan College of Architecture and Urban Planning and WesternMichiganUniversity, and holds certifications as a construction specifier, contract administrator, and LEED professional. He has over 30 years experience in architectural and construction quality management and instruction. He is Past Chair of the AIA MasterSpec Architectural Review Committee, a contributor to The Construction Specifier magazine, and founding Chair of the Charlotte Building Enclosure Council. He is a Fellow of the Construction Specifications Institute and a member of Specifications Consultants in Independent Practice.

Your posting on order of precedence clauses covers a topic that is near and dear to the professional specifier's heart. AIA contract documents and professional specifier practices maintain that order of precedence clauses are typically not called for – the drawings and specifications are a unified whole, and any conflict between or within them is subject first to interpretation by the architect/engineer, and if not resolved, is subject to resolution through the claims process.

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What happened in the fuel tank replacement case you cite is the bidding subcontractor, whom we can assume to be reasonably competent and fully aware of the conflict between the two documents, sought a bid advantage by withholding their discovery of the product note conflict and by bidding the less expensive product, perceiving that the chances that they will be held to the higher product standard were low enough to take the risk of reversal of their claim.

Bidding subcontractors/suppliers are responsible for reading and interpreting a small portion of the drawings and one or two specifications sections out of the 200 or more sections on a project, the work results for which they are held to be specialists. The architect/engineer is responsible for preparing all of several hundred drawings plus the 200 or more specification sections describing work results for which they are held to be reasonably knowledgeable under their respective standards of care. So let's keep in mind that **the bidding subcontractor/supplier is in a position of superior specialty knowledge and is electing to withhold discovered information about the architect/engineer's documents for his/her own business advantage**.

To incorporate an order of precedence clause declaring that either a drawing note or a specification clause should take precedence in the contract will mean that 50 percent of the times where there are conflicts within the documents (I'm guessing the percentage), the owner will be entitled to receive a component that does not meet their design intent. The architect/engineer has either prepared or carried over a drawing note that includes erroneous information, or a specification has been written that is not coordinated with the drawing note or otherwise does not reflect the owner's design intent in the product selection indicated by the architect/engineer.

Upon discovery of the conflict during the submittal process (assuming that it is discovered), the owner's alternative is to negotiate for the appropriate component in a setting in which they have only one party with whom to negotiate – a contractor who is already under contract, who may have a financial interest in exploiting a delay through the negotiation, and who often has little incentive to provide the appropriate component for a reasonably adjusted price. **While the order of precedence clause may make contract interpretation simple, it does nothing to ensure that the owner will obtain their design intent at a reasonable price** – it just shifts the difficulty to the later price negotiation. Or worse.

What's most troubling is the assumption that an order of precedence clause plus the normal submittal review process will protect the owner in such an instance by revealing the conflict already concealed by the bidding subcontractor. This is because **the architect/engineer's review of the contractor's submittals takes place in a very**

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different environment compared to the design environment in which the original product selection decision was made and the drawings and specifications were developed. Someone knew which underground fuel tank was required; was it the drafter of the drawings, or the specifier? Which should take precedence?

Submittal reviews are not as comprehensive and coordinated an architect/engineer activity as is design. Submittal reviews are not necessarily carried out by the designing architect or engineer. The purpose of submittal review is to establish basic conformance between the contractor's submittals and the requirements of the contract documents – not to comprehensively review the content of the design documents. So the likelihood that the reviewer would miss the drawing note and your GC's owner would receive a UL 142 underground fuel tank only to have it rejected by the authorities having jurisdiction during an onsite inspection is rather high – or worse, to have it installed and fail, resulting in an environmental calamity and giving rise to an extraordinarily expensive claim and drawn out resolution process that will cost thousands of times the difference in price between the two tanks.

It is in order to avoid such expensive experiences that the standard AIA documents place the management of the risk for the result of conflicting requirements in the contract documents in the hands of the party that they know is in the best position to perceive and handle the conflict: the contractor whose specialist subcontractor/supplier has a high financial incentive to take note of the conflict and who can decide to handle it responsibly – or not. This is not an argument in favor of architect/engineers avoiding responsibility for their design errors; **this is a case where the overriding interest of the owner and the public in achieving design intent should take precedence**, because the potential for enormous loss to all parties plus their insurers is greatly reduced.

The AIA and professional specifier position that the bidding subcontractor **should not withhold information but should seek interpretation** during the bidding process is not unreasonable, even if it is not a popular one among contractors jostling for bidding advantage. One or two well published case precedents that uphold the contract clause requiring the contractor to provide the "more stringent requirement or expensive product" likewise would be enough to curtail the bidder practice of deliberately withholding information in order to secure a contract.

As for the specifics of the contract your party is wrestling with, a couple of well-deserved whacks on the architect/engineer's mousing hand for placing specification information in the drawings, and for not relying on carefully prepared specifications to address this topic. Engineers are especially prone to doing this. **That is one reason why two-thirds**

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of architect's potential claims result from their consultant's poorly prepared documents. The Construction Specifications Institute's maxim to "say it once, say it correctly, and say it in the proper place" is often ignored by the engineering community at their and their architect clients' peril.

Let's not let the owner off the hook, either. Words matter, and use of the term "more stringent" without the accompanying "or more expensive" phrase likely comes from the owner's own custom contract and certainly gives the contractor something to hang their hat on in this dispute. It shouldn't. The "more stringent" term is not in the AIA contract documents nor does it appear in MasterSpec, the AIA's master specification library. (Disclosure: We are a consultant to ARCOM, MasterSpec's publisher and have produced several recent updates to the MasterSpec Division 01 General Requirements.) This suggests that the owner has their own contract clauses or supplementary conditions that include the phrase "more stringent."

Professional specifiers throughout the country decry the deplorable conditions of most public agency contracting documents, and this one is likely no exception. Case in point: the State of North Carolina's construction general conditions document OC-15 that intermingles the requirements for bidders and for the contractor, which apply to two different entities in two different phases of the project and should be well separated. The OC-15 also conflicts with the state's own supplementary conditions document. The state also dictates architect/engineer performance that conflicts with the professional standard of care. That's not to mention the nearby city government whose general conditions consist of the 1976 AIA A201, much modified, and probably thoroughly misunderstood as well. Add to that any contract where the owner's attorney incorporates the bidding requirements documents in the construction contract – unnecessarily providing meat for more interpretations, claims, and disputes, and fees.

It's a wonder that anything gets built. That it does is testimony to the many people in our industry who are determined to do good if imperfect work, build things, make a living, and stay out of court.

[Melissa here again]: Well said, Phil. Thanks for providing me a much better understanding of the Specifier's position concerning "order of precedence" clauses. The attorney in me still likes them, but I can understand your point that contractors can abuse their position by failing to inform the design team of conflicts in the documents. I represent many such architects and engineers who have experienced such after-market bidding by contractors. Sometimes it is difficult to know whether the contractor honestly missed the conflicts, or whether he saw it and is taking advantage of

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the situation. I certainly agree that the contractor should bear some responsibility for reviewing his scope of work completely prior to submitting his bid.

Do you agree with Phil? What is your position on the role and interplay of contract documents on the construction project?