

# FINALITY OF ENGINEERS' DECISIONS IN PUBLIC WORKS CONSTRUCTION

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**I**N MOST municipal public works contracts, the agreement prepared by the public entity will provide that the engineer or architect will be the final arbiter of any contract disputes, particularly as to the quality or quantity of work and for certification of payment to the contractor. This engineer or architect (for convenience, to be referred to as the "engineer") may be a staff employee or, as is often the case, an employee of the engineer who designed the project.

While a municipality could choose to give only limited authority to the engineer, or apportion his powers throughout various segments of the work, one typical comprehensive clause in this regard would state as follows:

"The Engineer, in addition to those matters elsewhere herein expressly made subject to his determination, direction or approval, shall have the power:

1. To inspect the performance of the work;
2. To determine the amount, kind, quality, sequence, and location of the work to be paid for hereunder;
3. To determine all questions in relation to the work to interpret the Drawings, Specifications, and Addenda.

The foregoing enumeration shall not imply any limitation upon the power of the Engineer, for it is the intent of the Contract that all of the work shall be subject to his determination and approval except where the determination and approval of someone other than the Engineer is expressly called for herein: All orders of the Engineer requiring the Contractor to perform work as contract work shall be promptly obeyed by the contractor."

By way of example, an often encountered less verbose formulation would be:

"The architects shall interpret the drawings and specifications and their decision as to the

true intent and meaning thereof and the quality, quantity, and sufficiency of the materials and workmanship furnished thereunder shall be accepted as final and conclusive."

Public works construction, being important, technical, difficult, and expensive, *should* have someone in charge with the requisite expertise to guide the construction. Hence, clauses such as those cited are certainly desirable from the municipality's standpoint, especially since this authority will not be implied — clear language is required.

However, lucid as the language appears to be, the governmental agency cannot assume that it means simply that the engineer's power is unfettered. There is much more to it than that.

## The General Rule

As a general proposition, there is extensive case law authority throughout the United States holding that an engineer's decision is final and binding upon those matters which he is authorized to determine, in the absence of fraud, bad faith, misconduct, or palpable error. It can be immediately observed, however, that what may be viewed by a court as "palpable error" has the potential to dilute considerably the engineer's power since this could often be a question of fact for a judge to determine.

Moreover, while it is accepted that an engineer may, for example, have the power to be the final arbiter of quantity of materials in place, it is equally accepted that authority to *construe* a contract is not conferred by the usual clause. The theory is that the construction of the terms of a contract is legal question which can only be determined by a court of law.

But that formulation also has its problems because virtually any decision in a construction contract dispute usually requires some degree of interpretation of the contract. The courts attempt to solve this by confining the engineer's authority to questions of *fact*, with legal construction of the contract — questions of law — reserved for the court. Still, the quandary is not fully resolved because there is almost always room to determine whether the engineer's decision is merely a determination of an issue of

fact, or is in actuality a legal interpretation of the contract.

It should therefore be immediately apparent that no formulation of general rules will be capable of predicting precisely the result of all cases. Nevertheless, an examination of some actual decisions accepting or rejecting engineers' determinations will serve as a guide to obtain a sense of practical direction.

## Engineer's Decision Upheld

In a major state project, the contract contained a usual clause concerning the engineer's authority. A question arose as to whether it was qualitatively more difficult for a contractor to unload, handle, and install certain material known as "Duriron" pipe as opposed to ordinary cast iron pipe. The engineer rendered his decision in the negative, asserting that the contractor was bound accordingly.

When the contractor challenged the engineer's finding, the court upheld the engineer noting that this was a bona fide *factual* dispute. There being no claim of fraud or bad faith on the engineer's part, it was an issue involving quality or classification, clearly to be left to the engineer and not a court for disposition.

Where an engineer was given the authority to estimate and certify the quantity of work performed, such estimate was upheld as final and binding, even when the engineer did not personally measure the quantity but relied upon his subordinates to do so.

In a case in the United States Supreme Court, there was a claimed ambiguity in foundation specifications arising from the use of the singular word "building" instead of the plural "buildings" in specifying underpinning to protect adjoining property. The contractor argued that use of the singular term meant underpinning was required at only one location. The engineer decided, however, that reading other portions of the specifications led to the conclusion that underpinning was in fact required at multiple locations. Because the contract contained the usual clause, the engineer's view was upheld as final and binding.

Along the same lines was a case where a dispute arose as to whether the contract required installation of extra heavy pipe and what the mean-

ing of that term was in the trade. The contractor installed pipe it asserted was in accord with the specifications. The engineer directed the contractor to remove that pipe and install such pipe as the engineer determined complied with the mandate of the specifications. When the contractor sued for extra work, the court upheld the engineer's interpretation as binding.

