

INTERPRETATION

Clause Order

the order of the clause in the contract matters

By Christopher S. Drewry

The complexity of construction projects has increased over time—with a corresponding expansion of the contract documents utilized to build the job. With this expansion comes an increased risk of conflict and/or ambiguity within the contract documents themselves. Since a flawless project manual may be as elusive as a surprise-free job, the contractor is often left with a dilemma as to what specification controls.

PRECEDENCE CLAUSE

Most times the issue can be resolved at the project level. But what if the size or scope of the ambiguity proves too impactful to resolve in this informal manner? What controls? The answer can be provided by an order of precedence clause, which identifies the order in which the various contract documents are prioritized when resolving a conflict or ambiguity by and between the requirements of those contract documents. The goal of a precedence clause is to create certainty in the resolution of a conflict or ambiguity in the contract documents. In theory, there is a contractual “tie break” so to speak, thus, never leaving the matter unsettled. Of course, sometimes that certainty comes at the cost of the equitable resolution. One of the challenges in

deciding whether to include an order of precedence clause and how to prioritize the contract documents within that clause is the difficulty of determining how that priority will affect the outcome of a dispute.

REAL-WORLD EXAMPLE

Imagine a set of drawings that depicts the design of a distribution center. The civil drawings identify 50 engine block heaters installed throughout the site to warm truck engines during the winter months. The electrical site drawings identify 40 engine block heaters. The electrical site drawings are much more specific regarding the number and location of the engine block heaters, even identifying each circuit within the electrical panels that serve the 40 engine block heaters. The project owner—a developer—demands the general contractor install an additional 10 engine block heaters as shown on the civil drawings. The owner points to the order of precedence clause in the contract that gives precedence to larger scale drawings over smaller scale drawings. It just so happens the civil drawings are drawn on a larger scale than the electrical site drawings. The general contractor, on the other hand, argues that the more specific, detailed drawing should control over the more general drawing as to

the issue of the engine block heaters. Who wins? Basic deductive reasoning suggests the intent of the design is for 40 engine block heaters to be installed, but should the order of precedence clause be applied anyway? After all, the order of precedence clause typically does not require any analysis or interpretation; rather, it provides the roadmap for reaching the contractually determined conclusion. In so doing, the precedence clause eliminates any subjectivity in determining the outcome.

The question for judges, arbitrators, and even initial decision makers, is when the order of precedence clause should be invoked. Should it be the first authority consulted any time there is a difference between or among the contract documents? Or is there a preliminary analysis which must take place using rules of contract interpretation, which have developed over decades of case law and provide the framework for the contract analysis in the absence of an order of precedence clause? While many construction professionals, such as the developer in the example above, will immediately look to the order of precedence clause as the controlling authority, courts will often attempt to interpret the terms of the contract prior to (or at least in conjunction with) applying the order of precedence clause.

CONTRACT INTERPRETATION

One of the primary rules of contract interpretation is the court attempts to determine the intent of the parties from the four corners of the contract. If the joint intent of the parties can be ascertained from the actual contractual language, then that language controls. In other words, if the contract can be applied to avoid inconsistencies between clauses, there is no need to refer to the "Order of Precedence" clause. Courts will seek interpretations that harmonize provisions, rather than those that require you to read out or ignore conflicting terms. Additionally, when in conflict, specific language or terms control over more general language.

A common term in construction contracts reinforces this process. Most sophisticated construction contracts contain a term which requires the contract documents be read together in conjunction with one another to determine the extent of the contractor's obligations. "The drawings and specifications are complementary. If work is shown only on one but not on the other, constructor shall perform the work as though fully described on both." § 14.2.1, ConsensusDocs 200® 2011, Revised June 2019. "The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results." § 1.2.1, AIA A201 – 2017. Given these clauses and the applicable case law, the decision maker (whether a court, arbitrator, architect, or other initial decision maker) should attempt to resolve any internal conflicts using traditional contract interpretation rules first before invoking the order of precedence clause.

Interestingly, of the two primary standard form contracts used in building construction, ConsensusDocs and

American Institute of Architects (AIA), only ConsensusDocs contains an order of precedence clause. AIA, quite famously, recommends against incorporating an order of precedence clause in the contract documents. Their reasoning is that it is the architect's responsibility to interpret the contract documents and an artificial hierarchy would interfere with the proper criteria for the architect's interpretation. ConsensusDocs, on the other hand, desires the certainty created by the inclusion of an order of precedence clause. §§ 14.2.2, 14.2.3 ConsensusDocs 200.

CLOSING THOUGHT

The two approaches are quite different and are both good examples of how one may choose to address order of precedence clauses in construction contracts. If you choose to include an order of precedence clause or must negotiate the specific language of an order of precedence clause, consider whether to include language requiring the decision maker to first undertake an analysis using traditional contract interpretation techniques in an effort to determine the intent of the parties as a precursor to invoking the order of precedence clause. While doing so may interject some measure of subjectivity into an otherwise mechanical interpretation, it may also avoid unequitable results (and unnecessary disputes). ■

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