

CONSTRUCTION : BULLETIN

Order of Precedence Clauses

Do You Need Them?

Construction and engineering projects are often complex, so it is inevitable that construction and engineering contracts will include a number of different documents setting out the requirements and specifications for the project. These contract documents will often run into hundreds of pages and it is easy to see the potential for inconsistency between them.

It should go without saying that contract documents must be checked for inconsistencies before the contract is signed, but as it is very difficult to spot every possible inconsistency, contracting parties often include an order of precedence clause as a safeguard. An order of precedence clause sets out the order in which the contract documents take precedence in the event of an inconsistency.

However, many popular standard form contracts do not include order of precedence clauses. For example, NEC contracts give the Project Manager the power to issue instructions dealing with inconsistencies and JCT contracts emphasise the importance of the contract conditions whilst apportioning the risk of inconsistencies in other documents between the employer and contractor. So, do you need an order of precedence clause in your contracts?

RWE Npower Renewables v J N Bentley

The recent case of *RWE Npower Renewables v J N Bentley* highlighted the limited application of order of precedence clauses.

J N Bentley Limited ('JNB') were engaged by RWE Npower Renewables

Limited ('RWE') to carry out civil engineering work in relation to a hydro-energy project in Scotland. The contract was an NEC3 Engineering & Construction Contract which included a short "Agreement" document to be signed by the parties. The Agreement contained a clause which set out an order of precedence of contract documents as follows: Contract Data Part One, Z clauses, NEC3 conditions of contract, post-tender clarifications, Works Information, Site Information, Contract Data Part Two and the tender.

Completion of the project was delayed and the parties got into dispute about the extent of the works which had to be completed in order for JNB to achieve completion of section 2 of the works (and to avoid the deduction of liquidated damages). JNB argued that there was a conflict between the Works Information and the Contract Data Part One, so the Contract Data Part One should take precedence. RWE argued that the contract had to be construed as a whole and it was not necessary to rely on the order of precedence clause because it was possible to read the Contract Data Part One and the Works Information together in a way which made sense.

The court stated that it was only necessary to consider the order of precedence clause where there was an irreconcilable ambiguity or discrepancy between the contract documents. To illustrate what sort of ambiguity or discrepancy would be considered irreconcilable, the court gave the example of the Contract Data Part One requiring something to be painted white but the Works Information requiring it to be painted black.



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The court went on to state “*If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one; in those circumstances, one does not need the ‘order of precedence’ to resolve an ambiguity which does not actually on a proper construction arise at all*”. The court analysed the contract documents and decided that they could be interpreted collectively, so the order of precedence clause was redundant.

The case went to the Court of Appeal, but the decision was upheld. The appeal judges agreed that the relevant provisions of the Contract Data Part One and the Works Information could be interpreted together in a commercially sensible manner.

Is an order of precedence necessary?

The RWE case makes it clear that a court will seek to construe a contract as a whole and will always attempt to reconcile apparently conflicting provisions in a commercially sensible way. An order of precedence clause will only be used if it is necessary to break an irreconcilable deadlock between two conflicting provisions. The example of white paint versus black paint given by the court is quite extreme and suggests that genuinely irreconcilable conflicts are likely to be relatively rare in practice.

The case also demonstrates that even if an order of precedence clause is included in a contract, it will not necessarily prevent disputes from arising.

Bearing in mind the approach of the courts, contracting parties involved with a simple project or a contract which does not contain many documents may decide that an order of precedence clause is not necessary. Even without an order of precedence clause, there are other common law rules of contract interpretation which could be used to try to resolve a conflict. For example, bespoke amendments will generally take precedence over standard conditions.

However, on more complex projects, there will inevitably be a large number of contract documents and a greater scope for inconsistency, so it may be considered sensible to include an order of precedence clause as a fall-back, particularly if the parties are using a standard form and do not like the way the standard form deals with conflicts between documents. From the perspective of a contractor or sub-contractor, it may certainly be preferable to include an order of precedence clause than to give a project manager or other agent of the employer the power to correct ambiguities.

It is nevertheless important for the parties to understand that the order of precedence clause will only apply where there is an irreconcilable conflict within the documentation and should not be relied on as a substitute for thoroughly checking the contract documents at the outset.

Drafting considerations

If a decision is taken to include an order of precedence clause, it will clearly be necessary to identify all of the contract documents and consider their order of importance. This can be a difficult task in itself, as each party will generally prefer documents which they have produced to be at the top of the list.

Careful consideration should also be given to where in the contract the clause will be located. It is best practice to include an order of precedence clause in a separate overarching “form of agreement” document which is executed by the parties. If the clause is contained in one of the contract documents, such as within the bespoke amendments to a standard form, the clause would effectively be specifying its own location within the order of precedence. This could give rise to difficulties with interpretation.

Finally, where a standard form contract is being used, it is also important to check that any other clauses in the contract which deal with discrepancies in documents are amended or deleted. For example, clause 17.1 of the NEC3 Engineering

Construction Contract will probably need to be deleted so that the project manager’s power to issue instructions dealing with ambiguities does not conflict with the order of precedence clause. The same applies for clause 5(c) of the Infrastructure Conditions of Contract Design & Construction Version. If a JCT Design & Build Contract is being used, clause 1.3 (which emphasises the importance of the conditions over all other documents) and the clauses dealing with ambiguity between the Employer’s Requirements and Contractor’s Proposals are all likely to require amendment.

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