Sometimes the question becomes just what authority has been conferred upon the engineer. A contract provided that on-site material could be used as backfill if approved by the architect. But its use was further conditioned upon the material meeting specified compaction requirements, so that absolute power to determine the suitability of on-site fill was withheld from the architect. When the architect refused to allow the on-site fill to be used, the contractor sued on the theory that the engineer had no right to reject it, asserting bad faith or palpable error. Because the evidence at trial showed that the fill was in fact unsuitable, the engineer's decision was upheld.

Although the architect in this case was interpreting the specifications, it was readily apparent that had the proof not supported the architect's interpretation, palpable error or bad faith could have been found, thus voiding the architect's decision. This then leads to a review of some factors where an engineer is not upheld.

### **Engineer's Decision Overturned**

When an engineer performs functions associated with his areas of skill and expertise and confines his determinations to factual issues such as quality and quantity of materials, certification of payment, technical interpretation of specifications, etc., it is usual that his determination will be sanctioned by the courts, so long, of course, as the contract gives him such authority.

However, as previously noted, there are some limitations on this power. Notwithstanding a broad powers clause, the engineer's decision will not be final if there is shown what is variously referred to as fraud, bad faith, arbitrary conduct, failure to exercise honest judgment, palpable error, or erroneous construction of the contract (meaning a legal decision).

Precisely what variety of engineers' decisions fall within these exceptions is a factual issue which will vary from case to case.

An analysis of court rulings reveals that there are in actuality only two major areas where the engineer's decision will be called into question. The

first is where he oversteps his authority and makes legal decisions which are reserved for courts. The second is where the engineer is just wrong. If what the engineer has done is clearly erroneous, it could be called bad faith or arbitrary conduct or palpable error, but it all amounts to the same thing. (Fraud is rather obvious and rarely encountered in public works so it is not worthy of review.)

As a practical matter, here is how the problem most often arises. The contractor begins his performance. Some time during construction, a dispute arises as to one of the many issues over which the engineer is given binding authority, such as determination of scope of work, extra or additional work, change orders, quantity measurements, quality of materials, certification of payment, and so forth. The contractor disagrees with the engineer but continues his work, usually under protest, lest he be declared in default.

When the job is finished, the aggrieved contractor sues for whatever damages he claims to have suffered. The municipality would serve its answer to the complaint and, if it is astute, and further assuming that the question revolves around an engineer's decision, it would make a motion for summary judgment. Such a motion asserts that there are no factual issues for a court to adjudicate, only matters of law.

The municipality would argue that the contract provided that the engineer was the final arbiter of the particular item in dispute and as a matter of law the contractor is bound by the terms of the contract, and thus the engineer's decision. Therefore, he may not now be heard to complain.

In response, the contractor would argue either that the engineer made a legal decision beyond the scope of the contract or, even assuming the decision was in his power to make, he was grossly incorrect and the contractor never bound himself to the arbitrary whims of the engineer.

Did the engineer exceed his authority? It depends upon the facts of the case, which harkens back to our earlier mention of the oft-encountered difficulty in deciding whether the engineer was delving into the realm of fact or law.

Was the engineer so incorrect that the court will ignore the contractual provision and rule for the contractor? It would be reluctant to do so, but again, it will depend upon the facts of the particular case.

One example of an engineer's error which lead a court to reject his holding occurred in a railway construction project. There, the contract stated

that additional work not susceptible of classification under unit prices was to be paid on a cost plus ten percent basis. After the contractor furnished concrete, he was required to do considerable work on concrete panels. The engineer decided that the work was classifiable under unit prices for natural cement. The court held that the engineer's determination was unjustified as being either arbitrary or not in conformance with contractual terms.

In another case, a contractor had done certain flagging and curbing which the engineer refused to certify for payment, arguing that it was not a payment item in the contract. The court inquired into the terms of the contract and found that while the provisions were somewhat confusing, the contractor was entitled to be paid for 20 feet of new flagging. Hence, the engineer's decision was erroneous and the court ruled for the contractor.

The subject of arbitrary conduct was raised in a case where a contractor submitted claims to an engineer of a town. The engineer rather summarily dismissed the claims without a hearing. When the engineer's decision was made, the basis thereof and the timing of notice to the contractor was unclear. Based upon such facts, the court directed the engineer to hold a hearing on the claim, finding his conduct to have been arbitrary.

Varying fact patterns can and do go on and on. The point is that while the status of the law supports the finality of the engineer's decision, that decision will not be upheld if it is erroneous enough to incur the ire of the court. How erroneous that is cannot be predicted with certainty.

### **Conclusion**

The most that can be said for the finality of engineers' decisions in public works construction is that the clauses making the engineer the final arbiter are sanctioned by case law if the decision is reasonably well founded and if the interpretation is one of fact and not of law.

There is, however, one very practical aphorism which emerges from an extensive review of decisional law. When an engineer renders a decision, he should endeavor to be as careful, reasonable, and rational as possible. He should not give short shrift to a contractor's claim even if he believes it is transparent. He should observe, listen, evaluate, and communicate — preferably in writing.

If the engineer has maintained a careful record in support of his position, there is a much greater chance that his evaluation will be sustained by the court. □□□